



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

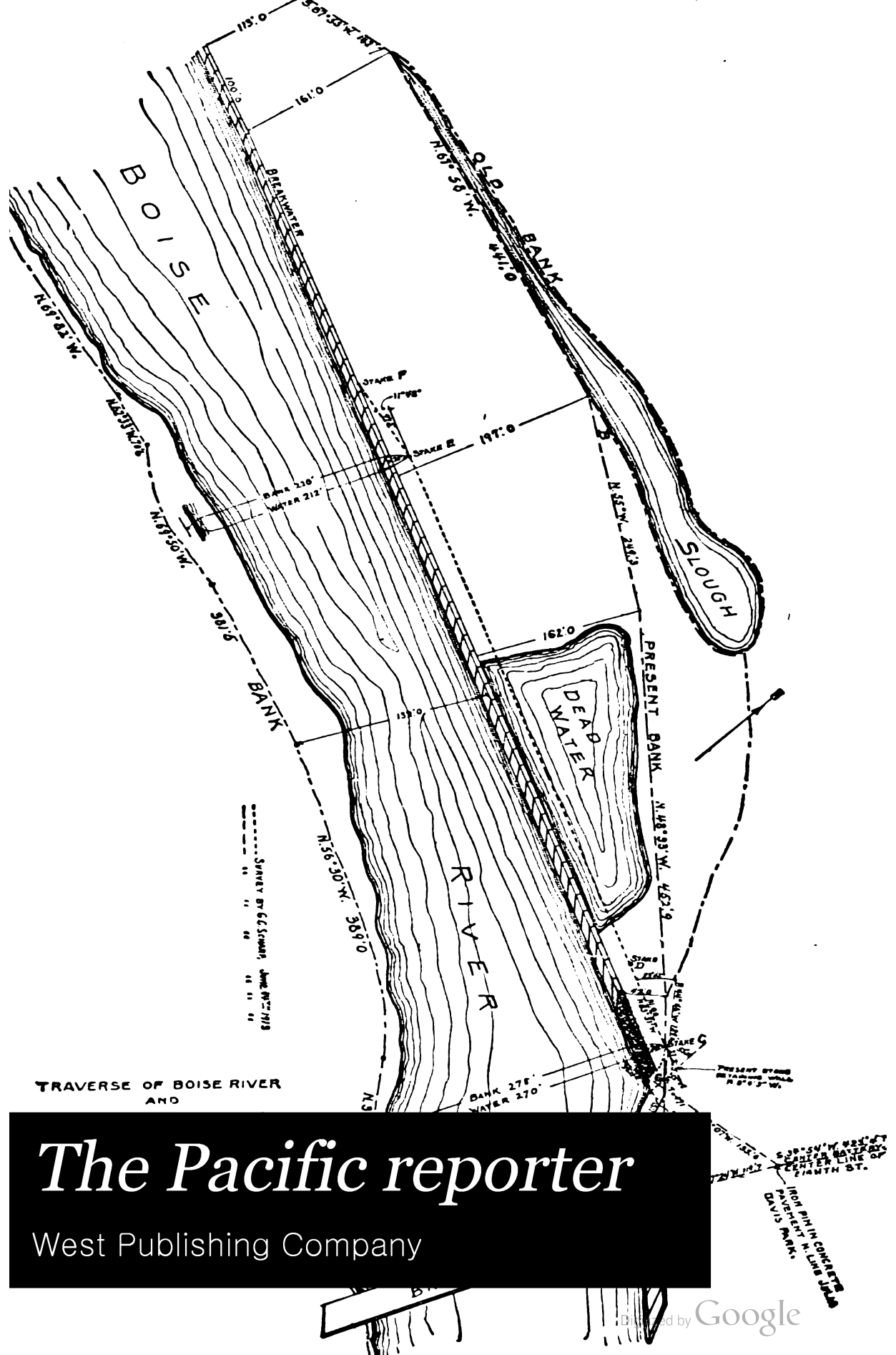
We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>





TRAVERSE OF BOISE RIVER  
AND

*The Pacific reporter*  
West Publishing Company



~~RECEIVED~~  
~~LAR~~



HARVARD LAW SCHOOL  
LIBRARY



























National Reporter System—State Series

# THE PACIFIC REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 133  
PERMANENT EDITION

CONTAINING ALL THE DECISIONS OF THE

SUPREME COURTS OF CALIFORNIA, KANSAS, OREGON, WASHINGTON  
COLORADO, MONTANA, ARIZONA, NEVADA, IDAHO, WYOMING  
UTAH, NEW MEXICO, OKLAHOMA, COURTS OF APPEAL  
OF CALIFORNIA AND COLORADO, AND CRIMINAL  
COURT OF APPEALS OF OKLAHOMA

WITH TABLE OF PACIFIC CASES IN WHICH REHEARINGS  
HAVE BEEN DENIED

JULY 28 — SEPTEMBER 1, 1913

ST. PAUL  
WEST PUBLISHING CO.  
1913

135  
135



**COPYRIGHT, 1913**  
**BY**  
**WEST PUBLISHING COMPANY**  
**(133 PAC.)**



---

# JUDGES

OF THE

## COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME

---

### ARIZONA—Supreme Court.

ALFRED FRANKLIN, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

HENRY D. ROSS.

D. L. CUNNINGHAM.

### CALIFORNIA—Supreme Court.

WILLIAM H. BEATTY, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

F. W. HENSHAW.

W. G. LORIGAN.

F. M. ANGELLOTTI.

M. C. SLOSS.

LUCIEN SHAW.

HENRY A. MELVIN.

### District Courts of Appeal.

#### First District.

THOS. J. LENNON, PRESIDING JUSTICE.

S. P. HALL.

F. H. KERRIGAN.<sup>1</sup>

#### Second District.

M. T. ALLEN, PRESIDING JUSTICE.

VICTOR E. SHAW.

W. P. JAMES.

#### Third District.

N. P. CHIPMAN, PRESIDING JUSTICE.

E. C. HART.

A. G. BURNETT.

### COLORADO—Supreme Court.

GEORGE W. MUSSER, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

WILLIAM H. GABBERT.

JAMES E. GARRIGUES.

S. HARRISON WHITE.

MORTON S. BAILEY.

WILLIAM A. HILL.

TULLY SCOTT.

### Court of Appeals.

LOUIS W. CUNNINGHAM, PRESIDING JUDGE.

ASSOCIATE JUDGES.

ALFRED R. KING.

WILLIAM B. MORGAN.

EDWIN W. HURLBUT.

JOHN C. BELL.



**IDAHO—Supreme Court.****JAMES F. AILSHIE, CHIEF JUSTICE.****JUSTICES.****ISAAC N. SULLIVAN.****GEORGE H. STEWART.****KANSAS—Supreme Court.****WILLIAM A. JOHNSTON, CHIEF JUSTICE.****JUSTICES.****ROUSSEAU A. BURCH.****SILAS PORTER.****HENRY F. MASON.****ALFRED W. BENSON.****CLARK A. SMITH.****JUDSON S. WEST.****MONTANA—Supreme Court.****THEO. BRANTLY, CHIEF JUSTICE.****ASSOCIATE JUSTICES.****WM. L. HOLLOWAY.****SYDNEY SANNER.****NEVADA—Supreme Court.****GEORGE F. TALBOT, CHIEF JUSTICE.****ASSOCIATE JUSTICES.****F. H. NOBCROSS.****P. A. MCCARRAN.****NEW MEXICO—Supreme Court.****CLARENCE J. ROBERTS, CHIEF JUSTICE.****ASSOCIATE JUSTICES.****RICHARD H. HANNA.****FRANK W. PARKER.****OKLAHOMA—Supreme Court.****SAMUEL W. HAYES, CHIEF JUSTICE.****ASSOCIATE JUSTICES.****R. L. WILLIAMS.****JESSE J. DUNN.****MATTHEW J. KANE.****JOHN B. TURNER.****SUPREME COURT COMMISSIONERS.***Division No. 1.***J. B. A. ROBERTSON.****J. F. SHARP.****CHAS. M. THACKER.***Division No. 2.***PHIL. D. BREWER.****M. E. ROSSER.****JNO. B. HARRISON.****Criminal Court of Appeals.****JAS. R. ARMSTRONG, PRESIDING JUDGE.****ASSOCIATE JUDGES.****THOMAS H. DOYLE.****HENRY M. FURMAN.**



**OREGON—Supreme Court.****THOMAS A. McBRIDE, CHIEF JUSTICE.****ASSOCIATE JUSTICES.**

<b>FRANK A. MOORE.</b>	<b>GEORGE H. BURNETT.</b>
<b>HENRY J. BEAN.</b>	<b>ROBERT EAKIN.</b>
<b>WILLIAM M. RAMSEY.*</b>	<b>CHARLES L. McNARY.*</b>

*Department 1.2*

**THOMAS A. McBRIDE, CHIEF JUSTICE.**  
**FRANK A. MOORE, PRESIDING JUDGE.**

**ASSOCIATE JUDGES.**

<b>GEORGE H. BURNETT.</b>	<b>WILLIAM M. RAMSEY.</b>
---------------------------	---------------------------

*Department 2.2*

**THOMAS A. McBRIDE, CHIEF JUSTICE.**  
**HENRY J. BEAN, PRESIDING JUDGE.**

**ASSOCIATE JUDGES.**

<b>ROBERT EAKIN</b>	<b>CHARLES L. McNARY.</b>
---------------------	---------------------------

**UTAH—Supreme Court.****WM. M. McCARTY, CHIEF JUSTICE.****JUSTICES.**

<b>D. N. STRAUP.</b>	<b>J. E. FRICK.</b>
----------------------	---------------------

**WASHINGTON—Supreme Court.****HERMAN D. CROW, CHIEF JUSTICE.***Department 1.***ASSOCIATE JUSTICES.**

<b>STEPHEN J. CHADWICK.</b>	<b>EMMETT N. PARKER.</b>
<b>MACK F. GOSE.</b>	<b>WALLACE MOUNT.</b>

*Department 2.***ASSOCIATE JUSTICES.**

<b>O. G. ELLIS.</b>	<b>GEORGE E. MORRIS.</b>
<b>MARK A. FULLERTON.</b>	<b>JOHN F. MAIN.</b>

**WYOMING—Supreme Court.****RICHARD H. SCOTT, CHIEF JUSTICE.****ASSOCIATE JUSTICES.**

<b>CHARLES N. POTTER.</b>	<b>CYRUS BEARD.</b>
---------------------------	---------------------

\* Beginning June 2, 1912.

✱







# COURT RULES

## SUPREME COURT OF NEW MEXICO

ADOPTED MARCH 22, 1912, AND IN FORCE APRIL 15, 1912

### Rule I.—CLERK.

1. The clerk of this court shall reside and keep his office at the seat of the state government, and he shall not practice as an attorney, solicitor or counsellor in this court nor in any district court of this state, while he shall continue to be clerk of this court.

2. The clerk shall not permit any original record or paper to be taken from the court room, or from the office, without an order from the court.

### Rule II.—MOTIONS.

All motions shall be reduced to writing.

### Rule III.—TRANSCRIPT ON CROSS-APPEAL.

When appeal or writ of error is duly taken by both parties, a transcript of the record filed by either may be used on both hearings, and they shall both be heard thereon in the same manner as if records had been filed by the appellants or plaintiffs in error in both cases.

### Rule IV.—DOCKETING CASES.

1. The clerk shall enter cases upon the docket in the order in which the transcripts in cases brought up by appeal, or the præcipes in cases brought up by writ of error, are filed in his office specifying upon the docket the date of the allowance of the appeal, or of the issuance of the writ of error.

2. Upon the filing of the præcipe for a writ of error, on writ of error, or the transcript of record, on appeal, a written appearance of the counsel for the party docketing the case, shall be filed with the clerk of this court, and upon notice to the defendant in error or appellee, the counsel for said defendant in error or appellee, shall likewise file a written appearance with the clerk of this court, before such party will be heard in this court.

3. Upon docketing a case in this court, the appellant or plaintiff in error, shall deposit with the clerk of this court the sum of twenty dollars (\$20.00) as advanced costs, which sum shall be applied by the clerk to the payment of costs, as they accrue and when said amount shall have been applied to

the payment of costs, the clerk shall, before any further costs shall accrue, require an additional deposit, sufficient to provide for the probable accruing costs in the case. Upon the final determination of a cause the clerk shall refund to the party advancing such money, the balance not applied to the payment of costs, and the sum collected for accrued costs from the losing party. (As amended May 27, 1912.)

### Rule V.—TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal, shall contain any document, paper, testimony or other proceedings in a foreign language, and the record does not also contain the translation of such document, paper, testimony or other proceedings, made under the authority of the district court, the record shall not be received, but the case shall be reported to this court by the clerk, and the court will thereupon remand it to the district court in order that a translation may be there supplied and inserted in the record.

### Rule VI.—NO APPEARANCE OF PLAINTIFF.

When there is no appearance for the plaintiff in error or appellant, when the case is called for argument or submission on briefs, the defendant may have the plaintiff in error or appellant called, and dismiss the writ of error or appeal, or may open the record and pray for an affirmance.

### Rule VII.—NO APPEARANCE OF DEFENDANT.

When the defendant in error or appellee fails to appear, when the cause shall be called for argument or submission on briefs, the court may proceed to hear an argument on part of the plaintiff in error or appellant, and to give judgment according to the right of the case.

### Rule VIII.—NO APPEARANCE OF EITHER PARTY.

When a case is called for argument or submission on briefs and no appearance is



entered for either party, the case shall be dismissed at the cost of the plaintiff in error or appellant.

**Rule IX.—NEITHER PARTY READY AT SECOND SESSION.**

When a case is called for argument at two successive sessions, and upon the call at the second session neither party is prepared to argue it, it shall be dismissed at the cost of the plaintiff in error, or appellant, unless sufficient cause is shown for further postponement, or unless the cause be submitted on briefs.

**Rule X.—PRINTED ARGUMENT.**

In all cases brought into this court by appeal, writ of error or otherwise, the court will receive printed arguments without regard to the number of the case on the docket, if the counsel on both sides shall choose to submit the same but ten copies of such argument signed by attorney or counsellor of this court must be filed.

**Rule XI.—ARGUMENTS.**

Arguments in a cause will be limited to one hour on each side, unless by special order time is extended. Not more than two counsel will be permitted to speak on each side.

**Rule XII.—ASSIGNMENT OF ERRORS.**

Assignment of errors shall be written on a separate paper, and filed in the cause and shall be also copied into the brief of appellant or plaintiff in error. Such assignment of error shall contain the title of the cause and of the court from which the case comes. Each error relied upon shall be stated in a separate paragraph.

**Rule XIII.—BRIEFS.**

1. Counsel will not be heard unless a printed brief or abstract of the case be first filed together with the points intended to be made and the authorities cited in support of them, arranged under the respective points, except as provided in section 9 of this rule.

2. The same shall be signed by an attorney or counsellor of this court.

3. If one of the parties omits to file such a statement he cannot be heard, and the case will be heard ex parte upon the argument of the party by whom the statement is filed.

4. Ten printed copies of the abstract, points and authorities required by this rule and of the transcript, where the same is required by law to be printed, shall be filed with the clerk, and two copies thereof, shall be served on the adverse party, his attorney or counsel, by the plaintiff in error or appellant, within thirty days after the original transcript of record is filed in the office of the clerk of this court and by the defendant

in error or appellee within thirty days after being served with a copy of the transcript, when the same is required by law to be printed, and two copies of the brief of appellant or plaintiff in error; appellant or plaintiff in error may file a reply brief within ten days after being served with copies of the brief of appellee or defendant in error.

5. Upon written application by either party in a submitted cause, the court will set it down for oral argument, if the application is made within the time allowed for filing briefs; otherwise the court, in its discretion will refuse the application. The court will order without application oral argument in such cases as it deems to require the same. When a cause is set down for oral argument, the clerk shall at once notify the respective counsel by mail.

6. The plaintiff in error or appellant shall be entitled to open and conclude the argument; but when there are cross-appeals, they shall be argued together as one case, and the plaintiff in the court below, shall be entitled to open and conclude the argument.

7. By consent of the parties, or for good cause shown before the expiration of the time allowed, the court, or a justice thereof in recess, may extend the time for filing briefs.

8. When the appellant or plaintiff in error has failed to file and serve his brief as required by these rules, the appellee or defendant in error may have the cause dismissed, or may submit it. When the appellee or defendant in error has failed to file and serve his briefs as required by these rules and the brief of the appellant or plaintiff in error has been duly filed and served within the time required, the appellant or plaintiff in error may submit the cause, and the other party shall not be heard. A cause will be considered by the court at any time after jurisdiction attaches for the purpose of enforcing this rule.

9. When the transcript of record is not required to be printed under section 34, chapter 57, Laws of 1907, the brief of any party to the proceedings need not be printed, but the same may be type-written, and four copies thereof filed with the clerk of the Supreme Court, and one copy served on counsel for adverse party.

**Rule XIV.—PRINTING COSTS.**

1. All records, briefs and arguments which are required to be printed shall be legibly printed with black ink on white book paper of good quality, properly paged at the top, with a margin at the outer edge of the page of at least one and a half inches in width. The printed page shall not be less than seven inches long and three and one half inches wide, and the paper page shall be seven inches wide and ten and one half inches long. Each printed record, brief or argument, shall be properly bound with paper or cloth cover



on which shall be printed the title of court and cause.

2. The clerk of this court, as soon as any cause shall be argued and submitted to the court, and finally disposed of, shall cause to be bound in a single volume, a copy of the printed record, briefs and arguments in the cause to be preserved among the files in his office, said binding to be in law sheep and to cost not to exceed two (\$2.00) dollars per volume to be taxed as costs in the cause.

3. There shall be taxed as costs for printing the transcript of the record its actual reasonable costs, not to exceed seventy cents a page, together with ten cents per folio of one hundred words for the original transcript of the stenographer's notes as now provided by law, and three cents per folio for each additional copy thereof.

#### Rule XV.—DAMAGES.

In cases where writ of error or appeal prosecuted to this court shall delay the proceedings on the judgment of the district court, and shall appear to have been taken or sued out merely for delay, damages shall be awarded to the appellee or defendant in error at the rate of ten per cent on the amount of the judgment.

#### Rule XVI.—OPINIONS OF THE COURT.

All opinions by this court shall, immediately upon the announcement thereof, be delivered to the clerk to be recorded and filed, and he shall immediately notify one counsel of record on each side of the case decided.

#### Rule XVII.—CALL OF THE DOCKET.

1. All cases on the calendar, except cases advanced as hereinafter provided, shall be heard when reached in the regular call of the docket and in the order in which they are set.

2. Criminal cases and cases which involve or affect some matter of general public interest or policy may be advanced by leave of the court on motion of either party.

3. Two or more cases involving the same question, may, by leave of the court be heard together, but they must be argued as one case.

#### Rule XVIII.—MOTION FOR RE-HEARING.

A motion for rehearing after judgment can be presented only at the term at which the judgment is entered, unless by special leave granted during the term, and must be filed within twenty days after such judgment, if the term shall so long continue. No motion for rehearing shall be filed unless in the ground or grounds of said motion it shall distinctly point out that some question decisive of the cause and duly submitted by counsel had been overlooked by the court, or that the decision of the court, is in conflict

with some controlling decision or provision by statute to which the attention of the court has not been called through the oversight or neglect of counsel. Such motion shall be considered by the court without oral argument, but may be supported by a printed brief, but will not be granted or permitted to be argued unless a justice who concurred in the judgment desires it and the majority of the court so determines.

#### Rule XIX.—SUPERSEDEAS.

After a præcipe for a writ of error is filed, if the plaintiff in error shall, within the time after rendition of judgment in the court below as limited by statute, file the bond required as a pre-requisite to a stay of execution or supersedeas, the clerk of the court shall, upon approving said bond, immediately certify the fact of his having received and approved said bond to the clerk of the district court in which the judgment was rendered, and execution upon the judgment shall be stayed until the decision of this court can be had. If execution shall have issued from the district court before such certificate from the clerk of this court is received, the judge of the district court shall supersede such execution upon the application of any interested party, but such a party shall be required to lodge the writ of error in the district court and to produce such certificate as aforesaid, before he shall have any supersedeas.

#### Rule XX.—SERVICE OF PAPERS.

Service of papers shall be made in the manner provided by law for such service in the district courts, and proof of service of briefs, transcripts, motions and other papers shall be made by the certificate of the attorney making the service or affidavit of other person making the service, and the same shall be filed with the clerk of this court.

#### Rule XXI.—OPINION OF COURT BELOW TO BE ATTACHED.

In all cases brought into this court by writ of error or appeal to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

#### Rule XXII.—EXHIBITS—ORIGINAL PAPERS.

1. Voluminous exhibits and exhibits which are important only as to the fact of their existence or as to small portions of their subject matter or as establishing a negative fact shall not be included in full in the record unless the trial judge shall so order; but a statement of their existence or substance with so much of their contents as shall be necessary to properly present the



point at issue shall be agreed upon by the parties or settled by the trial judge and included in the record in place of the exhibits as omitted.

2. Whenever it shall be necessary or proper in the opinion of the judge of any district court that original papers of any kind should be inspected in this court, upon appeal or writ of error, such judge may make such rule or order for the safe keeping, transporting and return of such original papers as to him may seem proper, and this court will receive and consider such original papers in connection with a transcript of the proceedings.

#### **Rule XXIII.—SESSIONS OF THE COURT.**

1. Sessions of the court for the purpose of hearing arguments will be held, beginning with the second Wednesday of January, and the first Monday of March, May, September and November of each year, and the clerk will set for argument all matured cases, and cases which will mature during such session in which application for oral argument has been made for, or oral argument ordered by the court, giving five days notice to the attorneys interested.

2. All cases, in which oral argument has not been requested by the parties or ordered by the court, will be taken by the court upon the briefs at maturity when jurisdiction has attached.

#### **Rule XXIV.—MANDATE.**

Upon the denial of a petition for rehearing, or if within 20 days after the decision no petition for rehearing is filed a mandate shall issue, to the court below, as the cause may require, for execution therein, upon the payment of the costs of this court by either party.

#### **Rule XXV.—PREROGATIVE WRITS AND RULES.**

1. (Habeas Corpus and Prerogative Writs.) In any application made to the court for a writ of habeas corpus, mandamus, quo warranto, or for any prerogative writ to be issued in the exercise of its original jurisdiction and for which an application might have been lawfully made to some other court in the first instance, the petition shall, in addition to the necessary matter requisite by the rules of law to support the application, also set forth the circumstances which, in the opinion of the applicant, render it necessary or proper that the writ should issue originally from this court, and not from such other court, and the sufficiency or insufficiency of such circumstances so set forth in that behalf will be determined by the court in awarding or refusing the application. In case any court, justice, or other officer, or of any board or other tribunal, in the discharge of duties of a public character,

be named in the application as respondent, the petition shall also disclose the name or names of the real party or parties, if any, in interest, or whose interest would be directly affected by the proceedings, and in such case it shall be the duty of the applicant obtaining an order for any such writ, to serve or cause to be served upon such party or parties in interest, a true copy of the petition and of the writ issued thereon, and to file in the office of the clerk of this court evidence of such service.

2. (Writs of Prohibition.) Writs of prohibition shall be applied for upon petition duly verified in manner required for the verification of petitions in other cases; such petition shall state in concise form, the grounds upon which the application is made and shall be presented to the court, or a justice thereof in recess. If the cause shown appears to the court or justice, to be sufficient, a writ shall thereupon issue, which shall command the court or judge thereof, and the party in whose favor the proceedings to be restrained were taken or are about to be taken, to desist and refrain from further proceedings in the action or matter specified therein until the further order of the court thereon, and to show cause on some day to be fixed in the writ, why they should not be absolutely restrained from any further proceedings in such action or matter.

3. (Answer-Writ.) The court or justice shall in said writ designate the answer day and direct the manner of service thereof: Provided, however, the day fixed for the answer of the court or judge thereof, and the party to whom it is directed shall not be less than ten days after service shall be made; and provided further, such service shall be by copy of the writ.

4. (Answer by Judge.) To the writ issued in accordance with section 3 of this rule, an answer shall be made by the court or judge thereof: Provided, however, that in lieu of such answer the court or judge thereof may by demurrer or motion question the sufficiency of the petition filed, subject to the rules of pleading governing other proceedings under the Code of Civil Procedure.

5. (Contents of Answer.) If the party in whose favor the proceedings were taken, or are about to be taken, shall by an instrument in writing, to be signed by him or his attorney, and annexed to such answer or other pleading, adopt the same answer or pleading and reply upon the matters therein contained as sufficient cause why such court or judge thereof should not be restrained as mentioned in said writ, such party shall henceforth be deemed a defendant in such proceedings; and the person prosecuting such writ may take issue by reply or demur to the matters so relied upon by such defendant, or set up in the answer of the court or judge thereof.

6. (Hearing.) Upon the filing of the answer



of the court or judge thereof, the Supreme Court shall set a day for the hearing of the application for a writ of absolute prohibition, and also fix a day for pleading to such answer, if such pleading is not already filed. Upon such hearing all parties may introduce such evidence by affidavits, original files of the trial court or otherwise as they may desire or as may be required by the Supreme Court.

7. (Finding of Court.) The court, after hearing the proofs and allegations of the parties, shall render judgment, either that a

writ of prohibition absolute restraining the court or judge and party from proceeding in such action or matter, do issue, or that such writ be denied, and may make and enforce such order in relation to costs and charges as may be deemed just.

8. (Certiorari.) Writ of certiorari shall be allowed upon application therefor in writing duly verified, unless the facts be admitted by the opposite party. Such writ shall be served and made returnable in such manner and within such time as the court shall order.

### Rules on Admission of Attorneys to the Bar, Chapter 53, Laws 1909, and Following Rules

#### RULE I.

That no applicant for examination shall be recommended to admission and license to practice before the Supreme Court of the state of New Mexico, unless such applicant shall have a general average of sixty-eight per centum in his examination.

#### RULE II.

That no marks on examination papers be hereafter given out, but it shall be announced to the applicant by "passed" or "failed."

#### RULE III.

That no members of the Board of Bar Examiners shall at any time coach, teach, supervise or in any manner assist any student or applicant for the bar examination in the conduct of his studies and in the preparation for admission to the bar.

#### RULE IV.

That hereafter all applicants for examination and for admittance to the bar on certificate must file his application together with all necessary papers with the secretary of the board, at Santa Fé, not less than thirty days before the time set for holding the examinations.

That with reference to section 14, chapter 53, Laws of 1909, applicants for admission without examination must have practiced three years immediately prior to the filing of the application and a proper certificate other than the certificate of the applicant, shall be required to show such a fact.

#### RULE V.

That no application shall hereafter be considered unless the fee prescribed by law accompany the application; and it shall be the duty of the secretary of the board to notify any applicant failing to remit the fee with the application as provided by statute.

#### RULE VI.

That no form of application be issued by the Board of Bar Examiners, but that the applicant shall prepare same in accordance with the provisions of chapter 53, Laws of 1909, and the said form as prepared shall constitute part of the examination of applicant.

#### RULE VII.

That no applicant who has taken the examination twice, as prescribed by law, and failed, shall be permitted to again become an applicant until two years after the failure, and that he shall then file a new application and take the whole examination as prescribed by law.

#### RULE VIII.

That with reference to section 15, chapter 53, Laws of 1909, all applicants who have not studied law two years in some reputable law school or who have not studied law in the office of some member of the bar of this state for at least two years continuously and diligently, shall not be permitted to take the examination for admission to the bar.

#### RULE IX.

That proper certificate other than the certificate of the applicant shall be required to show that the applicant pursued such studies for two years, continuously and diligently.

#### RULE X.

That unless otherwise announced, the Board of Bar Examiners shall hold an examination at Santa Fé, each year, on the first day of the mid-summer session of the Supreme Court in addition to the regular January examination.

#### RULE XI.

That no temporary license shall be granted any applicant unless such applicant shall



have filed with the Board of Bar Examiners his application for admission to the Bar of the state.

**RULE XII.**

That the form of the temporary license issued by the various district courts be chang-

ed so as to conform with section 25 of chapter 53, of the Laws of 1909, and that the several district clerks report at once to the secretary of the Board of Bar Examiners whenever and to whom such temporary licenses may have been granted, as provided by law.



# CASES REPORTED

	Page		Page
Abercrombie, Birch v. (Wash.).....	1020	Baxter v. Riverside Portland Cement Co. (Cal. App.).....	1150
Ackles v. Pacific Bridge Co. (Or.).....	781	Bay Cities Electric Co., Jones v. (Cal. App.).....	492
Akins v. Holmes, two cases (Kan.).....	849	Beard v. Beard (Or.).....	795
Alaux, Consolidated Lower Boulder Reservoir & Ditch Co. v. (Colo. App.).....	1046	Beard v. Beard (Or.).....	797
Alleman, Western Grocer Co. v. (Kan.).....	575	Beard, Gray v. (Or.).....	791
Allen v. Angus (Or.).....	1190	Bearman, Bell v. (Okl.).....	188
Allen v. Migliavacca Realty Co. (Wash.).....	580	Beck v. Chambers (N. M.).....	972
Allen v. State (Okl. Cr. App.).....	1138	Becker, Seattle Nat. Bank v. (Wash.).....	618
Allison, Lytle v. (Cal.).....	1000	Beers v. Beers (Wash.).....	605
Allison, Lytle v. (Cal. App.).....	999	Belasco-Blackwood Co., Kneiser v. (Cal. App.).....	989
All Persons, etc., Osmont v. (Cal.).....	480	Belcher, Black Eagle Oil Co. v. (Cal. App.).....	1153
Altpeper v. Postal Telegraph-Cable Co. (Cal. App.).....	329	Bell v. Bearman (Okl.).....	188
American Bonding Co. of Baltimore v. State Savings Bank (Mont.).....	367	Benson v. Murton (Or.).....	340
American-Hawaiian Engineering & Construction Co. v. Butler (Cal.).....	280	Benson v. Murton (Or.).....	1189
American Marble & Onyx Co., Utah Black Marble Co. v. (Utah).....	472	Benson v. State (Okl. Cr. App.).....	271
American Mercantile Co., Morrison Mill Co. v. (Wash.).....	1083	Berry v. Kiefer (Okl.).....	1126
American Sugar Mfg. & Refining Co., State v. (Kan.).....	864	Berry v. Woodward (Okl.).....	1127
American Wheel & Vehicle Co., Lum v. (Cal.).....	808	Berthiaume v. Doe (Cal. App.).....	515
Amos, Cleveland Nat. Bank v. (Okl.).....	204	Bigger, Welch v. (Idaho).....	381
Anaconda Copper Min. Co., Andree v. (Mont.).....	1090	Big Three Ranch Co., Boyd v. (Cal. App.).....	623
Anaconda Copper Min. Co., Titus v. (Mont.).....	677	Bilson, Haughton v. (Kan.).....	722
Anderson, Pasarel v. (Wash.).....	441	Bingham & McClelland Co. v. National Brick & Clay Co. (Or.).....	1187
Andree v. Anaconda Copper Min. Co. (Mont.).....	1090	Birch v. Abercrombie (Wash.).....	1020
Andrew Peterson & Co., Farrar v. (Wash.).....	594	Black Eagle Oil Co. v. Belcher (Cal. App.).....	1153
Angus, Allen v. (Or.).....	1190	Blair, Buchanan v. (Kan.).....	709
Anicker, Baughman v. (Okl.).....	1128	Blazier, Franck v. (Or.).....	800
Apex Gold Mines Co., Jorguson v. (Wash.).....	465	Blonde v. Merriam (Wyo.).....	1078
Arizona Copper Co., Kain v. (Ariz.).....	412	Bloodsworth v. State (Okl. Cr. App.).....	1181
Arkansas Valley Interurban R. Co., Phillips v. (Kan.).....	429	Blunck, Miller v. (Idaho).....	383
Armijo, Hubbell v. (N. M.).....	978	Board of Com'rs of Cloud County, Wilson v. (Kan.).....	718
Ash, Plummer v. (Kan.).....	157	Board of Com'rs of Fremont County, Pickett v. (Idaho).....	112
Ashley & Rummelin v. Himmelfarb (Or.).....	771	Board of Com'rs of Leavenworth County, Mottin v. (Kan.).....	165
Atchison Live Stock Co., Smith, Carey & Co. v. (Kan.).....	723	Board of Com'rs of Sumner County, Harrison v. (Kan.).....	154
Atchison, T. & S. F. R. Co. v. Chanute (Kan.).....	576	Board of Com'rs of Washita County, Smith v. (Okl.).....	177
Atchison, T. & S. F. R. Co., Corley v. (Kan.).....	555	Board of Directors of Veterans' Home of California, Brownlee v. (Cal. App.).....	1158
Atchison, T. & S. F. R. Co., Duncan v. (Kan.).....	730	Board of Sup'rs of Contra Costa County, Richmond School Dist. of Contra Costa County v. (Cal.).....	619
Atchison, T. & S. F. R. Co., Fike v. (Kan.).....	871	Board of Trustees of City of Buenaventura, Giddings v. (Cal.).....	479
Atkinson v. State Department of Engineering (Cal.).....	616	Bohanan, In re (Okl.).....	44
Aylmore v. Hamilton (Wash.).....	1027	Boise Development Co. v. Idaho Trust & Savings Bank (Idaho).....	916
Bagwell, Long v. (Okl.).....	50	Bolcom Mills, Hagen v. (Wash.).....	1000
Bailey v. Edwards (Mont.).....	1095	Bond v. Bankers' Life Ass'n of Des Moines, Iowa (Kan.).....	854
Bailey, Wilkie v. (Wash.).....	388	Bostwick, Carroll v. (Cal. App.).....	509
Baker v. United Iron Works Co. (Kan.).....	737	Bouffleur, Hoover v. (Wash.).....	602
Baldwin Piano Co., Van Arsedale v. (Kan.).....	703	Bowers, Moore v. (Okl.).....	1127
Balfe v. Rumsey & Sikemeler Co. (Colo.).....	417	Bowles v. Hickson (Cal. App.).....	1149
Ballog, Yenco v. (Wash.).....	1198	Boyce v. Goldfield Third Chance Min. Co. (Nev.).....	397
Bankers' Life Ass'n of Des Moines, Iowa, Bond v. (Kan.).....	854	Boyd v. Big Three Ranch Co. (Cal. App.).....	623
Bankers' & Merchants' Mut. Fire Relief Ass'n, Oatman v. (Or.).....	1183	Boyle v. Boyle (Wash.).....	1009
Bank of Hamlin, Smith v. (Kan.).....	428	Boyle, Edwards v. (Okl.).....	233
Barnes v. State (Okl. Cr. App.).....	1194	Brady, Kreps v. (Okl.).....	216
Barr v. Minto (Or.).....	639	Brashear, Brown v. (Cal. App.).....	505
Bateman v. Gitts (N. M.).....	969	Bredemeyer, Butterworth v. (Wash.).....	1061
Battelle, Empire Ranch & Cattle Co. v. (Colo. App.).....	1123	Breeding, Old Mill Ditch & Irrigation Co. v. (Or.).....	89
Baughman v. Anicker (Okl.).....	1128	Brittain v. Gorman (Utah).....	370
Baum v. Concord Land & Improvement Co. (Colo. App.).....	760	Brock, Justice v. (Wyo.).....	1070
		Brose, Hillcrest Irr. Dist. v. (Idaho).....	663
		Brose v. Twin Falls Land & Water Co. (Idaho).....	673
		Bross v. McNicholas (Or.).....	782



	Page		Page
Brown v. Brashear (Cal. App.).....	505	City of Portland v. Inman-Poulsen Lumber Co. (Or.).....	829
Brown v. Cruce (Kan.).....	865	City of Portland, Pacific Milling & Elevator Co. v. (Or.).....	72
Brown v. Erb-Harper-Rigney Co. (Mont.).....	691	City of Portland, State v. (Or.).....	62
Brown, Hope v. (Wash.).....	612	City of Pueblo, Moffitt v. (Colo.).....	754
Brown, Lewis v. (Cal. App.).....	331	City of Seattle v. Galbraith-Bacon & Co. (Wash.).....	8
Brown, State v. (Okl. Cr. App.).....	1143	City of Seattle, Jahn Contracting Co. v. (Wash.).....	458
Brown v. Stuart (Kan.).....	725	City of Seattle v. King (Wash.).....	442
Brown v. Wellington Mines Co. (Colo. App.).....	427	City of Seattle, Maggs v. (Wash.).....	388
Brownlee v. Board of Directors of Veterans' Home of California (Cal. App.).....	1158	City of Seattle v. Seattle Electric Co. (Wash.).....	8
Bruner Oil Co., Deming Inv. Co. v. (Okl.).....	958	City of Seattle, State v. (Wash.).....	11
Bruns, Ralphs v. (Cal. App.).....	997	City of Seattle, State v. (Wash.).....	1005
Buchanan v. Blair (Kan.).....	709	Clarke-Woodward Drug Co., Dorn v. (Or.).....	351
Buchanan v. Lewis A. Hicks Co. (Or.).....	780	Clausen v. State (Wyo.).....	1055
Buckley, Meyer v. (Cal. App.).....	510	Clay, Shwyder v. (Colo. App.).....	420
Budge, Kissler v. (Idaho).....	125	Claypool v. O'Neill (Or.).....	349
Burgin v. Missouri, K. & T. R. Co. (Kan.).....	560	Cleveland Nat. Bank v. Amos (Okl.).....	204
Burnett v. Topeka R. Co. (Kan.).....	534	Clopton v. Meeves (Idaho).....	907
Burris, Ex parte (Okl. Cr. App.).....	1139	Clough v. Dawson (Or.).....	345
Burroughs, Ex parte (Okl. Cr. App.).....	1142	Coast Coal Co., Sheets v. (Wash.).....	433
Bussell Land Co., Howard v. (Wash.).....	596	Cobb, Kent v. (Colo. App.).....	424
Butler, American-Hawaiian Engineering & Construction Co. v. (Cal.).....	290	Coffee, Johns v. (Wash.).....	4
Butterworth v. Bredemeyer (Wash.).....	1061	Coffee, Needels v. (Cal. App.).....	491
Buty v. Goldfinch (Wash.).....	1057	Coffey, Haradon v. (Or.).....	815
Cain v. Western Union Tel. Co. (Kan.).....	874	Colbert v. First Nat. Bank (Okl.).....	206
Caldwell v. Modern Workmen of America (Kan.).....	843	Collins v. Hoffman (Wash.).....	450
California Mother Lode Min. Co. v. Page (Cal.).....	14	Colonial Hotel Co., Proskey v. (Nev.).....	390
California Pine Box & Lumber Co., Loyalton Electric Light Co. v. (Cal. App.).....	323	Columbia & P. S. R. Co., Johnson v. (Wash.).....	604
California Safe Deposit & Trust Co., People v. (Cal. App.).....	324	Columbus, State v. (Wash.).....	455
California Safe Deposit & Trust Co., Wick-ersham v. (Cal. App.).....	324	Commercial State Bank of Waverly v. Ross (Kan.).....	538
Callahan v. Chicago, B. & Q. R. Co. (Mont.).....	687	Commission for Fiftieth Anniversary of Battle of Gettysburg v. Nye (Cal. App.).....	1145
Campbell v. People (Colo.).....	1043, 1199	Comstock v. Ramsay (Colo.).....	1107
Campbell, Williams v. (Wyo.).....	1071	Concord Land & Improvement Co., Baum v. (Colo. App.).....	760
Canon City v. Cox (Wyo.).....	1040	Consolidated Lower Boulder Reservoir & Ditch Co. v. Alaux (Colo. App.).....	1046
Caraduc v. Schanen-Blair Co. (Or.).....	636	Cook-Reynolds Co. v. Chipman (Mont.).....	694
Carlisle v. State (Okl. Cr. App.).....	1194	Co-operative Inv. Co., Omaha Lumber Co. v. (Colo.).....	1112
Carlock v. Denver & R. G. R. Co. (Colo.).....	1103	Copeland v. State (Okl. Cr. App.).....	258
Carlson Sheep Co. v. Schmidt (Wyo.).....	1053	Corley v. Atchison, T. & S. F. R. Co. (Kan.).....	555
Carr v. Remele (Wash.).....	593	Cornish, Fournier v. (Wash.).....	9
Carrico v. Crocker (Okl.).....	181	Cox, Canon City v. (Colo.).....	1040
Carroll v. Bostwick (Cal. App.).....	509	Crable & Son v. O'Connor (Wyo.).....	376
Carroll, Demple v. (Wyo.).....	137	Crane v. Oregon R. & Nav. Co. (Or.).....	810
Carroll v. Durant Nat. Bank (Okl.).....	179	Crane Falls Power & Irrigation Co. v. Snake River Irr. Co. (Idaho).....	655
Carroll v. Kit Carson Land Co. (Colo. App.).....	148	Crawford, State v. (Wash.).....	590
Carton, In re (Wash.).....	596	Crocker, Carrico v. (Okl.).....	181
Case, Mountain Timber Co. v. (Or.).....	92	Cronquist v. Smith (Utah).....	130
Case, Standrod v. (Idaho).....	651	Crouch & Case, Schon v. (Colo. App.).....	765
Cassidy, Downs v. (Mont.).....	106	Cruce, Brown v. (Kan.).....	865
Caudill v. State (Okl. Cr. App.).....	1195	Cullen, Ryan v. (Kan.).....	430
Chambers, Beck v. (N. M.).....	972	Culver, Holmes v. (Kan.).....	164
Chapman Timber Co., Hagermann v. (Or.).....	342	Cummings, Mutual Ben. Life Ins. Co. of Newark, N. J., v. (Or.).....	1169
Chesebro, Nesbitt v. (Kan.).....	545	Cutts, State v. (Idaho).....	115
Chicago, B. & Q. R. Co., Callahan v. (Mont.).....	687		
Chicago, M. & P. S. R. Co., Walters v. (Mont.).....	357	Dabney Oil Co. v. Providence Oil Co. of Arizona (Cal. App.).....	1155
Chicago, R. I. & P. R. Co., Robinson v. (Kan.).....	537	Daily v. Marshall (Mont.).....	681
Chipman, Cook-Reynolds Co. v. (Mont.).....	694	Dake Advertising Agency v. Fielding J. Stilson Co. (Cal. App.).....	327
Christiansen v. McLellan (Wash.).....	434	Dalhoff, Ow v. (Kan.).....	569
Churchill v. Albany (Or.).....	632	Daniels-Jones Co., Fratt v. (Mont.).....	700
Churchman v. Payte (Okl.).....	178	Darling, Taylor v. (Cal. App.).....	503
Citizens' Bank v. Stewart (Cal. App.).....	337	Darneal, Tirey v. (Okl.).....	614
City and County of Denver, Koch v. (Colo. App.).....	1119	Daughtry v. Murry (N. M.).....	101
City and County of San Francisco, Egan v. (Cal.).....	294	Daughtry, Murry v. (N. M.).....	1070
City of Albany, Churchill v. (Or.).....	632	Davidson Grocery Co. v. Johnston (Idaho).....	929
City of Chanute, Atchison, T. & S. F. R. Co. v. (Kan.).....	576	Davis, Fischer v. (Idaho).....	910
City of Coffeyville, State v. (Kan.).....	711	Davis v. National Lumber Co. (Cal. App.).....	509
City of Emporia v. Emporia Tel. Co. (Kan.).....	858	Dawson, Clough v. (Or.).....	345
City of Leavenworth, Roman v. (Kan.).....	551	Day, London v. (Okl.).....	181
City of McAlester, Herndon v. (Okl. Cr. App.).....	1196	Day v. State (Okl. Cr. App.).....	1195
City of Pendleton, Johns v. (Or.).....	817	Deal v. Western Clay & Gypsum Products Co. (N. M.).....	974
		De Cloedt v. De Cloedt (Idaho).....	664
		De Freece v. State (Okl. Cr. App.).....	254



	Page		Page
De Laveaga's Estate, In re (Cal.).....	307	Fielding J. Stillson Co., Dake Advertising Agency v. (Cal. App.).....	327
Del Monte Live Stock Co. v. Ryan (Colo. App.).....	1048	Fike v. Atchison, T. & S. F. R. Co. (Kan.).....	871
Delmore v. Kansas City Hardwood Flooring Co. (Kan.).....	151	First Nat. Bank, Colbert v. (Okl.).....	206
Deming Inv. Co. v. Bruner Oil Co. (Okl.)..	958	First Nat. Bank v. Livermore (Kan.).....	734
Dempie v. Carroll (Wyo.).....	137	First State Bank of Ardmore v. King & McCants (Okl.).....	30
Dennis v. People (Colo.).....	741	Fischer v. Davis (Idaho).....	910
Denton v. Missouri, K. & T. R. Co. (Kan.)..	558	Fisher, St. Louis & S. F. R. Co. v. (Okl.)..	41
Denver & R. G. R. Co., Carlock v. (Colo.)..	1103	Fleshman, Yuen Suey v. (Or.).....	808
Denver & R. G. R. Co. v. Ruane (Colo.)....	1194	Flynn v. State (Okl. Cr. App.).....	1133
De Witt v. State (Okl. Cr. App.).....	1195	Fogarty v. Northern Pac. R. Co. (Wash.)..	609
Dickson, Ex parte (Nev.).....	893	Foreman, Patterson v. (Okl.).....	178
Diefenderfer, Hamilton v., two cases (Wyo.).....	1081	Forsyth, State v. (Wyo.).....	521
Dishon v. State (Okl. Cr. App.).....	1195	Ft. Smith & W. R. Co. v. Harrison (Okl.)..	222
Disney v. Lang (Kan.).....	572	Fosha, Underwood v. (Kan.).....	866
District Court of Second Judicial Dist. in and for Silver Bow County, State v. (Mont.).....	679	Foster, Gibson v. (Colo. App.).....	144
Dockstader, Rogers v. (Kan.).....	717	Foster v. Gray (Colo. App.).....	146
Dodd, Traver v. (Colo. App.).....	1117	Foster, King v. (Colo. App.).....	146
Dodge v. Northern Electric R. Co. (Cal. App.).....	1181	Fournier v. Cornish (Wash.).....	9
Doe, Berthiaume v. (Cal. App.).....	515	Fowler Packing Co., Remy v. (Kan.).....	707
Dorn v. Clarke-Woodward Drug Co. (Or.)..	351	Fox, Newby v. (Kan.).....	890
Doty v. Garfield Tp. (Kan.).....	172	Fraley v. Hoban (Or.).....	1190
Downs v. Cassidy (Mont.).....	106	Francis v. Western Screen Co. (Cal. App.)..	327
Duncan v. Atchison, T. & S. F. R. Co. (Kan.).....	730	Franch v. Blazier (Or.).....	800
Duncan, State v. (Mont.).....	109	Frat v. Daniels-Jones Co. (Mont.).....	700
Durant Nat. Bank, Carroll v. (Okl.).....	179	Fredonia Brick Co., Griffin v. (Kan.).....	574
Durkin v. Ward (Or.).....	345		
Dwyer Plumbing & Heating Co., Leiter v. (Or.).....	1180	Galbraith-Bacon & Co., City of Seattle v. (Wash.).....	8
Dye, State v. (Nev.).....	935	Gamble v. Silver Peak Mines (Nev.).....	936
		Ganahl, Lund v. (Cal. App.).....	501
Earl, Hockett v. (Kan.).....	852	Garner v. Meisel (Cal. App.).....	1165
E. Clemens Horst Co., Palmer v. (Or.)....	634	Georgia Home Ins. Co. v. Halsey (Okl.)..	202
Edmondson, Wiley v. (Okl.).....	38	Gerard-Fillio Co. v. McNair (Wash.).....	462
Edwards, Bailey v. (Mont.).....	1095	German-American Ins. Co., Wilson v. (Kan.)..	715
Edwards v. Boyle (Okl.).....	233	Gibbons v. Hood River Irr. Dist. (Or.)....	772
Edwards v. Union Pac. R. Co. (Kan.).....	728	Gibson v. Foster (Colo. App.).....	144
Egan v. San Francisco (Cal.).....	294	Gibson, Johnson v. (Colo. App.).....	1052
Eilers Music House v. Reine (Or.).....	788	Giddings v. Board of Trustees of City of San Buenaventura (Cal.).....	479
Elliott Avenue, In re (Wash.).....	8	Gila Valley Copper Co. v. Gilpin (Ariz.)..	98
Ellsworth, Ex parte (Cal.).....	272	Gilmore v. Harpster (Kan.).....	726
Eminent Household of Columbian Woodmen v. Prater (Okl.).....	48	Gilpin, Gila Valley Copper Co. v. (Ariz.)..	98
Empire Dist. Electric Co., Rambo v. (Kan.)..	553	Gise v. Myers (Cal. App.).....	500
Empire Ranch & Cattle Co. v. Battelle (Colo. App.).....	1123	Gitts, Bateman v. (N. M.).....	969
Empire Ranch & Cattle Co. v. Howell, two cases (Colo. App.).....	1124	Goddard, State v. (Or.).....	90
Empire Ranch & Cattle Co. v. Patterson (Colo. App.).....	1125	Goldfield Third Chance Min. Co., Boyce v. (Nev.).....	397
Emporia Tel. Co., City of Emporia v. (Kan.)..	858	Goldfinch, Buty v. (Wash.).....	1057
Engleson v. Port Crescent Shingle Co. (Wash.).....	1030	Gooch v. Gooch (Okl.).....	242
Enloe, Watkins v. (Okl.).....	44	Gorman, Brittain v. (Utah).....	370
Ennis v. Nusbaum (Kan.).....	537	Gould, Roper v. (Cal. App.).....	622
Eppler, O'Neil v. (Kan.).....	705	Gould v. Soto (Ariz.).....	410
Equi v. Olcott (Or.).....	775	Gove, W. H. Peeps Fixture Co. v. (Colo. App.).....	143
Erb-Harper-Rigney Co., Brown v. (Mont.)..	691	Grand Court of Washington, Foresters of America v. Hodel (Wash.).....	438
Estell, Old Mill Ditch & Irrigation Co. v. (Or.).....	90	Grand Opera House Co., O'Rourke v. (Mont.).....	965
Estes, Zobrist v. (Or.).....	644	Grant v. Huschke (Wash.).....	447
Exchange Nat. Bank of Spokane v. Pantages (Wash.).....	1025	Grant v. State (Okl. Cr. App.).....	1195
		Grant Smith & Co., Trovik v. (Wash.)..	454
Fairservice, Hoko River Boom Co. v. (Wash.).....	1037	Gray v. Beard (Or.).....	791
Farah Bros., Stern v. (N. M.).....	400	Gray, Foster v. (Colo. App.).....	146
Farmers' Development Co. v. Rayado Land & Irrigation Co. (N. M.).....	104	Green, Jagger v. (Kan.).....	174
Farrar v. Andrew Peterson & Co. (Wash.)..	594	Green, People v. (Cal. App.).....	334
Farwell v. Farwell (Mont.).....	958	Greig v. Mueller (Or.).....	94
Feder Silberberg Co. v. McNeil (N. M.)....	975	Griffin v. Fredonia Brick Co. (Kan.).....	574
Fenn v. Northwestern Nat. Life Ins. Co. (Kan.).....	159	Griffith v. Griffith (Wash.).....	443
Fertig v. State (Ariz.).....	99	Gurnett v. Henry (Colo. App.).....	1047
Fidelity & Deposit Co. v. Sheahan (Okl.)..	228		
Field v. Spokane, P. & S. R. Co., two cases (Wash.).....	611	Hagen v. Bolcom Mills (Wash.).....	1000
		Hagen, Watson v. (Or.).....	66
		Hager v. State (Okl. Cr. App.).....	263
		Hagermann v. Chapman Timber Co. (Or.)..	342
		Haines v. Wooster (Cal. App.).....	978
		Halsey, Georgia Home Ins. Co. v. (Okl.)..	202
		Hamilton, Aylmore v. (Wash.).....	1027
		Hamilton v. Diefenderfer, two cases (Wyo.)..	1081
		Hammond v. Ocean Shore Development Co. (Cal. App.).....	978
		Hampton, Kelly v. (Cal. App.).....	339
		Hamrick, Ex parte (Okl. Cr. App.).....	1196
		Haradon v. Coffey (Or.).....	815



	Page		Page
Harbour, Kemper Grain Co. v. (Kan.)	565	J. J. Crable & Son v. O'Connor (Wyo.)	376
Harpster, Gilmore v. (Kan.)	726	Johns v. Coffee (Wash.)	4
Harrison v. Board of Com'rs of Sumner County (Kan.)	154	Johns v. Pendleton (Or.)	817
Harrison, Ft. Smith & W. R. Co. v. (Okl.)	222	Johnson v. Columbia & P. S. R. Co. (Wash.)	604
Harrison Street, In re (Wash.)	8	Johnson v. Gibson (Colo. App.)	1052
Hartzler, Leonard v. (Kan.)	570	Johnson v. Lennox (Colo.)	744
Haskin v. Stuart (Kan.)	725	Johnson, Patrick v. (Kan.)	161
Haughton v. Bilson (Kan.)	722	Johnson v. Superior-Portland Cement Co. (Wash.)	460
Hayden v. Superior Court in and for Los Angeles County (Cal. App.)	26	Johnston, Davidson Grocery Co. v. (Idaho)	929
Haynes, Little Willow Irr. Dist. v. (Idaho)	905	Jones v. Bay Cities Electric Co. (Cal. App.)	492
Haynes, Payette Heights Irr. Dist. v. (Idaho)	907	Jones v. National Laundry Co. (Or.)	1178
Hayne's Estate, In re (Cal.)	277	Jones v. State (Okl. Cr. App.)	249
Hedges, Tonkin-Clark Realty Co. v. (Idaho)	669	Jones v. State (Okl. Cr. App.)	1134
Heginbotham v. Webster (Colo.)	740	Jones v. Teller (Or.)	354
Heible, Teynor v. (Wash.)	1	Jones Leather Co. v. Woody (Okl.)	201
Henry, Gurnett v. (Colo. App.)	1047	Jorguson v. Apex Gold Mines Co. (Wash.)	465
Henry v. Montezuma Water & Land Co. (Colo.)	747	Joseph, Souza v. (Cal. App.)	981
H. E. Orr Co. v. Interlaken Land Co. (Wash.)	599	Justice v. Brock (Wyo.)	1070
Herber v. State (Okl. Cr. App.)	1196	Kain v. Arizona Copper Co. (Ariz.)	412
Herndon v. McAlester (Okl. Cr. App.)	1196	Kalberer, Wilmore v. (Colo. App.)	763
Herrett, Willey v. (Or.)	630	Kansas City Hardwood Flooring Co., Delmore v. (Kan.)	151
Herron Co. v. Shaw (Cal.)	488	Kansas Flour Mills Co., Kansas Mill Co. v. (Kan.)	542
Hewitt, Stroupe v. (Kan.)	562	Kansas Mill Co. v. Kansas Flour Mills Co. (Kan.)	542
Hibberd, Walk v. (Or.)	95	Keating v. Mutual Laundry Co. (Kan.)	152
Hicks Co., Buchanan v. (Or.)	780	Keener v. Lloyd (Kan.)	710
Hickson, Bowles v. (Cal. App.)	1149	Kelly v. Hampton (Cal. App.)	339
Hill, Lindley v. (Okl.)	179	Kelly v. Lewis Inv. Co. (Or.)	826
Hillcrest Irr. Dist. v. Brose (Idaho)	663	Kelsey, State v. (Or.)	806
Hillman, Lee v. (Wash.)	533	Kemper Grain Co. v. Harbour (Kan.)	565
Hillock v. Idaho Title & Trust Co. (Idaho)	119	Kennedy, People v. (Cal. App.)	25
Himmelfarb, Ashley & Rummelin v. (Or.)	771	Kent v. Cobb (Colo. App.)	424
Hoban, Fraley v. (Or.)	1190	Kern, Mundy v. (Wash.)	1035
Hobbs v. Twin Falls Canal Co. (Idaho)	899	Kiefer, Berry v. (Okl.)	1126
Hockett v. Earl (Kan.)	852	King, City of Seattle v. (Wash.)	442
Hodel, Grand Court of Washington, Foresters of America v. (Wash.)	438	King v. Foster (Colo. App.)	146
Hoffman, Collins v. (Wash.)	450	King, Laughlin v. (Wyo.)	1073
Hogan v. Leeper (Okl.)	190	King & McCants, First State Bank of Ardmore v. (Okl.)	30
Hoko River Boom Co. v. Fairservice (Wash.)	1037	Kingsley v. United Rys Co. (Or.)	785
Holden v. Tidwell (Okl.)	54	Kinnear v. Ross (Wash.)	607
Holmes, Akins v., two cases (Kan.)	849	Kinney v. St. Louis & S. F. R. Co. (Okl.)	180
Holmes v. Culver (Kan.)	164	Kirkpatrick, Oregon Mill & Grain Co. v. (Or.)	69
Holt & Jeffery, Larned v. (Wash.)	460	Kissler v. Budge (Idaho)	125
Hood River Irr. Dist., Gibbons v. (Or.)	772	Kit Carson Land Co., Carroll v. (Colo. App.)	148
Hoover v. Bouffleur (Wash.)	602	Kizer, People v. (Cal.)	521
Hope v. Brown (Wash.)	612	Kizer, People v. (Cal. App.)	516
Horst Co., Palmer v. (Or.)	634	Klein v. Turner (Or.)	625
Howard v. Bussell Land Co. (Wash.)	596	Kloeber, Yamoaka v. (Wash.)	1037
Howell, Empire Ranch & Cattle Co. v., two cases (Colo. App.)	1124	Kneiser v. Belasco-Blackwood Co. (Cal. App.)	989
Hoyt, Mesa De Mayo Land & Live Stock Co. v. (Colo. App.)	471	Knudson, Shorett v. (Wash.)	1029
Hubbard v. Price (Cal. App.)	1166	Koch v. Denver (Colo. App.)	1119
Hubbell v. Armijo (N. M.)	978	Kreps v. Brady (Okl.)	216
Huff v. State (Okl. Cr. App.)	265	Ladd, St. Louis & S. F. R. Co. v. (Okl.)	57
Hufford, Nichols v. (Wyo.)	1084	Lane v. Wentworth (Or.)	348
Hughey v. Smith (Or.)	68	Lang, Disney v. (Kan.)	572
Hunt v. Remsberg (Kan.)	706	Lanning, Walker v. (Wash.)	462
Hunt, Wheelan v. (Okl.)	52	Larimer County Canal No. 2 Irrigating Co. v. Pleasant Valley & Lake Canal Co. (Colo.)	749
Hupp v. Superior Court in and for Los Angeles County (Cal. App.)	987	Larned v. Holt & Jeffery (Wash.)	460
Huschke, Grant v. (Wash.)	447	Latimer v. Nelson (Mont.)	680
Idaho Title & Trust Co., Hillock v. (Idaho)	119	Laughlin v. King (Wyo.)	1073
Idaho Trust & Savings Bank, Boise Development Co. v. (Idaho)	916	Lavner v. Independent Light & Water Co. (Wash.)	592
Independent Light & Water Co., Lavner v. (Wash.)	592	Lawrence, Nordgren v. (Wash.)	436
Inman-Poulsen Lumber Co., City of Portland v. (Or.)	829	Leach v. Nez Perce (Idaho)	926
Interlaken Land Co., H. E. Orr Co. v. (Wash.)	599	Lee v. Hillman (Wash.)	583
Investment Co., Richardson v. (Or.)	773	Lee, Thomas v. (Wash.)	446
Irvine v. State (Okl. Cr. App.)	259	Leeper, Hogan v. (Okl.)	190
Jagger v. Green (Kan.)	174	Leiter v. Dwyer Plumbing & Heating Co. (Or.)	1180
Jahn Contracting Co. v. Seattle (Wash.)	458	Lennox, Johnson v. (Colo.)	744
Janke v. McMahon (Cal. App.)	21	Leonard v. Hartzler (Kan.)	570
Jennings, Niles State Bank v. (Cal. App.)	329	Lewis v. Brown (Cal. App.)	331
		Lewis A. Hicks Co., Buchanan v. (Or.)	780
		Lewis Const. Co., Sweeney v. (Wash.)	441



	Page		Page
<b>Lewis Inv. Co., Kelly v. (Or.)</b> .....	828	<b>Missouri, K. &amp; T. R. Co., Ray v. (Kan.)</b> ..	847
<b>Liebeck v. Wilson (Wash.)</b> .....	468	<b>Missouri, K. &amp; T. R. Co. v. State (Okl.)</b> ..	35
<b>Lieber v. Rogers (Okl.)</b> .....	30	<b>Missouri, K. &amp; T. R. Co. v. Walston (Okl.)</b> ..	42
<b>Lindley v. Hill (Okl.)</b> .....	179	<b>Missouri Pac. R. Co., Richardson v. (Kan.)</b> ..	535
<b>Linn County, Linn &amp; Lane Timber Co. v. (Or.)</b> .....	347	<b>Modern Woodmen of America, Caldwell v. (Kan.)</b> .....	843
<b>Linn &amp; Lane Timber Co. v. Linn County (Or.)</b> .....	347	<b>Moffitt v. Pueblo (Colo.)</b> .....	754
<b>Little Willow Irr. Dist. v. Haynes (Idaho)</b> ..	905	<b>Mohr v. Sands (Okl.)</b> .....	238
<b>Livermore, First Nat. Bank v. (Kan.)</b> .....	734	<b>Monarch Portland Cement Co. v. Washburn, two cases (Kan.)</b> .....	156
<b>Lloyd, Keener v. (Kan.)</b> .....	710	<b>Montezuma Water &amp; Land Co., Henry v. (Colo.)</b> .....	747
<b>London v. Day (Okl.)</b> .....	181	<b>Moody v. State (Okl. Cr. App.)</b> .....	1197
<b>Long v. Bagwell (Okl.)</b> .....	50	<b>Moore v. Bowers (Okl.)</b> .....	1127
<b>Long v. Tighe (Nev.)</b> .....	60	<b>Moore v. Superior Court in and for Sacramento County (Cal. App.)</b> .....	990
<b>Loughery, United Materials Co. v. (Cal. App.)</b> .....	18	<b>Morrison Mill Co. v. American Mercantile Co. (Wash.)</b> .....	1033
<b>Lowrey v. Missouri K. &amp; T. R. Co. (Kan.)</b> ..	719	<b>Morse Hardware Co., Ruuth v. (Wash.)</b> .....	587
<b>Loyalton Electric Light Co. v. California Pine Box &amp; Lumber Co. (Cal. App.)</b> .....	323	<b>Mottin v. Board of Com'rs of Leavenworth County (Kan.)</b> .....	165
<b>Lum v. American Wheel &amp; Vehicle Co. (Cal.)</b> .....	303	<b>Mountain Timber Co. v. Case (Or.)</b> .....	92
<b>Lumbermen's Nat. Bank of Portland v. Minor (Or.)</b> .....	87	<b>Mueller, Greig v. (Or.)</b> .....	84
<b>Lund v. Ganahl (Cal. App.)</b> .....	501	<b>Mullen, Robinson v. (Okl.)</b> .....	1194
<b>Lynch, Territory v. (N. M.)</b> .....	405	<b>Mullen v. Short (Okl.)</b> .....	230
<b>Lytle v. Allison (Cal.)</b> .....	1000	<b>Mundy v. Kern (Wash.)</b> .....	1035
<b>Lytle v. Allison (Cal. App.)</b> .....	999	<b>Munson, Powers v. (Wash.)</b> .....	453
<b>McCall Co., Miller Bros. v. (Okl.)</b> .....	183	<b>Murphine, Scwabacher Bros. &amp; Co. v. (Wash.)</b> .....	598
<b>McCaw, Toon v. (Wash.)</b> .....	469	<b>Murphy v. Fairmount Tp. (Kan.)</b> .....	169
<b>McClure v. Nye (Cal. App.)</b> .....	1145	<b>Murry, Daughtry v. (N. M.)</b> .....	101
<b>McClure, State v. (N. M.)</b> .....	1063	<b>Murry v. Daughtry (N. M.)</b> .....	1070
<b>McCray v. Manning (Cal. App.)</b> .....	17	<b>Murton, Benson v. (Or.)</b> .....	340
<b>McDowell, Wiley v. (Colo.)</b> .....	757	<b>Murton, Benson v. (Or.)</b> .....	1189
<b>McElroy v. Whitney (Idaho)</b> .....	118	<b>Muskogee Electric Traction Co. v. McIntire (Okl.)</b> .....	213
<b>McGarrah v. State (Okl. Cr. App.)</b> .....	260	<b>Mutual Ben. Life Ins. Co. of Newark, N. J., v. Cummings (Or.)</b> .....	1169
<b>McGilvray Stone Co., Van Damme v. (Cal. App.)</b> .....	995	<b>Mutual Laundry Co., Keating v. (Kan.)</b> ..	152
<b>McIntire, Muskogee Electric Traction Co. v. (Okl.)</b> .....	213	<b>Myers, Gise v. (Cal. App.)</b> .....	500
<b>McIvor, Woods v. (Wash.)</b> .....	590	<b>Nacey, Stephens v. (Mont.)</b> .....	361
<b>McKenna, Thompson v. (Cal. App.)</b> .....	512	<b>National Brick &amp; Clay Co., Bingham &amp; McClelland Co. v. (Or.)</b> .....	1187
<b>McLaughlin v. State (Okl. Cr. App.)</b> .....	1196	<b>National Copper Bank of Salt Lake City, Wheelwright v. (Utah)</b> .....	132
<b>McLellan, Christiansen v. (Wash.)</b> .....	434	<b>National Laundry Co., Jones v. (Or.)</b> .....	1178
<b>McMahan v. Olcott (Or.)</b> .....	836	<b>National Lumber Co., Davis v. (Cal. App.)</b> ..	509
<b>McMahon, Janke v. (Cal. App.)</b> .....	21	<b>Needels v. Coffee (Cal. App.)</b> .....	491
<b>McNair, Gerard-Fillio Co. v. (Wash.)</b> .....	462	<b>Neil, Rominger v. (Or.)</b> .....	1198
<b>McNeill, Feder Silberberg Co. v. (N. M.)</b> ..	975	<b>Neis, State v. (Wash.)</b> .....	444
<b>McNicholas, Bross v. (Or.)</b> .....	782	<b>Nelson, Latimer v. (Mont.)</b> .....	680
<b>McPherson, Rooney v. (Okl.)</b> .....	212	<b>Nelson v. St. Helens Timber Co. (Or.)</b> .....	1167
<b>Maddin v. Robertson (Okl.)</b> .....	1128	<b>Nesbitt v. Chesebro (Kan.)</b> .....	545
<b>Maddy, Robbins v. (Kan.)</b> .....	575	<b>New Century Min. Co., Reynolds v. (Kan.)</b> ..	844
<b>Maggs v. Seattle (Wash.)</b> .....	388	<b>Newby v. Fox (Kan.)</b> .....	890
<b>Manning, McCray v. (Cal. App.)</b> .....	17	<b>Nichols v. Hufford (Wyo.)</b> .....	1084
<b>Marks &amp; Co.'s Estate, In re (Or.)</b> .....	777	<b>Nichols v. State (Okl. Cr. App.)</b> .....	256
<b>Marks &amp; Wollenberg's Estate, In re (Or.)</b> ..	779	<b>Nicoll v. Nicoll (Cal. App.)</b> .....	1144
<b>Marshall, Daily v. (Mont.)</b> .....	681	<b>Niemann, Temescal Water Co. v. (Cal. App.)</b> .....	992
<b>Meeker v. Trappett (Idaho)</b> .....	117	<b>Niles State Bank v. Jennings (Cal. App.)</b> ..	329
<b>Meeves, Clopton v. (Idaho)</b> .....	907	<b>Nolan, Plinsky v. (Or.)</b> .....	71
<b>Meizel, Garner v. (Cal. App.)</b> .....	1165	<b>Nordgren v. Lawrence (Wash.)</b> .....	436
<b>Melosevich, Ex parte (Nev.)</b> .....	57	<b>Northern Electric R. Co., Dodge v. (Cal. App.)</b> .....	1161
<b>Merchant v. State (Okl. Cr. App.)</b> .....	1190	<b>Northern Pac. R. Co., Fogarty v. (Wash.)</b> ..	609
<b>Merriam, Blonde v. (Wyo.)</b> .....	1076	<b>Northwestern Nat. Life Ins. Co., Fenn v. (Kan.)</b> .....	159
<b>Merrill v. State (Wyo.)</b> .....	134	<b>Null, Springfield Fire &amp; Marine Ins. Co. v. (Okl.)</b> .....	235
<b>Mesa De Mayo Land &amp; Live Stock Co. v. Hoyt (Colo. App.)</b> .....	471	<b>Nusbaum, Ennis v. (Kan.)</b> .....	537
<b>Metcalf v. State (Okl. Cr. App.)</b> .....	1130	<b>Nye, Commission for Fiftieth Anniversary of Battle of Gettysburg v. (Cal. App.)</b> ..	1145
<b>Metcalf v. State (Okl. Cr. App.)</b> .....	1131	<b>Nye, McClure v. (Cal. App.)</b> .....	1145
<b>Metzler, Prudential Loan &amp; Trust Co. v. (Or.)</b> .....	1191	<b>Oatman v. Bankers' &amp; Merchants' Mut. Fire Relief Ass'n (Or.)</b> .....	1183
<b>Meyer v. Buckley (Cal. App.)</b> .....	510	<b>Ocean Shore Development Co., Hammond v. (Cal. App.)</b> .....	978
<b>Midland Val. R. Co. v. State (Okl.)</b> .....	27	<b>O'Connor, J. J. Crable &amp; Son v. (Wyo.)</b> ..	376
<b>Migliavacca Realty Co., Allen v. (Wash.)</b> ..	580	<b>O'Day, Staley v. (Cal. App.)</b> .....	620
<b>Milam v. Smith-Mauer Bros. (Okl.)</b> .....	33	<b>Oelke v. State (Okl. Cr. App.)</b> .....	1140
<b>Miller v. Blunck (Idaho)</b> .....	383	<b>Olcott, Equi v. (Or.)</b> .....	775
<b>Miller v. Miller (Or.)</b> .....	86	<b>Olcott, McMahan v. (Or.)</b> .....	836
<b>Miller v. Owens (Colo.)</b> .....	141		
<b>Miller, State v. (Kan.)</b> .....	878		
<b>Miller Bros. v. McCall Co. (Okl.)</b> .....	183		
<b>Minor, Lumbermen's Nat. Bank of Portland v. (Or.)</b> .....	87		
<b>Minto, Barr v. (Or.)</b> .....	639		
<b>Missouri, K. &amp; T. R. Co., Burgin v. (Kan.)</b> ..	560		
<b>Missouri, K. &amp; T. R. Co., Denton v. (Kan.)</b> ..	558		
<b>Missouri, K. &amp; T. R. Co., Lowrey v. (Kan.)</b> ..	719		



	Page		Page
Old Mill Ditch & Irrigation Co. v. Breeding (Or.).....	89	Prater, Eminent Household of Columbian Woodmen v. (Okl.).....	48
Old Mill Ditch & Irrigation Co. v. Estell (Or.).....	90	Prement v. Wells (Or.).....	647
Omaha Lumber Co. v. Co-operative Inv. Co. (Colo.).....	1112	Price, Hubbard v. (Cal. App.).....	1166
Oneida Farmers' Shipping Ass'n v. St. Joseph & G. I. R. Co. (Kan.).....	883	Prskey v. Colonial Hotel Co. (Nev.).....	390
O'Neil v. Eppler (Kan.).....	705	Providence Oil Co. of Arizona, Dabney Oil Co. v. (Cal. App.).....	1155
O'Neill, Claypool v. (Or.).....	349	Prudential Loan & Trust Co. v. Metzler (Or.).....	1191
Oregon Mill & Grain Co. v. Kirkpatrick (Or.).....	69	Pruitt v. State (Okl. Cr. App.).....	1197
Oregon R. & Nav. Co., Crane v. (Or.).....	810	Purdy v. Sherman (Wash.).....	440
Oregon R. & Nav. Co. v. Thisler (Kan.).....	539	Ralphs v. Bruns (Cal. App.).....	997
O'Rourke v. Grand Opera House Co. (Mont.).....	965	Rambo v. Empire Dist. Electric Co. (Kan.).....	553
Orr Co. v. Interlaken Land Co. (Wash.).....	599	Ramsay, Comstock v. (Colo.).....	1107
Osmont v. All Persons, etc. (Cal.).....	480	Ray v. Missouri, K. & T. R. Co. (Kan.).....	847
Ow v. Dalhoff (Kan.).....	569	Ray, State v. (Mont.).....	961
Owen, Swofford Bros. Dry Goods Co. v. (Okl.).....	193	Rayado Land & Irrigation Co., Farmers' Development Co. v. (N. M.).....	104
Owens, Miller v. (Colo.).....	141	Reed v. State (Okl. Cr. App.).....	1197
Pacific Bridge Co., Ackles v. (Or.).....	781	Reine, Eilers Music House v. (Or.).....	788
Pacific Coast Const. Co., Subbo v. (Or.).....	83	Remele, Carr v. (Wash.).....	593
Pacific Coast Sav. Soc. v. Sturdevant (Cal.).....	485	Remillard v. State (Okl. Cr. App.).....	1132
Pacific Lumber & Timber Co., Way v. (Wash.).....	595	Rensberg, Hunt v. (Kan.).....	706
Pacific Milling & Elevator Co. v. Portland (Or.).....	72	Remy v. Fowler Packing Co. (Kan.).....	707
Pacific Surety Co., Williams v. (Or.).....	1186	Reynolds v. New Century Min. Co. (Kan.).....	844
Page, California Mother Lode Min. Co. v. (Cal.).....	14	R. H. Herron Co. v. Shaw (Cal.).....	488
Palmer v. El. Clemens Horst Co. (Or.).....	634	Richardson v. Investment Co. (Or.).....	773
Pantages, Exchange Nat. Bank of Spokane v. (Wash.).....	1025	Richardson v. Missouri Pac. R. Co. (Kan.).....	535
Park City School Dist. No. 12 of Summit County, State v. (Utah).....	128	Richardson v. Sears (Wash.).....	1010
Partridge v. Twin Falls Land & Water Co. (Idaho).....	677	Richardson v. Simpson (Kan.).....	534
Pasarel v. Anderson (Wash.).....	441	Richman v. Wenaha Co. (Wash.).....	467
Pate v. State (Okl. Cr. App.).....	1132	Richmond School Dist. of Contra Costa County v. Board of Sup'rs of Contra Costa County (Cal.).....	619
Patrick v. Johnson (Kan.).....	161	Rinkle, St. Louis & S. F. R. Co. v. (Okl.).....	199
Patterson, Empire Ranch & Cattle Co. v. (Colo. App.).....	1125	Riverside Portland Cement Co., Baxter v. (Cal. App.).....	1150
Patterson v. Foreman (Okl.).....	178	Robbins v. Maddy (Kan.).....	575
Payette Heights Irr. Dist. v. Haynes (Idaho).....	907	Robertson, Maddin v. (Okl.).....	1128
Payte, Churchman v. (Okl.).....	178	Robinson v. Chicago, R. I. & P. R. Co. (Kan.).....	537
Peeps Fixture Co. v. Gove (Colo. App.).....	143	Robinson v. Mullen (Okl.).....	1194
Penn v. Penn (Okl.).....	207	Rocky Mountain Fuel Co., Williams v. (Colo.).....	742
People v. California Safe Deposit & Trust Co. (Cal. App.).....	324	Roe, Seccombe v. (Cal. App.).....	507
People, Campbell v. (Colo.).....	1043, 1199	Rogers v. Dockstader (Kan.).....	717
People, Denniss v. (Colo.).....	741	Rogers, Lieber v. (Okl.).....	30
People v. Green (Cal. App.).....	334	Roman v. Leavenworth (Kan.).....	551
People v. Kennedy (Cal. App.).....	25	Rominger v. Neil (Or.).....	1198
People v. Kizer (Cal.).....	521	Rooney v. McPherson (Okl.).....	212
People v. Kizer (Cal. App.).....	516	Roper v. Gould (Cal. App.).....	622
People, Phillips County Court v. (Colo.).....	752	Ross, Commercial State Bank of Waverly v. (Kan.).....	538
People v. Scott (Cal. App.).....	496	Ross, Kinnear v. (Wash.).....	607
People v. Watson (Cal.).....	298	Ross v. State (Okl. Cr. App.).....	1197
People, Wentzel v. (Colo.).....	415	Ross, Stewart & Holmes Drug Co. v. (Wash.).....	577
Perryman v. Woodward (Okl.).....	244	Ruane, Denver & R. G. R. Co. v. (Colo.).....	1194
Peterson & Co., Farrar v. (Wash.).....	594	Rumsey & Sikemeier Co., Balfe v. (Colo.).....	417
Pettit, State v. (Wash.).....	1014	Russell v. State (Okl. Cr. App.).....	475
Phillips v. Arkansas Valley Interurban R. Co. (Kan.).....	429	Ruuth v. Morse Hardware Co. (Wash.).....	587
Phillips County Court v. People (Colo.).....	752	Ryan v. Cullen (Kan.).....	430
Pickett v. Board of Com'rs of Fremont County (Idaho).....	112	Ryan, Del Monte Live Stock Co. v. (Colo. App.).....	1048
Pioneer Telephone & Telegraph Co. v. State (Okl.).....	476	St. Helens Timber Co., Nelson v. (Or.).....	1167
Pleasant Valley & Lake Canal Co., Larimer County Canal No. 2 Irrigating Co. v. (Colo.).....	749	St. Joseph & G. I. R. Co., Oneida Farmers' Shipping Ass'n v. (Kan.).....	883
Plinsky v. Nolan (Or.).....	71	St. Louis & S. F. R. Co. v. Fisher (Okl.).....	41
Plummer v. Ash (Kan.).....	157	St. Louis & S. F. R. Co., Kinney v. (Okl.).....	180
Pool v. Pool (Wyo.).....	372	St. Louis & S. F. R. Co. v. Ladd (Okl.).....	57
Port Crescent Shingle Co., Engleson v. (Wash.).....	1030	St. Louis & S. F. R. Co. v. Rinkle (Okl.).....	189
Port of Bayocean, State v. (Or.).....	85	St. Louis & S. F. R. Co. v. Sparks, Peery & Sacra (Okl.).....	57
Postal Telegraph-Cable Co., Altpeter v. (Cal. App.).....	329	St. Louis & S. F. R. Co. v. Steele (Okl.).....	209
Powers v. Munson (Wash.).....	453	St. Louis & S. F. R. Co. v. Walker (Okl.).....	185
		Salaries of Commissioners and Employees of State Land Board, In re (Colo.).....	140
		Sands, Mohr v. (Okl.).....	238
		Scaife v. Scaife (Or.).....	1198
		Schacht Motor Car Co., Shelton v. (Cal. App.).....	504
		Schanen-Blair Co., Caraduc v. (Or.).....	636
		Schmidt, Carlson Sheep Co. v. (Wyo.).....	1053



	Page		Page
Schon v. Crouch & Case (Colo. App.)....	765	State, Irvine v. (Okl. Cr. App.).....	259
Scott, People v. (Cal. App.).....	496	State, Jones v. (Okl. Cr. App.).....	249
Scwabacher Bros. & Co. v. Murphine (Wash.).....	598	State, Jones v. (Okl. Cr. App.).....	1134
Sears, Richardson v. (Wash.).....	1010	State v. Kelsey (Or.).....	806
Seattle Electric Co., City of Seattle v. (Wash.).....	8	State v. McClure (N. M.).....	1063
Seattle Nat. Bank v. Becker (Wash.).....	618	State, McGarrath v. (Okl. Cr. App.).....	260
Secombe v. Roe (Cal. App.).....	507	State, McLaughlin v. (Okl. Cr. App.).....	1196
Seymour Packing Co., Weeks v. (Kan.)....	713	State, Merchant v. (Okl. Cr. App.).....	1196
Shaw, R. H. Herron Co. v. (Cal.).....	488	State, Merrill v. (Wyo.).....	134
Sheahan, Fidelity & Deposit Co. v. (Okl.)	228	State, Metcalf v. (Okl. Cr. App.).....	1130
Sheets v. Coast Coal Co. (Wash.).....	433	State, Metcalf v. (Okl. Cr. App.).....	1131
Sherman, Purdy v. (Wash.).....	440	State, Midland Val. R. Co. v. (Okl.).....	27
Shewey, Van Gundy v. (Kan.).....	720	State v. Miller (Kan.).....	878
Shorett v. Knudson (Wash.).....	1029	State, Missouri, K. & T. R. Co. v. (Okl.)..	35
Short, Mullen v. (Okl.).....	230	State, Moody v. (Okl. Cr. App.).....	1197
Shwayder v. Clay (Colo. App.).....	420	State v. Neis (Wash.).....	444
Sides v. Union Pac. R. Co. (Colo.).....	1040	State, Nichols v. (Okl. Cr. App.).....	256
Siemens, State v. (Or.).....	1173	State, Oelke v. (Okl. Cr. App.).....	1140
Silliman v. Silliman (Or.).....	769	State v. Park City School Dist. No. 12 of Summit County (Utah).....	128
Silver Peak Mines, Gamble v. (Nev.).....	936	State, Pate v. (Okl. Cr. App.).....	1132
Simpson, Richardson v. (Kan.).....	534	State v. Pettit (Wash.).....	1014
Singer v. Taylor (Kan.).....	841	State, Pioneer Telephone & Telegraph Co. v. (Okl.).....	476
Skelton v. Schacht Motor Car Co. (Cal. App.).....	504	State v. Portland (Or.).....	62
S. Marks & Co.'s Estate, In re (Or.).....	777	State v. Port of Bayocean (Or.).....	85
Smith v. Bank of Hamlin (Kan.).....	428	State, Pruitt v. (Okl. Cr. App.).....	1197
Smith v. Board of Com'rs of Washita Coun- ty (Okl.).....	177	State v. Ray (Mont.).....	961
Smith, Cronquist v. (Utah).....	130	State, Reed v. (Okl. Cr. App.).....	1197
Smith, Hughes v. (Or.).....	68	State, Remillard v. (Okl. Cr. App.).....	1132
Smith v. State (Okl. Cr. App.).....	1136	State, Ross v. (Okl. Cr. App.).....	1197
Smith, Carey & Co. v. Atchison Live Stock Co. (Kan.).....	723	State, Russell v. (Okl. Cr. App.).....	475
Smith-Mauer Bros., Milam v. (Okl.).....	33	State v. Seattle (Wash.).....	11
Smith & Co., Trovik v. (Wash.).....	454	State v. Seattle (Wash.).....	1005
Snake River Irr. Co., Crane Falls Power & Irrigation Co. v. (Idaho).....	655	State v. Siemens (Or.).....	1173
Snow v. Union Pac. R. Co. (Colo.).....	1037	State, Smith v. (Okl. Cr. App.).....	1136
Soto, Gould v. (Ariz.).....	410	State v. Taylor (Kan.).....	861
Souza v. Joseph (Cal. App.).....	981	State, Teague v. (Okl. Cr. App.).....	1134
Sparks, Perry & Sacra, St. Louis & S. F. R. Co. v. (Okl.).....	57	State v. Terry (Wash.).....	336
Spencer, Thomas v. (Or.).....	822	State, Tyler v. (Okl. Cr. App.).....	270
Spokane, P. & S. R. Co., Field v., two cases (Wash.).....	611	State, Vann v. (Okl. Cr. App.).....	1197
Spreckels v. Spreckels (Cal.).....	289	State, Weinberger v. (Okl. Cr. App.).....	1197
Spreckels' Estate, In re (Cal.).....	289	State, White v. (Okl. Cr. App.).....	263
Springfield Fire & Marine Ins. Co. v. Null (Okl.).....	235	State v. Whitworth (Mont.).....	364
Staley v. O'Day (Cal. App.).....	620	State, Wietelmann v. (Okl. Cr. App.).....	249
Standrod v. Case (Idaho).....	651	State, Wietelmann v. (Okl. Cr. App.).....	1198
Starbuck, White v. (Okl.).....	223	State v. Willis (Mont.).....	962
State, Allen v. (Okl. Cr. App.).....	1138	State, Yota v. (Okl. Cr. App.).....	257
State v. American Sugar Mfg. & Refining Co. (Kan.).....	864	State Department of Engineering, Atkinson v. (Cal.).....	616
State, Barnes v. (Okl. Cr. App.).....	1194	State Savings Bank, American Bonding Co. of Baltimore v. (Mont.).....	367
State, Benson v. (Okl. Cr. App.).....	271	Steele, St. Louis & S. F. R. Co. v. (Okl.)..	209
State, Bloodsworth v. (Okl. Cr. App.).....	1131	Stephens v. Nacey (Mont.).....	361
State v. Brown (Okl. Cr. App.).....	1143	Stern v. Farah Bros. (N. M.).....	400
State, Carlisle v. (Okl. Cr. App.).....	1194	Stewart, Citizens' Bank v. (Cal. App.).....	837
State, Caudill v. (Okl. Cr. App.).....	1195	Stewart & Holmes Drug Co. v. Ross (Wash.).....	577
State, Claussen v. (Wyo.).....	1055	Stilson Co., Dake Advertising Agency v. (Cal. App.).....	327
State v. Coffeyville (Kan.).....	711	Stroupe v. Hewitt (Kan.).....	562
State v. Columbus (Wash.).....	455	Stuart, Brown v. (Kan.).....	725
State, Copeland v. (Okl. Cr. App.).....	258	Stuart, Haskin v. (Kan.).....	725
State v. Crawford (Wash.).....	590	Sturdevant, Pacific Coast Sav. Soc. v. (Cal.)	485
State v. Cutts (Idaho).....	115	Subbo v. Pacific Coast Const. Co. (Or.)...	83
State, Day v. (Okl. Cr. App.).....	1195	Sullivan v. Wakefield (Or.).....	641
State, De Freese v. (Okl. Cr. App.).....	254	Superior Court in and for Los Angeles County, Hayden v. (Cal. App.).....	26
State, DeWitt v. (Okl. Cr. App.).....	1195	Superior Court in and for Los Angeles County, Hupp v. (Cal. App.).....	987
State, Dishon v. (Okl. Cr. App.).....	1195	Superior Court in and for Sacramento County, Moore v. (Cal. App.).....	990
State v. District Court of Second Judicial Dist. in and for Silver Bow County (Mont.).....	679	Superior-Portland Cement Co., Johnson v. (Wash.).....	460
State v. Duncan (Mont.).....	109	Sweeney v. Lewis Const. Co. (Wash.).....	441
State v. Dye (Nev.).....	935	Swift & Co., Wells v. (Kan.).....	732
State, Fertig v. (Ariz.).....	99	Swofford Bros. Dry Goods Co. v. Owen (Okl.).....	193
State, Flynn v. (Okl. Cr. App.).....	1133		
State v. Forsyth (Wyo.).....	521	Taylor v. Darling (Cal. App.).....	503
State v. Goddard (Or.).....	90	Taylor, Singer v. (Kan.).....	841
State, Grant v. (Okl. Cr. App.).....	1195	Taylor, State v. (Kan.).....	861
State, Hager v. (Okl. Cr. App.).....	263	Teague v. State (Okl. Cr. App.).....	1134
State, Herber v. (Okl. Cr. App.).....	1196	Tebow v. Teller (Colo. App.).....	421
State, Huff v. (Okl. Cr. App.).....	265	Teller, Jones v. (Or.).....	354
		Teller, Tebow v. (Colo. App.).....	421



	Page		Page
Temescal Water Co. v. Niemann (Cal. App.)	992	Way v. Pacific Lumber & Timber Co. (Wash.)	595
Territory v. Lynch (N. M.)	405	Weaver, Wallace v. (Mont.)	1099
Terry, State v. (Wash.)	386	Webster, Heginbotham v. (Colo.)	740
Teynor v. Heible (Wash.)	1	Weeks v. Seymour Packing Co. (Kan.)	713
Thisler, Oregon R. & Nav. Co. v. (Kan.)	539	Weinberger v. State (Okl. Cr. App.)	1197
Thomas v. Lee (Wash.)	446	Welch v. Bigger (Idaho)	381
Thomas v. Spencer (Or.)	822	Welch v. Watkins (Okl.)	44
Thompson v. McKenna (Cal. App.)	512	Wellington Mines Co., Brown v. (Colo. App.)	427
Thornton's Estate, In re (Wyo.)	134	Wells, Fremont v. (Or.)	647
Tidwell, Holden v. (Okl.)	54	Wells v. Swift & Co. (Kan.)	732
Tighe, Long v. (Nev.)	60	Wenaha Co., Richman v. (Wash.)	467
Tirey v. Darneal (Okl.)	614	Wentworth, Lane v. (Or.)	348
Titus v. Anaconda Copper Min. Co. (Mont.)	677	Wentzel v. People (Colo.)	415
Tonkin-Clark Realty Co. v. Hedges (Idaho)	669	Western Clay & Gypsum Products Co., Deal v. (N. M.)	974
Toon v. McCaw (Wash.)	469	Western Grocer Co. v. Alleman (Kan.)	575
Topeka R. Co., Burnett v. (Kan.)	534	Western Screen Co., Francis v. (Cal. App.)	327
Township of Fairmount, Murphy v. (Kan.)	169	Western Union Tel. Co., Cain v. (Kan.)	874
Township of Garfield, Doty v. (Kan.)	172	Westlake Ave. North in City of Seattle, In re (Wash.)	598
Trappett, Meeker v. (Idaho)	117	Wheelan v. Hunt (Okl.)	52
Traver v. Dodd (Colo. App.)	1117	Wheelwright v. National Copper Bank of Salt Lake City (Utah)	132
Tritthart v. Tritthart (Idaho)	121	White v. Starbuck (Okl.)	223
Trovik v. Grant Smith & Co. (Wash.)	454	White v. State (Okl. Cr. App.)	263
Turner, Klein v. (Or.)	625	Whitney, McElroy v. (Idaho)	118
Twin Falls Canal Co., Hobbs v. (Idaho)	899	Whitworth, State v. (Mont.)	364
Twin Falls Land & Water Co., Brose v. (Idaho)	673	W. H. Peeps Fixture Co. v. Gove (Colo. App.)	143
Twin Falls Land & Water Co., Partridge v. (Idaho)	677	Wickersham v. California Safe Deposit & Trust Co. (Cal. App.)	324
Tyler v. State (Okl. Cr. App.)	270	Wietelmann v. State (Okl. Cr. App.)	249
Underwood v. Fosha (Kan.)	806	Wietelmann v. State (Okl. Cr. App.)	1198
Union Pac. R. Co., Edwards v. (Kan.)	728	Wilcox, In re (Kan.)	547
Union Pac. R. Co., Sides v. (Colo.)	1040	Wiley v. Edmondson (Okl.)	38
Union Pac. R. Co., Snow v. (Colo.)	1037	Wiley v. McDowell (Colo.)	757
United Iron Works Co., Baker v. (Kan.)	737	Wilkie v. Bailey (Wash.)	388
United Materials Co. v. Loughery (Cal. App.)	18	Willey v. Herrett (Or.)	630
United Rys. Co., Kingsley v. (Or.)	785	Williams v. Campbell (Wyo.)	1071
United States Fidelity & Guaranty Co., Young Men's Christian Ass'n of Salina, Kan., v. (Kan.)	894	Williams v. Pacific Surety Co. (Or.)	1186
University Land Co., Wrenn v. (Or.)	627	Williams v. Rocky Mountain Fuel Co. (Colo.)	742
Utah Black Marble Co. v. American Marble & Onyx Co. (Utah)	472	Willis, State v. (Mont.)	962
Van Aresdale v. Baldwin Piano Co. (Kan.)	703	Wilmore v. Kalberer (Colo. App.)	763
Van Damme v. McGilvray Stone Co. (Cal. App.)	995	Wilson v. Board of Com'rs of Cloud County (Kan.)	713
Van Gundy v. Shewey (Kan.)	720	Wilson v. German-American Ins. Co. (Kan.)	715
Vann v. State (Okl. Cr. App.)	1197	Wilson, Liebeck v. (Wash.)	468
Village of Nez Perce, Leach v. (Idaho)	926	Woods v. McIvor (Wash.)	590
Wakefield, Sullivan v. (Or.)	641	Woodward, Berry v. (Okl.)	1127
Walk v. Hibberd (Or.)	95	Woodward, Perryman v. (Okl.)	244
Walker v. Lanning (Wash.)	462	Woody, Jones Leather Co. v. (Okl.)	201
Walker, St. Louis & S. F. R. Co. v. (Okl.)	185	Wooster, Haines v. (Cal. App.)	998
Wallace v. Weaver (Mont.)	1099	Wrenn v. University Land Co. (Or.)	627
Walston, Missouri, K. & T. R. Co. v. (Okl.)	42	Wright, Wright Restaurant Co. v. (Wash.)	464
Walters v. Chicago, M. & P. S. R. Co. (Mont.)	357	Wright Restaurant Co. v. Wright (Wash.)	464
Ward, Durkin v. (Or.)	345	Wunsch v. Wunsch (Kan.)	740
Washburn, Monarch Portland Cement Co. v., two cases (Kan.)	156	Yamoaka v. Kloeber (Wash.)	1037
Watkins v. Enloe (Okl.)	44	Yenco v. Ballog (Wash.)	1198
Watkins, Welch v. (Okl.)	44	Yota v. State (Okl. Cr. App.)	257
Watson v. Hagen (Or.)	66	Young Men's Christian Ass'n of Salina, Kan., v. United States Fidelity & Guaranty Co. (Kan.)	894
Watson, People v. (Cal.)	298	Yuen Suey v. Fleahman (Or.)	803
		Zobrist v. Estes (Or.)	644



## REHEARINGS DENIED

---

[Cases in which rehearings have been denied, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this Reporter.]

---

### OKLAHOMA.

City of Lawton v. Harkins, 126 P. 727.

Davis v. Selby Oil & Gas Co., 128 P. 1083.

Hocker v. Carroll, 129 P. 56.

Hughes v. Garrelts, 129 P. 43.

133 P.

Humphrey v. Coquillard Wagon Works, 132 P. 899.

Park v. Merrill, 128 P. 1131.

Rhea v. State, 131 P. 729.

Scribner v. State, 132 P. 933.

Snyder v. Blake, 129 P. 34.

(xxiii)†







THE  
PACIFIC REPORTER  
VOLUME 133

(74 Wash. 22)

TEYNOR et ux. v. HEIBLE et al.

(Supreme Court of Washington, July 1, 1913.)

**1. HUSBAND AND WIFE (§ 249\*)—"SEPARATE PROPERTY."**

Where a single man entered land under the homestead laws of the United States and then married and then made final proof and obtained a patent and died intestate without having parted with the title, the property was his separate property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 887, 889-892; Dec. Dig. § 249.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6415, 6416; vol. 8, p. 7797.]

**2. EXECUTORS AND ADMINISTRATORS (§ 315\*)—DISTRIBUTION—PROCEEDINGS—NOTICE.**

Under Rem. & Bal. Code, § 1589, providing that a decree of distribution may be made on the application of the executor or administrator after notice given in the manner prescribed by sections 1499, 1500, relating to the sale of real estate by an executor or administrator on personal notice or notice by publication for at least four successive weeks, a decree of distribution made on notice by publication is subject to collateral attack where less than three weeks elapsed between the first publication and the time fixed for the hearing.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298-1314; Dec. Dig. § 315.\*]

**3. EXECUTORS AND ADMINISTRATORS (§ 315\*)—COLLATERAL ATTACK—VALIDITY—PRESUMPTIONS.**

Where the decree of distribution recites that the court finds from the affidavits on file that due service was made while the affidavits on file show service by publication only, which service is insufficient under the statute, the court, as against a collateral attack on the decree, will not presume that a proper personal service was had so as to confer jurisdiction on the court.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298-1314; Dec. Dig. § 315.\*]

Department 2. Appeal from Superior Court, Adams County; O. R. Holcomb, Judge.

Action by John Teynor and wife against Chloe Heible and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Lovell & Davis, of Ritzville, for appellants. Adams & Naef, of Ritzville, for respondents.

FULLERTON, J. This action was brought by the respondents against the appellants for

the partition of certain real property. The land in question was acquired from the United States under the homestead laws by one Peter Teynor, who died without lineal heirs. The respondents are his father and mother. The appellant Chloe Heible was his wife at the time of his death. The other appellants claim an interest in the land through mortgages or contracts to convey executed by Chloe Heible. Peter Teynor entered the land in the year 1901. He was then a single man, never having theretofore been married. On January 1, 1903, he intermarried with the respondent Chloe Heible. He made final proof under the homestead laws on September 12, 1906, and thereafter a patent to the land from the United States was duly issued to him. He died intestate on October 30, 1906, without having parted with the title acquired by him under the homestead patent.

Letters of administration on Peter Teynor's estate were issued out of the superior court of the county in which the land is situated to John A. Willis, the father of the appellant Chloe Heible. The administrator performed the duties of his trust, and on October 26, 1908, filed his final account with the estate, together with a petition asking for the distribution of the property thereof, praying that his account be settled and allowed, and that the estate be distributed to those lawfully entitled thereto. The court sitting in probate entertained the petition and made an order, dated as of the date on which the petition was filed, appointing November 16, 1908, as the time for hearing the petition, further ordering that the clerk of the court give notice thereof by causing notices to be posted in three of the most public places in the county in which the land is situated "at least two weeks before said day of settlement and hearing of petition, and publish notice thereof, according to law, for two weeks before said day of settlement and hearing upon the petition" in a certain designated newspaper. Proof by affidavit was made of the posting and publishing by the clerk, and on the day fixed for the hearing the court entered a decree in which it approved the final account and distributed the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 133 P.—1



estate. That part of the decree relating to the proof of service of notice of the time of the hearing recited that it appeared "to the court by affidavits on file herein that due and regular notice as required by law, and the order of this court, was given of the hearing hereof." The order distributed the whole of the estate to the appellant Chloe Helble as the sole heir at law of Peter Teynor, deceased. In making the order of distribution the probate court proceeded on the theory that the real property was, when acquired from the United States, the community property of Peter Teynor and Chloe Teynor, his wife, and that it descended on the death of Peter Teynor, under the statutes of the state governing the descent and distribution of community real property, to the wife, since the entryman died without issue.

The court in the case now before us, on the same state of facts, held the property to be the separate property of Peter Teynor and to have descended on his death, under the statutes governing the distribution and descent of separate property, one-half to the father and mother of the deceased and one-half to his wife, Chloe Teynor, holding further that the decree of distribution entered in the administration proceedings was void because entered without sufficient notice. The first question suggested by the record relates, therefore, to the nature of the title acquired by Peter Teynor in virtue of his homestead entry. Did the land become on his acquisition of the title thereto his separate property, or did it become the community property of himself and his then wife, the respondent in this proceeding?

[1] On the question our own cases are out of harmony. Indeed, they seem incapable of being reconciled, whether considered with relation to the facts upon which they are founded or with relation to the reasons by which they are thought to be sustained. The cases in which the question of the nature of the title acquired by a homestead entry from the United States is considered are the following: *Philbrick v. Andrews*, 8 Wash. 7, 35 Pac. 358; *Bolton v. La Camas Water Power Co.*, 10 Wash. 246, 38 Pac. 1043; *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671; *Forker v. Henry*, 21 Wash. 235, 57 Pac. 811; *In re Feas' Estate*, 30 Wash. 51, 70 Pac. 270; *Ahern v. Ahern*, 31 Wash. 334, 71 Pac. 1023, 96 Am. St. Rep. 912; *Towner v. Rodegeb*, 33 Wash. 153, 74 Pac. 50, 99 Am. St. Rep. 936; *James v. James*, 35 Wash. 655, 77 Pac. 1082; *Cox v. Tompkinson*, 39 Wash. 70, 80 Pac. 1005; *Hall v. Hall*, 41 Wash. 186, 83 Pac. 108, 111 Am. St. Rep. 1016; *Cunningham v. Krutz*, 41 Wash. 190, 83 Pac. 109, 7 L. R. A. (N. S.) 967; *Curry v. Wilson*, 45 Wash. 19, 87 Pac. 1065; *Rogers v. Minneapolis Threshing Machine Co.*, 48 Wash. 19, 92 Pac. 774, 95 Pac. 1014; *Delacey v. Commercial Trust Co.*, 51 Wash. 542, 99 Pac. 574, 130 Am. St. Rep. 1112; *Krieg v.*

*Lewis*, 56 Wash. 196, 105 Pac. 483, 26 L. R. A. (N. S.) 1117; *Curry v. Wilson*, 57 Wash. 509, 107 Pac. 367; *Eckert v. Schmitt*, 60 Wash. 23, 110 Pac. 635.

Grouping the cases according to their facts, and the decision of the court upon the facts, in the first group can be placed the cases of *Philbrick v. Andrews* and *In re Feas' Estate*. In these cases all that appeared in the record was that the land was occupied by the entryman and his wife at the time final proof was made and patent issued, and it was assumed, as if not subject to controversy, that the property was the community property of the husband and wife.

In the second group can be placed *Forker v. Henry* and *Rogers v. Minneapolis Threshing Machine Co.* In the first case the land was settled upon and entered as a homestead by a single woman who lived thereon for some four years and then married. Thereafter, while the marriage relation continued, she made final proof and was granted a patent. In *Rogers v. Minneapolis Threshing Machine Co.* the land was settled upon and entered by a married man living with his wife. Some two years later while living on the land the wife died leaving issue. A year and a half thereafter the entryman married a second time, and two years after the second marriage made final proofs and received a patent. In each of the cases the land was held to be the separate property of the entryman.

In the third group can be placed *Kromer v. Friday*, *Ahern v. Ahern*, *James v. James*, and *Cox v. Tompkinson*. In these cases the wife resided upon the land with her husband at the time of its entry and continued to reside thereon until her death, which occurred in each instance prior to making final proof and the receipt of patent, although occurring after the full period of residence required by the federal statute as preliminary to making final proof had expired. The property acquired was held to be community property.

In the fourth group can be placed *Bolton v. La Camas Water Power Co.* and *Cunningham v. Krutz*. In the first of these cases the wife resided on the land from the time of its entry by the husband until the residence period expired, but died before the making of final proof and the issuance of patent. In the second case the entry was made by a married man living with his wife. The wife died some three years later after a continuous residence on the land subsequent to the entry. A few months later the husband commuted the entry and received a patent for the land. The property was held in each case to be the separate property of the husband.

In the fifth group can be placed *Curry v. Wilson*, 45 Wash. 19, 87 Pac. 1065, *Curry v. Wilson*, 57 Wash. 509, 107 Pac. 367, *Krieg v. Lewis*, and *Eckert v. Schmitt*. In these cas-



es the wife resided with the husband on the homestead from the time of the original entry until after the making of final proof, and in two of them until after patent was issued. The land acquired was held to be the community property of the spouses.

In a sixth group can be placed the cases of *Towner v. Rodegeb*, *Hall v. Hall*, and *Delacey v. Commercial Trust Co.* In the first case the land was settled upon prior to the extension of the public surveys thereover and prior to the time the land was subject to entry under the public land laws. The settler died before the land became so subject to entry, and it was held that he had no estate of inheritance therein or estate of any kind that was cognizable in proceedings instituted on his estate in the probate court. In *Hall v. Hall* the parties thereto, while husband and wife, settled upon unsurveyed lands of the United States and lived thereon together as husband and wife for a period of more than five years. Prior to the time the lands were open to entry they were divorced, and subsequent to the divorce the lands became subject to entry, and the husband entered the same as a homestead, and subsequent thereto made final proofs and received a patent. It was held that his divorced wife had no interest in the property. In *Delacey v. Commercial Trust Co.* it was held that a mere settlement on government land by a husband and wife conferred no community interest in the land.

The arguments thought to sustain these several conclusions we shall not set forth. It is manifest, however, that no reasoning based upon principle can reconcile the first with the second group or the third with the fourth. It is the opinion of the court how that the property in each of these groups, if nothing more appeared in the record than is shown in the opinion, should have been held to be the separate property of the entryman. In other words, the rule should be that, in all cases where the marital relation does not exist at the time of the original settlement and entry and continue until final proof is made, the property should be held to be the separate property of the spouse who finally acquires the patent to the land. The folly of any other rule is illustrated by the case of *Rogers v. Minneapolis Threshing Machine Co.*, 48 Wash. 19, 92 Pac. 774, 95 Pac. 1014. This case we have placed in the second group, but it belongs under its facts in the fourth group also. In that case it will be remembered that the entryman was married at the time he made entry on the land; that his then wife died leaving issue some two years later after a continuous residence thereon; that about a year later the entryman married a second time, resided with his second wife on the property for some two years more, and made final proof and received a patent. If a community interest is impressed on the land by the fact of marriage at the time of its

entry, as is held in the fourth group of cases, and if a community interest is also impressed by the fact of marriage at the time of the making of final proof and the issuance of the patent, as is held in the first group, then this land was impressed with the interests of two distinct communities, the one in favor of the issue of the first wife and the other in favor of the second wife. A rule that leads to such incongruous results is certainly not to be commended.

The facts of the case at bar bring it within the cases found in both the first and second groups of cases as we have listed them; and, since we conclude that the decisions in respect to the first group rather than in the second were wrong in principle, we hold the property in question here to have been the separate property of the husband on its acquisition from the government.

[2] The second question suggested by the record is the validity of the decree of distribution entered in the probate proceedings. This present action is a collateral attack upon the decree, and it is conceded that, unless the record shows affirmatively a want of jurisdiction, it is conclusive upon all the world. We think the record does show affirmatively a want of jurisdiction. The statute relating to decrees of distribution in probate proceedings provides that such decrees may be made on the application of the executor or administrator, or any one interested in the estate, but only after "notice has been given in the manner required in regard to an application for the sale of land by an executor or administrator." Rem. & Bal. Code, § 1589. The statute relating to the sale of real estate by an executor or administrator provides that the court after the petition for the sale is filed shall "make an order directing all persons interested to appear at a time and place specified not less than four or more than eight weeks from the time of making such order," and that a "copy of such order to show cause shall be personally served on all persons interested in the estate at least ten days before the time appointed for the hearing of the petition, or shall be published at least four successive weeks in such newspaper as the court shall order." Id. §§ 1499, 1500. From an examination of the dates before set out it will be observed that in this instance the time elapsing between the date of the order to show cause and the time fixed for the hearing was only 21 days, and that less than three weeks elapsed between the first publication of the order and the time fixed for the hearing. The notice actually shown in the record, therefore, was clearly insufficient to give the court jurisdiction to make the order.

[3] But the appellant says that, since this action is a collateral attack on the decree, all intendments are in favor of its validity, and, since personal service on the persons interested ten days prior to the time fixed



for the hearing is made equivalent to published notice, the court will presume, in the absence of a showing to the contrary, that such a service was made. But, as we say, we think the record does show on its face to the contrary. The recital in the judgment is that the court finds from the "affidavits on file" that due service was made. As the only affidavits on file, or that were put on file, show service by publication only, the idea of any other service is clearly negated. "If a want of jurisdiction affirmatively appears upon the face of the \* \* \* record, the judgment will be held to be void upon collateral as well as direct attack." *wick v. Rea*, 54 Wash. 424, 103 Pac. 462.

The judgment appealed from will stand affirmed.

ELLIS, MORRIS, and MAIN, JJ., concur.

(74 Wash. 189)

JOHNS v. COFFEE et ux.

(Supreme Court of Washington. June 28, 1913.)

1. CORPORATIONS (§ 80\*)—STOCK SUBSCRIPTIONS—FRAUD—EVIDENCE.

Evidence held to sustain a finding that one was induced by the fraud of an agent of a corporation to subscribe for stock of the corporation, authorizing a rescission.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 244, 246-264, 1407, 1407½; Dec. Dig. § 80.\*]

2. CORPORATIONS (§ 80\*)—STOCK SUBSCRIPTIONS—FRAUD—ESTOPPEL.

A subscriber of stock, who gave his note for the unpaid price to the corporation, and who assigned the stock to it, is not thereby estopped to deny that he knew of the existence of the corporation, but relied on the representations that he subscribed for stock in a corporation to be formed.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 244, 246-264, 1407, 1407½; Dec. Dig. § 80.\*]

3. APPEAL AND ERROR (§ 1011\*)—FINDINGS—CONCLUSIVENESS.

A finding on conflicting evidence, and not contrary to the preponderance of the evidence, will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

4. CORPORATIONS (§ 80\*)—STOCK SUBSCRIPTIONS—FRAUDULENT REPRESENTATIONS.

Where a subscriber of stock made inquiries of an officer and an agent of the corporation, and was informed by them that he was subscribing to the stock of a corporation to be formed, neither the corporation then actually in existence, nor its receiver, could complain on the ground that the subscriber suing for the fraud could have obtained knowledge of the fact of the existence of the corporation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 244, 246-264, 1407, 1407½; Dec. Dig. § 80.\*]

5. CORPORATIONS (§ 80\*)—STOCK SUBSCRIPTIONS—FRAUD—RIGHTS OF SUBSCRIBERS.

Where a subscriber of stock was deceived by the corporation and induced thereby to subscribe for stock which he otherwise would not

have done, and the investment proved a total loss, his equities were equal to the equities of creditors of the corporation, and he should not be made to contribute to them by paying the balance due on the subscriptions.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 244, 246-264, 1407, 1407½; Dec. Dig. § 80.\*]

6. CORPORATIONS (§ 80\*)—STOCK SUBSCRIPTIONS—FRAUD—EFFECT.

Where one was induced to purchase stock in an existing corporation in reliance on the fraudulent representations that he was purchasing stock in a corporation to be formed, and the bulk of the stock in the corporation was, until after he rescinded the purchase, in the hands of the original promoters, who controlled the corporation until it became hopelessly insolvent, the court could not find that he was not injured by the fraud.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 244, 246-264, 1407, 1407½; Dec. Dig. § 80.\*]

7. CORPORATIONS (§ 77\*)—STOCK SUBSCRIPTIONS—CONTRACTS—PERFORMANCE.

A contract to purchase particular stock of a corporation is not fulfilled by assigning to him other stock of equal value.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 210-212, 219-243, 455; Dec. Dig. § 77.\*]

8. CORPORATIONS (§ 537\*)—INSOLVENCY.

A corporation, which is in need of ready money to meet its obligations, and which has no other means of procuring it than by calling in the balance due on stock subscriptions, one-half of which only has been paid, is not necessarily insolvent.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 2150; Dec. Dig. § 537.\*]

9. CORPORATIONS (§ 83\*)—STOCK SUBSCRIPTIONS—RESCISSION—NOTICE.

One induced by fraud to subscribe for stock, who gives notice of his rescission to the officers of the corporation, need not resort to equity to annul the subscription, but he can wait until the corporation or its receiver sues to enforce the subscription, and then rely on the fraud.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 328-336; Dec. Dig. § 83.\*]

Department 2. Appeal from Superior Court, Pierce County; Ernest M. Card, Judge.

Action by Joseph Johns, as receiver of the Pioneer Fire Insurance Company, against William B. Coffee and wife. From a judgment for defendants, plaintiff appeals. Affirmed.

Burkey, O'Brien & Burkey, of Tacoma, for appellant B. S. Grosscup and W. C. Morrow, both of Tacoma, for respondents.

FULLERTON, J. In February, 1909, the Pioneer Fire Insurance Company was incorporated under the laws of the state of Washington as a domestic fire insurance company. Its articles of incorporation located its principal place of business at Seattle, Wash., and fixed the amount of its capital stock at \$200,000. On May 25th of the same year, and before it attempted to transact any insurance business, it filed supplemental articles of incorporation increasing its capital stock to \$1,000,000; the stock being di-



vided into 10,000 shares, of the par value of \$100 each. Of these shares the incorporators subscribed for 975, agreeing to pay therefor at the rate of \$150 per share, and did pay into the treasury of the corporation, either in cash or securities taken for cash, one-half thereof, or \$75 per share. In the month of June, 1909, the company was examined by the State Insurance Commissioner and granted a certificate authorizing it to write fire insurance within the state of Washington from and after July 1, 1909. In August, 1909, further supplemental articles of incorporation were filed changing the principal place of business of the corporation from Seattle, Wash., to Tacoma, Wash., and its offices were at once moved to the Equitable building in the latter city, where they remained until the appointment of a receiver, as hereinafter stated. After the removal of the corporation to Tacoma an effort was made to induce the citizens of that place to purchase shares of stock in the corporation, and among others the respondent William B. Coffee was induced to subscribe for 40 shares thereof; his contract of subscription being as follows: "Pioneer Fire Insurance Company. Stock Subscription. No. 67. Shares, 40. Par Value, \$100. Subscription Price, \$150 per share. I, the undersigned, hereby subscribe for forty shares of the capital stock of the Pioneer Fire Insurance Company, of Tacoma, Washington, and I promise to pay for the same at the rate of one hundred and fifty dollars (\$150) per share, \$100 whereof shall be credited to capital stock and \$50 to the surplus fund and I agree to pay on account of this subscription the sum of seventy-five dollars (\$75) per share, of which amount \$50 per share is to be credited to capital stock and \$25 per share to surplus. Wm. B. Coffee. P. O. Address, 1012 A St. Dated this 2d day of Nov., 1909." In settlement of the amount immediately due Coffee gave his promissory note for \$2,000, and agreed to assign to the insurance company certain capital stock of the par value of \$1,000, which he held in another corporation, but which was not at that time fully paid up; Coffee agreeing in the contract of assignment to pay the balance due thereon as it matured, and when fully paid to turn the stock over to the insurance company. The company early got into financial difficulty, and on August 18, 1910, the board of directors passed a resolution making a call upon all of the subscribers to the capital stock for the balance due thereon. The formal notice of the call was given by the secretary on September 27, 1910. On August 23, 1910, five days after the call was made, an informal meeting of directors and stockholders of the company was held at Tacoma at which meeting Mr. Coffee attended. At this meeting the affairs of the company were fully gone over. From what he learned at this meeting Mr. Coffee conceived that he

had been deceived and fraudulently induced, to make a subscription to the capital stock of the insurance company, and immediately thereafter served a notice upon the company that he rescinded and repudiated his contract of subscription and demanded the cancellation thereof and the return of the same to him, together with the sums he had paid on account of the subscription. This notification and demand was in writing, and in it the respondent demanded that the insurance company be placed immediately in the hands of a receiver and its affairs wound up without further attempt to do business or the incurrence of further indebtedness. The company, however, continued as a going concern until March, 1911, when a receiver was appointed over it at the suit of creditors. In the meantime it had greatly increased its indebtedness. This is an action brought by the receiver to recover on the unpaid balance of the respondent's subscription. The complaint is in the usual form in such cases. The respondent answered, and among other defenses set up that he had been induced to subscribe to the capital stock of the corporation by fraud and deceit practiced upon him by the corporation's agent and vice president. A reply was filed putting in issue this allegation of the answer, and afterwards a trial was had on the issues thus made by the court sitting without a jury. The court determined the issues in favor of the respondent, and entered judgment in his favor. From this judgment the receiver appeals.

[1] The particular fraud and deceit which the court found had been perpetrated upon the respondent was that he had been induced to enter into the written contract of subscription by the false representations of the insurance company's agent, to the effect that the subscription was to the capital stock of a fire insurance company thereafter to be formed by the subscribers to such capital stock, among whom were certain men of the city of Tacoma whose names were furnished the respondent, and who the respondent well knew to be men of repute and standing in the community and of good business and financial ability, and concealed from him the fact that the corporation had then been organized, and was then controlled and would thereafter continue to be controlled by men strangers to the respondent, and not by the men named to him in whose business ability and integrity he had confidence; further finding that the respondent would not have entered into the contract of subscription had he been made aware of the true state of the matter.

The appellant assails this conclusion of the trial court on a number of grounds, the first of which is that the finding is contrary to the weight of the evidence. On this question we find the facts found by the court are testified to by the respondent and denied



by the agent, with but little else in the record that seems to us to lend support to the testimony of either party, although much is pointed out in the record that is thought to do so. It is claimed on the part of the appellant that a certain letter of introduction was handed the respondent by Marsh when the respondent was first approached, which recited the fact of the insurance company's organization and incorporation, but the contention rests wholly on the evidence of Marsh, and is denied by the respondent. Again it is said that Marsh testified that he solicited insurance from the defendant at the time he solicited his subscription to the capital stock, and that this statement is not denied by the respondent, also that Marsh testified that he showed the respondent a list of the officers and directors of the company, and that his (Marsh's) name was included therein as such an officer, and that this statement is not denied by the respondent. It is probably true that the respondent did not specifically negative these statements in his testimony, but his testimony amounts to a denial of them in substance and effect. He states what did occur between Marsh and himself at the time the subscription contract was signed, and testifies to facts which could not be true if the statements of Marsh are true. In other words the respondent gave one version of the transaction and Marsh another and contradictory version, and a particular statement by either party cannot be taken as admitted because the other did not specifically negative it.

[2] Again in his letter of rescission prepared by his then counsel, the respondent makes recitals which are claimed to show that he knew, at the time he made the subscription, that the company was incorporated, and that Marsh was an officer thereof. But we do not so read the letter. Unquestionably it shows that he knew when the letter was written that the company had been organized prior to the time he made the contract of subscription, but this was some months after that event, and after he had attended the informal meeting of stockholders, where he was made acquainted with the actual facts. Our attention is also called to the fact that the note given by the respondent in part payment for the stock was made payable to the "Pioneer Fire Insurance Company, a corporation," and the assignment of stock was made to the same company, and it is argued that this not only shows knowledge on the part of the respondent at that time of the existence of the corporation, but estops him to deny that he then knew of its corporate existence. Answering the legal question suggested, it is enough to say that the respondent does not deny the then existence of the corporation; he denies only that he knew of its existence, and the rule of law suggested does not estop him from making this denial. As to the

question of fact thought to be established by these writings, it must be remembered that they are no more definite in respect to the person to whom they are payable than is the subscription contract itself; and, while it may be that the fact might suggest an inquiry in the mind of a more prudent person, or a person better versed in the law than was the respondent, the failure of the respondent to observe the incongruity does not necessarily convict him of bearing false witness.

[3] The circumstances that are thought to support the respondent we shall not review. It is sufficient to say that since the trial court found with the respondent, and since we are not able to find that the testimony preponderates against its conclusion, we are constrained to follow that conclusion and hold that the appellant was induced to make his subscription through the deceit and fraud of the corporation.

[4] It is next said that the respondent could readily have obtained knowledge of the facts of which he now pleads ignorance by inquiry, and hence must be held to be guilty of laches if he failed to make such inquiry. But the respondent did inquire concerning the matters of the respondent's vice president and agent, and was told that he was subscribing to the capital stock of a corporation thereafter to be formed. This being true, it is manifest that the corporation itself cannot be heard to complain in this regard.

[5] Nor do we perceive wherein the receiver, as the representative of the creditors, has superior rights. Since the appellant was deceived by the corporation, and induced by such deceit to make an investment which he otherwise would not have made, and which has proved a total loss, his equities are equal to the creditors, and he should not be made to contribute to their advancement.

[6] Again it is said that the respondent is not injured by the fraud and deceit attributed to Marsh, even though it be conceded that he was so deceived. It is somewhat difficult to follow the argument advanced to support this proposition; but it seems to be that, inasmuch as the corporation to whose stock the appellant actually subscribed was under the control of the very person whom the appellant expected to control the corporation he anticipated would be formed, it is not to be presumed that the new corporation would have met with any better financial success than the existing one. But we cannot agree with the fact here assumed. As we read the record the great bulk of the capital stock of the corporation was, until after the time the appellant rescinded his purchase, in the hands of the original promoters of the scheme, and that they exercised the control and management of it until long after that time, until in fact the company became so hopelessly insolvent that nothing could be done with it except to wind up its affairs



with as little loss as possible. Moreover, the argument in itself is not sound.

[7] If the respondent contracted to purchase particular stock, the contract is not fulfilled by assigning to him other stock of equal value. A vendor may sometimes be permitted to show in mitigation of damages, that in the performance of a contract to deliver a specific article he delivered something just as good as the specific article, but he is never permitted to make such a showing as a fulfillment of the contract.

[8] It is next contended that the attempted rescission of the contract to purchase the shares of stock was ineffectual, and the first reason suggested in its support is that the corporation was insolvent at the time. But without listing in detail its then debits and credits, we think it too much to say that it was then insolvent if it had ever been a solvent concern. It is true the corporation was then in need of ready money to meet the accumulating fire losses, and seems to have had no other means of procuring it other than by calling in the balance due upon its stock subscriptions, one-half of which only had then been paid. But this was not necessarily insolvency, and the concern still had the approval of the State Insurance Commissioner. At any rate its condition financially seems to have been no worse at that time than it was when the respondent made his stock subscription.

[9] It is further argued that the mere giving notice of rescission to the corporate officers is not in itself sufficient to accomplish a rescission, but that some action should have been taken by the respondent to have his name stricken from the stockholders' list in order to make the notice effectual. A number of English cases are cited as supporting this rule, but they seem to have been founded upon particular provisions of the English statutes not found in our own. The general rule as adopted by the American cases is thus stated by Mr. Thompson: "Where a subscription has been procured by fraud, and the subscriber has taken timely steps, as elsewhere pointed out, to rescind the subscription, he is not then compelled to resort to equity to have the contract judicially annulled; but he can wait until the corporation brings an action to enforce the subscription, and set up the fraud as a defense." Thompson on Corporations (2d Ed.) § 740. No different rule should be applied, we think, merely because the action was delayed until after the corporation had gone into the hands of a receiver. If the respondent had a defense against a suit to recover on the unpaid balance by the corporation itself, he had a like defense against a suit by the receiver of this corporation, unless of course he has committed some affirmative act subsequent

to serving his notice of rescission which would estop him from making the defense, such as inducing others to become creditors of the corporation on the faith and belief that he was a stockholder therein. No mere delay on his part will work that result. Here there is nothing to show that any of the persons the receiver represents became creditors of the corporation on the faith of the belief that the respondent was a stockholder therein. On the contrary it is not shown that any of them ever knew he was such a stockholder until the books were searched after the corporation's insolvency.

Mr. Justice Miller, in his dissenting opinion in *Upton, Assignee, v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203, used this language: "I am of opinion that, where an agent of an existing corporation procures a subscription of additional stock in it by fraudulent representations, the fraud can be relied on as a defense to a suit for the unpaid installments, when suit is brought by the corporation, and that if the stockholder has in reasonable time repudiated the contract, and offered to rescind before the insolvency or bankruptcy of the corporation, the defense is valid against the assignee of the corporation." So, also, the Supreme Court of Virginia: "The authorities are abundant in support of the general rule that a person fraudulently induced by an agent of the corporation—and a promoter is an agent—to subscribe to its capital stock may, at his option, repudiate the contract; and a fraud may consist as well in the suppression of what is true as in the representation of what is false. Indeed, the law is that where the person solicited, to subscribe has no other information on the subject than that which the agent chooses to convey, the statements of the agent ought to be characterized by the utmost candor and honesty. 1 Cook, Stock, Stockh. and Corp. Law (3d Ed.) § 147; *Crump v. U. S. Mining Co.*, 47 Va. 352 [56 Am. Dec. 116]; *Bosher v. R. & H. Land Co.*, 89 Va. 455 [16 S. E. 360, 37 Am. St. Rep. 879]; *Directors, etc., v. Kisch*, L. R. 2 H. L. App. Cas. 99." *Virginia Land Co. v. Haupt*, 90 Va. 533, 19 S. E. 168, 44 Am. St. Rep. 939.

In the foregoing discussion we have noticed only what seems to us to be the principal reasons advanced by the appellant in support of his contentions, as to follow the argument *seriatim* would extend this opinion to an undue length. It is enough to say, therefore, that we have examined the arguments of the receiver with care, and find nothing that in our judgment warrants a reversal of the judgment entered by the trial court.

The judgment is affirmed.

MORRIS, ELLIS, and MAIN, JJ., concur.



(74 Wash. 187)

In re **HARRISON STREET.**  
**CITY OF SEATTLE v. SEATTLE ELECTRIC CO. et al.**

(Supreme Court of Washington. June 28, 1913.)

**1. MUNICIPAL CORPORATIONS (§ 406\*)—LOCAL IMPROVEMENTS—ASSESSMENTS.**

Assessments for local improvements are levied by a city on the theory of a special benefit to the property assessed by reason of the improvement, and the power to levy is derived from the power of taxation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1001, 1002; Dec. Dig. § 406.\*]

**2. EMINENT DOMAIN (§ 145\*)—REGRADING STREETS—DAMAGES.**

The damages which must be paid on regrading a street by a city under its right of eminent domain are the damages which the abutting owners will sustain to accommodate their property to the changed situation, and the damages must be paid before the city can confer any benefit on an abutting owner, and where compensation is made it may collect an assessment for special benefits.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 378-389; Dec. Dig. § 145.\*]

Department 2. Appeal from Superior Court, King County; John F. Main, Judge.

Proceedings by the City of Seattle to adjudicate the damages to be paid the owners of abutting property on the regrading of streets. From a judgment awarding damages, the Seattle Electric Company and another appeal. Affirmed.

Jas. B. Howe and Hugh A. Tait, both of Seattle, for appellants. Jas. E. Bradford and Wm. B. Allison, both of Seattle, for respondent.

**MORRIS, J.** This proceeding was commenced by the city of Seattle to adjudicate the damages to be paid owners of abutting property upon the regrading of certain city streets. The Seattle Electric Company was the owner of certain lots involved in the improvement, and at the trial it was agreed that its damages, because of the cost of building a necessary bulkhead, would be the sum of \$5,000, in which amount the city consented verdict should be returned. Appellant contended it was entitled to another element of damage, and offered to prove that the regrade had been accomplished and a local improvement district created by ordinance for the purpose of creating a fund to pay the cost of the work, and that for this purpose the property of appellant had been assessed in the sum of \$3,822.60. The lower court sustained the city's objection to including this assessment as an element of damage, and the electric company appeals.

[1] The lower court in our opinion must be sustained. In levying an assessment for a local improvement the city is not acting under authority of any eminent domain statute, but such assessment, while not, strictly

speaking, a tax, is in the nature of a tax, and the power to levy it is derived by the municipality under its sovereign power of taxation. Under this power these assessments are levied upon the theory of a special benefit to the property assessed by reason of the improvement. The city not only assumes a benefit to the property, but fixes and by proper proceedings levies the amount of that benefit against the property, and when the owner pays the assessment he is, in contemplation of law, paying for a benefit to his property.

[2] In determining the damages to be paid when the city proposes to change the grade of the street under its right of eminent domain, the purpose of the inquiry is to ascertain the cost or damage to the owner to accommodate his property to the changed situation, irrespective of the power vested in the city to levy an assessment against the property because of the benefits flowing from the improvement. Under the provisions of our Constitution the city cannot confer that benefit upon the property until it first ascertains and pays the damages suffered by the property. In other words, before the owner can fully avail himself of the benefit to his property, he will be put to certain expense in adapting his property to the changed condition which is in law a damage. This damage the city must pay him before it can confer the benefit upon him. Having fully compensated the owner for the damage he must suffer in availing himself of the benefit conferred upon him, the city has the right to collect the assessment representing that benefit. To accept appellant's contention would make the city pay both the damage and the benefit, which cannot be supported under any theory of law. The owner must pay for his benefit by way of assessment upon his property, and the city must pay the damage caused the owner in conferring that benefit.

The judgment is affirmed.

**ELLIS, FULLERTON, and PARKER, JJ.,**  
 concur.

(74 Wash. 184)

In re **ELLIOTT AVENUE.**

**CITY OF SEATTLE v. GALBRAITH-BACON & CO. et al.**

(Supreme Court of Washington. June 28, 1913.)

**1. MUNICIPAL CORPORATIONS (§ 437\*) — STREET IMPROVEMENTS—ASSESSMENTS.**

No part of the cost of a street improvement should be assessed against the general fund of a city, in the absence of evidence that the city at large has been specially benefited by such improvement.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1051; Dec. Dig. § 437.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



## 2. MUNICIPAL CORPORATIONS (§ 437\*) — STREET IMPROVEMENTS—ASSESSMENTS.

Whether a city at large has been benefited by a street improvement must be determined by the conditions existing at the time of the improvement, and a finding of such benefit cannot be based on the effect of a different local improvement proceeding subsequently inaugurated.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1051; Dec. Dig. § 437.\*]

Department 2. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

In the matter of the levy of a special assessment for the improvement of Elliott Avenue in the City of Seattle. The court having ordered a reduction of 10 per cent. to be paid out of the general fund of the city at the instance of Galbraith-Bacon & Co. and others, the city appeals. Reversed, with instructions.

Jas. E. Bradford, Wm. B. Allison, and C. B. White, all of Seattle, for appellant. Farrell, Kane & Stratton, Bogle, Graves, Merritt & Bogle, Kerr & McCord, and Ballinger, Battle, Hulbert & Shorts, all of Seattle, for respondents.

MORRIS, J. Appeal by the city of Seattle from a judgment of the lower court modifying an assessment roll as made up and filed by the board of eminent domain commissioners so as to reduce all assessments appearing upon the roll 10 per cent. and charge that amount to the general fund. Cases of this character have been so often before this court in the past few years that it might well be said that the law is so well settled that there is nothing new to be said. The only thing we can do is to apply to the case before us the rules established by the previous cases.

[1] The latest assertion of the rule here applicable is found in *Spokane v. Miles*, 131 Pac. 206, where, citing previous cases, it is said: "The best rule that has been announced, and the only practicable working rule, is that the courts should not change the district established by the commissioners, except where the commissioners have acted arbitrarily or fraudulently, or have proceeded upon a fundamentally wrong basis." In answering the contention there made that part of the cost of the improvement should have been assessed to the general fund of the city, it was said: "The evidence does not show that any especial benefit accrued to the city at large in consequence of the improvement," and cases are cited holding that "the city, like a private owner, can only be assessed for an improvement where it is especially benefited." In this case the lower court, in announcing its decision upon the contention of objectors to the roll that the general fund of the city should bear part of the assessment, said: "The fact is that there is no evidence here showing that any of these

assessments are not in proportion to the benefits." If the lower court was of this opinion, the roll should have been sustained. While the lower court has the authority under the statute to modify the assessment roll as returned by the commissioners, to the end that justice may be attained and each tract of land benefited bear its relative equitable proportion of the cost of the improvement, as is said in *Seattle v. Sylvester-Cowen Inv. Co.*, 55 Wash. 662, 104 Pac. 1121, the power so vested in the court must be exercised under the evidence. Like other instances where a discretion is vested in the trial court, it is a judicial discretion, and must be exercised according to the facts before the court.

[2] In this case the lower court, while frankly admitting there was no evidence to justify its ruling, was of the opinion that the general fund should bear 10 per cent. of the entire assessment because he believed that the improvement was "a part of the thoroughfare that we are laying out to Smith's Cove." We find no evidence of that fact. The only mention of it is found in the testimony of one of the witnesses as follows: "Q. You think that under those circumstances the city ought to pay a part of it? A. If they were to continue it, the main traffic thoroughfare connecting Smith's Cove and Interbay and through the Ballard district, unquestionably some portion should be borne by the general fund. But that condition when we made the roll we did not find existing. Q. Has that been condemned since? A. Yes; that was condemned since this condemnation was instituted." The facts which might appear upon the confirmation of the roll in some other local improvement proceeding would hardly justify the court in determining the question submitted to it in this.

Finding, as did the lower court, that there is no evidence here showing that any of these assessments are not in proportion to the benefits, we conclude the roll as returned should have been confirmed, and it was error to modify it in the respect complained of. The judgment is reversed, with instructions to enter a judgment as here indicated.

MAIN, ELLIS, and FULLERTON, JJ., concur.

(74 Wash. 175)

FOURNIER et ux. v. CORNISH et al.  
(Supreme Court of Washington. June 24, 1913.)

## 1. TRUSTS (§ 94\*) — CONSTRUCTIVE TRUST — TRUST EX MALEFICIO.

The agent of defendant insurance company by false representations as to its stock obtained from plaintiff a conveyance of two pieces of land for which the company issued its stock, one of which pieces was sold to an innocent purchaser who paid the agent an amount in cash and gave him his note for \$1,600, which the agent indorsed to parties who

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



knew of the agent's fraud and the infirmity of his title. The grantor obtained a judgment against the company for \$1,800 damages for the fraud. *Held*, that the company might elect to treat the agent as a trustee ex maleficio as to the \$1,600 note.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 143; Dec. Dig. § 94.\*]

## 2. SUBROGATION (§ 11\*)—TRUST EX MALEFICIO.

The insurance company, subrogated to the rights of the transferee of the note, as such transferee stood in the shoes of the agent.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 4; Dec. Dig. § 11.\*]

## 3. BILLS AND NOTES (§ 332\*)—TRANSFER—HOLDER IN DUE COURSE.

A transferee of notes, who has notice of the equities against the transferor by reason of his fraud, is not a holder in due course.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 805, 815, 816; Dec. Dig. § 332.\*]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Frank Fournier and wife against the American Life & Accident Insurance Company, Judson H. Cornish, and others. Judgment for plaintiffs, and defendant American Life & Accident Insurance Company appeals. Modified.

Carkeek, McDonald & Kapp, of Seattle, for appellant. Ward & Gilbert, of North Yakima, and France & Helsell, of Seattle, for respondents.

GOSE, J. The American Life & Accident Insurance Company is an Oregon corporation licensed to do business in this state. The controversy arose out of certain alleged fraudulent acts and representations of its agent, the defendant Judson H. Cornish, which culminated in the loss to the plaintiffs of two separate tracts of land containing respectively 40 acres and 160 acres. The plaintiffs tendered their stock contracts which the insurance company had issued to them and prayed a rescission, that the land be reconveyed to them unless the evidence showed that it was held by an innocent purchaser, and in that event for damages to the extent of its value in excess of certain mortgage liens.

[1-3] The court found that the title to the 40-acre tract was in the defendants Gibbon; that they were innocent purchasers; that the title to the 160-acre tract was in the defendant Frampton & Howie, Incorporated, a corporation; that it took title through the defendant Cornish, its stockholder and manager, with notice of the infirmity of his title; that Cornish had induced the plaintiffs to convey the land and purchase stock contracts in the insurance company by falsely representing that the stock was dividend paying when it was not; that it had a value of \$175 per share when its market value did not exceed its face value (i. e., \$100 per share); and that the insurance company would re-

deem the stock at any time at \$175 per share, the price the plaintiffs agreed to pay. The decree required Frampton & Howie, Incorporated, to reconvey the 160-acre tract to the plaintiffs, directed the plaintiffs to surrender their several stock contracts to the insurance company, and required it to surrender the plaintiffs' notes which represented the price they had agreed to pay for the stock in excess of the value of the land. The judgment further provides that the plaintiffs recover from the defendant the insurance company the sum of \$1,874.76, the value of their equity in the 40-acre tract which they had conveyed to the defendants Gibbon, whom the court found to have been innocent purchasers.

In respect to the sale of the 40-acre tract the defendant Cornish represented to the plaintiffs, both orally and in writing, that he had received from Gibbon \$1,800 in cash, which he had paid to the insurance company to apply on their stock contracts. He made the same representation to the insurance company, and it issued to the plaintiffs three stock contracts for ten shares each at \$175 per share, and credited them with \$600 cash payment upon each thereof. The plaintiffs gave the insurance company three notes for \$1,150 each to complete the payment. The contracts are in terms nontransferable and provide that when the purchase price has been paid the stock will issue. The fact is that Gibbon paid Cornish \$400 cash and gave him his note for \$1,600 in exchange for a conveyance of the plaintiffs' equity in the land. This note Cornish indorsed to Frampton & Howie, Incorporated, and later Gibbon took it up and gave it his two notes for \$800 each. These notes were held by Frampton & Howie, Incorporated, at the time of the trial. The insurance company requested the court to subrogate it in the decree to the rights of Frampton & Howie, Incorporated, in the Gibbon notes. This the court declined to do. The insurance company reserved an exception to the ruling and has appealed. Frampton & Howie, Incorporated, has not appealed.

In the oral argument the appellant stated, in substance, that it would be content to be subrogated to the rights of Frampton & Howie, Incorporated, in the Gibbon notes. The plaintiffs, the only other parties who have appeared here, stated that they had no objection to such subrogation. We therefore limit our investigation to this question. As we have seen, the court found that the plaintiffs were defrauded of their land by means of false representations and fraudulent manipulations of the defendant Cornish while acting as the agent of the appellant in selling its stock, and that Frampton & Howie, Incorporated, had notice of the infirmity in the title of Cornish to the 160-acre tract and generally of his fraudulent manipulations and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



transactions with the plaintiffs. The record furnishes indubitable evidence of these facts. Nor is Frampton & Howie, Incorporated, a holder in due course of the Gibbon notes. The court in the course of its opinion observed that the stock manipulation between Cornish and Frampton & Howie, Incorporated, was "simply scandalous." Frampton & Howie, Incorporated, stands in the shoes of Cornish. To recapitulate: Cornish represented to the plaintiffs and the appellant that he had \$1,800 cash belonging to the plaintiffs out of the sale of the 40-acre tract. Upon this representation the appellant issued its stock contracts to the plaintiffs. In consequence of Gibbon having been an innocent purchaser, the plaintiffs have a judgment against the appellant for \$1,800 in round numbers, because, and only because, Cornish was its agent in his transactions with the plaintiffs. The appellant may therefore elect to treat Cornish as its trustee *ex maleficio* in the \$1,800 note. Frampton & Howie, Incorporated, took the note and later the two notes of Gibbon for \$800 each in lieu thereof, with notice and impressed with this trust. The record is long and complicated, but the subject need not be further pursued. As the learned trial court remarked, the plaintiffs were stripped of their entire fortune through the manipulations of Cornish. The appellant has been made to bear the burden of the wrongful acts of its agent to the extent of \$1,800. It will be subrogated to the rights of the defendant Howie and Frampton & Howie, Incorporated, in the two notes of Gibbon for \$800 each.

Remanded, with instructions to modify the decree as indicated; costs to be taxed against Frampton & Howie, Incorporated.

CHADWICK, MOUNT, and PARKER, JJ.,  
concur.

(74 Wash. 199)

STATE ex rel. VORIS v. CITY OF SEATTLE et al.

(Supreme Court of Washington. June 28, 1913.)

MUNICIPAL CORPORATIONS (§ 218\*) — CIVIL SERVICE — EMPLOYMENT — REDUCTION OF FORCE—AUTHORITY OF CITY COUNCIL.

A city council, in the interest of economy, had power to pass an ordinance abolishing the position of file and real estate clerk in the department of the city comptroller, the same ordinance operating to reduce the city force by five men, and to impose their duties on other employes notwithstanding relator, who had formerly occupied the office of abstractor and real estate clerk, was a classified employe and held his position under the civil service.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 589-598; Dec. Dig. § 218.\*]

Department 1. Appeal from Superior Court, King County; Everett Smith, Judge.

Mandamus by the State, on relation of Edwin A. Voris, against the City of Seattle

and others. Judgment for relator, and respondents appeal. Reversed and remanded.

Jas. E. Bradford and Wm. B. Allison, both of Seattle, for appellants. Preston & Thorgrimson and Sanford C. Rose, both of Seattle, for respondent.

CHADWICK, J. The trial judge filed a memorandum decision in this case. He found the facts to be as follows: "In May, 1911, there occurred a vacancy in the office of the city comptroller for the place of real estate clerk, a position recognized by classification under the civil service system. An emergency having arisen, relator Voris was appointed by the comptroller pending civil service regulations. In June, upon investigation by the secretary of the commission of the duties required for the position of real estate clerk, it was classified as that of abstractor and real estate clerk, and the comptroller notified that an original examination must be held for the position. Relator in November, having successfully passed the examination received the regular appointment of file and real estate clerk, which seems to be another designation of abstractor and real estate clerk. On April 30, 1912, the city council, by ordinance 29343, ordained that the position of file and real estate clerk in the department of city comptroller be abolished, and on the same day the comptroller reported to the commission the separation of Voris from his department, alleging the cause to be on account of the reduction of force. On May 6, 1912, the council, by ordinance 29380, established the salary of detail clerk in charge of index and real estate record work at \$100 per month. Thereupon the commission notified the comptroller that, inasmuch as a separate classification had been provided for this position, the work should be done by none except those regularly qualified for the same. The comptroller, ignoring the communication, notified the commission June 7th that he had given the increase of salary made by ordinance 29380 to R. F. Farran as detail clerk. On June 29th Voris appealed for investigation by the commission of the reasons for his dismissal. Such investigation was had, and on September 26, 1912, the commission found Voris entitled to the office held by Farran and recommended that he be returned to the position as the employe rightfully entitled to the same. The comptroller having refused to comply with the recommendation of the commission, relator Voris has brought this action." It may be inferred from this statement that the position occupied by the relator was the only position abolished by the council. This is not true. The ordinance of which he complains abolished several positions, and the new ordinance seems to have been designed to combine their several duties with that of others. From these facts

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the court concluded that the office in which the relator had been employed had been abolished in name only, and that the relator was entitled to reinstatement, with his salary from the time of his separation from the office.

The question put by the trial judge is, Was the office abolished? It is not denied that the city council has the power to abolish a position, but it was the opinion of the court below and is the opinion of counsel for the relator that the council could not declare an office abolished unless "in fact the duties themselves were abolished." "The testimony before the court clearly established the existence of the duties as formerly, but their transference to another clerk. Owing to varying changes of conditions the duties at times have been more or less numerous than formerly, but there is no dispute of the fact that the same duties of the alleged abolished position remain to be performed and still continue to occupy another clerk from one-half to two-thirds of all his time." We think the court has gone further than the law warrants. The council has the right to create offices and it may abolish them, or it may, in the interest of economy and efficiency, combine the work of several employes so that their duties will be thereafter performed by a lesser number of men. In this case the city council has done no more than this. It abolished the position of "file and real estate clerk" and by another ordinance provided that the work formerly done by that employe should be done by "a detail clerk in charge of index and real estate record work in clerk's division." The testimony, and most of it, is in our opinion irrelevant, shows that Farran, the present employe and a civil service man, is doing a part of his old work as well as the work formerly done by Voris. Relator undertook to show that he was not keeping up with his work. That is a matter with which courts have nothing to do. So long as he is performing either in whole or in part the work that he formerly did, his right to remain in the office of the comptroller is greater than is the right of the relator to be reinstated. An employe cannot be removed to make way for one who is in the same legal position. In other words, the work formerly done by Voris being combined with that formerly done by Farran, neither the civil service commission nor the courts have power to say that a present employe shall give way to one who insists upon the right to perform a part only of the present duties of the existing position. In the instant case the object of the ordinance was to work a reduction of the force. We are informed by counsel on oral argument that there was an actual reduction, under the ordinance complained of, of five men. We may assume that this could only be done by combining the work previously done by the greater number, and

this the council had a lawful right to do under its general powers, as defined in sections 18, 19, and 41, art. 4, of the charter. Much of the brief of the respondent is taken up with a discussion that goes to the good faith of the city council in abolishing this office. Courts will not inquire into the motives of the legislative body. If the ordinance or law is fair upon its face and does no violence to any provision of the city charter or the Constitution, it will be upheld. This ordinance is fair upon its face. It suggests nothing unless it be a purpose to work economy. If the rule were otherwise, it would be impossible for the governing body of a city to change, rearrange, or redefine the duties of its employes so long as any one of them had been classified by the civil service commission and had a scintilla of work to perform.

The case of *Fitzsimmons v. O'Neill*, 214 Ill. 494, 73 N. E. 797, is a valuable authority in that it deals with a case similar to the one at bar and reviews many authorities. A foreman in the city repair shop was laid off for the reason that no appropriation had been made to meet his salary. He demanded reinstatement, contending that the duties of his position had not been abolished, and could not be abolished, as it was essential to the proper management of the repair department that there should be a superintendent. It was further made to appear that the duties which had been performed by him were performed by others; that those who had been doing the work were not superintendents; that one of them was a wagon-maker and the other a laborer. Relator insists that the work of real estate clerk must be done by an abstractor, and that Farran was never qualified as such. The case is a stronger one than is this for the reason that it is alleged "that neither of these men, while performing duties formerly performed by the petitioner, performed the duties pertaining to their former position, but devoted their entire time to the duties formerly done by petitioner." In all things the right to reinstatement is based on the same grounds as the relator sets up in his petition. It was held that the plaintiff in that case could not reinstate himself. It was contended there, as here, that the removal was illegal, but the court held that the civil service rules do not apply to a case where the incumbent is dismissed for want of funds or in order to reduce expenses.

In *Phillips v. Mayor, etc., City of New York*, 88 N. Y. 245, a clerk of the fire department of the city was discharged, not for any personal reason, but because it was necessary for the department to conform its expenses to a smaller appropriation, thus necessitating a reduction of the clerical force. It was held that the civil service rules did not apply; that it was not a case of removal within the meaning of those rules.



The court said: "He [plaintiff] could not claim that the office or clerkship should be retained for his benefit, and the fire commissioners were not obliged to consult him before abrogating it."

In *Langdon v. Mayor, etc., City of New York*, 92 N. Y. 429, a clerk in the financial department of the city was separated from the service, and his removal was sustained as not in violation of the civil service rules for the reason that "the business of the department had so diminished that the plaintiff's services were not needed."

In *People ex rel. Corrigan v. Mayor, etc.*, 149 N. Y. 225, 43 N. E. 556, speaking of the civil service statutes, the court said: "While these statutes are positive in form, it is clearly not their intent to give to occupants of such positions a life tenure where, upon grounds of economy or for other proper reasons, the office or position is in good faith abolished."

A case which we conceive to be more in point is that of *People ex rel. Hartough v. Scannell*, 48 App. Div. 445, 62 N. Y. Supp. 930. The relator, a civil war veteran, was employed as "an inspector of fire hydrants." He was discharged, and duties similar to those theretofore performed by him were performed by persons who were not veterans. The court found the real question to be: "Whether \* \* \* the fire department had the right to abolish the position held by the relator, without notice and hearing, so long as other laborers, not veterans, were retained in the service." "We are thus left to the question whether the position which the relator had was abolished in good faith and for reasons of economy. This was a question of fact. It appears that 16 other veterans occupying positions similar to that of the relator were removed in January, 1898, and that there was evidence tending to show that this was done so as to bring about uniformity in the rules and method of inspecting fire hydrants over the entire city by extending over Brooklyn and Queens the rules which had been in existence for many years in the old city of New York; the duty in the boroughs of Brooklyn and Queens being devolved upon the fire department instead of the water department, and that this was done from motives of economy. In such a change, standing alone, we can see no evidence of bad faith on the part of the commissioner."

Judge Dillon finds the law to be: "*The purpose of the civil service statutes and of other laws prohibiting the discharge of employees without cause assigned, notice, and a hearing is to insure the continuance in public employment of those officers who prove faithful and competent, regardless of their political affiliations. These statutes are not intended to affect or control the power of the city council or the executive officers of the city to abolish offices when they are no*

longer necessary or for reasons of economy. They are not intended to furnish an assurance to the officer or employé that he will be retained in the service of the city after the time when his services are required. They do not prevent his discharge in good faith without a trial and without notice, *when the office or position is abolished as unnecessary or for reasons of economy.* But, although the operation of these statutes does not prevent the abolition of an office in good faith, the local authorities have no power to discharge an officer or employé of the city *upon the pretense* that his office is abolished and immediately thereafter assign another person to do the same work which has been done by the discharged employé. \* \* \*

2 Dillon, *Municipal Corporations*, 479. See, also, *People ex rel. Moloney v. Waring*, 7 App. Div. 204, 40 N. Y. Supp. 275; *Caulfield v. Jersey City*, 63 N. J. Law, 148, 43 Atl. 433; In the *Matter of Kelly*, 42 App. Div. 283, 59 N. Y. Supp. 30; *People ex rel. Nason v. Feltner*, 58 App. Div. 594, 69 N. Y. Supp. 141; 28 Cyc. 445, 594.

The council having the right to abolish the position occupied by relator, it would be an unwarranted usurpation for the courts to go beyond the question of the good faith of that body. We find nothing in the record to overcome that presumption of regularity and integrity which attends every act of a co-ordinate branch of the government. If there was anything proven that would challenge the good faith of the council, the fact that five positions were abolished in the ordinance which abolished the relator's position is a sufficient answer and enough to sustain our holding that the motive of the council was pure and prompted by a disposition to work economy. It would certainly be harsh doctrine to hold that a city council cannot reduce the expenses of a department. As has been held, the council can abolish an office and refuse to make an appropriation to pay the employé. If this is so, it cannot be denied that the same power can combine two or more positions in one. We think this case is controlled by the authorities cited and commented upon. In passing it may not be out of place to say that many of the cases to which we have referred grew out of departmental orders, whereas we have had to deal with an expression of the lawmaking body.

Nor do we find anything in *Gilmur v. City of Seattle*, 69 Wash. 289, 124 Pac. 919, or *State ex rel. Powell v. Fassett*, 69 Wash. 555, 125 Pac. 963, *Foster v. Hindley*, 131 Pac. 197, or *State ex rel. Cole v. Coates*, 132 Pac. 727, that in any way qualifies our view of this case. Those cases are in line with the general rule laid down by Judge Dillon and admitted in all the cases we have cited. In the *Gilmur Case* the court found that the position had been changed only in name. The plaintiff was "a foreman of outside construction." The council passed a new



ordinance creating the position of "foreman pole gang; such position being intended to cover the position then held by respondent, to wit, that of foreman of outside construction." The case was decided in favor of the plaintiff because "his duties remained the same after the passage of the second ordinance, and the title of his office is of no moment." If the relator in this case were reinstated, his duties would not be the same. He would have to take the place now occupied by Farran and perform additional duties. This fact distinguishes this case from the Gilmur Case. In the case of Foster v. Hindley the employé of the city was dismissed from the service by the mayor for the reason, as stated by that officer, that "the office that you now hold is discontinued." As required by the civil service rules, the mayor reported the cause of the separation to be "reduction of force." We held that the office was not discontinued; that the council and not the mayor had police power under the charter to abolish offices. Here we have the act of a council with power "to modify or abrogate, from time to time as the needs of the city shall require, all proper offices and bureaus, and to provide for the conduct and government of such offices and bureaus, and the appointment, removal, duties, and compensation of officers. \* \* \*." The Powell Case is so clearly without significance here that it needs no comment. The Cole Case, as does the Powell Case, holds that a civil service employé cannot be removed without cause, and further that a change in the method of compensation, although under a different title, did not change the nature of the employment; that the right of employment is to be determined from the character of the service performed by the new employé as compared with the services which had been performed by the ousted employé. In the case at bar the council, having authority so to do, has destroyed that standard of comparison. In a negative way that case sustains our present holding.

The Supreme Court of Illinois was called upon in Fitzsimmons v. O'Neill, supra, to distinguish a former decision. In the case of Chicago v. Luthardt, 191 Ill. 516, 61 N. E. 410, the court had held as we held in the Gilmur Case. The court distinguished the earlier case, saying: "The common council merely changed the name of the official but did not change his duties, and made an appropriation for the salary of the same office by another name. No such facts exist in the case at bar. The appropriation bill here did not designate the foreman of the repair shop by another name or appropriate any salary for his successor acting under another name." That Farran, the present incumbent, has had an increase of salary and has not been able to keep up with his work can have no bearing. These facts do not indicate bad

faith. People ex rel. Steers v. Dep't of Health, 86 App. Div. 521, 83 N. Y. Supp. 800. If the council errs in its judgment when it passes an ordinance combining two positions, the courts are powerless to correct the mistake. In the case just cited it is said: "If in good faith a department initiates a policy of enforced economy, but goes too far, \* \* \* that affords no reason for the reinstatement of a subordinate. \* \* \*"

Nor does the testimony offered to show that the comptroller has acted in bad faith have any bearing. Whatever his design may have been, it is lost in the ordinance. Our conclusion is that the ordinance was passed in good faith and in the interest of economy, and not for the purpose of circumventing or evading the civil service act; that the function of the civil service commission, so far as the abolished position is concerned, has been performed. It may classify the present position and require an examination, but it cannot supplant a present employé of equal right to make way for one who claims under a position that is abolished. This court has been extremely liberal in upholding the powers of the civil service commissions of our cities. Notwithstanding the sentiment which sustains laws providing for classified civil service, there must be a limit to the right of such commissions to impose employes upon a city. A limitation is found in the power of the council to legislate and in the right of the taxpayers to insist on economy in the administration of public affairs. This conclusion makes it unnecessary to discuss the remaining assignments of error.

The judgment of the lower court is reversed and remanded, with instructions to enter a judgment of dismissal.

GOSE, MOUNT, and PARKER, JJ., concur.

(165 Cal. 549)

CALIFORNIA MOTHER LODGE MINING CO. v. PAGE et al. (Sac. 1,984.)

(Supreme Court of California. June 3, 1913.)

1. TRIAL (§ 391\*)—TRIAL BY COURT—FINDINGS—ISSUES.

Where, in a suit to quiet title to a mining claim and to restrain defendant from taking minerals therefrom, the complaint alleged that plaintiff was the owner of the claim indefinitely described, and that defendant claimed an adverse interest therein and was mining the same, and threatened to continue so to do, and defendant answered, denying that plaintiff was the owner of any part of the property described in the complaint, and admitted that he conducted mining operations on the land claimed by plaintiff, the ownership of the property attempted to be described in the complaint was a material issue, and a finding thereon was essential.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 914; Dec. Dig. § 391.\*]

2. JUDGMENT (§ 256\*) — QUIETING TITLE — FINDINGS—CONFORMITY.

A finding, in a suit to quiet title to a mining claim indefinitely described in the complaint.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



and to enjoin defendant from mining the same, that plaintiff was the owner of a claim definitely described, and that he was not entitled to the possession of any other part of the land described in the complaint, and that defendant had not claimed any interest in the claim as definitely described, and that he had no interest therein, and had not mined thereon or threatened so to do, determined the issues of ownership raised by the pleadings, and the court properly denied an injunction, but must render judgment for plaintiff as owner of the claim definitely described, and protect the rights of defendant as to the remainder of the property.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 446-454; Dec. Dig. § 256.\*]

Melvin and Lorigan, JJ., dissenting in part.

In Bank. Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action by the California Mother Lode Mining Company against Ed. Page and another. From a judgment for defendants, plaintiff appeals. Reversed, with directions.

Richard Belcher and W. H. Carlin, both of Marysville, for appellant. Brittan & Raish and Wallace Dinsmore, all of Marysville, for respondents.

ANGELLOTTI, J. This is an appeal upon the judgment roll alone by plaintiff from a judgment in favor of defendants. The action was one to quiet plaintiff's title to a certain mining claim known as the "Eagle Quartz Mine" and to enjoin defendants from taking valuable minerals therefrom. The complaint alleged that plaintiff was the owner of such claim, attempting to more particularly describe it, but the description, except for the name of the claim, was somewhat indefinite. It was alleged that defendants claimed an interest therein adverse to plaintiff, that defendants were mining the same and had extracted valuable minerals therefrom, and were threatening to continue to so do, and that they were in possession of a part thereof in the southeastern portion, consisting of about three acres. Defendants answered, denying that plaintiff was the owner of all or any part of the property referred to in the complaint, denying that they had no interest therein, and denying that they had trespassed on plaintiff's claim. They based their claim of title on a certain mining location known as the "Last Chance Mining Claim," and admitted that they were conducting mining operations upon such land claimed by plaintiff as was within the limits of said Last Chance mining claim. The cause was tried upon the issues joined. The trial court found that plaintiff is the owner and entitled to the possession of the claim known as the "Eagle Quartz Mining Claim," particularly and definitely describing it. It further found that plaintiff is not the owner or entitled to the possession of any other land described, or attempted to be described, in its complaint; that none of the defendants had ever claimed any estate or interest in the property so

described in the findings and constituting the Eagle quartz mining claim, and that none of them has any estate or interest therein, or any part thereof; that none of said defendants has ever entered upon said land, or any part thereof, or taken any mineral therefrom, or ever threatened so to do; and that all of their mining operations complained of by plaintiff have been upon land not included in said Eagle quartz mining claim, but which is a part of their own Last Chance quartz claim, which adjoins the Eagle quartz claim. Upon these findings judgment was given that plaintiff take nothing, that the injunctions and restraining orders theretofore issued be dissolved, and that defendants recover their costs.

[1] The finding to the effect that defendants never claimed and do not now claim any estate or interest in the property found to belong to plaintiff is opposed to the express statements of the answer. Probably what the learned judge of the trial court meant by this finding was that defendants had never in fact made any claim in any way to any portion of the land that was included in the Eagle quartz claim as described in the findings, prior to the commencement of the action, and that their claim had been confined to land lying outside of such claim as the same was described in such findings. The condition of defendants' answers in this regard may be due, as is claimed by their counsel, to the somewhat uncertain description in the complaint, and the inability of defendants to ascertain what land was intended to be included thereby. Of course it was manifest that plaintiff claimed that the land actually occupied and being worked by defendants was so included. But under the allegations of the complaint and answer, it was established for all the purposes of the case that defendants claimed all the land described in the complaint, and the finding to the contrary was unwarranted. Under these circumstances, it is clear that there was a material issue as to the ownership of the property attempted to be described in the complaint, and of course, as is claimed by plaintiff, a finding thereon was essential.

[2] But we cannot concur in plaintiff's claim that there is not a sufficient finding upon this issue. Plaintiff by its complaint attempted to include within the limits of the Eagle quartz claim, of which the court found it to be the owner, land that was not in fact included therein, according to the findings. The court found that plaintiff is the owner of the Eagle quartz mining claim, particularly and with certainty describing said claim, and that none of the defendants has any estate, right, title, or interest in the same, or any part thereof. It is perfectly apparent from a comparison of the description in the findings with that in the complaint that they both refer to the same claim, the Eagle quartz mining claim in the old Indiana ranch min-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ing district, Yuba county, Cal., and that the more particular description in the findings includes some, but not all of the land attempted to be particularly described in the complaint. The court further found that plaintiff was never the owner or entitled to the possession of any land described or attempted to be described in the complaint other than that so specifically described in the findings as constituting in fact the Eagle quartz claim. We are utterly at a loss to see why these findings do not clearly and definitely determine the issue as to ownership; the determination being in favor of plaintiff as to a specified portion of the land attempted to be particularly described in the complaint, and in favor of the defendants as to all the remainder thereof. As we have already said, the court found that none of defendants had ever entered upon the land found to belong to plaintiff, or been in possession of any part thereof, or taken any mineral therefrom, or threatened to do any of these things, and that all their acts in this behalf had been confined to land outside of plaintiff's lines, and to land embraced within their own Last Chance mining claim.

The judgment was correct in so far as it denied plaintiff any relief by way of injunction. But eliminating from consideration the finding that defendants never claimed any interest in the property found to belong to plaintiff, as we must do in view of the conditions of the pleadings in that regard, we think that upon the findings on the material issues made by the pleadings, plaintiff was entitled to have the judgment decree it to be the owner of so much of the property as was found by the court to belong to it. We do not mean to imply that the judgment as given would be held, in the light of the findings, to be an adjudication that plaintiff has no interest in any of the property described in the complaint, but we are of the opinion that plaintiff is entitled upon the findings to such a provision in the judgment. The provision should be so expressed as to fully protect the rights of the defendants as to the remainder of the property. As to the other relief asked, the judgment of the lower court was correct in decreeing that plaintiff take nothing.

The judgment is reversed, with directions to the lower court to enter a new judgment upon the findings already made, in accordance with the views herein expressed.

We concur: BEATTY, C. J.; SHAW, J.; SLOSS, J.; HENSHAW, J.

MELVIN, J. I concur in the judgment of reversal, but dissent from the direction to the lower court to enter judgment on the findings. I believe that the cause should be sent back for a new trial. In the above opinion this language is used: "It is perfectly apparent from a comparison of the descrip-

tion in the findings with that in the complaint that they both refer to the same claim, the Eagle quartz mining claim in the old Indiana ranch mining district, Yuba county, Cal., and that the more particular description in the findings includes some, but not all, of the land attempted to be particularly described in the complaint." In order to reach such a conclusion we must assume that the initial point mentioned in the findings is identical with that indicated in the description contained in the complaint, and there is nothing to show this. In the complaint the description commences at a monument in Freegoose ravine by the arrastre owned by Higgins and Sons. The claim is described as running 750 feet north and 750 feet south from this point on a certain ledge or lode, and 300 feet on either side of the center of the lode, "including all dips, spurs and angles." In the findings the said mining claim is described as being 1,500 feet long and 600 feet wide, having its initial monument in the center of said claim and in Freegoose ravine near the site of an old arrastre formerly known as "the Higgins and Sons arrastre." The center line is described as extending 750 feet from said monument north 38 degrees 30 minutes east, and 750 feet in the opposite direction. The side lines are described as extending 300 feet on each side of the center line and parallel thereto. The northerly and southerly lines are designated as parallel and at right angles with the center and side lines. Obviously there may be an unlimited number of points near the old arrastre. The one mentioned in the findings may or may not have been the point designated in the complaint. If it were the same one, the court might have so found very easily. The argument may be advanced that the description in the complaint is very indefinite, and that the plaintiff is entitled to no more definite description in the findings than the one that he furnished the court in his pleading; but the very purpose of the action was the obtaining of a distinct delimitation of the boundaries of plaintiff's mine. The judgment fails to quiet his title to anything, and leaves the whole matter in a tangle. No surveyor on earth could tell from the description in the findings whether or not it included a part of the property described in the complaint, yet the lower court is directed to enter a judgment based upon such findings. It cannot be determined from the findings whether or not the description in the complaint would include a part of the Last Chance claim, and, if so, whether or not the portion included was that from which defendants had removed valuable minerals. In these respects the findings are so uncertain that they do not support the judgment as entered. Plaintiff was entitled to distinct findings upon every material issue presented by the pleadings and to a judgment supported by such findings. *Perkins v. West Coast*



Lumber Co., 120 Cal. 28, 52 Pac. 118; Gilman v. Curtis, 66 Cal. 116, 4 Pac. 1094; Harlan v. Ely, 55 Cal. 344. I think the case ought to be tried anew, that findings free from ambiguity should be made, and that a proper judgment should be based thereon.

I concur: LORIGAN, J.

(22 Cal. App. 25)

**McCRAY v. MANNING et al.** (Civ. 1,355.)  
(District Court of Appeal, Second District, California. May 6, 1913. Rehearing Denied by Supreme Court July 2, 1913.)

**1. STATUTES (§ 107\*)—SUBJECTS AND TITLES.**

The title of St. 1907, p. 806, reciting that it is an act to provide for work upon public roads, streets, etc., not within the territory of incorporated cities or towns, for the incidental establishment of grades thereof, for the construction therein or thereon of sidewalks, sewers, etc., for the issue of bonds for the costs and expenses thereof, for a special fund derived in part from the county road fund and in part by special assessment upon a district, and for the establishment of such districts, embraces only the one subject of the improvement of highways including provisions for the cost thereof, and therefore does not violate Const. art. 4, § 24, providing that every act shall embrace but one subject, which shall be expressed in the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 121-134; Dec. Dig. § 107.\*]

**2. HIGHWAYS (§ 136\*)—ASSESSMENT OF BENEFITS—PROPERTY LIABLE.**

An assessment may be made against property benefited by the improvement of a highway outside of an incorporated city or town, although it does not front upon such highway.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 390; Dec. Dig. § 136.\*]

**3. HIGHWAYS (§ 136\*)—ASSESSMENT OF BENEFITS—PROPERTY LIABLE.**

The boundaries of the district or locality benefited by the improvement of a street or highway outside of an incorporated city or town is a matter for the determination under the discretion of the board of supervisors, which will be presumed, in the absence of anything to the contrary, to have been correctly determined.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 390; Dec. Dig. § 136.\*]

**4. EMINENT DOMAIN (§ 75\*)—COMPENSATION—INCIDENTAL DAMAGES.**

St. 1907, p. 806, relative to the improvement of streets and highways outside of incorporated cities or towns, is not unconstitutional, as taking property for public use without compensation first being provided, because of the failure to provide for the payment of damages incidental to the interference with abutting owners' ingress and egress to the property before the proceedings are instituted, and which damage the abutting owner sustains in common with other abutters, since the damage contemplated in the Constitution, for which compensation must first be paid, is damage other than such as is sustained in common with the abutters on the street or the general public.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 198, 199; Dec. Dig. § 75.\*]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by S. McCray against G. D. Manning and others, constituting the Board of

Supervisors of the County of Los Angeles, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

W. R. Law, of Los Angeles, for appellant. J. D. Fredericks, Dist. Atty., B. C. Hanna, Chief Deputy Dist. Atty., A. J. Hill, Deputy Dist. Atty., and Frederick Baker, all of Los Angeles, for respondents.

ALLEN, P. J. The complaint filed herein by plaintiff alleged ownership by plaintiff of real property within a certain road improvement district, No. 9, in Los Angeles county; that the defendant supervisors had, through a resolution of intention, ordered the improvement of a certain highway therein by grading and oiling the same and constructing therein curbs, sidewalks, and gutters, and had provided that to cover the cost and expenses of such work bonds were to be issued to the amount of the same, and a special fund for the payment of said bonds to be constituted, partly by the transfer of moneys from the county road fund and partly by levying a special assessment tax upon the land within the district; that pursuant to such resolution of intention, a contract was entered into between the supervisors and defendant Law for the work of improving said road; that said contractor is about to begin work on said road; that defendant Hunt threatens to and will, unless restrained, upon completion of such work issue the bonds provided by said act, and that the board of supervisors threaten to levy an assessment upon the property within said road district to pay the principal and interest of said bonds. Plaintiff prays for an injunction restraining defendants from further proceeding under said contract and the performance of any acts thereunder. To this complaint a general demurrer was filed, which being sustained by the trial court and no amendment thereto being had, judgment went for defendants, from which judgment plaintiff appeals.

[1] This appeal rests solely upon the claim of appellant that the act under which this proceeding is sought to be taken (Stats. 1907, p. 806) is unconstitutional, in that the title thereto violates the constitutional inhibition found in section 24 of article 4, which provides that every act shall embrace but one subject, which subject shall be expressed in its title; it being contended that more than one subject is embraced therein. The title to the act in question is in these words: "An act to provide for work upon public roads, streets, avenues, boulevards, lanes, and alleys not within the territory of incorporated cities or towns; for the incidental establishment of grades thereof; for the construction therein or thereon of sidewalks, sewers, manholes, bridges, cesspools, gutters, tunnels, curbing, and crosswalks; for the issue of bonds representing the costs and expenses thereof; for a special fund derived in part

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
133 P.—2



from the county road fund and in part by special assessment upon a district; and for the establishment of such districts." It is plain to us that the only subject embraced within this title has reference to the improvement of highways, together with providing means for payment of the cost thereof, either by way of general improvement, as is shown to be the object in the case under consideration, or certain specific improvements in furtherance of such general improvements, and whether general or special, they are nevertheless improvements and proper methods for the attainment of the ends sought by the act; and therefore not in conflict with the constitutional provision quoted. *Ex parte Kohler*, 74 Cal. 41, 15 Pac. 436.

[2, 3] It is contended further by appellant that but one road is sought to be improved in the district, other roads remaining unimproved, and that no authority vests in the supervisors to form a district, the property within which should be liable for the improvement of any particular specified road; in other words, that the only assessment which supervisors could make would be one upon abutting property. We think it has been so frequently determined that it may be said to have become established law in this state that the benefits from improving streets are not confined necessarily to property fronting upon the street; that the right to levy assessments exists because of the benefits derived to property, whether abutting or otherwise, and that the boundaries of the district or locality so benefited is a matter for determination under the discretion of the board of supervisors, which will be presumed, in the absence of anything to the contrary, to have been correctly determined.

[4] It is further contended that the act is unconstitutional as an invasion of plaintiff's rights, in that property is being taken for public use without compensation first being provided; the only claim in relation thereto certainly affecting plaintiff's property being that ingress and egress to the property will necessarily be affected during the time the improvement is being made, or if thereafter only such as is in common with other abutters, and therefore he is entitled to be paid damages incidental to this injury to his ingress and egress before the proceedings are instituted. The damage contemplated in the Constitution for which compensation must first be paid is damage other than such as is sustained in common with other abutters on the street, or the general public. In other words, it refers to a special injury which he receives over and above such common injury. This was determined as early as *Reardon v. San Francisco*, 66 Cal. 506, 6 Pac. 317, 56 Am. Rep. 109, and has been followed and approved in subsequent decisions by our Supreme Court.

We see no merit in appellant's contention that the act in question is unconstitutional, and are of opinion that the demurrer to plaintiff's complaint was properly sustained. Judgment affirmed.

We concur: JAMES, J.; SHAW, J.

(22 Cal. App. 1)

**UNITED MATERIALS CO. v. LOUGHERY et al. (Civ. 1,063.)**

(District Court of Appeal, Third District, California. April 26, 1913.)

**1. MECHANICS' LIENS (§ 271\*)—FORECLOSURE—COMPLAINT—INDEBTEDNESS BY OWNER TO CONTRACTOR.**

Under Code Civ. Proc. § 1184, requiring an owner to retain 25 per cent. of the contract price for 35 days after completion of the contract, in order to meet claims against the contractor, it is not necessary that a complaint to foreclose a materialman's lien for materials furnished a subcontractor, the lien having been filed in the proper time, allege that there was anything due from the owner to the contractor, or from the contractor to the subcontractor.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 494-513; Dec. Dig. § 271.\*]

**2. MECHANICS' LIENS (§ 281\*)—FORECLOSURE OF LIEN—MATERIALS—PRICE—TIME OF PAYMENT—EVIDENCE.**

Where, in a suit to foreclose a materialman's lien, it was proved that the subcontractor ordered the materials from plaintiff, and that the reasonable value of the materials furnished was \$55.80, such facts were sufficient to raise an implied contract to pay the reasonable market value on demand, and was sufficient to prove the agreement between plaintiff and the subcontractor as to the price and the time of payment.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 565-572; Dec. Dig. § 281.\*]

**3. MECHANICS' LIENS (§ 148\*)—STATEMENT—VERIFICATION—AMOUNT DUE—CREDITS AND OFFSETS.**

Code Civ. Proc. § 1187, requires that a mechanic's lien claimant shall file a claim containing a statement of his demand, after deducting all just credits and set-offs, which claim must be verified. *Held*, that where a materialman's claim of lien stated that the contract price and value of the materials furnished was \$55.80, that nothing had been paid thereon, and that such sum was still due, the claim was not objectionable because it did not state, either in the body of the claim or in the verification, that the amount specified was due over and above all just credits and set-offs.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 254; Dec. Dig. § 148.\*]

**4. MECHANICS' LIENS (§ 108\*)—SUBCONTRACTOR OR MATERIALMAN.**

Where a contractor for the construction of certain buildings employed S. to furnish all the materials and do all the brickwork and plastering for a specified price, and S. purchased the necessary material from claimant, S. was a subcontractor and not a materialman; and hence claimant was not entitled to file a claim of a lien as a materialman for the material so furnished.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 140, 141; Dec. Dig. § 108.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



# 5. APPEAL AND ERROR (§ 1011\*)—FINDINGS—REVIEW.

A finding on conflicting evidence will not be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

Appeal from Superior Court, Alameda County; S. W. Harris, Judge.

Action by the United Materials Company against J. F. Loughery and others. Judgment for plaintiff, and defendants appeal. Affirmed.

W. B. Rinehart, of Oakland, for appellants. Wm. O. Minor, of Oakland, for respondent.

CHIPMAN, P. J. Action to enforce a materialman's lien upon the buildings and land of defendant Wilder, and for a deficiency judgment against the defendant Standberry.

It is alleged in the complaint that defendant Wilder is the owner of the premises described therein; that on October 3, 1908, defendant Loughery entered into a contract with said Wilder to erect on said real estate two one-story cottages for which said Wilder agreed to pay said Loughery the sum of \$4,250; that said Loughery entered into a contract with defendant Standberry to furnish all the material and labor for plastering and brickwork on said buildings and agreed to pay said Standberry therefor the sum of \$120, and said Standberry agreed to furnish all said materials and do all the brickwork and plastering on said buildings; that said contractors and each of them, pursuant to said contracts, erected said buildings, and the same were completed on March 5, 1909, at which time said Wilder was owing said contractors \$1,062.50; that, in the month of November, 1908, "plaintiff sold and delivered to said Standberry, to be used in the erection of said buildings, the following described material" (describing it), which "said material was used in the construction of said buildings; that by the terms of the agreement between plaintiff and said Standberry said material was to be paid for in cash on delivery, and for each of said articles the sum above set forth, amounting in the aggregate to the sum of \$55.80; that said material is now and was at the time of the delivery thereof reasonably worth said sum." It is further alleged "that on April 2, 1909, plaintiff, for the purpose of securing and perfecting a lien for the moneys due him as aforesaid, upon the buildings and land above described, filed for record \* \* \* its claim thereof, duly verified by its secretary, which is hereto attached, marked 'Exhibit A,' and made a part of this complaint," and which said claim was on the same day duly recorded.

The notice of lien states: That plaintiff, "at the times hereinafter mentioned, furnished and supplied materials to be used, and

which were actually used, in the construction of those certain buildings now upon that certain lot \* \* \* sought to be charged with this lien" (describing the lots as in the complaint). "That Horace E. Wilder is the name of the owner and reputed owner of said premises, and caused two buildings to be constructed on said premises. That one of said buildings was erected on said lot 83, and one on said lot 84. That J. F. Loughery is the name of the contractor who on the 3d day of October, 1908, entered into a contract with said owner for the erection of said buildings. That T. A. Standberry is the name of the person to whom said United Materials Company furnished materials as aforesaid. That said Standberry contracted with said United Materials Company to furnish him with the following described materials to be used, and which were all used, in the construction of said buildings, to wit" (describing the materials and the price as mentioned in the complaint). Delivery of said materials is alleged, and that by agreement between plaintiff and defendant Standberry, "the same was to be paid for in cash on delivery, and for each of said articles the amount above set forth, amounting in the aggregate to the sum of \$55.80. That the amount of the contract price for said materials furnished as aforesaid is said sum of \$55.80, and said sum is now and at the time it was delivered was the reasonable value thereof. That the same was furnished at the special instance and request of said Standberry. That nothing has been paid on said contract price or on account of said materials, and the sum of \$55.80 is still due and owing thereon and therefore to said United Materials Company. That both of said buildings are now completed, but as much time as 30 days has not passed since the completion of either one of them. Wherefore," etc. "[Signed] United Materials Co., by W. S. Hoyt, Secretary." Verified also by Hoyt, as secretary.

A general demurrer to the complaint was overruled, and defendants Loughery and Wilder answered. Defendant Standberry made default. The answer does not deny the original contract, or that it was for the sum of \$4,250. Its recitation is admitted. The answer also admits the filing of the lien in time, but otherwise denies the averments of the complaint.

The court made findings of fact: That defendant Wilder was and is the owner of the premises as alleged in the complaint; that he entered into a contract with defendant Loughery to erect said cottages as alleged for the price alleged; that Loughery entered into a contract with defendant Standberry to furnish "all the material and labor for the brickwork on said building, and agreed to pay said Standberry the sum of \$150, and the said Standberry agreed for said sum" to furnish said materials and do said

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



work for said sum; that said contractor erected said buildings, and the same were completed on March 5, 1909, "at which time said Wilder was owing said contractor \$1,062.50"; that in November, 1908, plaintiff sold and delivered to said Standberry, to be used and which was used in said buildings, certain material, describing it as in the complaint; that by the terms of the agreement between plaintiff and said Standberry, "said materials were to be paid for on delivery, and for each of said articles the sums above set forth, amounting in the aggregate to the sum of \$55.80; that said material is now, and was at the time of the delivery thereof, reasonably worth said sum" no part of which has been paid; that plaintiff filed its claim of lien as set forth in the complaint and paid \$1.95 for verifying and recording the same; that said claim of lien "contained a correct statement of plaintiff's said demand, after deducting all just credits and offsets, and all other matters required by law" to entitle plaintiff to a lien; that said Standberry "agreed to perform said contract work in a workmanlike manner, and the same was so performed by him and said work was completed by him and never abandoned; that said Standberry was not fully paid, prior to the filing of said claim of lien, \* \* \*" and at said time "there was owing and unpaid, from said defendant Loughery to said defendant Standberry, the sum of \$63."

As conclusions of law the court found that plaintiff is entitled to judgment against said Standberry for the sum of \$57.75 and "is entitled to a lien on said premises, and to have them sold for the payment of said lien." Judgment was entered accordingly from which defendants Loughery and Wilder appeal.

[1] 1. In support of the demurrer appellants contend that the complaint fails to state that there was anything due from Wilder, the owner, to Loughery, the original contractor, or from Loughery to Standberry, the subcontractor. The complaint alleges that there was due from the owner to the contractors \$1,062.50. This is 25 per cent. of the contract price, which the statute (section 1184, Code Civ. Proc.) made payable 35 days after the completion of the contract, and this final payment must be withheld and would be available to meet claims provided for by the statute, even though the owner had paid the contractor. *Sweeney v. Meyer*, 124 Cal. 512, 57 Pac. 479; *Ganahl v. Weir*, 130 Cal. 237, 62 Pac. 512. It was not necessary for plaintiff to allege that anything was owing to the plaintiff by the owner. Under the lien law the 25 per cent. of the final payment is withheld as money belonging to materialmen, should there be any unpaid. The materialman has no knowledge of the contract between the original contractor and the subcontractor whose contract is not required to be recorded (*Reed v. Norton*, 90 Cal. 590, 26

Pac. 767, 27 Pac. 426), and his security is the right given him to file a lien within 30 days, and, as respondent well observes, "he is not required to allege something of which in the nature of things he can know nothing."

2. The point that there is not sufficient in the lien to show its identity with the claim sued upon is without merit.

[2] 3. An agreement between plaintiff and Standberry as to the price for the materials and time of payment is found by the court, and is attacked as without support in the evidence. It appeared that Standberry ordered the materials from plaintiff to be sent to the buildings; that the reasonable then market value was \$55.80. The materials, were delivered as ordered, and an implied contract arose and was pleaded that the buyer would pay their reasonable market value on demand. Where the price fixed corresponds with the market price, no injury can result to the owner. *Lucas v. Rea*, 10 Cal. App. 641, 102 Pac. 822; *Barrett-Hicks Co. v. Glas, Jr.*, 9 Cal. App. 491, 99 Pac. 856; *L. A., etc., Brick Co. v. L. A., etc., Dev. Co.*, 7 Cal. App. 460, 94 Pac. 775.

[3] 4. It is contended that the verification of the claim of lien is insufficient because it does not state that the amount is due above all just credits and offsets. Section 1187 of the Code of Civil Procedure requires that the claimant "must file \* \* \* a claim containing a statement of his demand, after deducting all just credits and offsets, \* \* \* which claim must be verified by the oath of himself or of some other person. \* \* \*" The statute does not require the affidavit or verification to contain such statement. Nor, in our opinion, is it necessary that such statement should appear in the body of the notice of claim. This question arose and was so held, under a similar statute, in *Whittier, Fuller Co. v. Blakeley*, 13 Or. 546, 558, 11 Pac. 305, 309, opinion by Thayer, J., from which we quote: "I do not think the statute necessarily requires that those words should be inserted in the notice. It says that a notice shall be given of the amount of the claim over and above all payments or offsets. And I would suppose that if the claimant had done so in fact, it would answer the requirement. Section 7 of the act (corresponding with our section 1202 of the Code of Civil Procedure), as has been shown, makes the presentment of a false claim in such a case, or the willful omission to allow all credits which may be justly allowable, a ground of forfeiture of the lien. The fact whether a claim is false or true must be ascertained by proof. The claimant's saying it was true does not make it so, nor in this case would it make the matter more certain. The appellants say by the notice that the contractor had purchased of them material to the value of \$428.78, and that said amount was due and unpaid. What stronger assurance could they have given him of the amount of their claim than this, aside



from actual proof? \* \* \* Again, the amount of the claim as stated in the notice was the amount as established by the proof. It was the true amount 'over and above all payments or offsets.' It was not a false claim. Then why in reason and justice should the appellants forfeit their lien? The proposition, to my mind, is highly absurd." Held, also, in *Kezartee v. Marks & Co.*, 15 Or. 529, 16 Pac. 407, that it is not necessary that such claim should on its face state the amount specified therein is due, over and above all just credits and offsets, following the case above cited. The requirement of the statute as to such claims is not the same as in cases of claims against estates. There the statute requires that the affidavit of the claimant must state that the "amount is justly due, that no payments have been made hereon which are not credited, and that there are no offsets to the same, to the knowledge of affiant." We think the question was rightly decided by the Oregon Supreme Court.

[4] 5. Standberry was a subcontractor, as we think clearly appears from the evidence, and not a materialman. Hence plaintiff was entitled to file a lien as a materialman.

[5] 6. In their answer defendants alleged that Standberry did not comply with his contract, and there was nothing due him. The evidence on the point is conflicting, and we are not permitted to depart from the findings in such case. It may be here repeated that it was not necessary to allege or prove any indebtedness from the owner, Wilder, to Loughery or to Standberry. It was said in *Los Angeles Pressed Brick Co. v. Los Angeles, etc., Co.*, supra: "There is nothing in the spirit or the letter of the law which indicates that the laborer's or materialman's lien can be affected by the obligations which exist between the contractor and the subcontractor." See, also, *Hampton v. Christensen*, 148 Cal. 729, 737, 84 Pac. 200, where the question is searchingly discussed.

We are unable to discover any prejudicial error in the record. The judgment is, therefore, affirmed.

We concur: HART, J.; BURNETT, J.

(21 Cal. App. 781)

JANKE v. McMAHON. (Civ. 1,065.)

(District Court of Appeal, Third District, California. April 25, 1918.)

# 1. ADVERSE POSSESSION (§ 68\*)—NECESSITY OF CLAIM OF TITLE.

Occupancy of land commencing in 1862, with nothing further to indicate a claim of title, could not ripen into title by adverse possession, since, while the statute at that time did not require the payment of taxes as an element of adverse possession, it did require that the possession should be under a claim of right.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 387-393; Dec. Dig. § 68.\*]

# 2. ADVERSE POSSESSION (§§ 57, 85\*)—ACTIONS—PRESUMPTIONS AND BURDEN OF PROOF.

In an action for the recovery of real property or its possession, a person establishing a legal title thereto is presumed to have been possessed thereof within the time required by law, occupation by any other person is deemed subordinate to the legal title, unless it appears that the property has been held and possessed adversely for five years before the commencement of the action, and the burden is on such person to show that his occupancy is hostile, and not subordinate to the legal title, and to prove all the essential elements of adverse possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 277, 278, 498-503, 655-657, 660, 667, 668, 687-690; Dec. Dig. §§ 57, 85.\*]

# 3. ADVERSE POSSESSION (§ 70\*)—CHARACTER OF POSSESSION—ENTRY AND POSSESSION BY MISTAKE.

Where a lot owner through mistake, inadvertence, or carelessness inclosed with his lot a narrow strip of an adjoining lot with no desire to appropriate or claim any land that he did not own, a belief by him that his lot extended to the limits of his inclosure was not equivalent to a claim of title or right sufficient to render his possession adverse.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 394-414; Dec. Dig. § 70.\*]

# 4. ADVERSE POSSESSION (§ 68\*) — HOSTILE CHARACTER OF POSSESSION — STATUTORY PROVISIONS.

Civ. Code, § 1007, providing that occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar an action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all, must be construed in connection with the corresponding provisions of the Code of Civil Procedure, and as so construed the occupancy must be under a claim of right or adverse.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 387-393; Dec. Dig. § 68.\*]

# 5. ADVERSE POSSESSION (§ 85\*)—EVIDENCE—WEIGHT AND SUFFICIENCY.

That one in possession of land does not have it assessed to himself is strongly persuasive evidence that he does not claim to be the owner.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 498-503, 656, 657, 660, 668, 688-690; Dec. Dig. § 85.\*]

# 6. BOUNDARIES (§ 46\*) — AGREEMENTS BETWEEN PARTIES—VALIDITY.

An agreement between adjoining owners to a wrong boundary line was not binding where one of the parties knew, or by reference to his deed could have known, that such was not the line, since such an agreement is not valid unless there is an actual or believed uncertainty as to the true line on the part of both parties, and a party would be presumed to be familiar with his deed and would not be heard to say that the fence was located upon an accepted division line, where he had means of knowledge of the location of the line.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 212-226, 249-251; Dec. Dig. § 46.\*]

# 7. APPEAL AND ERROR (§ 843\*) — REVIEW — MATTERS NOT NECESSARY TO DECISION.

In an action to recover the possession of real property, the alleged insufficiency of the evidence to support a finding as to the rental



value would not be considered, where such rental value was not allowed in the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.\*]

#### 8. EJECTMENT (§ 149\*)—FINDINGS—FORM AND SUFFICIENCY.

In an action to recover real property, the court properly found the facts as they existed at the time the complaint was filed, ignoring improvements made thereafter by defendant.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 525, 526; Dec. Dig. § 149.\*]

#### 9. APPEAL AND ERROR (§ 1071\*)—HARMLESS ERROR—FINDINGS.

In an action to recover real property, where the judgment adjudicated plaintiff's title and right of possession, the invalidity of defendant's claim, defendant's unlawful occupancy thereof, and illegal interference with plaintiff's enjoyment in consequence of structures placed thereon by defendant, the findings as to plaintiff's ownership and right of possession, that defendant, without right, had entered and placed improvements thereon, continued to maintain them and refused to vacate the premises, although notified in writing to do so, and that the action was not barred by the statute of limitations, controlled the judgment, and hence alleged errors in other findings and in the court's refusal to make certain findings were immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.\*]

#### 10. EJECTMENT (§ 147\*)—DEFENSES—EQUITABLE DEFENSES.

In an action to recover real property, where the evidence showed that when defendant placed improvements thereon he knew or had ready means of knowing that they were located upon plaintiff's land, and that plaintiff did not know that they were on her land, the court properly excluded evidence to show that plaintiff permitted such improvements to be made without protest, and that it would be inequitable to award the land to her.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 520, 521; Dec. Dig. § 147.\*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Cornelia L. Janke against Alfred H. McMahon. From an order denying a motion for a new trial, defendant appeals. Affirmed.

William H. Chapman, of San Francisco, for appellant. C. W. Eastin, of San Francisco, for respondent.

BURNETT, J. The action is to recover the possession of a narrow strip of land, nearly three feet in width and forty feet in depth, and to quiet plaintiff's title thereto. The appeal is from an order denying defendant's motion for a new trial. It is admitted by appellant that the record title is in respondent, but its normal effect is sought to be obviated by the claim of adverse possession. Herein it is the contention that "nowhere does it appear that the plaintiff or her predecessors or any one of them had actual physical possession or ever occupied the disputed strip of land, the surface of the soil; on the contrary, the undisputed evi-

dence is that neither the plaintiff nor any of her predecessors ever had such possession, but that the father of the defendant was continuously in the occupancy and exclusive possession of the disputed strip since March 3, 1862, up to the time of his death, about 1890, and that thereafter the defendant, a son and heir of the person so in possession, has continuously occupied and actually held possession of the disputed strip; that on the line between the disputed strip and plaintiff's property there was constructed, about 1862, a building and fence, and that the building and fence remained on said line without objection on the part of any one until the fire of April, 1906, and that immediately thereafter the defendant rebuilt the said building and fence, and it was not until the latter part of 1907, long after defendant had made his improvements, that any claim to the disputed strip was made by plaintiff or any one else." It was conceded, however, at the trial that by reason of his failure to pay the taxes defendant's possession had not ripened into a title by prescription, but it was asserted that the father became the owner by virtue of his possession of the disputed strip and the son had succeeded to the father's interest. The character of the father's possession is therefore the first question to be considered.

The evidence as to his occupancy of the land is brief, and it may be well to exhibit it in full. It appears in the testimony of appellant as follows: "My father was in possession of this piece of property about 46 years. He obtained possession of the property in dispute in 1862, and built on it one year afterwards. He built a three-story house on it, and this covered the land in dispute. There was a fence on the easterly side of the property that he had in his possession the same place as where the fence is now. There was a 4-foot alleyway between the fence and the old house. The stairs ran into that alleyway from the back porch. The old house ran back 60 feet to where there was a back porch built coming down into this alleyway on the 2 feet 10 inches that is in dispute. The stairs ran into that alleyway from the back porch. Neither Mrs. Janke, the plaintiff, nor her husband, to my knowledge, at any time had possession of any portion of that 2 feet 10 inches, not since my father bought it. There was no agreement between my father or Mr. or Mrs. Janke with respect to the dividing line, but my father had the fence on it before Mrs. Janke's house was ever built."

[1] It is thus to be seen that the only evidence of adverse possession consists of mere occupancy. The disputed strip was inclosed with and as a part of the lot belonging to McMahon, Sr., and the back porch of his house partially rested upon said strip, but there is no further basis for the claims of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



title. There is no evidence that he ever declared that he owned the land, or that he intended to retain it as against the holder of the legal title. In short, there is no showing beyond the fact of possession already pointed out of any act or declared purpose on the part of McMahon indicative of a claim of title. While during the period of his occupancy the statute did not, as it does now, require the payment of taxes, to vest title by adverse possession, it did exact as it does now that the possession must be for the statutory period under a claim of right in order to prevail over what we denominate the legal title.

[2] Occupancy was, then as now, only one of the elements that constitute title by prescription and the rule of law has ever been in this state that: "In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title unless it appears that the property has been held and possessed adversely to such legal title, for five years before the commencement of the action." In other words, the burden of proof is upon the person in possession and claiming against the holder of the legal title to show that his occupancy is hostile and not subordinate to the legal title. He must prove all the essential elements of adverse possession. *Sharp v. Daugney*, 33 Cal. 505; *De Frieze v. Quint*, 94 Cal. 653, 30 Pac. 1, 28 Am. St. Rep. 151; *Ball v. Kehl*, 95 Cal. 606, 30 Pac. 780; *Baldwin v. Temple*, 101 Cal. 396, 35 Pac. 1008; 2 Am. & Eng. Ency. of Law and Practice, 363. It is equally true that possession may be open and notorious, and still not adverse. *Thompson v. Felton*, 54 Cal. 547; *Sheils v. Haley*, 61 Cal. 157; *Rix v. Horstmann*, 93 Cal. 502, 29 Pac. 120; *Baldwin v. Temple*, supra; *Woodward v. Faris*, 109 Cal. 12, 41 Pac. 781; *Peters v. Gracia*, 110 Cal. 89, 42 Pac. 455.

[3] The reasonable and credible inference, harmonizing with the presumption of law, is that McMahon, Sr., had no desire to appropriate land belonging to another, and that he laid no claim to property that he did not own, but that through an honest mistake as to the location of the division line, or through inadvertence or carelessness, he included the said strip within his inclosure, holding himself in readiness to yield what a survey or other satisfactory evidence should legally exact of him. We may suspect that he believed that his lot extended to the limits of the inclosure, but such belief is not equivalent to a claim of title or right, and therefore not sufficient to constitute an adverse possession. *Grube v. Wells*, 34 Iowa, 148; *Palmer v. Osborne*, 115 Iowa, 715, 87 N. W. 712; *Hess v. Rudder*, 117 Ala. 525, 23 South.

136, 67 Am. St. Rep. 182; *Woodward v. Faris*, supra.

[4] Of course, if plaintiff had shown no title, there would be significance and potency in the suggestion of appellant that defendant being in possession is entitled to judgment "regardless of whether he had acquired a prescriptive title by adverse possession or not." But, during all the time in controversy, the record title was in plaintiff or her predecessors in interest, and the "occupancy" referred to in section 1007 of the Civil Code must be construed in connection with the corresponding provisions of the Code of Civil Procedure, and thus the conclusion is reached that to overcome the legal title the occupancy must be under a claim of right, or adverse, as that term is used in the law. The cases cited by appellant hold nothing to the contrary, but are in harmony with respondent's position.

In *Woodward v. Faris*, supra, it was said: "Title to land may be acquired by adverse possession for five years within the limits of an inclosure, although the inclosure was made under a mistaken belief as to the boundary of the land, where it is claimed as matter of fact that the fences were upon the line; but, if the inclosure was made without claiming that the fences were upon the line, but with the expectation of moving them to the true line when it should be determined, the possession would not be adverse, and the statute would not run." The character of the title acquired by adverse possession and not by mere occupancy is the principal question discussed in the well-considered case of *Arrington v. Liscom*, 34 Cal. 365, 94 Am. Dec. 722, and it is there properly held that "a party who has been in the exclusive adverse possession of lands for a period of time which, under the statute of limitations, vests him with a title thereto, may maintain an action against a party claiming under a record title, to have said adverse claim determined and adjudged null and void as against him." In other words, adverse possession for the requisite period confers a substantial title with all of the incidents of possession under a valid written title. The point decided in *Cannon v. Stockmon*, 36 Cal. 535, 95 Am. Dec. 205, was that the five years of "continued, exclusive adverse possession" need not be "next preceding" the commencement of the action."

The controverted question in *Breon v. Robrecht*, 118 Cal. 469, 50 Pac. 689, 51 Pac. 33, 62 Am. St. Rep. 247, was whether during the pendency of an action the defendant from the mere fact that he remains in possession could acquire any new right as against the plaintiff. The Supreme Court aptly illustrates the baseless character of such contention by this statement: "If that be so, a successful plaintiff in ejectment, although he commenced his action within five years after the beginning of the adverse holding, gains nothing by his suit unless he can so control



the machinery of the courts and the conduct of the defendant as to obtain a judgment and the execution of a writ of restitution within five years after the first unlawful entry of the defendant." That possession under a claim of right was in the mind of the court in the case of *Baker v. Clark*, 128 Cal. 181, 60 Pac. 677, is disclosed by the following quotation: "Baker, from that time, continued in the open, notorious, uninterrupted, adverse, and exclusive possession of the premises, claiming the same in his own right." In *Sousa v. Pereira*, 132 Cal. 77, 64 Pac. 90, it was held that "the plaintiff in ejectment must recover upon the strength of his own title, and not upon the weakness of his adversary's title; and, where the plaintiff shows no title, the defendant in possession is entitled to judgment, regardless of whether he has acquired a prescriptive title by adverse possession or not." This, of course, must be true, since "occupancy for any period confers a title sufficient against all except the state and those who have title by prescription, accession, transfer, will or succession." Section 1006, Civ. Code.

[5] We omit specific mention of the other cases cited by appellant, but, in dismissing this contention, it may be said that not only is there an entire lack of evidence that the senior McMahon's occupancy was under a claim of right, but appellant has furnished an important circumstance in aid of the presumption that the possession was in subordination to the legal title. He testified, in effect, that the disputed strip was not assessed to him nor to his father. The fact that one in possession of land does not have it assessed to himself is, of course, strongly persuasive that he does not claim to be the owner.

[6] Nor is plaintiff estopped from questioning the boundary line by reason of any agreement or acquiescence as to its location. As we have seen, there was no express agreement relating to it, and we cannot infer such an understanding. We cannot assume that coterminal owners would agree to a wrong boundary line unless there was actual or believed uncertainty as to its true location. If they did, their agreement would not be binding. "But a formal agreement to fix a boundary line is not valid, indeed is void, if the parties knew, or any one of them knew, that the agreed line is not the true line, or, in other words, if there be not an actual or believed uncertainty as to the true line." *Clapp v. Churchill*, 130 Pac. 1061. Either McMahon, senior or junior, had only to refer to his deed to ascertain that he was entitled to only 23 feet and 6 inches instead of 26 feet and a fraction included within the inclosure. He must be presumed to have been familiar with the terms of the instrument that constituted his muniment of title. If he did not actually know the extent of his property, he had the means of knowledge within reach, and he would not be heard to say

that the fence was located upon the accepted division line. "Where there is an acquiescence in a wrong boundary, when the true boundary may be ascertained by the deed, it is treated, both in law and equity, as a mistake, and neither party is estopped from claiming to the true line. The boundary is considered definite and certain when by survey it can be made certain from the deed." *Hartung v. Witte*, 59 Wis. 285, 18 N. W. 175. "Where a boundary fence was built on what the parties supposed was the true line, and there was no dispute, and it was not known that there was any uncertainty, an establishment of the boundary by implied consent and acquiescence was not shown." *Peters v. Reichenbach*, 114 Wis. 209, 90 N. W. 184.

It is further contended by respondent that whatever title McMahon, Sr., may have acquired is of no consequence, since appellant has furnished no evidence that he has succeeded to that interest. In this connection it is claimed that since the father left a will, and the decree of distribution in the estate does not purport to distribute the controverted strip and makes no reference to it, and there having been no further administration of the father's estate as provided in section 1698 of the Code of Civil Procedure, the said decree of distribution is the only proof that could be offered that appellant has succeeded to his father's interest and therefore no privity is shown. We deem it unnecessary, however, to consider this phase of the controversy.

[7] Appellant's specification as to the insufficiency of the evidence to support the finding as to the rental value of \$37.50 per month may be passed by since no part of it was allowed in the judgment.

[8] Attention is called to certain findings that relate to contemplated improvements upon plaintiff's lot, and it is contended that at the time of the trial the situation had changed so that said findings did not present the truth. But the court properly found the facts as they existed at the time the complaint was filed. The same suggestion may be made as to the criticism that "the finding that defendant entered into possession within one year last past is at a time subsequent to the filing of the complaint." That the market value of plaintiff's land would be depreciated by the excision and loss of the 3-foot strip would seem to require no direct evidence. It is indeed quite manifest from the circumstances appearing in the case.

[9] Finding 29 deals with the actual occupancy of the disputed strip, and it is a fair inference from the evidence that neither the residence of appellant nor of his father was constructed "up to said line." At any rate, this finding and some others attacked by appellant are entirely immaterial as they could not have altered the judgment if they had been in favor of appellant. *Witcher v. Conklin*, 84 Cal. 499, 24 Pac. 302.

Likewise, the contention that the court



failed to find upon certain averments of the answer does not demand specific consideration for the reason that certain findings of the court, which are supported by the evidence, control and uphold the judgment. *S. P. Co. v. Dufour*, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92.

The judgment is, substantially, "That ever since the 21st day of March, 1883, plaintiff has been and now is the owner and entitled to the possession of that certain lot," describing it; that defendant "has no right, title or interest whatever in or to said lot \* \* \* nor any right to the occupation, use or control thereof or any portion thereof," nor any right to maintain upon plaintiff's land any improvement whatever or to enter upon plaintiff's land for any purpose; that plaintiff is entitled to remove any structure that may have been placed upon her land; that defendant be enjoined from asserting any right, title, or interest in or to said land or any portion thereof, and that any structure placed upon said land by defendant is a nuisance and should be abated, and that defendant be required to abate the nuisance at his own cost, and that if he fails to do so for the period of 30 days that the same may be removed by the sheriff at the cost of defendant, to be taxed and fixed by the court, as costs to be added to the judgment, and that, in case of defendant's failure to so remove the obstruction, plaintiff is to be allowed the reasonable value of the use and occupation of the disputed strip until the time when plaintiff recovers possession, said amount to be fixed by the court upon notice to defendant.

The vital features of the judgment, therefore, consist in the adjudication of plaintiff's title and right of possession to the disputed strip, of the invalidity of the claim on the part of defendant to any title or interest in or to said land, and of the unlawful occupancy by defendant of said tract, and of his illegal interference with the enjoyment of the same by respondent in consequence of structures placed thereon by said appellant. To this the other directions in the judgment are merely incidental and without particular significance.

Looking, then, to the findings, it is discovered that they are full and complete as to the ownership of respondent and her right to the possession of the disputed strip, that defendant without right has entered upon it, placed improvements thereon, and continues to maintain them and refuses to vacate the premises, although notified in writing by respondent to do so, and that the action is not barred by the statute of limitations. These are the essential findings, they control the judgment, and they are abundantly supported by the evidence.

[10] Objections are made to several rulings of the court as to the admissibility of

evidence, but we find no prejudicial error. The one of which apparently the most serious complaint is made is the order of the court sustaining an objection to this question asked on the direct examination of appellant: "What effect would it have upon your building if the 2 feet 10 $\frac{1}{4}$  inches were awarded to plaintiff, and you were required to remove therefrom?" Appellant claims that "this question should have been allowed upon the theory that a mutual mistake had been made in locating the improvements and boundary fence, and would show whether or not it would be inequitable under all the facts of the case to award the disputed strip to plaintiff, and also as tending to estop plaintiff who stood silently by and allowed without protest valuable improvements to be made by defendant."

Under some circumstances, no doubt, such inquiry would be permissible as against the owner of the legal title, but the ruling here was correct for the reason that the court was justified in concluding that at the time the improvements were made respondent believed that they *were not* located upon her land and appellant knew or at least had the ready means of knowing that they *were* located upon her land. Indeed, without reciting it in detail, we may say that the evidence, consisting of instruments executed by appellant and declarations and acts made and done by him, amply justify the inference that he knew he had no legal claim to the property in controversy.

It is believed that the conclusion of the trial court is right, and the order denying the motion for a new trial is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(22 Cal. App. 20)

PEOPLE v. KENNEDY. (Cr. 268.)

(District Court of Appeal, Second District, California. May 6, 1913.)

1. INDICTMENT AND INFORMATION (§ 125\*)—SUFFICIENCY OF AN INDICTMENT.

Where a statute describes several acts, the doing of any or all of which constitutes a crime, a defendant may be charged with the doing of all of them, consequently, an information charging an accused with both having set and used a fixed contrivance for catching fish contrary to Pen. Code, § 636, making both the setting and the use a misdemeanor, is not defective as charging two offenses.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.\*]

2. INDICTMENT AND INFORMATION (§ 86\*)—SUFFICIENCY.

An information alleging that accused on the 21st day of March and before the filing of "this information at the county and state aforesaid did willfully and unlawfully," etc., sufficiently avers that the offense was committed in the county and state aforesaid.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 230-243; Dec. Dig. § 86.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Appeal from Superior Court, Kings County; John G. Covert, Judge.

John J. Kennedy was convicted of a misdemeanor, and he appeals. Affirmed.

E. T. Cosper, of Hanford, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of a misdemeanor, the particular charge made against him being that he did on the 21st day of March, in the county of Kings, set and use a fixed contrivance for catching fish, contrary to the provisions of section 638 of the Penal Code. The undisputed evidence showed that on the day mentioned in the information defendant was discovered by a deputy game warden taking fish from a set line which was stretched across the Kings river. This line had attached to it numerous short lines bearing hooks which hung from the main cord into the water of the river, and it was from the hooks on these short lines that defendant was detaching fish at the time of his arrest. He stated to the arresting officer that he had placed the line there, that he was fishing for the market, and that the only way he could catch fish was by using these lines. He made the further statement to the officer that he would break the law, as it was not right but unconstitutional. No evidence was introduced at the trial on behalf of defendant.

[1] The points urged upon which it is claimed that a reversal of the judgment and order denying a new trial should be directed are quite technical, and call for but brief consideration. Defendant first insists that, because the information charged him with both having set and used a set line, two offenses are alleged. The statute under which the prosecution was had does indeed provide that any person who shall either set or use a set line or fixed contrivance for catching fish in the waters of the state shall be guilty of a misdemeanor, punishable by a fine of not less than \$100, or imprisonment for not less than 50 days, or by both such fine and imprisonment. It has very long been settled that under a statute which describes several acts, the doing of any or all of which shall constitute a crime, a defendant may be charged either with the doing of the single act so described, or by the doing of all of them. This rule is so well settled that we need only cite one of the several decisions which affirm it. See *People v. Leyshon*, 108 Cal. 440, 41 Pac. 480.

[2] It is also contended that it was not sufficiently charged by the information that the alleged crime was committed in the county of Kings, and in support of this contention counsel for defendant relies wholly upon the omission of the district attorney to place a comma after the word "information" in the body of the charge. It was alleged in

the information that defendant on the 21st day of March "and before the filing of this information at the county and state aforesaid, did willfully and unlawfully," etc. Because of the lack of a comma after the word "information," it is now contended that the phrase "at the county and state aforesaid" should be read as referring to the place where the information was filed rather than to the place where the crime was alleged to have been committed. This contention should not be sustained, as it is very evident as to what was intended to be there charged, and the defendant could not in any wise have been misled or prejudiced by the failure of the district attorney to be more exact in his use of punctuation marks.

The evidence was abundant to support the verdict of the jury, and the defendant appears to have been given every opportunity to defend himself against the charge, and to have had a fair trial.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

(22 Cal. App. 23)

# HAYDEN v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

(Civ. 1,387.)

(District Court of Appeal, Second District, California. May 1, 1913.)

## 1. COURTS (§ 80\*)—RULES OF COURT—REASONABLENESS.

A rule of the superior court providing that civil actions at issue may be set for trial upon motion of a party upon five days' written notice or upon motion based upon stipulations of the parties is not unreasonable.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 282-292; Dec. Dig. § 80.\*]

## 2. COURTS (§ 78\*)—RULES OF COURT—STATUTE.

A rule of the superior court providing that actions at issue may be set for trial upon motion of a party upon five days' written notice to the adverse party or on motion based upon stipulations is not invalid as being inconsistent with Code Civ. Proc. § 594, providing that either party may bring an issue to trial, and, where the issue is one of fact, proof must first be made that the adverse party has had five days' notice of such trial; this statute not applying to the procedure for setting a cause out for trial.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 274, 276-281; Dec. Dig. § 78.\*]

## 3. COURTS (§ 85\*)—RULES OF COURT—SETTING CAUSE FOR TRIAL.

A rule of the superior court providing that civil actions at issue may be set for trial upon motion upon five days' written notice or upon stipulations of the parties is binding, not only upon the court, but upon the parties, and, where the plaintiff failed to give the required notice, an order setting the cause for trial should be vacated.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 294, 296-301; Dec. Dig. § 85.\*]

Petition by W. R. Hayden for writ of mandate to be directed to the Superior Court of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Los Angeles County and Charles Monroe, judge thereof. Writ denied.

E. M. Barnes, of Los Angeles, for petitioner.

**PER CURIAM.** [1] The petition herein purports to be an application for a writ of mandate directed to the superior court of Los Angeles county (Hon. Charles Monroe, judge thereof), requiring it to try a certain cause pending therein, entitled "W. R. Hayden, Plaintiff, v. Robert Law, Defendant." By an order of court made March 13, 1913, upon the ex parte motion of plaintiff, the case was set for trial on the 13th of May, 1913. On April 28th following, the court, upon motion of defendant, made an order vacating and setting aside the first order made for the reason that plaintiff had failed to comply with rule 17 of the superior court, which provides that "civil actions at issue may be set for trial in the respective departments, where they are pending, upon motion of a party upon five days' written notice of such motion to the adverse party, or on motion based upon stipulation of the parties." The power of a court of record to make reasonable rules for its government and the government of its officers is found in section 129 of the Code of Civil Procedure. That the rule in question is reasonable is apparent.

[2] The claim of petitioner, however, is that it is inconsistent with the provisions of section 594 of the Code of Civil Procedure, which provides that either party may bring an issue to trial and, that, where the issue to be tried is one of fact, "proof must first be made to the satisfaction of the court that the adverse party has had five days' notice of such trial." This section does not purport to prescribe or apply to the procedure for setting a cause down for trial, but provides that after a day is fixed for trial thereof notice of the same must be given to the adverse party. In the absence of a rule similar to rule 17, supra, no notice of the application to have a cause set for trial is required.

[3] By virtue of this rule, however, the giving of such notice is a prerequisite to the fixing of the time for trial. It is binding not only upon the court, but upon the parties to the action, and by reason of the failure on the part of plaintiff to give the required notice the court was clearly justified in granting the motion of defendant to vacate and set aside the order. What is said by the Supreme Court in the case of *McNeill & Co. v. Doe*, 163 Cal. 338, 125 Pac. 345, has no application for the reason that such rule was not involved in that case. The court merely held that under section 594, supra, the giving of a notice of an application for the setting of a cause for trial was not required.

The writ is denied.

(38 Okl. 342)

**MIDLAND VALLEY R. CO. et al.  
v. STATE et al.**

(Supreme Court of Oklahoma. June 10, 1913.)

(Syllabus by the Court.)

**1. CORPORATIONS (§ 394\*)—CORPORATION COMMISSION—FINDINGS OF FACT—REVIEW.**

Where the findings of fact of the Commission are based upon any competent evidence, the action (section 22, art. 9, Williams' Const.) appealed from must be regarded as *prima facie* just, reasonable, and correct; but when any finding is not supported by any evidence, and there is strong evidence to the contrary, this presumption does not apply.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1576; Dec. Dig. § 394.\*]

**2. CARRIERS (§ 12\*)—REGULATION BY CORPORATION COMMISSION—STORAGE OF BAGGAGE—SUFFICIENCY OF EVIDENCE.**

Record examined, and held to disclose no competent evidence tending to show that the order appealed from is just, reasonable, and correct.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. § 12.\*]

(Additional Syllabus by Editorial Staff.)

**3. CARRIERS (§ 248\*)—OPERATION—RULES.**

Since it is the duty of railroad companies to so conduct their business that their passengers shall be accorded the fullest use of their equipment and facilities, rules adopted by the companies for that purpose ought to be viewed with favor, so long as they are reasonable and subject no one to disadvantage.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 994-996; Dec. Dig. § 248.\*]

Appeal from the Corporation Commission.

A final order was made by the Corporation Commission regulating the storage charges to be made by the Midland Valley Railroad Company and others, and the railroad companies appeal. Reversed.

Edgar A. de Meules, of Muskogee, Cottingham & Bledsoe, of Oklahoma City, C. O. Blake, of El Reno, C. L. Jackson, of Muskogee, R. A. Kleinschmidt, of Oklahoma City, E. R. Jones, of Muskogee, C. E. Warner and Pryor & Miles, all of Ft. Smith, Ark., for appellants. Chas. West, Atty. Gen., and Chas. L. Moore, Asst. Atty. Gen., for the State.

**KANE, J.** This is an appeal from a final order of the Corporation Commission, directed to the appellants, wherein certain rules and regulations governing the charges which may be assessed for storage of baggage after the expiration of a certain free time are promulgated. The order provides that baggage arriving at a station shall be stored 24 hours after arrival free of charge, exclusive of Sundays and legal holidays, which shall be free time; that for each additional 24 hours, or fraction thereof, for the next succeeding 10 days, a charge of 10 cents per day may be collected, and for the succeeding 20 days a charge of 5 cents per day may be collected, and for all time after the expiration of 30 days 5 cents per day may be collected, observing a maximum of 50 cents per month



after the first 30 days. In computing time Sundays and legal holidays will be excluded.

This order was promulgated to supplant a rule by the railway companies, which provides that the first 24 hours shall be free; that for the second 24 hours a charge of 25 cents shall be made, and for each succeeding 24 hours, or fraction thereof, a charge of 10 cents shall be made, provided that for baggage received at any time Saturday and claimed before the same hour of the succeeding Monday, or when received any hour of Sunday and claimed before midnight Monday, no charge shall be made. Legal holidays will be treated same as Sundays, but no deduction will be made for Sundays or legal holidays after storage has commenced to run.

The contentions of the appellants are (1) that the order of the Corporation Commission is unreasonable and unjust, and (2) that there is no testimony whatsoever tending to support the order complained of, or that the order it was intended to supplant was unjust or unreasonable.

[1] It has several times been held by this court that all appealable orders of the Corporation Commission must be supported by some evidence, which must be made a part of the record on appeal, and that where the findings of fact of the Commission are based upon any competent evidence the action (section 22, art. 9, Williams' Const.) appealed from must be regarded as *prima facie* just, reasonable, and correct; but when any finding is not supported by any evidence, and there is strong evidence to the contrary, this presumption does not apply. *C. R. I. & P. Ry. Co. et al. v. State et al.*, 24 Okl. 370, 103 Pac. 617, 24 L. R. A. (N. S.) 393; *Atchison, T. & S. F. Ry. Co. et al. v. State*, 27 Okl. 820, 117 Pac. 330; *Pioneer Telegraph & Telephone Co. v. Westenhaver et al.*, 29 Okl. 429, 113 Pac. 354, 38 L. R. A. (N. S.) 1209; *Okl. Ry. Co. v. State*, 130 Pac. 151, not yet officially reported.

[2] There was only one witness on behalf of the state, and we are unable to gather from his evidence, or from the record, any circumstance tending to show that the rule which had generally been enforced by the railway companies for something like 25 years was unreasonable, or that the rule promulgated by the Corporation Commission covering the same subject was reasonable. On the other hand, Mr. Price, general baggage agent for the Frisco, Mr. Lee, general baggage agent for the Rock Island, Mr. Walsh, general baggage agent for the Santa Fé, and Mr. Kellond, general baggage agent for the "Katy," all experienced railroad men in their line, testified to the effect that long experience shows that the old rule of railway companies efficiently cured the evils connected with the handling of baggage for which it was promulgated; that it is a reasonable regulation, and that there is no com-

plaint against it on the part of the traveling public; that the rule promulgated by the Commission would tend to restore the confusion in the current handling of baggage which the old rule obviated, and would otherwise injuriously affect the great bulk of the traveling public, as well as the railway companies. The testimony of Mr. Walsh is fairly illustrative of it all. He testifies as follows:

"I am general baggage agent for the Atchison, Topeka & Santa Fé. Many years ago, perhaps 25, we had no storage on baggage at all; the result was that our baggage-rooms were filled with baggage indefinitely. Pieces were being stolen, and we couldn't locate them, and it was absolutely necessary for us to establish some sort of storage regulations in order to clear out the baggage-rooms and this was adopted: The first 24 hours free; following that, 25 cents for the next day, and 10 cents for each additional day. Afterwards it was deemed proper that we should allow Sundays and legal holidays, not count them, so the present law is, or the present rule is, that baggage that comes in on Saturday is held free of storage until the corresponding hour on Monday following. Baggage that comes in on Sunday is held free of storage until midnight Monday. That gives the passenger all day Monday to take his baggage away. If it comes in on Saturday, it gives him all day Saturday from the time it comes in up to the corresponding hour on Monday, and we thought that was a fair and reasonable proposition. Now it is my idea that 98 per cent. of the baggage we carry is claimed within the 24 hours, or within the free time allowed. If it is not called for on Sunday, it is called for on Monday, and there is very little baggage subject to storage charges compared to what we carry. That, I think, seems to be reasonable. I haven't heard any complaint. The people generally are prompt in taking out baggage to avoid storage charges. The average traveler, when he completes his journey, wants his baggage. The ordinary passenger, when his journey is terminated, and the railroad have piled away everything and are ready to deliver their baggage, he is ready to take it. That is the general rule. Our road runs through several states, and that rule applies to those states that we run through. At the end of 30 days, agents have instructions to send their baggage into the unclaimed room. That is done because where it lies at small stations it is liable to be pilfered, the windows are liable to be broken, and we have time and again had to pay for baggage that was laid over there, when the baggage has remained there. If a trunk was good looking, they would get possession of it, and I understand a few years ago there was two men and two women arrested in Ft. Smith with 34 empty trunks and valises on their hands which they got by means of this



switching checks. It is not a difficult matter to steal a check from a station. Those are things we are up against in carrying baggage over. The ordinary citizen of Oklahoma, not speaking of commercial men going from one town to another, universally gets his baggage out as soon as he arrives. I have never had any complaint from citizens of Oklahoma to the fact that the free storage limit was too short. I have heard of no trouble of that kind. Ordinary passenger will call and move it if he has to pay storage. It is not often that he has to do it. It is not once in a hundred times that a passenger has to pay storage."

Mr. Kellond testified, in part, as follows: "The railroad company's business is that of a common carrier, and not of a warehouse or storehouse man. If the rate is reduced, so that it is profitable for a traveler to leave his baggage, he will do that rather than transport it by wagon to the warehouse or hotel, and our stations and baggage rooms will be congested, and that necessarily will interfere with the proper handling of business and baggage that is moving promptly, and when we delay a piece of baggage in handling we are called up to pay damages for that. It ought to be fair that we should collect a reasonable charge, where the owner of the baggage delays in taking it out himself; that applies to personal baggage, as well as drummers' trunks. I have a claim pending now. A moving picture man right here in this town, claimed that he and his wife did not have any clothes to wear for two or three days; they are charging me for delay. The wife had to buy some new petticoats and shirt waists and things; but they kept jumping ahead of their baggage. The reduction of the rates for the promulgation of the order, as stated in this proposed order, would result in the congestion of baggage at stations, and result in the privilege of leaving baggage there being abused. That would be the almost entire effect of the order; just cover up our stations. We would not lose much money, because we do not make much money. In other words, the charge is there to move the baggage, so that we can use our baggage rooms for current business. Our charge for storage is uniform. There is just that slight modification in Texas that they exempt the Sundays and legal holidays; but it is 25 and 10 universally in all the states our lines run through. They give 24 hours in Texas free; second 24 hours or fraction thereof, 25 cents; for each succeeding 24 hours or fraction thereof, 10 cents; Sundays and holidays will be considered as additional free time."

From the foregoing testimony it is apparent that the railroad companies are not complaining so much of the possible loss of revenue as they are that the final order of the Commission strikes down arbitrarily a rule

and regulation which has been in force by the railroads of this country for 25 years, and one which experience has taught them is necessary and salutary in the handling of their current baggage business. Manifestly, the revenue feature of the rule is insignificant, the purpose being to facilitate the handling of the current baggage business, and the less revenue there is derived from such charges the greater the carriers are benefited and their facilities increased for serving the public.

[3] Rules of this kind which have stood the test of time and have been found effective in facilitating any branch of the business of a common carrier should not be disturbed, unless it is clearly shown that they are unreasonable. It is the duty of the railroad companies to so conduct their business that their patrons shall be accorded the fullest and freest use of their equipment and facilities, and rules adopted by the companies for that purpose ought to be viewed with favor, so long as they are reasonable and subject no one to disadvantage. *Peale, Peacock & Kerr v. Central R. R. Co. of New Jersey*, 18 Interst. Com. R. 25.

A railroad baggage room and a public storage warehouse are buildings whose business and uses are wholly dissimilar. The former is planned and built to accommodate the current business of a railroad when expeditiously handled, and affords no facilities for storage during long periods of time. The storage warehouse is expressly designed for storage for hire. Storage charges after baggage remains in a baggage room beyond a reasonable time are assessed, not especially for gain, but in order to enable the carrier to clear its baggage rooms, to the end that current business may be more expeditiously handled. That this object may be effected, the railway companies may impose a storage rate higher than that fixed by the ordinary public storage warehouse. If this could not be done, there would be no inducement for the removal of baggage within reasonable time. Another fact which renders storage in a railway depot expensive and risky is that, owing to the daily movements of travel into and out of the same depot, goods in storage are subject to the risk of damage, which often results in the loss to the railroad as well as to the owner of the baggage.

We are therefore of the opinion that, as there is absolutely no evidence tending to establish the reasonableness of the order entered by the Corporation Commission, or that the old rule promulgated by the railway companies is unreasonable, or that it subjects any one to disadvantage, the order of the Corporation Commission must be reversed. It is so ordered. All the Justices concur, except WILLIAMS, J., who concurs in the conclusion reached.



(37 Okl. 614)

LIEBER v. ROGERS, County Treasurer, et al.  
(Supreme Court of Oklahoma. June 11, 1913.)

(Syllabus by the Court.)

CONSTITUTIONAL LAW (§ 100\*) — HOMESTEAD ALLOTTEE—EXEMPTION FROM TAXATION.

A Creek homestead allottee under an agreement incorporated in congressional legislation by which, in part consideration of the relinquishment by the Indians of their claim to the tribal property, they were to receive homestead allotments which should be nontaxable and inalienable for a specified period, acquired a vested right to exemption from state taxation, protected by the federal Constitution against abrogation by Congress during that period. *English v. Richardson*, 224 U. S. 680, 32 Sup. Ct. 571, 56 L. Ed. 949.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 206; Dec. Dig. § 100.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Muskogee County; Chas. Bagg, Judge.

Action by Dora Lieber, a Creek Indian, against Connell Rogers, County Treasurer, and others, to restrain collection of taxes. Judgment for defendants, and plaintiff brings error. Reversed.

W. C. Franklin and P. J. Carey, both of Muskogee, for plaintiff in error.

ROBERTSON, C. On June 23, 1910, the plaintiff, Dora Lieber, a Creek Indian, filed her petition in the district court of Muskogee county, praying for an injunction against Connell Rogers, county treasurer, et al., who were then and there attempting to collect state, county, and township tax levied against her homestead allotment situated in the Creek Nation and Muskogee county. She alleged in her petition that she was a member of the Creek Tribe of Indians and as such had been awarded the land in controversy as her homestead allotment; that the patent thereto had been executed and delivered to her on April 18, 1903, and duly approved by the Secretary of the Interior; that the defendants, notwithstanding the provisions of the treaties between the United States and the Creek Nation, and notwithstanding the provisions of the Constitution of the state of Oklahoma, which exempted said land from taxation, had assessed the same and were about to sell it for state, county, and township taxes, etc. The defendants filed a demurrer to said petition which was sustained by the court over the objections of plaintiff, who brings this appeal and insists that the lower court erred in sustaining said demurrer and in dismissing her petition.

The issue thus presented is no longer open to discussion in this state. The Supreme Court of the United States, in *English v. Richardson*, County Treasurer, 224 U. S. 880, 32 Sup. Ct. 571, 56 L. Ed. 949, disposed of this question by the following language found in the syllabus, to wit: "A Creek homestead allottee under an agreement in-

corporated in congressional legislation by which, in part consideration of the relinquishment by the Indians of their claim to the tribal property, they were to receive homestead allotments which should be nontaxable and inalienable for a specified period, acquired a vested right to exemption from state taxation, protected by the federal Constitution against abrogation by Congress during that period." See, also, *Gleason v. Wood*, County Treasurer, 224 U. S. 679, 32 Sup. Ct. 571, 56 L. Ed. 947; *Choate v. Trapp*, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941.

These authorities are controlling, and the judgment should therefore be reversed and the cause remanded to the district court of Muskogee county, with instructions to overrule the demurrer, and for further proceeding in accordance with the views herein expressed.

PER CURIAM. Adopted in whole.

(37 Okl. 744)

FIRST STATE BANK OF ARDMORE v.  
KING & McCANTS et al.

(Supreme Court of Oklahoma. May 20, 1913.  
Rehearing Denied June 30, 1913.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES (§ 154\*)—RIGHTS OF SUBSEQUENT INCUMBRANCERS—PRIORITIES.

A. took a mortgage on certain chattels in 1908, upon which there was at the time a prior, valid, properly registered mortgage in favor of K. & M. At the time the controversy arose between these parties over the property, the lien of K. & M. had expired as to "subsequent purchasers or incumbrancers of the property in good faith for value," because of a failure to file a renewal affidavit. *Held*, that A., having taken his mortgage with notice of the lien of K. & M., never became, as to K. & M., a "subsequent incumbrancer of the property in good faith for value."

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 263, 269; Dec. Dig. § 154.\*]

2. CHATTEL MORTGAGES (§ 172\*)—REPLEVIN—PARTIES.

Where the holder of a second mortgage takes chattels from the mortgagor by a writ of replevin, the holder of a prior and superior mortgage has the right to be made a party to the replevin suit by the court, under section 5574, Comp. Laws 1909; and the fact that such party styles his pleading an intervention, and is called an intervener, is immaterial.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 306-308, 310-315; Dec. Dig. § 172.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Carter County; S. H. Russell, Judge.

Action by the First State Bank of Ardmore against King & McCants and another. Judgment for defendants, and plaintiff brings error. Affirmed.

W. D. Potter, of Ardmore, for plaintiff in error. Cruce, Cruce & Bleakmore, of Ardmore, for defendants in error.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**BREWER, C.** The particular questions in this case are as to which of two mortgagees has the superior right to certain mortgaged chattels, and whether or not, in a replevin suit by one of the mortgagees for the mortgaged chattels, the other mortgagee can, with leave of court, intervene and have his rights determined.

On December 6, 1906, one T. J. Jordan gave to defendants in error King & McCants, who will hereafter be called interveners, a mortgage on certain live stock situated in the Southern district of Indian Territory, in what is now Carter county, Okl. This mortgage was indorsed on the back, "This instrument is to be filed, but not recorded," and was on said December 6, 1906, filed in the office of the clerk of the United States Court in compliance with the law of Arkansas on the subject, then in force in Indian Territory. On November 29, 1907, King & McCants filed the statutory renewal affidavit required by the law of Arkansas, which had the effect of continuing the lien of the mortgage and notice thereof, as against all persons, for one year. On January 4, 1908, the First State Bank of Ardmore, plaintiff in error herein, who will hereafter be called plaintiff, obtained a mortgage from Jordan on the same property, which was duly filed under the laws of the state of Oklahoma in Carter county. On December 31, 1908, the said First State Bank brought a suit, as plaintiff, in the district court of Carter county in replevin, and obtained possession of the live stock covered by both mortgages, in addition to considerable property not covered by the mortgage of the interveners. After receiving possession of the property, the plaintiff bank proceeded to sell the same under the terms and power of sale contained in its mortgage. While this suit was pending, King & McCants filed, with leave of court first obtained, their petition in intervention, setting up their prior mortgage, together with the renewal affidavit, and alleging a superior lien as to certain of the property involved in the suit. At a trial in the district court, without a jury by agreement of the parties, the court found the issues in favor of the interveners, and that as to a certain horse and some cattle that the lien of their mortgage was prior and superior to that of plaintiff; that defendant Jordan owed interveners \$190 balance on their mortgage, and that plaintiff had sold the property covered by interveners' mortgage and had the proceeds thereof in a like sum in its possession; and that therefore interveners were entitled to judgment against the plaintiff for the said amount of money. Judgment being entered accordingly, the plaintiff brings this writ of error and relies here upon the two propositions mentioned at the beginning of this statement.

[1] (1) The principal question is: Did plaintiff's mortgage, taken at a time when

interveners' mortgage was a valid subsisting lien on the same property, and confessedly prior and superior to plaintiff's, later become superior to the first mortgage, because when suit was brought the year of extension under the renewal affidavit had expired without the filing of a second renewal affidavit by interveners?

Had this entire transaction occurred—that is, had both mortgages been executed and suit brought under the Arkansas law, thus fixing entirely the rights of both parties under that law—the question would be answered in the affirmative on the authority of *McKennon v. May*, 39 Ark. 442, and *Crawford v. Trigg* (Ark.) 15 S. W. 185, and *National S. Com. Co. v. Tallafarro*, 20 Okl. 177, 93 Pac. 983, following those cases. The Supreme Court of Arkansas had consistently held contrary to principle and the weight of authority, as admitted by that court in *Crawford v. Trigg*, supra, that a second mortgage, taken while the first was a valid lien and notice to all the world by virtue of being filed, became superior to the first, if at the time of suit the first mortgage had then been on file more than one year without a renewal affidavit. This holding was a logical sequence of the rule announced by that court that as to subsequent purchasers or incumbrancers in good faith actual notice of a prior mortgage was no notice at all; that the only notice that would bind or affect a subsequent purchaser or mortgagee was the notice arising out of a compliance with the statute. *Main v. Alexander*, 9 Ark. 112, 47 Am. Dec. 732; *Watkins v. Wassell*, 15 Ark. 73; *Hannah v. Carrington*, 18 Ark. 85; *Wright v. Graham*, 42 Ark. 140; *Hobbs v. Young*, 30 Okl. 271, 120 Pac. 946. In other words, that a man might see his neighbor take a mortgage and pay the consideration, and then take a second mortgage, and if he could get it filed before his neighbor's he would be a subsequent incumbrancer in good faith. This ruling, as has been suggested, led to the one in point here, and is contrary to the great weight of authority.

In this case, however, whatever rights the second mortgagee has flow from the law prevailing at the time he took his mortgage; it is an Oklahoma contract, into which the law in force at the time entered. That law, as construed by the courts, said to him when he took his mortgage that a subsequent purchaser or incumbrancer was not such in good faith under the statute (section 4422, Comp. L. 1909), if he took with notice of the prior incumbrance. *Campbell et al. v. Richardson et al.*, 6 Okl. 375, 51 Pac. 659; *Strahorn-Hutton-E. C. Co. v. Florer & Bannerman*, 7 Okl. 499, 54 Pac. 710. Our statute on this subject comes from Dakota. *Campbell et al. v. Richardson et al.*, supra, and the Oklahoma territorial Supreme Court followed the construction placed on it by the Dakota Supreme Court in *Walter A. Wood M. &*



*R. Machine Co. v. Lee*, 4 S. D. 495, 57 N. W. 238.

When plaintiff took his mortgage, interveners' mortgage was a valid subsisting lien, and being of record in compliance with the registration laws was notice to all persons, including plaintiff. This is conceded by plaintiff, but the contention is made that, with the failure of interpleaders to file the second renewal affidavit when required, that thereafter their mortgage was void as to plaintiff; we do not think so. Plaintiff took with notice and in hostility to the first mortgage, and under the law of his contract he never became a subsequent incumbrancer "in good faith for value" as against the first mortgage.

Almost this identical question is presented and so decided in *Howard v. First Nat'l Bank*, 44 Kan. 549, 24 Pac. 983, 10 L. R. A. 537, under practically the same statute. In that case the second mortgage was taken while the first was clearly alive under the Kansas statute, but when the matter got into suit the contention was made that an attempted renewal affidavit was void, and that therefore the first mortgage had expired and let the second one in to the exclusion of the first. After stating this contention the court say: "We don't care to discuss the sufficiency of the affidavit, as we believe with the trial judge that under the circumstances of this case the renewal affidavit is not a material matter. The affidavit could only be material in case there were subsequent purchasers, or mortgagees in good faith." And further: "Because the language of the statute (paragraph 3905, Gen. St. 1889), 'every mortgage so filed shall be void as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year after the filing thereof, unless, within 30 days next preceding the expiration of the term of one year from such filing, and each year thereafter, the mortgagee, his agent or attorney, shall make an affidavit,' etc., does not include intermediate purchasers or mortgagees; that is, purchasers or mortgagees who purchased, or whose mortgages were taken, intermediate the time of filing of such mortgage and the end of the year during which it remains in force without the renewal affidavit, but means only purchasers and mortgagees who purchased or took their mortgages, after the expiration of the year, and after it became necessary to file a renewal affidavit to continue the mortgage in force. This construction is based upon reason. He who purchases after the year has expired during which a mortgage remains in force has a right, in the absence of the renewal affidavit, to suppose the mortgage has been paid, even though not released on the record. But he who purchases before the year expires takes with notice of the mortgage and the rights of the mortgagee under

the same. If, therefore, the mortgagee falls at the end of the year and within the time prescribed by the statute to file his renewal affidavit, the purchaser is not affected adversely by the failure to file the affidavit, though the lien of the mortgage as to him remain intact. His rights are unaffected. They remain the same as before. He has invested nothing upon the strength of the failure of the mortgagee to file his renewal affidavit. At the time he purchased he knew of the incumbrance. This knowledge continues, and he may not be said to be a purchaser in good faith. The same reasoning applies to intermediate mortgagees. But we are not left to a decision of this question solely upon reason or principle. The great weight of authority sustains this view." The following cases seem to be in point: *Meech v. Patchin*, 14 N. Y. 71; *Dillingham v. Bolt*, 37 N. Y. 198; *Newman v. Tymeson*, 12 Wis. 448; *Lowe v. Wing*, 56 Wis. 33, 13 N. W. 892; *Edson v. Newell*, 14 Minn. 228 (Gil. 167); *Frank v. Playter*, 73 Mo. 672; 6 Cyc. 1093, 1094, notes, and cases cited.

[2] (2) Counsel contend in the second point that the intervention in this case was not authorized by law. This, too, must be decided against them. The second mortgagee sued the mortgagor in replevin and took possession of the mortgaged property. It may be true that a judgment in this suit would not have determined the question against the holders of the first mortgage; but they, knowing of the matter, were justified in feeling considerable concern over the situation. Their rights were being interfered with and their security appropriated. Why should they not ask to come into the case? They could have been made defendants under the terms of the statute. Section 5574, Comp. L. 1909, says: "When in an action for the recovery of real or personal property any person having an interest in the property applies to be made a party, the court may order it to be done."

Coming in by a petition in intervention merely made them parties. *Noble v. Worthing*, 1 Ind. T. 458, 45 S. W. 137. Had they not come in, plaintiff would have been forced to stand the expense of another suit over matters that could be determined fully, justly, and without inconvenience in the suit they had begun. In *Clevenger v. Lewis*, 20 Okl. 837, 95 Pac. 230, 16 L. R. A. (N. S.) 410, 16 Ann. Cas. 56, this court, speaking through Justice Williams, has said: "Where the intervenor voluntarily appears and asks to intervene and have his rights determined in said cause, it is certainly within the power of the court to permit it. This jurisdiction ought always to be exercised to the ends of the furtherance of justice." The right of a third party, who is a claimant of the property and its possession, to intervene in a replevin suit therefor is admitted in the following authorities: *Winchester v. Bryant*, 65 Ark. 116, 44



S. W. 1124; Hamilton & Co. v. Duty, 36 Ark. 474; Newton v. Round, 109 Iowa, 286, 80 N. W. 391; Schmitt & Bros. Co. v. Mahoney et al., 60 Neb. 20, 82 N. W. 99; Cobbey on Replevin, 444-446; Wells on Replevin (2d Ed.) page 536.

The suit of plaintiffs was the assertion of a right to the possession of the mortgaged property. The intervention took issue with this assertion and set up a superior right to the animals and their possession. It would be difficult to demonstrate how plaintiff was injuriously affected by the allowance of the intervention. Had it been refused or not resorted to, interveners could have waited until plaintiff established his right to possession, as against the defendant, then brought their suit against plaintiff for possession of the same property, and taken it, or, in case it had been sold, obtained its value to the extent of their interest. The same result was reached.

The cause should be affirmed.

PER CURIAM. Adopted in whole.

(38 Okl. 323)

MILAM et al. v. SMITH-MAUER BROS.  
(Supreme Court of Oklahoma. June 10, 1913.)

(Syllabus by the Court.)

1. TAXATION (§ 452\*)—CREATION OF ASSESSMENT—REPEAL.

Section 1845, Comp. Laws 1909 (section 9, c. 12, Sess. Laws 1897) was repealed by section 1, c. 34, Sess. Laws 1903.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 806, 807; Dec. Dig. § 452.\*]

2. TAXATION (§§ 466, 493\*)—CURE OF ASSESSMENT—APPEAL.

Sections 7601 and 7602, Comp. Laws 1909, do not confer upon the board of county commissioners authority to correct erroneous assessments, upon the ground that property has been assessed to the wrong person; and the district court, on appeal from an order of the board of county commissioners, upon application to correct the assessment, has only the jurisdiction of the inferior tribunal; and, where the ground for the correction is the one named above, the district court on appeal from the board of county commissioners is without power to investigate and determine the question attempted to be presented.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 829, 830, 876-883; Dec. Dig. §§ 466, 493.\*]

(Additional Syllabus by Editorial Staff.)

3. TAXATION (§ 466\*)—CORRECTION OF ASSESSMENT—POWER OF COUNTY COMMISSIONERS.

The authority of the board of county commissioners to correct defects or errors in the assessment rolls is statutory, and must be strictly confined to limits marked out by the statute.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 829, 830; Dec. Dig. § 466.\*]

Error from District Court, Choctaw County; Summers Hardy, Judge.

Action by the Smith-Mauer Bros. against J. W. Milam and others. Judgment for plain-

tiff, and defendants bring error. Reversed and remanded.

I. L. Strange, of Hugo, for plaintiffs in error. Wadlington & Wadlington, of Purcell, for defendant in error.

HAYES, O. J. Defendants in error were plaintiffs in the court below, and will be referred to as such. Their petition, filed in the court against plaintiffs in error, who will hereafter be referred to as defendants, is divided into five paragraphs. In the first paragraph they alleged that the court in which this action was brought did, in the month of January, 1912, in an appeal from the action of the board of county commissioners of Choctaw county, make and enter a judgment correcting the tax rolls of said county so as to place the name of J. P. Dick upon the assessment and tax rolls in lieu of the name of petitioners as the owner of certain property. By the second paragraph they alleged that, notwithstanding said order and judgment of the court directing the defendant Milam, as county clerk, to make such correction of the assessment and tax rolls, said defendant, although notified of the order of the court, still retains the name of petitioners upon said rolls, and refuses to make the correction. In paragraph 3 they allege that the defendant county treasurer has issued a tax warrant against the goods and chattels of petitioners and delivered the same to the sheriff of the county, and that the sheriff of the county, acting under the authority of said warrant, has levied upon the goods and chattels of petitioners, and is now proceeding to subject their property to the payment of taxes that should be assessed against one J. P. Dick, which because of an error in the assessment rolls has been assessed against plaintiffs. By paragraph 4 they allege that by refusal of the county clerk to comply with the judgment and order of the court in correcting the assessment rolls, and by reason of the issuance of the tax warrant by the county treasurer and the levying upon their property, said defendants have obstructed the lawful process and order of the court. By paragraph 5 they allege that because of said acts of the clerk in refusing to obey said judgment and order of the court to correct the rolls, petitioners have been damaged in the sum of \$500. They thereupon pray that the court issue its process to the defendants, county clerk and sheriff, requiring each and all to appear before the court and show cause why they should not be held for contempt, and further pray for a restraining order, restraining the sheriff from proceeding further under the tax warrant issued, and for judgment against the defendant county clerk for their damages in the sum of \$500.

It will be observed from plaintiffs' petition, the contents of which have been, in sub-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
133 P.—3



stance, stated above, that they do not seek by this proceeding to invoke the aid of a court of equity to correct the assessment rolls, but that they are attempting to enforce their rights under a former judgment of the district court of the county by which said rolls were ordered corrected. Defendants meet this issue in their answer by admitting that the district court of Choctaw county, on an appeal from the board of county commissioners, did, on the 9th day of January, 1912, make a certain order requiring defendant county clerk to correct the tax assessment rolls of said county by placing the name of J. P. Dick upon said rolls in lieu of petitioners' names, as the owners of certain property subject to assessment for taxes; but they allege and state for their defense that said order of the court was null and void, because the board of county commissioners from which the appeal was taken was without jurisdiction to make such order, and that the district court, upon appeal, was also without jurisdiction. The judgment appealed from enjoins the sheriff from proceeding further under the tax warrants, adjudges the county clerk in contempt, assesses a fine against him, and awards damages to plaintiffs.

The evidence establishes that the stock of goods seized by the defendant sheriff under the tax warrant was originally assessed for the year 1912 to one J. P. Dick, but thereafter said assessment was changed, and the same was assessed to plaintiffs; and as assessed to them, the tax rolls were made up and delivered to the county treasurer for collection of the taxes. In December, 1912, plaintiffs filed their petition with the board of county commissioners, charging that the property had been erroneously assessed to them, and praying that the tax rolls be corrected, so that the tax should be assessed on the tax rolls against J. P. Dick. The board of county commissioners dismissed the petition of plaintiffs, upon the ground that they were without jurisdiction. From this order an appeal was taken to the district court. That court, on the 9th day of January, 1912, heard the appeal over the objection of the county commissioners to its jurisdiction, and rendered judgment, ordering that the assessment of said stock of goods be changed from plaintiffs to J. P. Dick, and directed defendant county clerk to change said assessment upon the tax rolls accordingly, which the county clerk has failed to do. The county clerk contended that he was not a party to the proceeding before the board of county commissioners, and that the district court never acquired jurisdiction of his person; but the only question we need determine is whether the district court had jurisdiction, on appeal from the county commissioners, to order the correction of the assessment by the county clerk.

[3] The authority of the board of county commissioners to correct the defects or errors in the assessment of tax rolls is stat-

utory, and must be strictly confined to the limits marked out by the statute. *Bostick v. Bd. Co. Com'rs*, 19 Okl. 92, 91 Pac. 1125; 37 Cyc. 1087; *Cooley on Taxation*, p. 537.

[1] Counsel for plaintiffs, in the court below and in this court, have cited section 1845, Comp. Laws 1909 (section 9, c. 12, Sess. Laws 1897) as conferring upon the board of county commissioners authority to make the correction involved in this proceeding, and said section of the statute does authorize the commissioners, upon application of the person injured, to correct the assessment of property, where such property has been assessed to any person who did not own it; but this statute was expressly repealed by section 1, c. 34, Sess. Laws 1903.

[2] Sections 7601 and 7602, Comp. Laws 1909, constituting part of the act of the Legislature which became effective on March 10, 1909, constitute the only statutes upon the subject that have been called to our attention, or that we have been able to find. Section 7601 provides that the board of county commissioners are empowered to correct, either upon the assessment rolls or upon the tax rolls of the county, any double or erroneous assessments of property in the manner provided in the next section, and not otherwise. The succeeding section, to wit, section 7602, provides that upon complaint of the person beneficially interested, when it shall be made to appear by the testimony of the claimant, or at least one reputable witness, borne out by the records of the county, that the same property has been assessed more than once for the taxes for the same year, or that the property has been assessed in the county for taxes for a year to which the same was not subject, the board of county commissioners is empowered to issue to complainant a certificate of error, and to direct the county treasurer to accept said certificate as payment of cash in the amount found by the said board to have been unjustly assessed.

It will be observed that these sections of the statute do not name, as one of the classes of error which the board of county commissioners is empowered to correct, the assessment of property in the name of the wrong person. That the board of county commissioners and the district court were without jurisdiction of the application of plaintiffs for the correction of the assessment is, in effect, determined by *Bostick v. Board of County Commissioners*, supra. That was an application to have corrected by the board of county commissioners an excessive erroneous assessment. The statute then existing upon the subject is to be found in section 5972, *Wilson's Rev. & Ann. Statutes*, and section 5973 of said statute as amended by section 1, art. 1, c. 31, Sess. Laws 1905, which is very similar to the language of sections 7601 and 7602, Comp. Laws 1909, above referred to, except that those statutes authorize four character of assessments to be corrected:



First, a double assessment; second, when the property had been assessed to more than one person for the taxes for the same year; third, when the property had been assessed for the taxes for a year to which the same is not subject to assessment; and, fourth, when the property has been damaged by flood or tornado to the amount of 50 per cent of its value. The Supreme Court of the Territory held, in construing that statute, that the board of county commissioners was without power to correct an assessment upon the ground that it was excessive, and that the district court, on appeal, had only the jurisdiction of the inferior tribunal, and was likewise without power to investigate and determine the question presented. Upon the authority of that case it must be held in the instant case that the board of county commissioners is without authority, under sections 7601 and 7602, Comp. Laws 1909, to correct erroneous assessments, except upon the ground that property has been assessed more than once for taxes for the same year; or, second, that the property assessed in the county for the taxes of a year to which the same was not subject, and that the jurisdiction of the district court on appeal is confined to the subject-matter over which the board of county commissioners has jurisdiction conferred by said statutes. It is not contended in the instant case that the property involved has been assessed more than once for taxes for the same year, or that it was not subject to taxes for that year.

It follows, as a result of these conclusions, that the judgment of the district court, which plaintiffs make the basis of their action, is void; and the judgment appealed from should be reversed and the cause remanded. All the Justices concur, except TURNER and WILLIAMS, JJ., not participating.

(23 Okl. 401)

MISSOURI, K. & T. RY. CO. et al. v.  
STATE et al.

(Supreme Court of Oklahoma. March 11, 1913.  
Rehearing Denied June 24, 1913.)

(Syllabus by the Court.)

1. RAILROADS (§ 58\*)—REGULATION—CORPORATION COMMISSION—STATION FACILITIES—SUFFICIENCY OF EVIDENCE.

Evidence examined, and held sufficient to support the findings of the Commission to the effect that the present union station facilities at Durant are inadequate, and that the population of the city, its importance as a business center and the passenger business of the railways entering it, and the receipts derived therefrom, all justify a union station of the character required by the order appealed from.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 130, 131, 133, 135, 136; Dec. Dig. § 58.\*]

2. RAILROADS (§ 58\*)—REGULATION BY CORPORATION COMMISSION—REASONABLENESS OF ORDER.

In a proceeding before the Corporation Commission, wherein is involved the selection of

a site for a union station at a populous city having three railways, the question of the safety of the employes and patrons of the railways affected should be paramount, and if on appeal it appears from the record that it has been ignored, or, if considered, held to be subordinate to another consideration which affects only certain operating difficulties of an ordinary nature of one of the railways, an order of the Commission with the latter as a basis must be held to be unreasonable.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 130, 131, 133, 135, 136; Dec. Dig. § 58.\*]

Appeal from the State Corporation Commission.

An order was entered by the Corporation Commission requiring the Missouri, Kansas & Texas Railway Company and others to build a joint passenger depot within the City of Durant, and the company named and another appeal. Modified and remanded.

Clifford L. Jackson, W. R. Allen, and M. D. Green, all of Muskogee, for appellant Missouri, K. & T. Ry. Co. W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and Fred E. Suits, both of Oklahoma City, for appellant St. Louis & S. F. R. Co. Chas. West, Atty. Gen., and Chas. L. Moore, Asst. Atty. Gen., for the State. E. R. Jones and J. O. Wilhoit, both of Muskogee (Alexander New and Arthur Miller, of counsel), for appellee Missouri, O. & G. Ry. Co.

KANE, J. This proceeding comes before this court upon an appeal from an order of the Corporation Commission, which requires the Missouri, Kansas & Texas Railway Company, the St. Louis & San Francisco Railroad Company, and the Missouri, Oklahoma & Gulf Railroad Company to build a joint passenger depot at a convenient point for each of said lines within the city of Durant. Upon the hearing before it the Commission, among others, made the following finding: "It appears to be conceded by all the witnesses that the depot now used by the Katy and Frisco would be inadequate to serve all three roads. There is a block of tracks and the M., O. & G. tracks, which roads at that point run nearly north and south. The Frisco crosses both the Katy and the M., O. & G., and its right of way forms the south line of this tract. All of the land between these two roads is owned by the Katy, Frisco, and M., O. & G., with the possible exception of one lot or parts of two lots which lie in the southeast corner next to the tracks of the M., O. & G. Railway. The Katy right of way is sufficient to furnish its part of the ground for the union depot on the proposed site. It may be necessary for the other road to acquire the parts of the lots above mentioned. The present location of the union depot at Durant could not be made as convenient for the public generally as a location at the triangle above described. The main street of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



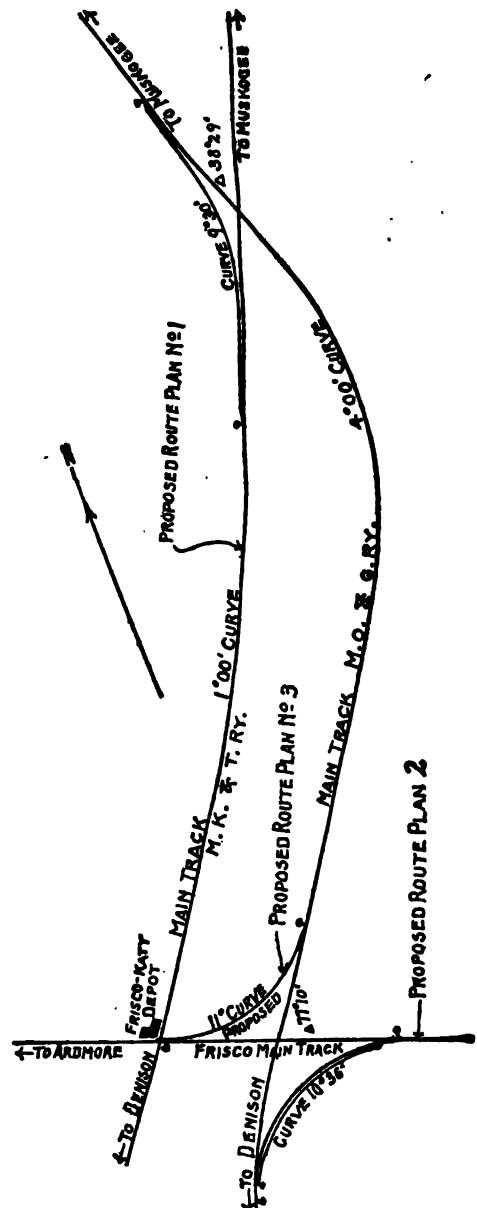
Durant crosses the main line of the Katy and forms the north line of the ground where the present depot is to be located; that is, the location is between the main street on the north and Frisco on the south, the Katy on the west, and the M., O. & G. on the east."

The order issued by the Commission is as follows: "It is therefore ordered that the defendants, the Missouri, Kansas & Texas Railway, the St. Louis & San Francisco Railroad, and the Missouri, Oklahoma & Gulf Railway Companies, shall build and operate a joint or union passenger depot in the town of Durant, to be located east of the tracks of the Missouri, Kansas & Texas Railway, immediately north of the tracks of the St. Louis & San Francisco Railroad, and west of the tracks of the Missouri, Oklahoma & Gulf Railway and south of Main street, at a point to be agreed upon by all of the defendants and the city council of Durant. If the exact location cannot be agreed upon by the complainants and the defendants, the Commission will designate the particular location."

[1, 2] The appellants assign various grounds upon which they contend the order of the Commission ought to be reversed, but owing to the conclusion we have reached it is necessary to notice only one of them: "The order of the Corporation Commission is unreasonable and unjust, and therefore unconstitutional."

In *M., O. & G. Ry. Co. v. State*, 29 Okl. 640, 119 Pac. 117, an order of the Corporation Commission was affirmed, compelling the three railroads herein named to operate a joint passenger depot at the city of Durant at the present site of the depot used by the St. Louis & San Francisco Railroad Company, and the Missouri, Kansas & Texas Railway Company, suitable for the accommodation of the passenger traffic into and out of said city. The present order was made on account of the inadequacy of that depot to meet the requirements of the traveling public, and to overcome certain operating difficulties which the former order imposed upon the Missouri, Oklahoma & Gulf Railway Company. The finding of the Commission in the instant case, to the effect that the present depot is entirely inadequate for the accommodation of the traveling public, and that the population of the city of Durant, its importance as a business center, and the passenger business of the railroads at that point, and their receipts therefrom, all justify a union depot of the character required by the order, is fully sustained by the evidence. But in the selection of a site for the new station there is a paramount consideration to which due weight has not been given, which, in our judgment, renders unreasonable that part of the order which requires the new union station to be erected at the point designated, and that is the increased hazard

to life and limb to which its enforcement would necessarily subject the employes and patrons of the railways involved. From the finding of the Commission and the plat herein set out, it appears that the site selected is situated in a cul de sac formed by the three railways, and that in order to reach the proposed station from any part of the city it would be necessary to cross the main line of at least one of the railroads. This, in itself, would create a very dangerous situation.



But this is not all. The plat indicates the situation of the three railways, the location of the present station, and also the pro-



posed site. The undisputed evidence shows that the Missouri, Kansas & Texas Railway Company operates double main-line tracks through the city, the west track for its south-bound trains and the east track for its north-bound trains. Practically all of the principal business houses of the city are located north of the Frisco and west of the Katy tracks. All of the schools, of which there are six or seven of various grades, except a primary ward school, are west of the Katy tracks, and there is substantial agreement between all the witnesses that from 75 to 90 per cent. of the inhabitants of the city reside west of the Katy tracks; the great majority of this number residing north of the Frisco. Eight passenger trains daily pass through Durant over the Katy and four over the Frisco, and a less number over the Missouri, Oklahoma & Gulf. It is also shown that the Missouri, Kansas & Texas handles a large proportion of the passenger traffic in and out of Durant, that the Frisco is second in that respect, and the Missouri, Oklahoma & Gulf runs but few trains, and handles a comparatively small proportion of the business. It thus appears that if the union station is located on the proposed site that a great majority of the traveling public would be required to cross the Katy main lines in going to and from it; that a smaller number would be required to cross both the Katy and the Frisco; and that only a very small number residing east of the Missouri, Oklahoma & Gulf would be accommodated. That this would materially increase the hazard of a great majority of the traveling public goes without saying. All of the witnesses concede that the crossing of the Katy tracks would be very hazardous; the citizens of Durant, on this point, agree with the representatives of the railroads.

Mr. Whale, a citizen of Durant, engaged in the real estate and loan business, testified as follows: "Q. Mr. Whale, now taking into consideration the interests of the M., O. & G., the M., K. & T., the Frisco, and the people together, where would you say would be the most practical and desirable location, giving everybody due consideration? A. The present location, decidedly so to my mind. Q. Why would you say so? A. Well, for this reason: I don't think that— I feel like, in the first place, the interests of the citizens and the lives of the citizens should be protected. Whenever we put that depot across the Katy, it is going to cause the loss of somebody's life, and we don't know how many, because when it is once located there it is going to be located there for quite a number of years, and there is practically 90 per cent. of the travel from the west side of the town. I think the present location would be decidedly to the best interests of the town and the citizens."

Mr. E. T. Rines, president of the First National Bank of Durant, testified as fol-

lows: "Q. Go ahead and tell the Commission what you think about it. A. Why, the present location is on the west side of the M., K. & T., tracks and north of the Frisco, and the town of Durant has grown up and built with the location of the station there, and consequently the business interests and the majority of the population are on that side of the triangle, and, in my opinion, it is the logical place for the station, for the reason if it is moved across there the traveling public will have to cross the main line and the freight switch on this side to reach this spot of ground where the location is proposed, and by doing so would be greater inconvenienced, and it would be very dangerous."

Mr. T. L. Cox, engaged in the ginning business at Durant, testified: "Q. What objection could you find to the building of a depot north of the Frisco, west of the M., O. & G., and east of the Katy an equal distance from each road, except that passengers would have in getting to the depot, the majority of them, to cross the Katy tracks? That would be the only objection, wouldn't it? A. That is the only objection; yes, sir. Q. Now, then, with a watchman there, and the fact that when people go to the passenger depot they go as passengers, and the freight trains are not passing about the time of the passenger trains, with a watchman there; wouldn't the danger be a minimum? A. Well, it minimizes it to an extent; yes, sir. Now, Mr. Hayes, the Katy Railroad through here is not to be compared with the others in point of danger, because they have got double tracks; that makes it more hazardous at crossing, and they have got more business, more trains."

Mr. E. Ringer, assistant chief engineer of the Missouri, Kansas & Texas Railway Company, testified as follows: "Q. From an operating standpoint, the only reason you can think of that it should not be done is that it would be inconvenient? A. Inconvenient I don't think is the word. I think it would be an added element of danger to every passenger crossing."

The foregoing excerpts from the evidence are but an epitome of the whole record on the question of the desirability of the selected site from the standpoint of safety. So we may say that it is established beyond peradventure that erecting the union depot on the east side of the Katy tracks, at or near the proposed point, would greatly increase the hazard of the employes and patrons of the railways involved. The only consideration that can be urged to offset this extra hazard is that the erection of a union station upon the proposed site would overcome some operating difficulties of the Missouri, Oklahoma & Gulf in the way of getting into and out of the present union station, imposed upon it by the former order of the Commission. The evidence tends to show that the operating in-



conveniences imposed are not of an unusual or difficult nature; that many railroads are required to do the same thing in order to reach union stations in other cities; and that the only substantial drawback directly attributable thereto is that the consumption of time required makes it necessary to have a somewhat slower schedule for its through trains. In our judgment this consideration should have no weight as against the personal safety of the employes and patrons of the respective roads. In *St. L. & I. M. Ry. Co. v. State*, 31 Okl. 509, 122 Pac. 217, Mr. Justice Dunn, after detailing some of the facts and elements to be taken into consideration by the Corporation Commission in determining the location of a railway station, among which safety is given a commanding position, says: "If the considerations referred to are ignored, or, if considered, are held to be subordinate, and other elements are considered as paramount, which are aside from either the public duties, or the interests of the traveling public, or the necessities of the operation of the trains, then an order made with the latter for its basis must be held to be unreasonable and without legal sanction." The destruction of life and limb upon American railways had almost become a scandal before any systematic move was made to remedy the evil. For some time past the railways and other common carriers of passengers have been giving the question of the safety of their employes and patrons the concerted attention its paramount importance demands, and it may be said in passing that several state corporation commissions, among them our own, and other tribunals having jurisdiction over the regulation of the affairs of common carriers in relation to their public duties, have greatly facilitated this humane work. We are in entire accord with this great movement which, in the management of our great passenger-carrying public service corporations, seeks to place safety above utility. It is well for the railroads to provide fast schedules for through trains, and every reasonable aid should be extended for the attainment of that purpose; but safety never should be subordinated to speed.

For the reasons stated, we are of the opinion that the order of the Commission, in so far as it requires the union station to be constructed on the proposed site, is unreasonable and unjust. It is clear to us that a union station should not be located east of the Katy tracks until some provision is made whereby it may be used by the traveling public without greatly increasing the present hazard. The order of the Commission is therefore modified, as herein indicated, and the cause remanded, with directions to take such further action in the premises, not inconsistent with this opinion, as may be necessary. All the Justices concur, except WILLIAMS, J., absent, and not participating.

(43 Okl. 1)

**WILEY v. EDMONDSON.**

(Supreme Court of Oklahoma. May 20, 1913.  
Rehearing Denied June 24, 1913.)

*(Syllabus by the Court.)***1. JUDGMENT (§ 540\*)—RES JUDICATA.**

A judgment rendered by a court having jurisdiction of the subject-matter and the parties is a bar to any future suit between the same parties, or their privies, upon the same cause of action, so long as it remains unreversed, and not in any way vacated or annulled.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1079; Dec. Dig. § 540.\*]

**2. JURY (§ 28\*) — RIGHT TO JURY TRIAL — WAIVER—ACTION BY MINOR.**

A minor, through her legal guardian, having commenced an action, and issues having been framed, the attorney of record for such minor may waive a trial by jury and consent for the issues of fact to be tried by the court.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 176-196; Dec. Dig. § 28.\*]

Error from Superior Court, Muskogee County; FARRAR L. MCCAIN, Judge.

Action by Genevieve Wiley, a minor, etc., against Maggie E. Edmondson. Judgment for defendant, and plaintiff brings error. Affirmed.

Kenneth S. Murchison and Edward C. Griesel, both of Muskogee, for plaintiff in error. James L. Allen, of Muskogee, for defendant in error.

**WILLIAMS, J.** This proceeding in error is to review the judgment of the trial court, wherein the plaintiff in error, as plaintiff, sued on July 14, 1911, the defendant in error, as defendant, in ejectment for the possession of the W.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of section 9, township 14 N., and range 18 E., of the Indian Base and Meridian. The defendant in due time answered (1) by general denial and (2) by pleading specially that on June 18, 1910, in said court, a court of competent jurisdiction, in an action between Genevieve Wiley and Maggie Edmondson and others, said case being numbered 340, said Maggie E. Edmondson recovered a judgment against plaintiff; that said last-mentioned case was for the identical cause of action, said suit being a suit in ejectment and said property being the property set out in the plaintiff's petition, to wit, the W.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of section 9, township 14 N., and range 18 E., and situated in Muskogee county, Okl., and said parties being the identical parties in this suit at issue; that said court in said cause decreed that the said Walter Wiley together with Hattie G. Wiley, his wife, made, executed, and delivered to the defendant, Maggie E. Edmondson, their warranty deed, thereby conveying to the said Maggie E. Edmondson all their right, title, and interest in and to said above-described land, said deed being filed for record on the 16th day of August, 1907, in volume 96, p. 577, in the office of the register of deeds of Muskogee county, Okl.,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



and that said deed was and is a good and valid conveyance, and conveyed all the right, title, and interest of the said Walter Wiley and Hattie G. Wiley, his wife, to the said described land to Maggie E. Edmondson; that Genevieve Wiley was the only heir of the said Walter Wiley, and further decreed that the title to other property, but not the property described above, was vested in said Genevieve Wiley.

The court further decreed that said suit numbered 340 was one for the title and possession of the said above-described property, and that Maggie E. Edmondson was and is the owner in fee simple of said property, and that her title and possession to said property was quieted as against the said plaintiff, Genevieve Wiley, and certain defendants, and they and each of them were forever enjoined from setting up any claim to said premises, or any part thereof, adverse to the title and possession of the said Maggie E. Edmondson. The court further decreed that the said finding and order of said court in said judgment in case No. 340 is final, for the reason that no appeal has been taken therefrom within the period of time by the statute in such cases made and provided, and said judgment is a bar to any recovery on the part of said Genevieve Wiley in this case now pending before the court.

The plaintiff replied to such special pleadings as follows:

"The plaintiff herein, replying to the second defense set forth in the answer of the defendant filed in this cause, states:

"First. That this plaintiff is a minor of the age of three (3) years; is a half-blood Creek Indian; is the daughter of Walter Wiley and Hattie G. Wiley, her legal guardian, and resides in the city of Muskogee with the said Hattie G. Wiley, her mother.

"Second. That Walter Wiley was a full-blood Indian, enrolled as such by the Commission to the Five Civilized Tribes opposite No. 904 on the final rolls of the Creek Indians; that he received as a part of his allotment as such full-blood Creek Indian the W.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of section nine (9), township fourteen (14) N., range eighteen (18) E., of the Indian Base and Meridian, containing 80 acres, more or less, on condition that said land should be and remain inalienable for the period of five (5) years from the 8th day of August, 1902, which period of restriction against alienation was by an act of Congress of April 26, 1906, and before the expiration of the said period of five years, extended for the period of 25 years from the date of said act; that on the 8th day of August, 1907, said Walter Wiley had no capacity under applicable to his lands to make a valid deed, the same being prohibited by express statute of the United States, and the deed set up by defendant as having been made on the 8th day of August, 1907, was absolutely void and incapable of ratification under the stat-

utes of the United States relating to said lands then existing.

"Third. That the judgment set up by the defendant in her said second defense is void as against plaintiff, for the reason that this court in the said cause No. 340, acquired no jurisdiction to render a judgment that would estop this plaintiff from asserting her title by virtue of her inheritance from her father to the lands in question, for the reason that said plaintiff was and is a minor, and the waiver of the trial of any cause in which she was interested by jury, was unlawful, and a denial of a right of said minor under the Constitution and statutes of this state, and of the United States, and that said suit was instituted without the consent or approval of said plaintiff, and without the authority or consent of the probate court having jurisdiction of her person and estate, and because neither in the pleadings nor in the judgment of this court was it suggested to the court that the deed in litigation and under consideration was the deed of a full-blood Creek Indian, and that question therefore was not adjudicated in that proceeding.

"Wherefore, the plaintiff prays judgment against the defendant said second defense notwithstanding."

Defendant filed a demurrer to said reply on the ground that it does not state facts sufficient to constitute a defense, which demurrer was sustained. Plaintiff elected to stand on its reply, and judgment was entered in favor of said defendant.

[1] 1. A judgment rendered by a court having jurisdiction of the subject-matter and the parties on the merits is a bar to any future suit between the same parties or their privies upon the same cause of action in the same or another court so long as it remains unreversed and not in any way vacated or annulled. *Cowan v. Maxwell*, 27 Okl. 87, 111 Pac. 388; *Pratt v. Ratliff*, 10 Okl. 168, 61 Pac. 523; *Thurston v. Washington et al.*, 18 Okl. 362, 90 Pac. 16; *Farmers' State Bank v. Stephenson et al.*, 23 Okl. 695, 102 Pac. 992; *Pettis et ux. v. McLain et al.*, 21 Okl. 521, 98 Pac. 927; *El Reno v. Cleveland-Trinidad Paving Co.*, 25 Okl. 648, 107 Pac. 163, 27 L. R. A. (N. S.) 650; *Woodworth v. Hennessey*, 32 Okl. 267, 122 Pac. 224. In *Goodrum et al. v. Buffalo*, 162 Fed. 817, 89 C. C. A. 525, paragraph 3 of the syllabus, is as follows: "Notwithstanding the general rule that a judgment between the parties *sui juris*, where the court has jurisdiction over the subject-matter and the parties, is conclusive of every question of fact and law in contestation, and cannot be attacked in a collateral proceeding, a judgment rendered by the United States Court in the Indian Territory, under a stipulation between a Quapaw Indian and a white man, submitting, under the provisions of local law, for decision the question of the power of such Indian allottee, or his heir, to convey his or her allotment within the 25-



year period of limitation under Act Cong. March 2, 1895, c. 188, 28 Stat. 907, adjudging the validity of such conveyance, held to be invalid, when interposed to defeat the action of ejectment by the Indian heir against the prevailing party in such proceeding, for the following reasons: (1) Because the stipulation of submission, in the affidavit thereto, omitted a material fact, which is jurisdictional in character; (2) because the stipulation and the judgment do not describe the land in suit; (3) because, as to the power of alienation of such land, the Indian allottee and his or her heir, within the limitation period of 25 years, was not a person *sui juris*, capable of assenting to such submission; and (4) because the United States Court in the Indian Territory, being itself a creature of Congress, with limited jurisdiction, was not invested with jurisdiction to extend by mere decretal order a power of alienation over such lands denied by another act of Congress to such Indian." In the opinion it is said: "Aside from these criticisms, the proceeding was not effectual to create an estoppel by judgment, notwithstanding the well-recognized rule contended for by counsel for plaintiffs in error that judgments of courts of record having jurisdiction over the subject-matter and the parties are binding on the parties and their privies in estate, and can not be attacked in a collateral proceeding. The Indian who consented to the stipulation for submission to the judgment of the court for such purpose was not a person *sui juris*. The submission required, as the very basis of its recognition, the acquiescence and consent of the Indian thereto. The effect of the act of Congress, under which the patent was granted, was to deny to the Indian the exercise of any consent whereby the restriction upon the power of alienation could be removed. If the Indian could create no estoppel against himself or herself by deed of conveyance, how could he or she create an estoppel, by consenting to a judgment as the basis of an estoppel, effectual to alienate the land, in direct contravention of the act of Congress? The allottees of these lands during the probationary period of 25 years were under as much disability to alienate them by contract, or deed, or voluntary submission to a court, as if they had been under the disability of coverture or minority. The disability of the minor to do these things is imposed by the common law. The disability of these Indians is imposed by statute. It must, therefore, logically and necessarily follow that the record and judgment of a court, disclosing on their face that the disqualified Indian was entering into an agreement for submission of the question of his right to dispose of these lands, was in no wise different from such a proceeding participated in by a minor infant. It is a wholesome rule of law that a party may not accomplish by indirection that which he could not do directly. That which

Goodrum undertook to do by stipulation with this Indian could not become the subject of a controversy to be submitted to the jurisdiction of the United States court, so as to build a foundation to support the plea of *res adjudicata*."

The judgments considered in *Goodrum et al. v. Buffalo*, supra, were entered in the United States court for the Northern District of the Indian Territory at Wagoner on May 24, 1899, and at Vinita on October 2, 1899. The members of the Quapaw Tribe of Indians that were parties to that judgment were not then citizens of the United States. The parties to the judgment under consideration in the case at bar were members of the Creek Tribe of Indians, and became citizens of the United States by Act Cong. March 3, 1901, c. 31, U. S. Stat. 1447; *Godfrey v. Iowa Land & Trust Co.*, 21 Okl. 293, 95 Pac. 792; *Heckman et al. v. United States*, 224 U. S. 410, 413, 32 Sup. Ct. 424, 56 L. Ed. 820.

In the case at bar all parties thereto were *sui generis*, the plaintiff in error, Genevieve Wiley, a minor, prosecuting her action by her legal guardian as the laws of the state provided. 2 Rev. Laws of Oklahoma 1910, § 4686. The judgment assailed here was rendered upon the pleadings and issues made after all the parties had been brought in by due process. The district court had jurisdiction not only of the person, but also of the subject-matter, and had the power to determine the validity of the deed or whether the restrictions were off of the land in controversy. Its action was reviewable, not only by this court, but also by the Supreme Court of the United States by proceeding in error or writ of error. No such remedy was invoked. For it to be contended that in this jurisdiction by any means other than by an appeal or proceeding in error said judgment could be reviewed is utterly without foundation. The United States government is not a party to this proceeding. Its right to bring an action to clear the title to this land notwithstanding the judgment complained of is not here involved. *Bowling et al. v. United States*, 191 Fed. 19, 111 C. C. A. 561; *Heckman et al. v. United States*, supra.

[2] 2. Another contention raised as to why the judgment is void is that the plaintiff, a minor, through her guardian or attorney, waived a trial by jury and consented for the issues of fact to be tried by the court. In 1 *Daniel's Chancery Pleading & Practice* (6th Am. Ed.) p. 164, it is said: "It has been said that the infants are as much bound by the conduct of their solicitors as adults; thus an issue *devisavit vel non* may, it seems, be waived on the part of the infant. And so, although the court does not usually, where infants are concerned, make a decree by consent, without an inquiry whether it is for their benefit, yet when once a decree has been pronounced without that previous step



it is considered as of the same authority as if such an inquiry had been directed, and a certificate thereupon made that it would be for their benefit; and in the same manner an order for maintenance, though usually made after an inquiry, if made without, would be equally binding." In *Walsh v. Walsh et al.*, 116 Mass. 377, 17 Am. Rep. 162, it is said: "An infant is ordinarily bound by acts done in good faith by his solicitor or counsel in the course of the suit, to the same extent as a person of full age. \* \* \*" See, also, *Levy v. Levy*, 3 Madd. 245; *Tillotson v. Hargrave*, 3 Madd. 494; *Lippiat v. Holley*, 1 Beav. 423; *Brooke v. Mostyn*, 33 Beav. 457; *Thompson v. Maxwell Grant & Railway Co.*, 168 U. S. 451, 18 Sup. Ct. 121, 42 L. Ed. 539. In *Kingsbury v. Buckner*, 134 U. S. 650, 10 Sup. Ct. 638, 33 L. Ed. 1047, both parties appealed, one being an infant suing by next friend. Under the statute an appeal bond was a prerequisite, unless waived. Both waived the bond. The appeal was cognizable in the Northern Division of the state, but by agreement to facilitate the appealing of the case it was transferred to the Central Division. In the opinion it is said: "It is undoubtedly the rule in Illinois, as elsewhere, that a next friend or guardian ad litem cannot, by admissions or stipulations, surrender the rights of the infant. The court, whose duty it is to protect the interests of the infant, should see to it that they are not bargained away by those assuming, or appointed, to represent him. But this rule does not prevent a guardian ad litem or prochein ami from assenting to such arrangements as will facilitate the determination of the case in which the rights of the infant are involved." The right to waive the appeal bond and to agree to the transfer of the cause to another division was also sustained. We think it is clear that the attorney appearing for the minor, who sued by her guardian, is authorized to waive the right to a jury trial. *Farmers' Nat. Bank of Tecumseh v. McCall*, 25 Okl. 600, 106 Pac. 866, 26 L. R. A. (N. S.) 217; and section 205, *Williams' Anno. Const.*

The judgment of the lower court is affirmed. All the Justices concur.

(37 Okl. 751)

# ST. LOUIS & S. F. RY. CO. v. FISHER.

(Supreme Court of Oklahoma. Feb. 18, 1913.  
Rehearing Denied June 30, 1913.)

(Syllabus by the Court.)

## APPEAL AND ERROR (§ 979\*)—GRANTING NEW TRIAL—EVIDENCE.

Where, in passing on a motion for new trial, it is necessary for the trial court to pass upon conflicting testimony as to a controverted question of fact in order to determine whether, under the law, the movant is entitled to a new trial, and where in such case a new trial is granted, the order will not be reversed by this

court unless there appears a clear abuse of discretion or misapplication of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871-3873, 3877; Dec. Dig. § 979.\*]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Bryan County; A. H. Ferguson, Judge.

Action by Mrs. C. A. Fisher against the St. Louis & San Francisco Railway Company. Judgment for defendant, and from an order granting plaintiff a new trial, defendant appeals. Affirmed.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and E. H. Foster, both of Oklahoma City, for plaintiff in error. J. M. Crook and Utterback, Hayes & MacDonald, all of Durant, for defendants in error.

HARRISON, C. This suit was commenced in the district court of Bryan county in August, 1910, by Mrs. C. A. Fisher against the St. Louis & San Francisco Railroad Company for damages sustained from injuries alleged to have been caused by the negligence of defendant while plaintiff was alighting from defendant's passenger train at Platter, Okl., May 22, 1910. The cause was tried to a jury in May, 1911, resulting in a verdict in favor of the defendant railway company. Whereupon plaintiff filed motion for a new trial, which was overruled. Thereafter, at the same term of court, plaintiff filed a second motion for a new trial, which was granted, and from the order granting a new trial the railroad company appealed.

The only question involved is whether the court abused its discretion in setting aside the verdict and granting a new trial. The doctrine of this court has been that trial courts must necessarily be vested with a reasonable range of discretion in granting or refusing new trials, and where a new trial is granted it has been the rule to affirm such order unless there appears to have been a clear abuse of discretion or misapplication of law.

In *Sharp v. Choctaw Ry. & Lighting Co.*, 34 Okl. 730, 126 Pac. 1025, in opinion rendered August 20, 1912, by Judge Sharp of this Commission, wherein all the authorities on this question from this court and from the courts of Kansas are collated, it was held: "Where a new trial has been granted, both parties have another opportunity to have a fair and impartial trial upon the merits of the action; but where a new trial has been refused, the matter is ended, unless a reversal can be had. And where the court grants a new trial, and it does not affirmatively appear that the same was upon some pure, simple, and unmixed question of law, its decision is of controlling force on appeal, and this court will in such cases reverse only where the trial court has clearly abused its discretion."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



The decision of the court below was not based wholly upon an unmixed question of law. There was a controverted question of fact upon which there was conflicting testimony. The court necessarily had to pass upon such fact in order to determine whether the statute on new trials was applicable; and having passed upon same and determined thereupon that the plaintiff was entitled to a new trial under the statute, in view of the well-settled doctrine of this court, the order will not be disturbed. *Ten Cate v. Sharp*, 8 Okl. 300, 57 Pac. 645; *Yarnell v. Kilgore*, 15 Okl. 591, 82 Pac. 990; *Trower v. Roberts*, 17 Okl. 641, 89 Pac. 1113; *Citizens' State Bank v. Chattanooga State Bank*, 23 Okl. 767, 101 Pac. 1118; *Farmers' & Merchants' Nat. Bank v. School District No. 56 et al.*, 25 Okl. 284, 105 Pac. 641; *Duncan v. McAlester-Choctaw Coal Co.*, 27 Okl. 427, 112 Pac. 982; *Hogan et al. v. Bailey*, 27 Okl. 15, 110 Pac. 890; *Nat. Refrigerator & Butchers' Supply Co. v. Elsing*, 29 Okl. 334, 116 Pac. 790; *Jacobs v. City of Perry*, 29 Okl. 743, 119 Pac. 243; *Chapman v. Mason et al.*, 30 Okl. 500, 120 Pac. 250; *Stapleton v. O'Hara*, 33 Okl. 79, 124 Pac. 55; *Jamleson v. Classen Co.*, 33 Okl. 77, 124 Pac. 67; *Ardmore Lodge No. 9, I. O. O. F., v. Dawson*, 33 Okl. 37, 124 Pac. 66; *Davis v. Stillwell*, 32 Okl. 757, 124 Pac. 74; *Anthony v. Eddy*, 5 Kan. 127; *Field v. Kinnear*, 5 Kan. 233, 238; *Owen v. Owen*, 9 Kan. 91; *Atyeo v. Kelsey*, 13 Kan. 212; *Brown v. Atchison, etc., Railway Co.*, 29 Kan. 186; *City of Sedan v. Church*, 29 Kan. 190; *McCreary v. Hart et al.*, 39 Kan. 218, 17 Pac. 839; *Sanders v. Wakefield*, 41 Kan. 11, 20 Pac. 518; *Willis v. Wyandotte Co.*, 86 Fed. 872, 30 C. C. A. 445. Also *St. L. & S. F. Ry. Co. v. R. S. Card*, 132 Pac. 144, from this court, not yet officially reported.

Therefore, following the rule so often announced in the foregoing cases, the order of the trial court granting a new trial is affirmed.

PER CURIAM. Adopted in whole.

(37 OKL. 517)

MISSOURI, K. & T. RY. CO. v. WALSTON.  
(Supreme Court of Oklahoma. June 11, 1913.)

(Syllabus by the Court.)

1. COMMERCE (§ 8\*)—EXCLUSIVE POWERS OF CONGRESS—INTERSTATE SHIPMENT—CONTRACT LIMITATION OF LIABILITY.

The intent of Congress to take possession of the subject of the liability of a carrier under contracts for interstate shipment, and to supersede all state regulations with reference to that subject, so clearly appears from Carmack Amendment June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1911, p. 1307), to Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169), as to invalidate, as applied to interstate shipments, the provisions of any state law nullifying con-

tracts limiting the liability of a carrier for loss or damage to the agreed or declared value.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 5; Dec. Dig. § 8.\*]

2. CARRIERS (§ 158\*)—INTERSTATE SHIPMENT—CONTRACT LIMITATION OF LIABILITY—VALIDITY.

A stipulation in a carrier's receipt limiting its liability to an agreed or declared value made to adjust the rate is not forbidden by the provision of the Carmack Amendment June 29, 1906 (Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1911, p. 1307]), to Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169), that "no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company, from the liability hereby imposed."

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 663-667, 699-703½, 711-714, 718, 718½; Dec. Dig. § 158.\*]

3. CONTRACTS (§ 167\*)—CONSTRUCTION—PRESUMPTION—STATUTES.

In cases where the subject-matter of a contract is exclusively one of national cognizance, and Congress has enacted a law for its complete regulation, the parties must be presumed to have contracted with reference to the act of Congress and its effect on the subject-matter, and not with reference to the state law, for they could not, by agreement or otherwise, make any other law the applicatory law in the determination of the nature, validity, or interpretation of the contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 750; Dec. Dig. § 167.\*]

4. CARRIERS (§ 158\*)—INTERSTATE SHIPMENTS—CONTRACT LIMITATION OF LIABILITY—EFFECT.

Where there is neither an agreed value, nor a representation of value made in writing by a shipper, and where the bill of lading, executed by the carrier, and signed by the shipper, contains a released valuation to \$5 per hundred-weight, and which bill of lading is accepted by the shipper, without fraud on the part of the carrier, and subsequently the shipper at point of destination pays the freight, based on the released valuation, no recovery can be had, in the event of loss, beyond that authorized under the bill of lading.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 663-667, 699-703½, 708-710, 718, 718½; Dec. Dig. § 158.\*]

5. CARRIERS (§ 158\*)—INTERSTATE SHIPMENTS—CONTRACT LIMITATION OF LIABILITY—EFFECT.

Where two rates on a given article are provided, the shipper may elect which of the rates he desires. If no election is made, and the goods are billed out by the carrier at the lower rate, and the bill of lading signed by the shipper so provides and accords with the published and approved tariffs, in the absence of fraud, the shipper is bound by the terms thereof, and, where loss occurs, he cannot insist on another and different liability from that fixed by the bill of lading.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 663-667, 699-703½, 708-710, 718, 718½; Dec. Dig. § 158.\*]

(Additional Syllabus by Editorial Staff.)

6. COURTS (§ 97\*)—DECISIONS AS AUTHORITY—STATE AND FEDERAL COURTS—CONSTRUCTION OF STATUTES.

Where an act of Congress which governs a contract has been construed by the Supreme Court of the United States, the decision of that court is supreme, and state courts are bound by it.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 329-333; Dec. Dig. § 97.\*]



Commissioners' Opinion, Division No. 1. Error from Superior Court, Oklahoma County; A. N. Munden, Judge.

Action by M. F. Walston against the Missouri, Kansas & Texas Railway Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Clifford L. Jackson, W. R. Allen, and M. D. Green, all of Muskogee, for plaintiff in error. W. P. Harper, of Oklahoma City, for defendant in error.

SHARP, C. On May 8, 1909, plaintiff below, defendant in error, through the agency of his son, shipped two boxes of household goods and one cook stove crated from St. Charles, Mo., to Oklahoma City, Okl. The weight of the goods shipped, according to the original bill of lading covering the shipment, was 1,025 pounds. The freight rate charged, and afterwards paid at point of destination by the plaintiff, was \$1.30 per hundredweight. The two boxes of household goods were never delivered, and plaintiff brought suit to recover their value. On the part of the defendant it was contended that the shipment was made upon a released valuation of \$5 per hundredweight, and that in no event would the carrier be liable beyond the value of the shipment, based upon said released valuation. The bill of lading recited that the goods to be shipped were received subject to the classifications and tariffs in effect on the date of the issue of the original bill of lading. In said bill of lading it was provided that: "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona-fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classifications or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence." No valuation in fact was represented in writing by the shipper, nor was there any agreement as to the value of the property at the time of the shipment. There was at the time on file in the office of the carrier at St. Charles, Mo., certain approved classifications and tariffs governing interstate shipments of the character in question, from which it appears that St. Charles was situated in what was known as St. Louis territory, and that the first-class rate on freight shipments from St. Louis territory to Oklahoma City was \$1.30 per hundredweight, or the exact rate inserted in the bill of lading by the carrier's agent at point of shipment. It further appears that, under the tariffs then in force, two rates on household goods were provided. In addition to the one we

have mentioned, the second provided a rate of 1½ or \$1.95 per hundredweight, where there was no release of valuation by the shipper. The rate charged plaintiff, and by him paid, was that properly chargeable under the tariffs in case of released valuation.

[1] Neither the law of Missouri, the point of shipment, nor the law of Oklahoma, the place of destination, furnish the law by which to determine the carrier's liability. The law controlling the respective rights of the shipper and carrier is that enacted by Congress regulating interstate commerce upon which Congress pursuant to its constitutional authority, after long delay, has assumed jurisdiction. See Act June 29, 1906, 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1911, p. 1288), being an act to amend the Interstate Commerce Act of 1887 (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]). On account of the passage of the amendatory act above mentioned, the state, under its police power, has ceased to have the authority to legislate concerning contracts made by carriers pertaining to interstate shipments. *St. Louis & S. F. Ry. Co. v. Bilby*, 130 Pac. 1089. See, also, *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. —; *Chicago, St. P. M. & O. Ry. Co. v. Latta*, 226 U. S. 519, 33 Sup. Ct. 155, 57 L. Ed. —; *Chicago, B. & Q. Ry. Co. v. Miller*, 226 U. S. 513, 33 Sup. Ct. 155, 57 L. Ed. —; *Kansas City S. R. Co. v. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. —; *Missouri, K. & T. Ry. Co. v. Harriman Bros.*, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. —, all being cases decided during the present year by the Supreme Court of the United States, construing at length the provisions of the foregoing acts of Congress.

[6] We must therefore recognize that, where an act of Congress which governs a contract has been construed by the Supreme Court of the United States, the decision of that court is supreme, and the courts of this state are bound by it. *Southern Ry. Co. v. Harrison*, 119 Ala. 539, 24 South. 552, 43 L. R. A. 385, 72 Am. St. Rep. 936. In the *Adams Express Co. v. Croninger* Case, supra, the manifest intent of Congress to take possession of the subject of the liability of a carrier under contracts for interstate shipment, and to supersede the state regulations with reference to that subject, is announced, and the conclusions are supported by much authority.

[2-5] The freight rate covering the shipment in question was that approved by the Interstate Commerce Commission, and was based upon a release of the carrier from liability for any loss or damage the property might sustain in excess of \$5 per hundred pounds. This contract, limiting the liability of the carrier, is not forbidden by the provision of the Carmack Amendment of June 29, 1906, to Act February 4, 1887, § 20, and was therefore the legitimate subject-matter



of contract. Keeping in mind that the tariff sheets filed with the commission and with the carrier at point of shipment showed two rates on household goods, a lower rate when released to \$5 per hundred, and a higher rate when not so released, and the further fact that the rate indorsed on the bill of lading and paid by the shipper was the lower rate so prescribed by the rate sheets, we cannot escape the conclusion that the shipper, as well as the carrier, is bound thereby. We may here say, as it was said in *Kansas City S. R. Co. v. Carl*, supra: "In the light of the published tariffs and of the rate applied to this shipment, the two papers, read together, plainly mean that the household goods included in the two boxes and one barrel were valued, for the purpose of coming under the lower rate at \$5 per hundred."

Neither is the question of the carrier's liability affected by the fact that the plaintiff had no actual knowledge of either the existence or contents of the tariffs and classifications at the time in force. He was charged with knowledge of the lawful rate. As was said in the *Carl Case*: "The defendant in error must be presumed to have known that he was obtaining a rate based upon a valuation of \$5 per hundredweight, as provided by the published tariff. This valuation was conclusive, and no evidence tending to show an undervaluation was admissible."

In the same case it was further said in this connection: "The valuation the shipper declares determines the legal rate where there are two rates based upon valuation. He must take notice of the rate applicable, and actual want of knowledge is no excuse."

\* \* \* When there are two published rates, based upon difference in value, the legal rate automatically attaches itself to the declared or agreed value. Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact, and that which the shipper must pay. The shipper's knowledge of the lawful rate is conclusively presumed, and the carrier may not be required to surrender the goods carried upon the payment of the rate paid, if that was less than the lawful rate, until the full legal rate has been paid." In *Missouri, K. & T. Ry. Co. v. Harriman Bros.*, supra, it was said: "In any event the rate sheets do provide for a choice between two rates, one with and one without a declared valuation. In one case the carrier is liable for whatever loss or damage the shipper sustains, and in the other its liability is limited to the valuation upon which the rate was based. The ground upon which the shipper is limited to the valuation declared is that of estoppel, and presupposes the valuation to be one made for the purpose of applying the lower of two rates based upon the value of the cattle." Thus it is

clear that if the shipper's knowledge of the lawful rate is to be conclusively presumed, and a shipment containing the lower rate, with released valuation, is made and acquiesced in by the shipper, who afterwards upon presentation of the freight bill at the point of destination pays the freight, based on the lower charge, though without knowledge of the legal effect either of the acceptance of the bill of lading or the payment of the freight charges, no recovery can be had beyond that authorized by the tariffs and included in the bill of lading. Neither the carrier nor the shipper has aught to do with fixing the rates. *Georgia R. Co. v. Creety*, 5 Ga. App. 424, 63 S. E. 528. The shipper can elect which of the two rates he desires. If no election is made, and the goods are billed out by the carrier at the lower rate, the shipper, in the absence of fraud, and particularly where without objection the lower rate of freight was afterwards paid, is bound by the terms thereof. If by his passive conduct he elects to take advantage of the lower rate, he cannot then insist upon another and different liability on the part of the carrier. Plaintiff's right to recover cannot extend beyond the released valuation of the goods lost, and the freight paid thereon, and the judgment of the court allowing a recovery based upon actual valuation cannot be upheld.

The judgment of the lower court should be reversed, and the cause remanded for a new trial.

PER CURIAM. Adopted in whole.

(37 Okl. 580)

In re BOHANAN. WATKINS v. ENLOE et al. WELCH v. WATKINS et al.  
(Supreme Court of Oklahoma. June 11, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 151\*)—RIGHT TO APPEAL—"PARTY AGGRIEVED"—GUARDIAN SALE.

Under sections 5451, 5452, Comp. Laws 1909, authorizing an appeal from a judgment, order, or decree of the county court against or in favor of directing the sale or conveyance of real property to any party aggrieved thereby, the highest responsible bidder at a guardian's sale, whose timely bid in writing is rejected by the county court, may appeal from an order confirming a sale and directing the issuance of a deed to a lower bidder made over his objections.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 947-952; Dec. Dig. § 151.\*

For other definitions, see Words and Phrases, vol. 1, pp. 271-273; vol. 8, p. 7569.]

2. GUARDIAN AND WARD (§ 105\*)—CONFIRMATION OF SALE—NEW BIDS.

Under section 5323, Comp. Laws 1909, where, upon a hearing on return of sale, an advanced bid of 10 per cent. more in amount than that named in the return is made to the court in writing by a responsible person, the court is not limited to the alternative of accepting the first offer that may be made, or ordering a new

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



sale, but should receive as many bids as may be made, and upon a consideration of all the bids determine whether to accept the highest bid submitted by a responsible bidder, or order a new sale.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 383-389; Dec. Dig. § 105.\*]

### 3. GUARDIAN AND WARD (§ 105\*)—CONFIRMATION OF SALE—NEW BIDS—DISCRETION.

The statute contemplates that the sale should be made to the highest responsible bidder, submitted at the time of the hearing, else that a new sale be ordered; and it is an abuse of discretion on the part of the county court to refuse to accept a much higher bid, submitted by a responsible bidder, momentarily after the court had accepted a former bid, and before the entry of an order confirming the sale and directing the issuance of a deed.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 383-389; Dec. Dig. § 105.\*]

### 4. GUARDIAN AND WARD (§ 97\*)—GUARDIAN'S SALE—RECEPTION OF BIDS.

Much liberality should be indulged in the manner of receiving bids, to the end that the estate of the minor be made to bring the best possible price.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 365-368; Dec. Dig. § 97.\*]

### 5. ABATEMENT AND REVIVAL (§ 69\*)—GUARDIAN'S SALE—CONFIRMATION PROCEEDINGS—DEATH PENDING APPEAL.

Where an order is made by the county court confirming a guardian's sale of real estate, and directing the execution of a deed, and on appeal to the district court the judgment of the county court, after hearing, is sustained, and an appeal is then taken to the Supreme Court, and the judgment below superseded, and where, pending the appeal, the ward dies, the proceedings cannot longer be sustained and should be dismissed.

[Ed. Note.—For other cases, see *Abatement and Revival*, Cent. Dig. §§ 349-354; Dec. Dig. § 69.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Le Flore County; M. E. Rosser, Judge.

In the matter of the guardianship of Luther Bohanan, a minor. From an order confirming sale and directing issuance of a guardian's deed to Wade Enloe, F. E. Watkins brings error, and W. A. Welch, Jr., guardian, files cross-petition in error. Reversed and remanded, with instructions to dismiss.

T. L. Wright, W. F. Bowman, and Thos. Norman, all of Ardmore, for plaintiff in error. Taylor & Moore, of Poteau, for defendants in error. W. C. Beesley, of Poteau, for W. A. Welch, Jr., guardian.

SHARP, C. [1] It is first insisted by the defendant in error Wade Enloe that the plaintiff in error F. E. Watkins was not such a party to the proceedings had in the county court as would entitle him to an appeal from the order of confirmation, directing the issuance of a deed to the said Wade Enloe. Our statutes (Comp. Laws 1909, §§ 5451, 5452) authorize an appeal to the district court from any judgment, decree, or order

of the county court against or in favor of directing the partition, sale, or conveyance of real property to any party aggrieved, save where the decree or order complained of was rendered or made upon his default. If, as contended for, the plaintiff in error was the highest bidder at the hearing had on the return of the sale, obviously he was aggrieved by the order of the court confirming the sale to a lower bidder, for by the decree of confirmation his right to acquire title at said sale was adversely determined. It was unnecessary under section 5452, supra, that the party aggrieved be interested in the estate or funds affected by the decree or order, as an heir, legatee, devisee, creditor, or one having a similar interest. In legal acceptance a party is aggrieved by a judgment or decree when it operates on his rights of property, or bears directly upon his interest. *Adams v. Woods*, 8 Cal. 306; *Lamar v. Lamar*, 118 Ga. 684; *McFarland et al. v. Pierce et al.*, 151 Ind. 546, 45 N. E. 706, 47 N. E. 1; *Tillinghast v. Brown University*, 24 R. I. 179, 52 Atl. 891.

Sections 5451 and 5452, as concerns the exact question here presented, are very similar to sections 938 and 963 of the Code of Civil Procedure of California. Construing these sections in connection with section 1553 of the California Statute, which is the same as section 5324, Comp. Laws 1909, it was said by the Supreme Court in *Re Pearson's Estate*, 98 Cal. 603, 33 Pac. 451: "The order confirming the sale and directing a conveyance to be made is appealable. Section 963 (3), Code Civil Proc., authorizes an appeal to be taken from the superior court to the Supreme Court 'from a judgment or order \* \* \* against or in favor of directing the partition, sale, or conveyance of real property.' There is no limitation upon the character of the proceeding in which the order directing the conveyance is made, and we are not authorized to limit the right of appeal more than it has been limited by the Legislature. The provisions of section 1553, Id., are not a limitation of the right of filing objections to the confirmation of the sale, but an extension of such right to those who are 'interested' in the estate. The right of the purchaser to be heard at the hearing upon the return is implied in the provision of the previous section, which requires public notice of the day fixed for the hearing to be given, and his right to be heard carries with it the right to make objection to the confirmation, and section 938, Id., gives the right of appeal to any party 'aggrieved' by the action of the court, whether he be 'interested' in the estate or not." See, also, *Estate of Corwin*, 61 Cal. 160; *In re Reed's Estate*, 3 Cal. App. 142, 85 Pac. 155; *Hammond v. Callleaud*, 111 Cal. 206, 43 Pac. 607, 52 Am. St. Rep. 167; *In re Jack's Estate*, 115 Cal. 203, 46 Pac. 1057; *In re Griffiths' Estate*, 127

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Cal. 543, 59 Pac. 988; In re Robinson's Estate, 142 Cal. 152, 75 Pac. 777; In re Leonis' Estate, 138 Cal. 194, 71 Pac. 171; In re Auerbach's Estate, 23 Utah, 529, 65 Pac. 488. In Re Guardianship of Billy et al., 34 Okl. 120, 124 Pac. 608, this court held that under the fifth subdivision of section 5451, supra, an appeal could be prosecuted to the district court by a purchaser at a guardian's sale from an order refusing to confirm the sale. The statute is one that should be liberally construed. In the administration of justice, full opportunity for the review and correction of errors should be afforded, not only to the minor, but to the highest bidder as well. The statute giving the right of appeal to an aggrieved party is sufficiently comprehensive to accord to plaintiff in error an opportunity to have reviewed the decree complained of.

[2-4] The remaining question for consideration is: Was there an abuse of discretion on the part of the county court in accepting the bid of defendant in error for \$5,100, and declining to receive or consider the bid of plaintiff in error for \$5,500? Section 5323, Comp. Laws 1909, provides that, upon the hearing of the return of sale, it becomes the duty of the court to examine said return and witnesses in relation thereto, and if the proceedings had were unfair, or the sum bid disproportionate to the value, and if it appears that a sum exceeding the return bid at least 10 per cent. exclusive of the expenses of a new sale, may be obtained, the court may vacate the sale and direct a new one to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place. But, if an offer of 10 per cent. more than the amount named in the return be made to the court in writing by a responsible person, it then rests in the discretion of the court to either accept such offer and confirm the sale to such person or to order a new sale. The guardian in the present case made his return in writing, reporting a sale to the defendant in error of the lands of his ward for \$4,100. The return coming on to be heard on July 26, 1910, the plaintiff in error submitted in writing a bid of \$4,525. Thereupon the defendant orally offered to bid \$4,600, and the court directed that additional bids must be in writing, and requested the parties to so submit their highest and best bids. Whereupon the defendant in error submitted a new bid of \$5,100; the plaintiff in error, a new bid of \$5,000. The court then stated that the said defendant in error was the highest bidder, and accepted the bid, and ordered the confirmation of the sale to the said defendant in error Enloe. Immediately thereupon plaintiff in error, acting through his attorney, objected to the confirmation of the sale of said lands to said defendant in error, and filed in said court on behalf of the plaintiff in error a raised bid in the sum of \$5,500. This

written bid, though filed in court at the time, the court refused to receive or consider, and proceeded to confirm the sale to the said Wade Enloe for the sum of \$5,100. It was shown that Watkins was a responsible person, and that his attorney offered to and did make a deposit in a local bank of 10 per cent. of the amount of the bid. The statute authorizing competitive bidding at the hearing to be had on the return of public sales conducted by guardians contains little in the way of procedure. But there is sufficient to indicate the legislative intent, that the primary duty of the court in such cases should be, and is, to fully protect the interests of the minor. Proper regard, however, should at all times be had for the rights of the prospective purchaser, who is the highest and best bidder at the sale, for he has rights, both legal and moral, which should receive due consideration in determining whether or not a confirmation of the sale will be ordered.

The case is presented to us without substantial conflict in the testimony. The county judge, who was a witness in the district court, testified concerning the sale: "If there was any further bidding to be done that I would not cry it off at public sale, it was not my policy, didn't think it was the law." It is not in the discretion of the county court to receive increased bids; that duty is mandatory. The statute, however, provides no procedure for receiving competitive bids, other than the original raised bid or bids. While it is not made the duty of the county court to cry off such sales, it is his right to receive all bids submitted on the hearing, and to afford a sufficient opportunity to all bidders, or those present desirous of bidding, to submit one or more bids. The object of the statute in allowing increased bids to be filed is that the court may secure as high a price for the land as possible; and if this can be accomplished without the necessity of ordering a new sale, thereby subjecting the estate to additional expense and delay, it is his duty to do so. Immediately upon opening the two bids, that of Enloe for \$5,100 and of Watkins for \$5,000, the representative of the latter objected to the lands being knocked off to the former, and promptly submitted in writing a further increased bid in the sum of \$5,500. This bid the court refused to receive or consider, though it was permitted to be filed. At the time no entry of the order of confirmation to the defendant in error had been made. The whole proceedings occupied the short space of from 15 to 30 minutes time. We are not disposed to consider technicalities in the manner of closing bids, particularly where no procedure is fixed by statute, or formal rule of court. Great liberality should be indulged in the manner of receiving bids, to the end that the best price possible may be obtained. The original increased bid of plaintiff in error caused defendant in error to increase his own bid



\$1,000, and we think the court should either have accepted the latter bid of the plaintiff in error of \$5,500, or in the exercise of a sound judicial discretion ordered a new sale. Clearly it was error, unless upon the technicality that the bidding had closed, to order confirmation of the sale to the second highest bidder at a difference of \$400 in the purchase price. Our views of the procedure that should obtain in such cases find support in *Re Griffith's Estate*, 127 Cal. 543, 59 Pac. 988, where it is said: "The provisions in section 1552, giving the court a discretion to accept the offer of an advanced bid, or to order a new sale, does not limit its exercise of that discretion to the alternative of accepting the first offer that may be made or ordering a new sale, but it is authorized to receive as many bids as may be made, and, upon a consideration of all the bids, may then determine whether to accept the highest, or to order a new sale. The object of the provision in the above section is that the court may secure as high a price for the property as possible, and, if it can accomplish this result without subjecting the estate to the expense and delay attendant upon a new sale, it would seem to be in the exercise of a wise discretion to permit a competitive bidding for the property at the hearing upon the return." See, also, *Griffin, Ex'r, v. Warner et al.*, 48 Cal. 383; *Estate of Durham*, 49 Cal. 490; *Perkins v. Gridley*, 50 Cal. 97; *In re Jack's Estate*, 115 Cal. 203, 46 Pac. 1057; *In re Leonis' Estate*, 138 Cal. 194, 71 Pac. 171; *In re Robinson's Estate*, 142 Cal. 152, 75 Pac. 777; *In re Reed's Estate*, 3 Cal. App. 142, 85 Pac. 155.

[5] Since the submission of this case it has been brought to our attention that Luther Bohanan, the ward, died in Le Flore county, July 25, 1911, and that on the 27th day of December, 1911, one J. W. Bryan was by the county court of Le Flore county appointed administrator of his estate. Application was filed in this court by said administrator on April 24th last to revive the cross-appeal prosecuted by W. A. Welch, Jr., guardian of the said Luther Bohanan, in the name of J. W. Bryan, administrator of the estate of Luther Bohanan, deceased, or that the name of said J. W. Bryan, administrator as aforesaid, be substituted in lieu of the name of said W. A. Welch, Jr., guardian of said Luther Bohanan, a minor, and thereupon the said administrator be permitted to prosecute the cross-appeal. Notice to revive or substitute as might by the court be deemed proper has been duly served upon all parties to the proceedings in this court, and the written consent to the making of the administrator a party and reviving the cross-appeal in his name has been filed by plaintiff in error, Watkins. The proceedings as originally instituted was an application on the part of the guardian for an order to sell real estate of his ward for the purpose of investment,

and for the support, maintenance, and education of said minor. The death of the ward necessarily terminated the guardianship, except for the purpose of final settlement by the guardian. *Missouri, O. & G. Ry. Co. v. Gentry*, 31 Okl. 579, 122 Pac. 537. The death of the ward likewise terminated any necessity for the sale of his estate for either of the purposes named. Being, dead, no title to his lands could be acquired through the instrumentality of a guardian's sale. The consent or passiveness of the parties to the appeal cannot convert the present action into an administration proceedings. A case similar in some of its aspects was before the Supreme Court of California in *Re Livermore's Estate*, 132 Cal. 99, 64 Pac. 113, 84 Am. St. Rep. 37. The application for the sale was made after the death of the ward, who before her death attained her majority. The order of sale was made by the superior court, and in reversing the case it was said by the court on appeal: "The foregoing proceeding is unique in this state, and the order made by the trial court cannot find support in the law. The title furnished to a purchaser at the sale by the deed of the guardian would not be worth a dollar. The proceedings here taken for the sale were had under the Code provisions pertaining to guardianship matters, and as to a sale of real estate those proceedings only contemplate a case where there is a living ward, a living ward not only when the proceedings are inaugurated, but up to and including the moment the deed is made. When the guardian executes the deed, he executes it for and in the place and stead of his ward, and the moment that ward is dead his power to execute the deed is gone. He has no more power to execute a deed under these circumstances than would an attorney in fact after the death of his principal. It is unnecessary to consider here what a court of equity might do under the circumstances presented by the facts of this case, in aid of the probate jurisdiction of the superior court, for here the statutory procedure laid down in the Code in guardianship proceedings alone has been followed, and the sale is asked under that procedure. The guardian, as such, is attempting to make the sale, and the court is well assured it cannot be done. In *Alford v. Halbert*, 74 Tex. 354, 12 S. W. 76, a case similar in principle to the one at bar, the court said, in speaking of the efforts of a guardian to recover from the ward's estate the amount found due him by the probate court: 'We think the only course left her was to administer in the proper court upon the estate of the deceased ward.'"

The decree of the county court having been stayed, no deed was made in pursuance thereof. None can now be executed on account of the death of the ward, and the cause should be reversed, with instructions to dismiss the petition.

PER CURIAM. Adopted in whole.



(37 Okl. 583)

**EMINENT HOUSEHOLD OF COLUMBIAN WOODMEN v. PRATER.**

(Supreme Court of Oklahoma. June 11, 1913.)

*(Syllabus by the Court.)***1. EVIDENCE (§ 374\*)—INSURANCE—APPLICATION.**

Plaintiff sued to recover on an insurance policy; the insurance company admitted the execution of the policy, the death of the insured and the identity of the beneficiary, but alleged fraud in the procurement of the policy by the insured in that the warranties contained in the application were false and untrue, etc. At the trial the application was offered in evidence, but rejected, on the objection of the beneficiary, on the ground that the same was signed by mark and such signature had not been properly proved; it was shown by the examining physician that he had written the answers to the questions, and had signed his name to the bottom of the same over the word "witness," but he testified that he did not sign the insured's name, nor witness her mark, nor did he see the insured sign, nor any one else sign for her. It was shown also that the insured was an educated woman and could write, and that she always signed her name by writing it in full, and never signed by mark. *Held*, that the court did not err in refusing to allow said application to be introduced in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1583, 1584, 1587-1612; Dec. Dig. § 374.\*]

**2. INSURANCE (§ 668\*)—DIRECTION OF VERDICT—PROOF OF FRAUD.**

Fraud is a fact to be proved as any other fact, by competent evidence; and, where there is no evidence in the record tending in any wise to establish that fact, which was the only defense relied upon in the case, it was not error for the court to direct a verdict for the plaintiff.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.\*]

**3. TRIAL (§ 141\*)—DIRECTION OF VERDICT—EVIDENCE.**

Where there is enough competent evidence in the record to support a verdict, and there is no conflicting evidence against plaintiff's contentions, it is the duty of the trial court to direct a verdict accordingly, on request of plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. § 141.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Carter County; S. H. Russell, Judge.

Action by William H. Prater against the Eminent Household of Columbian Woodmen. Judgment for plaintiff, and defendant appeals. Affirmed.

Dorsey, Brewster, Howell & Heyman, J. B. Moore, and J. A. Bass, all of Ardmore, for plaintiff in error. H. C. Potterf and E. A. Walker, both of Ardmore, for defendant in error.

ROBERTSON, C. This was an action to recover \$717.50, alleged to be due the defendant in error from the plaintiff in error, by virtue of a certain policy of insurance issued to Mrs. Elizabeth Prater, under date of December 19, 1905, and in which the defend-

ant in error, Wm. H. Prater, was named as beneficiary. The petition in the lower court was filed on December 17, 1906. The amended answer thereto was filed January 13, 1908. A reply was filed on June 3, 1910. The cause was tried to a jury on June 20, 1910, and resulted in a directed verdict for the plaintiff in error for the full amount claimed. The insurance company, feeling aggrieved by the judgment, brings error, and in its petition in error sets up eight different assignments of error, but in its brief has waived consideration of all save two, which are: "First. The court erred in refusing to admit in evidence competent and proper evidence offered by the plaintiff in error, by refusing to allow plaintiff in error to introduce in evidence the application of Mrs. Elizabeth Prater for a policy of insurance in the Eminent Household of Columbian Woodmen, plaintiff in error herein. Second. The court erred in overruling and in not granting the motion of the plaintiff in error for a new trial."

[1] In support of the first assignment the plaintiff in error contends that the court erred in refusing to admit in evidence the so-called application of Mrs. Elizabeth Prater for the policy of insurance. This application consists of a purported statement by the insured showing, as is usual in such applications, the date of her birth, occupation, full duties, date of last serious illness, name of attending physician, and such like questions, tending to recite a history of her life, upon which the insurance company determined whether or not she was a proper subject for insurance. The name of the applicant was attached to the application, and it shows that she signed the same by mark. Dr. William T. Bogle's name also appears near the name of the applicant, with the word "witness" attached, inferring that he signed the same as a witness to the applicant's signature. At the trial the defendant in error, who was plaintiff below, offered in evidence the policy of insurance, the execution of which was admitted and in no wise contested by the insurance company. Reference is made in said policy to an application, but no such application was attached to or made a part of said policy. It was also admitted by the insurance company at the trial that the insured was dead, and that the defendant in error was the beneficiary named in the policy. After the introduction and reception of the insurance policy and the admissions by the insurance company as aforesaid of the death of the insured, the execution of the policy, etc., the plaintiff in error rested his case, whereupon the insurance company offered in evidence the above-mentioned application for insurance, which, on objection by plaintiff was, by the court, rejected for the reason that its execution, having been denied under oath, was not in any manner proved, and was therefore incompetent, im-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



material, and irrelevant. Dr. Bogle was called as a witness in behalf of the insurance company, and testified, among other things, that he was acquainted with Mrs. Elizabeth Prater in her lifetime; that he was employed by the defendant company as a medical examiner at the time he examined Mrs. Prater for insurance, at the time mentioned in the proffered application; that said examination was made by questions and answers; that the answers in the application in question were, he thought, in his handwriting; he recognized his signature at the bottom of the application as genuine; he testified that there was no one present except himself and Mrs. Prater at the time the examination was made; that he propounded the questions to her; that he did not see her sign her name by mark or otherwise; that he did not sign her name for her; that he did not know who did sign it. The plaintiff below, Wm. H. Prater, testified in his own behalf, among other things, as follows: That he was a son of Elizabeth Prater, deceased; that she was educated and could write; that he knew her signature; that the signature purporting to be hers, attached to the application offered in evidence by the insurance company, was not her signature; that she did not sign by mark, but always wrote her name.

[2] The insurance company sought to evade liability under the policy of insurance on the ground of fraud, and specifically alleged that the answers made to the questions in the said application were false and untrue, and were known to be false and untrue when made by Mrs. Prater at the time of the execution of said application, and further alleged that said policy had been issued by virtue and on account of the false and fraudulent representations and warranties therein, made by the insured. But the foregoing evidence was all that was offered tending to establish the fraud alleged in the answer. There was no attempt made to supply the information contained in the application, by secondary evidence or otherwise. There was an attempt made to offer in evidence the report of the worthy physician, which was made on the reverse side of the application for insurance. Objection was made on the ground that the physician having testified that he was the agent of the defendant company, and there having been shown no fraud or collusion existing between the said agent and the insured, the report of said physician would be immaterial and would have no bearing upon the issues in the case after the policy had been issued and delivered, which objection was properly sustained, with exceptions to the insurance company. The report of this worthy physician is directed to the insurance company, and is in the nature of a confidential statement and report of the physical examination of the applicant by the doctor, as the agent for the insurance company; there is not a word of testimony in the record tending to show that the insured

ever saw the worthy physician's report, or that she knew the contents thereof; therefore it was clearly incompetent for that its contents, whatever they may have been, could not bind the insured in any way.

Fraud is a question of fact, the burden of proving which rests in this case upon the defendant company. Fraud is never presumed but must be proved by competent evidence by the party alleging the same. *In this case there is absolutely not one word of testimony, competent or otherwise, tending to show fraud on the part of the insured,* and the court committed no error in refusing to admit the application offered by the insurance company, for the reason that there was no proof that the same was in fact the application of Mrs. Prater. She did not sign the same. The doctor did not sign it for her, nor did he make her mark, nor witness her mark for her. The record affirmatively shows that she was an educated woman and could write her own name, and no excuse is offered as to why the said application purports to have been signed by her by mark, instead of in the usual manner. Nor was there any attempt made at the trial below to offer secondary evidence as to the truthfulness of the answers to the questions alleged to have been propounded to her by the worthy physician, although the doctor was a witness for the defendant company. Whether or not it could be proved that the deceased insured made fraudulent representations and warranties concerning the condition of her physical health for the purpose of obtaining the policy of insurance we cannot say, but the presumption obtains that she did not; this fact was not proved, nor was any attempt made to prove it, notwithstanding the doctor who made the examination was on the witness stand in behalf of the defendant company.

[3] Consequently we are bound to say that there is no proof in the record and no circumstance, however slight, tending to establish the fraud alleged in defendant's answer, and the court committed no error in directing a verdict for plaintiff. Under the well-established rule, as laid down in *Solts v. Southwestern Cotton Oil Co.*, 28 Okl. 706, 115 Pac. 776: "The question presented to a trial court on a motion to direct a verdict is whether, admitting the truth of all the evidence which has been given in favor of the party against whom the action is contemplated, together with such inferences and conclusions as may be reasonably drawn from it, there is enough competent evidence to reasonably sustain a verdict should the jury find in accordance therewith. Where the evidence is conflicting and the court is asked to direct a verdict, all facts and inferences in conflict with the evidence against which the action is to be taken must be eliminated entirely from consideration and totally disregarded, leaving for consideration that evidence only which is



favorable to the party against whom the motion is leveled." In this case there is no conflicting evidence in the record, and if there was we would be required to eliminate any fact or inference in conflict with the affirmative testimony tending to support the contention of plaintiff; therefore we have no hesitancy in saying that the lower court committed no error in refusing to admit in evidence the so-called application of the insured, for the reason that it was not shown that she ever signed said application, or that said application stated truthfully, or otherwise, her answers to the questions propounded by the worthy physician who made the examination. Nor was there any error in rejecting the report of the worthy physician, for the reason that said report was in its nature a confidential statement, made direct to the insurance company by the company's agent, and with which the insured had no connection, nor was it shown that she knew anything of its contents, and it certainly cannot be contended that the insured would be bound by any written report which the physician under such circumstances might make to the company, especially since it is shown by the record that the company issued and delivered the policy subsequent to the date of the said worthy physician's report.

If an insurance policy could be avoided, and the company exonerated from liability thereunder, in this manner, life insurance would lose its attractiveness and value to the average person. If a company, after admitting the due execution and delivery of a policy, the death of the insured, and everything else necessary to establish liability could thus escape responsibility, it would open the doors to all kinds of fraud and deceit. If a company after such admissions could bring into court a purported application for insurance, filled up with false and fraudulent representations and warranties, which paper had been in its exclusive possession all the time, and which was signed by mark, and the insurance company being admittedly unable to show, even by the doctor who claimed to have written the answers therein, that it was signed by the insured, and on the contrary, it being conclusively shown that the insured was an educated person, who never signed by mark, but always wrote her name, and no attempt of any kind being made to show, by secondary evidence or otherwise, that the answers in the application, notwithstanding the signature, were in fact the answers really made by the insured at the time of the examination, it would make all policy holders insecure in their insurance and place the insured absolutely at the mercy of the insurer. We do not pretend to say that the answers to the questions in the purported application were true, or that they were not

made by the insured, but we do undertake to say that the application, as offered, was wholly incompetent to prove those facts, and the court committed no error in rejecting the same. We are also satisfied that there is no word of testimony in the record tending in any manner to support the allegations of fraud, the only defense relied upon by the insurance company, and therefore there was nothing for the court to do but direct a verdict for plaintiff.

The judgment should be affirmed.

PER CURIAM. Adopted in whole.

(38 Okl. 312)

#### LONG v. BAGWELL.

(Supreme Court of Oklahoma. June 10, 1913.)

(Syllabus by the Court.)

#### 1. FORCIBLE ENTRY AND DETAINER (§ 6\*)—CROSS-PETITION—CONSTRUCTION.

In an action of ejectment, where defendant by cross-petition alleged that plaintiff is unlawfully in possession of the land described in plaintiff's petition, and that defendant owns a lease thereon that entitles him to possession thereof, the cross-petition states a cause of action in ejectment, and not one of forcible entry and detainer.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 29-32; Dec. Dig. § 6.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2325-2327, 2875-2877.]

#### 2. EJECTMENT (§ 9\*)—RIGHT OF ACTION.

Under the Code, action of ejectment lies to recover lands held under a lease for a term of years.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-20; Dec. Dig. § 9.\*]

#### 3. SET-OFF AND COUNTERCLAIM (§ 29\*)—WHAT CONSTITUTES—EJECTMENT—"COUNTERCLAIM."

Where plaintiff files a petition in ejectment, and defendant in his answer alleges that he has a lease upon the premises in controversy for a term of years, and that plaintiff is in the unlawful possession of the premises, and he unlawfully withholds same from the defendant and prays judgment for possession and for damages, that part of his answer claiming interest in the land and asking affirmative relief is a counterclaim.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 49-51; Dec. Dig. § 29.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1645-1650; vol. 8, pp. 7620, 7621.]

#### 4. DISMISSAL AND NONSUIT (§ 19\*)—DISMISSAL BY PLAINTIFF—SUBSEQUENT TRIAL—RIGHT.

In such an action, when the plaintiff dismisses his cause of action, the defendant has a right to proceed to the trial of his counterclaim for the purpose of determining his interest in the land as against the plaintiff, his right to possession thereof, and to recover damages.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 33-36; Dec. Dig. § 19.\*]

Error from District Court, Wagoner County; R. C. Allen, Judge.

Action by James E. Long against W. W.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Bagwell. Judgment for defendant, and plaintiff brings error. Affirmed.

Blair & Brown, of Wagoner, for plaintiff in error. Wm. W. Gresham, of Wagoner, for defendant in error.

HAYES, C. J. Plaintiff in error, herein-after called plaintiff, commenced this action against defendant in error, hereinafter called defendant, by filing his petition in the district court of Wagoner county, wherein he alleges that he was the owner of 40 acres of land lying in that county, and that he was entitled to possession thereof, but that defendant was in possession of said land wrongfully and unlawfully, claiming to hold the same by virtue of a certain lease, which plaintiff alleges was procured by fraud and is void. He further alleges that defendant is insolvent and owns no property subject to execution, and prayed for appointment of a receiver to collect the rents and profits of the land pending the determination of the title and right of possession, and also prayed for cancellation of the lease under which he alleges defendant claims possession of the property. Defendant, by answer and supplemental answer, admits that he holds a lease on said property which was executed on the 12th day of December, 1907, by the then owner of the land in controversy for a period of five years; and he denies that said lease was fraudulently obtained, or that the same is void. He further alleges that since the institution of this action plaintiff has taken possession of the land in controversy, and now wrongfully and unlawfully withholds possession of same from defendant, and has for a period of one year received the rents and profits on said land to defendant's damage; and he prays that plaintiff take nothing by his petition, and that he have judgment against plaintiff for quiet and peaceable possession of the land, and for the rents and profits. Before the action came on for trial, plaintiff dismissed his petition, and the cause thereafter proceeded to trial upon defendant's answer and cross-petition, and resulted in a judgment for defendant for possession, and for the sum of \$160 for rents and profits.

[1] Plaintiff challenges in this court for the first time the jurisdiction of the trial court to render judgment upon defendant's counterclaim or cross-petition. In support of his contention, he argues that plaintiff's cross-petition sets up a cause of action for forcible entry and detainer, of which courts of justices of the peace have exclusive original jurisdiction, and that the judgment for damages is less than the minimum jurisdiction of the district courts. These contentions are without merit. Plaintiff's answer and cross-petition do not set up a cause of action for forcible entry and detainer. It is not alleged that plaintiff is holding over his term; nor is it alleged either that he

obtained or retains possession by force. All that is alleged in the answer is that plaintiff is unlawfully in possession of the land in which defendant owns such a leasehold estate as entitles defendant to possession, and that plaintiff continues unlawfully to withhold such possession from defendant. This states only a cause of action in ejectment.

[2] Under the Code, an action of ejectment lies to recover lands held under a lease for a term of years. *Hurst v. Sawyer*, 2 Okl. 470, 37 Pac. 817. Where the holder of the lease attempts to recover possession by such action, he founds his recovery or right of possession upon an interest in the land arising from ownership of the lease upon the land. Of such actions courts of justices of the peace have no jurisdiction. *Zahn v. Obert*, 24 Okl. 159, 103 Pac. 702.

[3] Under the Code, a defendant may set forth in his answer as many grounds of defense, counterclaims, set-offs and for relief as he may have, whether such as have heretofore been denominated legal or equitable or both. Section 5634, Comp. Laws 1909. By section 5635, Comp. Laws 1909, it is provided that the counterclaims mentioned in the preceding section shall arise out of the contract or transaction set forth in the petition of plaintiff as the foundation of plaintiff's claim, or be connected with the subject of the action. The subject of the action in the case at bar is the possession of the land described in plaintiff's petition and the lease contract under which defendant claims his right to possession for plaintiff prays for a cancellation of the latter. Defendant in his cross-petition asks judgment for the possession of the same land, and for a decree declaring his lease contract valid. These allegations appear to us to bring it clearly within the statute authorizing defendant to obtain relief by his cross-petition; and this conclusion is supported by *Venable v. Dutch*, 37 Kan. 515, 15 Pac. 520, 1 Am. St. Rep. 260.

[4] A plaintiff may upon the payment of costs dismiss any civil action at any time before petition of intervention or answer praying for affirmative relief is filed, and after such intervention or answer praying for affirmative relief is filed he may dismiss his action; but such dismissal shall not prejudice the rights of intervener or defendant to proceed with the action. Sections 5919, 5920, Comp. Laws 1909. And in his action to recover the real estate he may join his cause of action for rents and profits on such real estate. Section 5623, Comp. Laws 1909; *Selbert v. Baxter*, 36 Kan. 189, 12 Pac. 934; *Gatton v. Tolley*, 22 Kan. 673.

We do not undertake to decide whether if the cause of action alleged in defendant's cross-petition had been one of forcible entry and detainer the court would have had jurisdiction to prosecute same after the dismissal of plaintiff's petition; for a decision of this question is not necessary, because the cause



of action set up in the cross-petition for affirmative relief is one of which the district court has jurisdiction, and for the reasons already suggested the judgment of the trial court must be affirmed. All the Justices concur.

(37 Okl. 523)

WHEELAN et al. v. HUNT.

(Supreme Court of Oklahoma. June 11, 1913.)

(Syllabus by the Court.)

1. BROKERS (§ 53\*)—RIGHT TO COMMISSION—  
"PROCURING CAUSE."

To be the procuring cause of a sale, a broker must first call the purchaser's attention to the property, and start negotiations which culminate in the sale thereof.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 74; Dec. Dig. § 53.\*]

For other definitions, see Words and Phrases, vol. 6, p. 5654.]

2. APPEAL AND ERROR (§ 1010\*)—QUESTION  
OF FACT—BROKERS.

The question of whether plaintiffs were the procuring cause of sale is one of fact, and, there being evidence reasonably tending to support the verdict, it will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.\*]

3. BROKERS (§ 53\*)—RIGHT TO COMMISSION—  
PROCURING CAUSE.

Plaintiffs, real estate brokers, took one Choate, who desired to buy a farm, to visit and inspect some farms which they had listed for sale. On the way they passed defendant's farm, on which was a sign reading, "This place for sale for \$5,500.00," which sign was the first time Choate's attention was called to the fact that said farm was for sale. Plaintiffs then informed Choate that they had said farm listed for sale at \$5,600, but discouraged his purchase thereof. Afterwards Choate returned and bought the farm direct from the defendant. Held, that plaintiffs were not the procuring cause of the sale, so as to be entitled to a commission for the sale thereof.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 74; Dec. Dig. § 53.\*]

(Additional Syllabus by Editorial Staff.)

4. BROKERS (§ 84\*)—ACTION FOR COMMISSION—  
—BURDEN OF PROOF.

The burden is on a broker in his action for a commission to show that he was the procuring or efficient cause of the sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 104, 105; Dec. Dig. § 84.\*]

Commissioners' Opinion, Division No. 1. Error from County Court, Noble County; H. E. St. Clair, Judge.

Action by M. L. Wheelan and another, etc., against B. F. Hunt. Judgment for defendant, and plaintiffs bring error. Affirmed.

P. W. Cress, of Perry, for plaintiffs in error. Henry S. Johnston, of Perry, for defendant in error.

SHARP, C. On March 20, 1900, plaintiffs sued defendant before a justice of the peace in and for Perry township, Noble county, seeking to recover \$100 commission alleged

to have been earned in the sale of defendant's farm to one S. H. Choate. Upon trial being had, and the jury failing to agree upon a verdict, by stipulation of the parties the action was transferred to the county court of said county, where judgment was afterwards rendered for defendant, and plaintiffs bring the case here for review.

[3] Plaintiffs, who resided at Billings, Okl., were engaged in the real estate business, and employed as their agents at Enid, Okl., Bailey & Scifres, another real estate firm, whose duty it was to secure prospective purchasers, and either bring or send them to Billings, from which place plaintiffs would take them to see such property as they had listed for sale. The evidence discloses that defendant's farm was listed for sale with plaintiffs, at a net price of \$5,500, they to have as commission, in event of sale through their efforts any amount obtained over and above said sum; that during the last week of October, 1909, Scifres, one of the agents of plaintiffs, brought Choate from Enid to Billings, and after having secured a buggy and team took him to visit and look over certain farms in what was known as the Antelope Flats, in which vicinity was located the farm of defendant; that Wheelan, one of the plaintiffs, joined them on the road south of Billings; that after having looked at several farms, and while passing along the roadway contiguous to the farm of defendant, Choate noticed and called attention to a sign on said farm, reading, "This place for sale for \$5,500.00," and remarked, "This place looks good to me at \$5,500," whereupon Wheelan told him that he had the farm listed for sale at \$5,600. There is material conflict in the testimony as to the actions and statements of plaintiffs, in regard to their efforts to sell said farm, but taking that of the defendant as true—since the jury did so—it is plain that plaintiffs did not mention, prior to the time that Choate saw the "for sale" sign, the fact that they had it listed for sale; and, further, that they made no endeavor to sell it to him. He was not introduced to the owner, nor was any offer made to take him on the land for an inspection thereof. In fact, there is testimony showing that they discouraged and tried to prevent the purchase of defendant's land by Choate, and that Scifres told him: "You see cottonwood trees over there at the south side. Quite a big ditch comes in there, cuts it in two. It isn't as good as it looks." Choate was then driven back to Billings and returned to Enid, without having made a purchase through plaintiffs' agency. Three days afterwards he came back, and independent of the plaintiffs negotiated and consummated the purchase of said farm from the defendant.

The sole contention of counsel for plaintiffs in error is that the evidence shows that they were the procuring cause of the sale, evidently basing their argument upon the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



fact that Choate would probably not have seen the "for sale" sign, or have entered into negotiations with the defendant for the purchase of his farm, except for the services of plaintiffs in bringing him from Enid to that vicinity, and in driving him along the roadway contiguous to said farm. We think this position untenable.

[1] To be the procuring cause of a sale, the broker must first call the purchaser's attention to the property, and start negotiations which culminate in the sale thereof. *Ware v. Dos Passos*, 4 App. Div. 32, 38 N. Y. Supp. 673, 675; *Wood v. Smith*, 162 Mich. 334, 127 N. W. 277; *Langford v. Issenhuth*, 28 S. D. 451, 134 N. W. 889. Choate, testifying for defendant, stated that his attention was first called to the Hunt farm when he saw the sign; the plaintiffs testified that they called Choate's attention to the farm before they reached the sign.

[2] This conflict of testimony was decided in favor of the defendant, so that it is evident plaintiffs' services did not come within the above definition, as they were not the first to call Choate's attention to the farm, that being done by the sign erected by the defendant; nor did they start negotiations which culminated in the sale thereof. It was a question of fact, for the jury to determine, whether plaintiffs were the procuring cause of the sale. *Reed v. Young*, 146 Ill. App. 210; *Fenton v. Miller*, 153 Iowa, 747, 134 N. W. 95; *Castelman v. Rustenholtz*, 145 Ky. 146, 140 S. W. 170; *Woods v. Lowe*, 207 Mass. 1, 92 N. E. 772; *Slagle v. Russell*, 114 Md. 418, 80 Atl. 164; *Wood v. Smith*, 162 Mich. 334, 127 N. W. 277; *Wells-Gerhart Real Estate Co. v. Epstein*, 157 Mo. App. 101, 137 S. W. 326; *Travis v. Bowron*, 138 App. Div. 554, 123 N. Y. Supp. 290; *Warne v. Johnston*, 48 Pa. Super. Ct. 98; *Longstreth v. Korb*, 64 N. J. Law, 112, 44 Atl. 934; *Shea Realty Corporation v. Page & Taylor*, 111 Va. 490, 69 S. E. 327; *Burdon v. Briquet*, 125 Wis. 341, 104 N. W. 83. The verdict having decided this issue for the defendant, and there being evidence reasonably tending to support the same, it is binding upon this court. *Hillsmeier v. Blake*, 34 Okl. 477, 125 Pac. 1129.

*Nation v. Harness*, 33 Okl. 630, 126 Pac. 799, was a case in which the defendant listed his property for sale with several real estate agents, among whom were the plaintiffs. Negotiations were begun by plaintiffs with one Achenhausen for the trade of his harness shop for defendant's farm. They failed to close the deal, but contended that they were the procuring cause of the trade subsequently made by another real estate agent, between the same parties. The court denied plaintiff's right to recover, and in the opinion quoted approvingly from the case of *Duval v. Moody*, 24 Tex. Civ. App. 627, 60 S. W. 269, wherein it was said: "Mr. Austin was not ready or willing to purchase the property upon Mrs. Duval's terms when

presented to her by appellee. And as appellee was not the procuring cause of Austin's readiness and willingness to purchase when the sale was effected, Hampton being the efficient and procuring cause, the evidence does not sustain the judgment, and it is reversed and the cause remanded."

Counsel for plaintiffs in error cites and relies upon the case of *Roberts v. Markham et al.*, 26 Okl. 387, 109 Pac. 127, in support of their contention that plaintiffs were the procuring cause of the sale. There the court said: "If, after the lot or realty is placed in the agent's hands for sale, it is brought about and procured by his advertisements or exertions, he will be entitled to his commission, or if the agent introduces or discloses the name of the purchaser to the vendor for such purpose, and through such introduction or disclosure negotiations for the sale of the property are begun, and then effected by the vendor, the agent is entitled to his commissions." In that case plaintiffs were shown to have brought about and procured the sale through their exertions; in other words, that they were the procuring cause of the sale. In the instant case plaintiffs failed to bear this burden of proof, and therefore the contention of counsel must fail.

Other cases involving the right of brokers to recover commissions for the sale of real estate, and laying down the rules to be followed in such actions, have been decided by this court. Plaintiffs, however, have not brought themselves within the requirements of such rules, as will be seen by a brief review of the cases.

*Plotner v. Chillson & Chillson*, 21 Okl. 224, 95 Pac. 775, 129 Am. St. Rep. 776, was a case in which the principal, upon learning that his agents, who were employed by him to purchase certain lands, were also receiving commissions from the vendor, sued said agents to recover the commissions he had paid them. The court, in upholding plaintiff's action, and refusing defendants the right to claim commission from both vendor and purchaser, said: "It is a condition precedent to the right of an agent to the compensation agreed to be paid him that he shall faithfully perform the services he undertook to render. \* \* \*" In the present case, plaintiffs cannot be said to have faithfully performed the services they undertook to render, when the evidence shows they discouraged the purchase of defendant's farm by Choate.

In *Birch v. McNaught*, 23 Okl. 634, 101 Pac. 1049, the court, in denying the right of the real estate agent to recover commission sued for, said: "To entitle McNaught to recover, the burden of proof was upon him to show that he had found and produced a person who was ready, willing, and financially able to make the purchase of the property at the price within the time and upon the terms fixed by Birch. 23 Am. & Eng. Enc. of



Law, 914; *Lockwood v. Halsey*, 41 Kan. 166, 21 Pac. 98, and cases cited; *Davis v. Lawrence & Co.*, 52 Kan. 383, 34 Pac. 1051; *Nelderlander v. Starr*, 50 Kan. 770, 33 Pac. 592. This he failed to do."

See, also, on this point, *Crutchfield v. Webster et al.*, 31 Okl. 142, 120 Pac. 615.

In *Scully v. Williamson*, 26 Okl. 19, 108 Pac. 395, 27 L. R. A. (N. S.) 1089, Ann. Cas. 1912A, 1265, *Scully*, a real estate agent with whom *Williamson's* land was listed for sale, introduced one *Remund* to said *Williamson* as a purchaser. The terms of the sale being agreed upon, a contract to purchase was executed by and between *Remund* and *Williamson*, but it eventually turned out that *Remund* was financially unable to fulfill his part of the contract. The court said: "The evidence fails to show that the sale contracted for between defendant and *Remund* was ever consummated; but it is said in *Kalley v. Baker*, 132 N. Y. 1, 29 N. E. 1091, 28 Am. St. Rep. 542, that a broker employed to sell property becomes entitled to his commission when he finds a purchaser satisfactory to his employer, and they enter into a mutual contract of purchase and sale, though it subsequently turns out that the purchaser is unable to comply with his contract, and on that account the sale is not consummated by transfer of the property. In the case at bar the broker brought to the owner of the property a prospective purchaser, with whom the owner was satisfied, and with whom he executed a contract for a sale, thereby determining for himself the ability of the purchaser to purchase. For any violation of this contract by the purchaser defendant had his remedy for damages for the loss sustained by him by reason of the purchaser failing to fulfill his contract."

The case of *Gilliland v. Jaynes*, 129 Pac. 8, was one in which there was no meeting or agreement between the prospective purchaser and the owner of the land, nor was it ever sold to such prospective purchaser. The doctrine there announced was that: "In order for a real estate agent to recover his commission for making a sale which has not been completed, it is necessary for him to find a purchaser who is ready, willing, and able to buy, and to procure a written agreement to buy from the purchaser, which will be enforceable against him, if accepted and signed by the seller, provided the seller and purchaser have not come together and an oral agreement to buy accepted by the seller."

[4] To recover the commission sued for it was imperative that plaintiffs show that they were the procuring or efficient cause of the sale, and, having failed to establish such fact, the judgment of the trial court was correct. *Nation v. Harness et al.*, 33 Okl. 630, 126 Pac. 799; *Arnold v. Woollacott et al.*, 4 Cal. App. 500, 88 Pac. 504; *Ayers v. Thomas*,

116 Cal. 140, 47 Pac. 1013; *Quinby v. Tedford*, 4 Colo. App. 210, 35 Pac. 276; *Chaffee v. Widman et al.*, 48 Colo. 34, 108 Pac. 995, 139 Am. St. Rep. 220; *Watts v. Howard & Calkins*, 51 Ill. App. 243; *Stone v. Ferry*, 144 Ill. App. 191; *White v. Sellmyer*, 157 Ill. App. 435; *Kurtz v. Payne Inv. Co. (Iowa)*, 135 N. W. 1075; *Kruse & Bishop v. Hauser*, 153 Iowa, 661, 133 N. W. 1067; *Wood v. Smith*, 162 Mich. 334, 127 N. W. 277; *Francis v. Eddy et al.*, 49 Minn. 447, 52 N. W. 42; *Fairchild v. Cunningham et al.*, 84 Minn. 521, 88 N. W. 15; *Studer et al. v. Byson*, 92 Minn. 388, 100 N. W. 90; *McCrorry v. Kellogg*, 106 Mo. App. 597, 81 S. W. 465; *Crain et al. v. Miles*, 154 Mo. App. 338, 134 S. W. 52; *Phinney et al. v. Chesebro et al.*, 87 App. Div. 409, 84 N. Y. Supp. 449; *Meyer v. Improved Property Holding Co.*, 137 App. Div. 691, 122 N. Y. Supp. 296; *Lord v. United States Transportation Co.*, 143 App. Div. 437, 128 N. Y. Supp. 451; *Karr v. Brooks (Tex. Civ. App.)*, 129 S. W. 160; *Goodwin v. Gunter et al. (Tex. Civ. App.)*, 142 S. W. 664.

For the reasons given the judgment should be affirmed.

PER CURIAM. Adopted in whole.

(37 Okl. 553)

HOLDEN v. TIDWELL.

(Supreme Court of Oklahoma. June 11, 1913.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT (§ 79\*)—"ASSIGNMENT" OF LEASE—DISTINGUISHED FROM SUBLEASE.

Where a lessee grants or transfers the whole term for which the premises were leased, leaving no reversionary interest in himself, the transfer being with the written consent of the owner, the assignee agreeing to comply in all respects with the terms of the original lease and to pay monthly rentals as originally agreed to be paid by the lessee direct to the owner, and the additional consideration for the transfer by monthly payments to the original lessee, *held*, to constitute an assignment and not a sublease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 235, 244–253; Dec. Dig. § 79.\*

For other definitions, see *Words and Phrases*, vol. 1, pp. 566–571; vol. 8, p. 7584.]

2. LANDLORD AND TENANT (§ 130\*)—LEASE—IMPLIED COVENANT OF QUIET ENJOYMENT—EFFECT.

Though a lease of land implies a covenant of quiet enjoyment, yet that covenant is not designed as an indemnity against any and all disturbance of the lessee's enjoyment, but extends only to acts of the lessor or those deriving authority or title through him or from a paramount title.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 470–481; Dec. Dig. § 130.\*]

3. PARTY WALLS (§§ 2, 8\*)—DEFINITION—RIGHT TO CLOSE OPENINGS.

A party wall must ordinarily be construed to mean a solid wall, without windows or openings; and, in the absence of statutory regulation or express agreement between the parties,



the right exists for either to close such openings or windows as may have been placed in said wall at a time when one of the lots was vacant.

[Ed. Note.—For other cases, see Party Walls, Cent. Dig. §§ 2, 24-41; Dec. Dig. §§ 2, 8.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5214, 5215.]

**4. LANDLORD AND TENANT (§ 177½\*)—EVICTION—WHAT CONSTITUTES.**

An assignee of a lease, in which there is no covenant for quiet enjoyment, except that implied in law, is not evicted by the act of another owner erecting a building on the adjoining lot, and in the course of its construction closing the windows in a party wall so as to cut off the light and ventilation formerly enjoyed by the tenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 712; Dec. Dig. § 177½.\*]

**5. LANDLORD AND TENANT (§ 173\*)—EVICTION—WHAT CONSTITUTES.**

The mere building upon the adjoining lot, although it may have rendered the demised premises less suitable or valuable to the use intended, did not authorize the tenant, in the absence of a special covenant against interference with light and air, to claim an eviction and refuse the payment of rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 705-707; Dec. Dig. § 173.\*]

**6. LANDLORD AND TENANT (§ 79\*)—ASSIGNMENT OF LEASE — ACTION FOR CONSIDERATION—DEFENSE.**

The demised buildings having been remodelled to meet the requirement made necessary by the closing of the openings in the party wall, the assignee of a lease cannot, in an action to recover the consideration for the assignment, defend under section 1166, Comp. Laws 1909.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 235, 244-253; Dec. Dig. § 79.\*]

*(Additional Syllabus by Editorial Staff.)*

**7. LANDLORD AND TENANT (§ 172\*)—“EVICTION.”**

Originally an eviction was understood to be a dispossession of the tenant by some act of his landlord or the failure of his title. Of later years it has come to include any wrongful act of the landlord which may result in an interference with the tenant's possession in whole or in part. The act may be one of omission as well as one of commission.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 695-703; Dec. Dig. § 172.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2517-2521.]

Commissioners' Opinion, Division No. 1. Error from County Court, Oklahoma County; F. B. Owen, Special Judge.

Action by A. J. Tidwell against P. W. Holden. Judgment for plaintiff, and defendant brings error. Affirmed.

Wylie Jones, of Oklahoma City, for plaintiff in error. O. C. Tarpenning, of Oklahoma City, for defendant in error.

SHARP, C. [1] October 9, 1909, one L. A. Lewis, the owner of a certain three-story building situated at 314 West First street, Oklahoma City, leased the second and third

floors thereof to the defendant in error for a term of two years, beginning January 1, 1910, for the consideration of \$2,400, to be paid in monthly installments of \$100 each. On December 10, 1909, by written assignment the said defendant in error transferred his entire interest in and to said lease to the plaintiff in error. By the terms of the assignment the assignee covenanted and undertook the payment of the monthly rent to the owner of the premises during the full term of the lease. The owner's agents gave their written consent to the transfer, conditioned only that the assignee should in every respect comply with the terms of the original lease. Plaintiff in error was therefore the assignee of the lease and not a subtenant of the lessee. Tyler Commercial College v. Stapleton, 33 Okl. 305, 125 Pac. 443; Washburn on Real Property, §§ 677, 679; Tiffany on Landlord and Tenant, § 151; Hogg v. Reynolds, 61 Neb. 758, 86 N. W. 479, 87 Am. St. Rep. 522; Stewart v. Long Island R. Co., 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844; Craig v. Summers, 47 Minn. 189, 49 N. W. 742, 15 L. R. A. 236. The language employed or form used by the parties in interest does not necessarily determine the character of the instrument or the relation created thereby. The fact that a transfer may be in form a sublease or that it reserves rights as against the transferee, similar to such as are ordinarily reserved in a lease, is, as a general rule, immaterial. Tiffany on Landlord and Tenant, § 151; Underhill on Landlord and Tenant, § 626.

[2] After the first two months of occupancy of the premises, the transferee refused to pay further rent, claiming an eviction, or at least a constructive eviction, caused by the acts of the owner of the adjoining property closing the windows in the east wall of the demised premises. At the time the lease and assignment thereof were executed, the adjoining lot on the east, which belonged to a different owner, was vacant. The east wall of the leased premises was a party wall, belonging to the owners of the adjoining properties. Some time in February, 1910, the owner of the adjoining lot commenced the erection of a three-story building thereon, and in the course of its erection the window openings, formerly in said east wall, were filled in with brick and mortar, thereby making a solid wall between the two buildings. Did the mere building upon the adjoining lot, by which the demised premises were rendered less valuable to the use of the assignee of the lease, affect the right of the assignor to his rent, and was it sufficient to authorize the tenant to refuse the payment of further rent on the ground that it constituted a breach of an implied covenant of quiet enjoyment? The lease contained no express covenant for quiet enjoyment of the premises. This, however, was unnecessary, as according



to the weight of authority, uninfluenced by statute, such a covenant will be implied. *Tiffany on Landlord & Tenant*, § 79; *McAdam on Landlord and Tenant* (4th Ed.) § 125; *Washburn on Real Property*, §§ 668, 668a. But whom does the implied covenant bind? The lessor or those in privity of estate with him, or does it extend to the owners of adjoining property? Obviously but the former. The owner of the adjoining vacant lot is not a party to the lease contract, hence is not bound by its terms.

In *Brown v. International Land Co.*, 29 Okl. 341, 116 Pac. 799, this court held that, to sustain an action for the breach of a covenant of quiet enjoyment in a lease, it is necessary for the plaintiff to show that he has been deprived from taking possession of the leased premises, or that his quiet enjoyment has been hindered or disturbed by the lessor or some person deriving their authority or title through him, or from a paramount title, but that hindrance or disturbance by a mere intruder is not sufficient. Authorities sustaining this decision might easily be multiplied. In order, therefore, for there to have been a breach of a covenant for quiet enjoyment, such as would release the defendant from his obligation to pay rent, it was necessary for him to show that he was evicted from the demised premises, either by the lessor or some one deriving their right or title through him, or one having a paramount title. The alleged eviction, however, consisted of the owner of the adjoining lot constructing a building thereon, in the course of which the windows in the wall separating the two buildings were filled in, and in consequence of which the tenant was deprived of his former enjoyment of light and air accustomed to pass through said windows. These acts were done by the adjoining owner on his own property by virtue of a title to that property, and not on account of any right or dominion over the lessor's property.

[3] The wall, it will be remembered, was a party wall. A party wall must ordinarily be construed to mean a solid wall. *Normille v. Gill*, 159 Mass. 427, 34 N. E. 543, 38 Am. St. Rep. 441, and cases cited; *Graves v. Smith*, 87 Ala. 450, 6 South. 308, 5 L. R. A. 293, 13 Am. St. Rep. 60; *Harber v. Evans*, 101 Mo. 661, 14 S. W. 750, 10 L. R. A. 41, 20 Am. St. Rep. 646; *Dauenbauer v. Devine*, 51 Tex. 480, 32 Am. Rep. 627; *Bloch v. Isham*, 28 Ind. 37, 92 Am. Dec. 287, and note. Each of the adjoining owners continued to own in severalty his own lot and the buildings thereon up to the division line; but each had an easement in the other's half of the wall, which entitled each to the use of the whole wall as a party wall. *Freeman on Cotenancy and Partition*, § 255; *Matts v. Hawkins*, 5 Taunt. 1 Eng. Com. L. 20; *Partridge v. Gilbert*, 15 N. Y. 601, 69 Am. Dec. 632; *Dauenbauer v. Devine*, supra. In other words, each

proprietor owns his own half in severalty, with an easement of support for the other half of his neighbor's. *Graves v. Smith*, supra; *Bloch v. Isham*, supra; 2 *Washburn on Real Property* (5th Ed.) 296; *Tiedeman on Real Property*, § 450.

[4, 5, 7] Originally an eviction was understood to be a dispossession of the tenant by some act of his landlord or the failure of his title. Of later years it has come to include any wrongful act of the landlord which may result in an interference with the tenant's possession in whole or in part. The act may be one of omission as well as one of commission. The rent is suspended by an eviction because it is plainly unjust that the landlord should be permitted to collect it, while by his own act he deprives the tenant of the possession which is the consideration for it. But the landlord is not responsible for the action of others lawfully done on their own premises. He is liable only for his own acts and for such acts of others as it was his duty to protect his tenant from. *Oakford v. Nixon*, 177 Pa. 76, 35 Atl. 588, 34 L. R. A. 575. A similar question was before the Supreme Court of Ohio in *Hilliard v. New York & Cleveland Gas Coal Co.*, 41 Ohio St. 662, 52 Am. Rep. 99. There the lessee of a room in a block covenanted to keep the premises in good repair, but if the premises were destroyed the lease was to become void. A building was thereafter erected on an adjoining lot by third persons, whereby the demised premises were to a great extent cut off from light and ventilation and rendered damp and unhealthy, but were capable of being made tenable by repairs. It was held that the lessee was not authorized to abandon the lease and refuse the payment of rent, either under the contract or under a statute providing that, where leased buildings shall be destroyed or be so injured by the elements as to be unfit for occupancy, the liability for rent shall cease. It was said in the opinion: "If the lessors had conveyed to the lessee a right to the unobstructed enjoyment of light and air over the vacant lot, for and during its term, they would have been answerable for that right in case of disturbance. But there was no such grant. And the vacant lot not belonging to the lessors at the time of leasing, it cannot be urged with any force of reason that an easement by implication in the passage of light and air followed a demise of premises to the lessee."

In *Johnson v. Oppenheim*, 55 N. Y. 280, it was held that a mere building upon or other improvement of an adjoining lot, by which the demised premises were rendered less commodious of occupancy or less suitable to the use of a tenant, did not affect the right of the landlord to his rent or authorize the tenant to terminate the lease and abandon the premises. In *Hazlett v. Powell*, 30 Pa. 293, it was said by the court that where



a lessor demised a building, in which were sundry windows opening on the ground of an adjoining owner, the erection by such adjoining owner of a building by which such windows were closed up is not an eviction of the lessee or a defense to the payment of accruing rent.

In *Barns v. Wilson*, 116 Pa. 303, 9 Atl. 437, it was held that the removal of a party wall by an adjoining owner, under an act of the Legislature, even though the leased premises became uninhabitable by the tenant, does not constitute such an eviction under a paramount title as will relieve the tenant from the payment of rent. In the course of the opinion it was said: "The act of the adjoining owner was a lawful act, performed in a lawful and proper manner, and the lessor took no part in the performance of it, indeed, was wholly powerless to prevent it. The loss of the rent must fall either on the lessor or the lessee, and as the latter is under a voluntary, express, and absolute promise to pay the rent, he ought to perform his agreement, when the lessor is in no default whatever." It was said that the lessee might have protected himself by a special contract, but not having done so could not complain. See, also, *Parker v. Foote*, 19 Wend. (N. Y.) 309; *Myers v. Gemmel*, 10 Barb. (N. Y.) 537; *Palmer v. Wetmore*, 4 N. Y. Super. Ct. 316; *White v. Mealow*, 37 N. Y. Super. Ct. 72; *Brown v. Curran*, 53 How. Prac. (N. Y.) 303; *Connor v. Bernheimer*, 6 Daly (N. Y.) 295; *Ramsay v. Wilkie* [Com. Pl.] 13 N. Y. Supp. 554; *Manville v. Gay et al.*, 1 Wis. 250, 60 Am. Dec. 379. There being no eviction, there was no legal excuse for the nonpayment of rent. Defendant could have protected himself by a special covenant but did not see fit to do so. He, as well as his assignor or the owner, knew that the adjoining lot was vacant, and that at any time the owner might conclude to erect a building thereon, and that in doing so would obstruct the light and air.

[8] It is finally contended that section 1166, Comp. Laws 1909, is conclusive of defendant's rights. Assuming the statute, fairly construed, to be applicable, we fail to see wherein it relieves the defendant of liability. It only provides for the termination of a contract of hire before the end of the term agreed upon, when the latter, within a reasonable time after request, fails to fulfill his obligations as to placing and securing the hirer in the quiet possession of the thing hired or putting it in a good condition or repair. This was done by the owner, apparently to the satisfaction of the defendant, at least as nearly so as the changed condition would permit of. Concessions were made the assignee by the owner. The former continued the occupancy of the premises at a reduced rental and has not been relieved of his obligation to pay plaintiff the original

consideration on account of the purchase of the lease.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

(38 Okl. 270)

ST. LOUIS & S. F. RY. CO. v. LADD.

SAME v. SPARKS, PEERY & SACRA.

(Supreme Court of Oklahoma. June 10, 1913.)

Action by G. W. Ladd against the St. Louis & San Francisco Railway Company. Judgment for plaintiff, and defendant brings error, and the clerk of the Supreme Court issues execution for costs of a former appeal. On motion to quash execution. Sustained.

R. A. Kleinschmidt, of Oklahoma City, for plaintiff in error. F. E. Riddle, of Chickasha, for defendant in error.

PER CURIAM. From a judgment of the county court of Grady county rendered and entered against it, St. Louis & S. F. Ry. Co., plaintiff in error, defendant below, brought the case here, and this court reversed and remanded the same for a new trial, and taxed the costs of that appeal to the defendant in error, G. W. Ladd, 33 Okl. 160, 124 Pac. 461. After a new trial, pursuant to our mandate, from a judgment rendered and entered therein against defendant, plaintiff in error, St. Louis & S. F. Ry. Co., again appeals.

On the 24th day of April, 1913, pending the second appeal, pursuant to precept duly filed, the clerk of this court issued an execution from this court for the amount of the costs accrued to plaintiff in error by virtue of its first appeal, and the same is outstanding and unsatisfied. Section 5258, Rev. Laws 1910, provides: "When a judgment or final order shall be reversed on appeal, either in whole or in part, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment. The court reversing such judgment or final order shall not issue execution in causes that are removed before them on error, on which they pronounce judgment as aforesaid, but shall send a special mandate to the court below as the case may require, to award execution thereupon; and such court, to which such special mandate is sent, shall proceed in such cases in the same manner as if such judgment or final order had been rendered therein."

The motion to quash the execution is sustained.

Let the same order be entered in cause No. 836, St. L. & S. F. R. Co. v. Sparks, Peery, & Sacra.

(36 Nev. 67)

Ex parte MELOSEVICH. (No. 2,065.)

(Supreme Court of Nevada. June 4, 1913.)

1. CRIMINAL LAW (§ 1208\*) — SENTENCE — LENGTH OF SENTENCE.

Rev. Laws, § 7260, provides that, when any person is convicted of any felony for which no fixed period of confinement is imposed by law, the court shall direct such person to be confined in the state prison for a term of not less than the minimum nor greater than the maximum term of imprisonment prescribed by law; section 7261 provides that the board of pardons may at any time after the expiration of the minimum term of imprisonment direct that such prisoner shall be released by parole;

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



while section 6638 provides that any person convicted of grand larceny shall be punished by imprisonment in the penitentiary for a term not less than 1 nor more than 14 years. *Held* that, under the first-mentioned statute, the court upon conviction could only impose an indeterminate sentence from 1 to 14 years and could not fix a greater or lesser minimum than that provided by the statute, for the board of pardons may parole the prisoner at any time after the expiration of the minimum sentence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3281-3287, 3289-3295; Dec. Dig. § 1208.\*]

## 2. PARDON (§ 1\*)—POWER OF BOARD OF PARDONS.

The right to apply to the board of pardons and its power to act exists independent of statute.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. § 1; Dec. Dig. § 1.\*]

## 3. CRIMINAL LAW (§ 991\*)—SENTENCE—VALIDITY.

An indeterminate sentence whereby the trial court imposed a greater minimum than that fixed by statute is not void on collateral attack, for a prisoner is not entitled to his discharge as a matter of right until the expiration of the maximum term, and, even though they are generally paroled at the expiration of the minimum term, a prisoner may at the expiration of the minimum fixed by statute apply to the board of pardons whose power to pardon exists independent of the indeterminate sentence law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2518, 2525, 2528; Dec. Dig. § 991.\*]

Original application of Trifke Melosevich for a writ of habeas corpus. Writ denied.

H. Pilkington, of Yerington, for petitioner. George B. Thatcher, Atty. Gen., for respondent.

**NORCROSS, J.** This is an original proceeding in habeas corpus. The petition alleges that the applicant is unlawfully confined in the state prison because of the alleged fact that the commitment by virtue of which he is so confined is based upon a void judgment. Applicant was regularly indicted, tried, and convicted for the crime of grand larceny. Based upon the jury's verdict of guilty, on August 14, 1912, judgment was entered, upon the order of the court, "that defendant, Trifke Melosevich, be confined in the penitentiary at Carson City, Nev., for the period of not less than two years and not to exceed three years." The commitment was in accordance with the judgment as entered.

[1] The statute of this state provides that a person convicted of the crime of grand larceny "shall be punished by imprisonment in the state prison for any term not less than one year nor more than fourteen years." Rev. Laws, § 6638.

Section 7260, Rev. Laws, provides: "Whenever any person shall be convicted of any felony for which no fixed period of confinement is imposed by law, the court shall, in addition to any fine or forfeiture which he may impose, direct that such person be con-

fined in the state prison, for a term not less than the minimum nor greater than the maximum term of imprisonment prescribed by law for the offense of which such person shall be convicted; and where no minimum term of imprisonment is prescribed by law, the court shall fix the minimum term in his discretion at not less than one year nor more than five years; and where no maximum term of imprisonment is prescribed by law, the court shall fix such maximum term of imprisonment."

Section 7261, Rev. Laws, provides: "The board of pardons may at any time after the expiration of the minimum term of imprisonment for which such prisoner was committed thereto, direct that any prisoner confined in such institution shall be released on parole upon such terms and conditions as in their judgment they may prescribe in each case."

The sections above quoted relative to an indefinite or indeterminate sentence were incorporated into the law of this state for the first time in the revised criminal practice act passed by the Legislature of 1911, which took effect January 1, 1912. Under the old statute, trial judges in all cases were required to impose a definite sentence. Some misconception appears to have existed for a time in the minds of a number of trial judges as to how sentences should be imposed under the new law. In a number of cases that have been under consideration by the board of pardons, sentences were imposed like that now in question. The court, upon imposing sentence, had assumed that it had discretion to fix a greater minimum or a less maximum sentence than the minimum and maximum sentence prescribed in the statute for the particular offense, for the commission of which judgment was imposed. This was not in accordance with the purpose designed to be accomplished by the indeterminate or, more properly speaking, the indefinite sentence law. Under the law which had existed for centuries in English-speaking countries, and until the adoption, in recent years, of certain reforms in criminal procedure, the imposition of definite sentences resulted in great inequality in the terms imposed by different judges for similar offenses. Whether for a certain offense the court would have imposed a sentence of one year, five, ten, or twenty years, would depend, to a considerable extent, upon the viewpoint of the individual judge who happened to have tried the case. If the judge happened to be of the opinion that severity of punishment was the best method of suppressing crime, a heavy sentence would be imposed. If it happened to fall to the lot of the offender to be tried before a judge inclined to the view that a greater degree of leniency would accomplish the desired result, a comparatively light sentence would be imposed. One purpose of the indeterminate sentence law was to minimize the personal

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



equation of the trial judge. Exact justice in the punishment of an offender is probably unattainable. If, however, from the light of all facts and circumstances having a bearing upon a particular case, a sentence, say of two years, would generally be accepted as a just measure of punishment to be imposed, but it appeared that, because of the view of the case peculiar to the mind of the trial judge who happened to have the say, a sentence of five or ten years is imposed, there has been a miscarriage of justice which only some pardoning power could remedy. As said by Chief Justice Winslow, of the Supreme Court of Wisconsin, in a recent address delivered before the American Institute of Criminal Law and Criminology, of which organization he is the president: "The court should have power to impose an indeterminate sentence, leaving the question of length of term to a board acting on accurate knowledge of the criminal's history, behavior, and apparent progress toward reformation." Again he says: "Power should be vested in some responsible and discreet board in cases where reform is possible to parole prisoners under proper supervision." These observations, in a measure, express the purpose sought to be accomplished by the Legislature in the enactment of these new provisions in the Criminal Code of 1912.

Where, as in the crime of grand larceny, the statute fixed a minimum and a maximum sentence, the trial court had no discretion to fix a greater minimum or less maximum sentence than that which the statute prescribed. *Miller v. State*, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109; *Terry v. Byers*, 161 Ind. 360, 68 N. E. 596; *In re Duff*, 141 Mich. 623, 105 N. W. 138.

The effect of section 7260, Rev. Laws, supra, was to cause the commitment of every defendant, convicted of felony, to the state prison for the maximum term fixed by statute for the particular offense for which conviction was had, unless the trial court deemed it a proper case for the suspension of the sentence under the provision of Rev. Laws, § 7259. Cases cited, supra. The length of service under the sentence was left entirely in the discretion of the board of pardons. It is manifestly the purpose of this statute to leave the period of confinement to the determination of the board of pardons, from a consideration of the circumstances of the crime, the defendant's past history, his conduct within the prison, the probabilities of or for reformation, and every other fact and circumstance which might have a bearing upon a determination of a just measure of punishment. While the powers of the board of pardons, composed of the Governor, the Justices of the Supreme Court, and the Attorney General, are derived from the Constitution (Const. art. 5, § 14; Rev. Laws, § 307) and are even greater than those specifically expressed in

the section of the statute quoted, supra, it was clearly the intention of the Legislature that the board of pardons should, when in its judgment a prisoner was deserving of release from confinement, discharge him from such confinement upon parole, thus giving him a further opportunity to establish his reformation while mingling with society, subject to the power of the board, if he proved unworthy of the confidence reposed in him, to return him to prison, and upon the other hand, when he established a just claim therefore, to grant him a full pardon. The judgment entered in this case should have been that the defendant be confined in the state prison for the period of not less than one year and not to exceed 14 years.

[2, 3] It does not follow, however, that, because the court did not so construe the provisions of the statute, the judgment is void and may be so declared upon collateral attack. Upon suggestion to the trial court, the judgment could have been amended to conform to the law or upon appeal it would have been so modified. If it could be successfully urged that the applicant here was, by reason of the judgment, deprived of his right to apply to the board of pardons for release upon parole until he had served the minimum sentence fixed therein, there might be some basis for saying that he was deprived by the judgment of a substantial right, and that the judgment for that reason might be void. As the right to apply to the board of pardons and its power to act exists independent of statute, it cannot be said that a judgment fixing a greater minimum of imprisonment than that prescribed by law has deprived a defendant of any substantial right. A prisoner does not have an absolute right of discharge after serving a minimum sentence. Such right exists only when he has served the maximum term. It is presumed, however, that the board of pardons will discharge upon parole, pardon a commutation, whenever the justice of the case warrants.

In the case of *In re Cummins*, 138 Mich. 39, 100 N. W. 1008, the court refused to discharge on habeas corpus a prisoner sentenced "for the maximum and minimum period of five years," but held that the sentence was to be treated as though the petitioner had been sentenced "for the maximum period of five years and the minimum period of one year." There was a statute of Michigan considered in the *Cummins* Case, which specifically declared that such judgments should not be considered void but in effect should be deemed to have been properly entered and so construed. While the court based its decision upon the statute, it could, we think, have reached the same conclusion based upon the weight of authority which holds that, where a sentence is merely excessive, it is valid to the extent that the court had power to impose it, and void only as to the excess. 12 Cyc. 782, and see, also, *Ex*



parte Tani, 29 Nev. 385, 91 Pac. 137, 13 L. R. A. (N. S.) 518.

In the Tani Case, this court, speaking through Talbot, C. J., said: "The most of the decisions, and especially those more in consonance with reason and justice, are averse to the discharge of criminals who have been duly convicted when the application for their release is by petition for habeas corpus based upon some error, omission, or mistake in the sentence which might have been cured or corrected by writ of error or appeal."

In *Re Duff*, 141 Mich. 623, 105 N. W. 138, a judgment was attacked upon habeas corpus where a less maximum was fixed than that prescribed by law. The court said: "It was held by this court (in *re Campbell*, 138 Mich. 597 [101 N. W. 826]) that the trial court had no authority, on a conviction for larceny under the indeterminate sentence act, to fix a maximum term of imprisonment, but that the statute must be referred to for the determination of such maximum term. In the case at bar the trial judge did fix the minimum term of imprisonment, and, striking out the provision for a maximum term, the sentence was a lawful sentence. The fixing of a maximum term of imprisonment was unauthorized and void. It was mere surplusage, as much so as though the sentence had provided what clothes the convict should wear, what food he should eat, or when he should be paroled. Rejecting the unauthorized and illegal surplusage, all of the elements of a strictly legal sentence remain. It is no more necessary to look beyond the sentence to determine its full extent and scope than in the *Campbell Case*, supra. In that case the sentence was to confinement in the Detroit house of correction for a period 'not less than one year,' fixing no maximum term. It is necessary in all such cases to refer to the statute to determine the maximum term, since that is fixed by the statute and need not be referred to in the sentence at all. The sentence need only be consulted for the determination of the minimum term. A sentence under the indeterminate sentence law is to be interpreted in the light of the statutes upon which it is based, and the maximum punishment fixed by law should be read into and considered a part of the sentence and mittimus. *People ex rel. Bradley v. Illinois State Reformatory*, 148 Ill. 413 [36 N. E. 76] 23 L. R. A. 139; *Miller v. State*, 149 Ind. 607, 618 [49 N. E. 894] 40 L. R. A. 109. The unauthorized fixing of the maximum term in the sentence was without force or effect and conferred no rights upon petitioner."

We see no more reason for reading the maximum sentence into a judgment or commitment than reading into them the minimum. The statute fixing a schedule of credits for the good conduct of prisoners is not taken account of usually, if ever, in entering

judgment, yet it is read into the judgment. *Ex parte Darling*, 16 Nev. 98, 40 Am. Rep. 495; *Ex parte Woodburn*, 32 Nev. 136, 104 Pac. 245.

Reading into the judgment the provisions of the statute, relative to an indeterminate sentence, is supported by reason and authority. It does not deprive a prisoner of any right and does not entitle him to discharge upon habeas corpus.

(36 Nev. 129)

LONG et al. v. TIGHE et al. (No. 1.920.)

(Supreme Court of Nevada. July 1, 1913.)

1. PROCESS (§ 137\*)—SERVICE—PROOF OF SERVICE.

Where personal service was had upon a nonresident, a certificate of the notary who administered the affidavit to the person making the service is prima facie proof of official character, and cannot be overturned in the absence of rebutting evidence.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. §§ 177-180; Dec. Dig. § 137.\*]

2. JUDGMENT (§ 486\*)—COLLATERAL ATTACK—VOID JUDGMENTS.

A void judgment may be collaterally attacked.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 919, 920-923; Dec. Dig. § 486.\*]

3. JUDGMENT (§ 120\*)—ENTRY OF JUDGMENT—AUTHORITY OF CLERK—SERVICE BY PUBLICATION.

Rev. Laws, § 5236, subd. 3, providing that, in actions where service is by publication, the plaintiff upon the expiration of the time within which the defendant is required to answer may apply for judgment, and the court shall thereupon require proof of publication, does not govern in actions where personal service is had upon a nonresident, even though the statute declares such service equivalent to publication, for there could be no proof as in case of publication, and the obvious intent of the statute was to protect the rights of nonresidents; hence a default in such case may be entered by the clerk.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 210; Dec. Dig. § 120.\*]

4. ATTACHMENT (§ 328\*)—RETURN—EFFECT.

Where a judgment was had upon attachment of the property of a nonresident and the personal service of summons, it cannot be presumed, as against the sheriff's return of service of the attachment, that there was an occupant upon the land attached.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. §§ 1170-1173; Dec. Dig. § 328.\*]

5. EXECUTION (§ 258\*)—SALES—WHO MAY QUESTION.

Where land was sold upon execution, persons not tracing their title through the judgment debtor cannot question the sufficiency and validity of the sheriff's deed.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 736-739, 789; Dec. Dig. § 258.\*]

Appeal from District Court, Esmeraldo County; Peter J. Somers, Judge.

Action by C. W. Long and another against Thomas Tighe and others. From a judgment entered upon an order sustaining a motion for nonsuit, plaintiffs appeal. Reversed and remanded.



H. F. Bartine, of Carson City, and Thompson, Morehouse & Thompson, of Goldfield, for appellants. Detch & Carney, of Goldfield, for respondents.

NORCROSS, J. This is an appeal from a judgment entered upon an order sustaining a motion for a nonsuit. Appellants brought their action for restitution of a certain parcel of land described as lot 1 in block 3 of the Phenix North addition to the town of Goldfield. The complaint alleged that on the 26th day of August, 1905, and for a long time prior thereto, one George Brunswick was the owner of said lot. That on the day last mentioned the plaintiff, C. W. Long, brought his certain action upon a money demand against the said Brunswick, and attached the said lot in question; that thereafter, and on the 9th day of January, 1906, judgment was obtained in said action in favor of the plaintiff Long and against the said defendant Brunswick; that execution was issued upon said judgment, and the said property theretofore attached was sold under execution to the appellants in this action, and after the time for redemption had expired a sheriff's deed was executed and delivered to appellants; that between the time of the levy of the writ of attachment and the execution and delivery of the said sheriff's deed, the respondents did, without right or title, enter into and upon said lot, and did take full possession thereof and did oust and eject the said Brunswick and all persons claiming under him therefrom. The answer, in addition to other matters, denied the validity of the judgment obtained by plaintiff Long in his suit against Brunswick, and the validity of the sheriff's deed executed in pursuance of the sale on execution based on said judgment. At the trial, as part of appellant's case, the judgment roll in the case of Long v. Brunswick and the papers in the execution sale were offered in evidence. Objection was made thereto upon the ground that the judgment was void upon the face of the judgment roll, and the objection sustained.

[1] The judgment in the Brunswick Case was entered upon default. Personal service of summons was had upon Brunswick in California, following an order for publication of summons, and, the defendant having failed to answer within the time allowed by law, his default and a judgment upon default were entered by the clerk. It is contended, first, that there was no sufficient proof of service, for the reason that the affidavit of the person making the service does not appear to have been made before a person authorized by law to take and certify to an affidavit. The affidavit purports to have been sworn to before one G. F. McLellan, a notary public in and for the county of Los Angeles. The certificate is in due form and under the seal of the notary, and the date when his commission expires is appended.

Conceding, for the purposes of this case, that this is a question which could be raised by objection to the introduction of the judgment roll, the question is one which was decided by this court some 46 years ago, contrary to the respondents' contention. In the case of Sargent v. Collins, 3 Nev. 272, this court held that a certificate to a deposition under the seal of the notary was prima facie evidence of official character, and that further proof of that fact could only be required after such evidence was overcome by rebutting testimony. See, also, Blackie v. Cooney, 8 Nev. 41, 48.

It is next contended that the affidavit fails to show that the person making the service was over 21 years old, as required by the statute, at the time of making the service. This objection is without the slightest merit. The affidavit sets forth that the affiant is over the age of 21 years, and the affidavit was made on the same day that the service was made.

[2, 3] The point mainly relied on is the authority, or want of authority, of the clerk to enter the judgment. If the clerk entered the judgment without authority so to do, it is void and subject to collateral attack. It is the contention of counsel for respondent that, in cases where a defendant is personally served without the state in lieu of publication of summons which has been ordered, the clerk cannot enter judgment for failure to answer without the order of the court, as in the case where the defendant is served within the state. In the case where there has been personal service without the state, it is contended that subdivision 3, Rev. Laws. § 5236, controls. Subdivision 3 reads: "In actions where the service of the summons was by publication, the plaintiff, upon the expiration of the time, within which, by law the defendant is required to answer, may, upon proof of the publication and that no answer has been filed, apply for judgment; and the court shall thereupon require proof to be made of the demand mentioned in the complaint, and if the defendant be not a resident of the state, shall require the plaintiff, or his agent, to be examined on oath respecting any payments that have been made to the plaintiff, or to any one for his use, on account of such demand, and may render judgment for the amount which he is entitled to recover. \* \* \*" While the section of the statute relative to publication of summons provides that personal service without the state "shall be equivalent to publication," etc., we are not of the opinion that these words are of any force in construing the provisions of subdivision 3, supra. While personal service outside the state is "equivalent to publication," it is not service by publication. Where there has been personal service, there can be no "proof of the publication," as required in subdivision 3, supra, for there has been no publication. Sub-



division 3, doubtless, was intended for the protection of defendants where substituted service by publication has been had, in which cases actual notice of the action may never, in fact, have reached the defendant. The court, we think, erred in excluding the judgment roll from evidence.

[4, 5] The contention of respondents that the return of the writ of attachment fails to show that the sheriff served a copy of the writ upon the "occupant" of the attached property is, we think, without merit. As against the return of the sheriff, there is no presumption that there was an occupant. Where, as in this case, it appears that a judgment was obtained against Brunswick, and that there was a sale upon execution of the interest of Brunswick in the property in question to the appellants in this action, respondents, not claiming title through Brunswick, are not in position to question the validity of the sheriff's deed issued in pursuance of the execution sale.

Judgment reversed, and cause remanded for a new trial.

(65 Or. 273)

**STATE ex rel. DUNIWAY et al. v. CITY OF PORTLAND et al.**

(Supreme Court of Oregon. May 28, 1913.)

**1. MUNICIPAL CORPORATIONS (§ 48\*)—BALLOTS—NOMINEES FOR OFFICES—CHANGE IN CHARTER.**

The law adopting a "commission charter" for a city being effective at the time for preparing ballots for an election, names of candidates nominated in accordance with its provisions should be placed thereon, even if the petition for such nominations on file and ready to be acted on were signed before the law went into effect.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 127, 128, 130-133; Dec. Dig. § 48.\*]

**2. ELECTIONS (§ 22\*)—CHARTER PROVISION—BALLOTS—POLITICAL PARTIES.**

The provision of the "commission charter" of Portland prohibiting the designation on ballots of the political party or affiliation of candidates is not open to the objection of prohibiting political parties or interfering with their councils.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 15; Dec. Dig. § 22.\*]

**3. MUNICIPAL CORPORATIONS (§ 48\*)—CHARTER PROVISIONS—NOMINATIONS FOR OFFICE.**

No rights of political parties are invaded by the provision of the "commission charter" of Portland that on adoption of such charter all nominations for offices made under the prior charter shall become void.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 127, 128, 130-133; Dec. Dig. § 48.\*]

**4. MUNICIPAL CORPORATIONS (§ 48\*)—AMENDMENTS OF CHARTER—SUBMISSION TO VOTE.**

Under Const. art. 11, § 2, as amended June 4, 1906, empowering the voters of a city to enact and amend their municipal charter, each section need not be submitted for a separate vote; but amendments amounting to a general

revision, the principal object being to provide for a commission form of government, and all being germane thereto, may be voted on as a whole.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 127, 128, 130-133; Dec. Dig. § 48.\*]

**5. MUNICIPAL CORPORATIONS (§ 48\*)—AMENDMENTS OF CHARTER—REPEAL.**

The power given by Const. art. 11, § 2, as amended June 4, 1906, to the voters of a city to amend their municipal charter includes the power to repeal or strike out provisions.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 127, 128, 130-133; Dec. Dig. § 48.\*]

**6. MUNICIPAL CORPORATIONS (§ 48\*)—ELECTIONS—SECOND AND THIRD CHOICE—CHARTER PROVISION.**

A city's charter enacted by its voters under the power given by Const. art. 11, § 2, is a law within article 2, § 16, as amended June 1, 1908, authorizing provision by law for the voter's expression of his first, second, or additional choices among candidates for any office.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 127, 128, 130-133; Dec. Dig. § 48.\*]

**7. MUNICIPAL CORPORATIONS (§ 48\*)—LEGISLATION BY VOTERS.**

Municipal elections and the choice of municipal officers are matters of purely municipal concern, as to which the people of a city have power, under Const. art. 4, § 1a, as amended June 4, 1906, to legislate.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 127, 128, 130-133; Dec. Dig. § 48.\*]

**8. MUNICIPAL CORPORATIONS (§ 48\*)—CHARTERS—POWER TO REPEAL—DELEGATION.**

The voters of a city by retaining as ordinances, subject to repeal by the commission council, provisions of a charter which they, in amending it, have repealed, do not delegate their power to repeal such provisions as parts of the charter; they having already exercised it.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 127, 128, 130-133; Dec. Dig. § 48.\*]

**9. MUNICIPAL CORPORATIONS (§ 48\*)—CHARTERS—REVISION BY VOTERS.**

A revision of a city charter which previously the Legislature could have enacted may be enacted by the voters of the city under the power given them by Const. art. 11, § 2, as amended June 4, 1906, to enact and amend their charter.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 127, 128, 130-133; Dec. Dig. § 48.\*]

Original proceeding in mandamus on the relation of Abigail Scott Duniway and others against the City of Portland and another. Writ dismissed.

This is a proceeding by mandamus to test the validity of the recent revision of the city charter of Portland, substituting a commission form of government for the present government by mayor, city council, etc.; the present charter being similar to the usual municipal charter. The revised charter, adopted by initiative vote on May 3, 1913, vests all the legislative, executive, and other



powers of the city in a mayor and four commissioners, who collectively constitute a city council. There are no other elective officers except a city auditor. All boards and commissions heretofore existing are abolished, and their powers and duties transferred to the council. The executive and administrative duties are distributed among the four commissioners and the mayor as follows: (1) A department of public affairs; (2) a department of finance; (3) a department of public safety; (4) a department of public utilities; and (5) a department of public improvements. The distribution of the work among these departments is to be made by order of the mayor, who may from time to time change these at his discretion. The council is authorized and directed, as soon as possible after their election, to pass a complete code providing for the administration of the powers and duties of the different departments. It is also authorized to prescribe the powers and duties of the officers and employees and to assign one or more officers to particular departments. None of the duties or powers of these departments are specified in the revised charter, except as above stated. The revision also prescribes a preferential system of voting which is as follows:

"Sec. 46. Ballots, Preparation and Form. The auditor shall cause ballots for general and special elections to be prepared, printed, and authenticated. The ballots shall contain complete list of the offices to be filled and the names of the candidates nominated therefor. When the number of candidates is more than three times the number of offices to be filled, each voter shall have the right to vote for as many first choice candidates as there are offices to be filled, and as many second choice candidates as there are offices to be filled, and as many third choice candidates as there are offices to be filled. The form of the ballot shall be substantially as follows: General (or special) municipal election, city of Portland (inserting date thereof). Instructions: To vote for any person mark a cross (X) in a square to the right of the name. *Vote first choice for* (here insert number of offices to be filled). *Vote second choice for* (here insert number of offices to be filled). *Vote for third choice for* (here insert number of offices to be filled). *Vote your first choices in the first column. Vote your second choices in the second column. Vote your third choices in the third column. Do not vote more than one choice for any one candidate.* All distinguishing marks make the ballot void. If you wrongly mark, tear or deface the ballot, return it and obtain another from the election officers (here state officers to be elected as mayor and two commissioners, or auditor and two commissioners). If any voter shall vote more than one choice for any one candidate the

vote highest in grade shall be counted and others rejected.

Mayor	First Choice	Second Choice	Third Choice
Names of Candidates			
Auditor	First Choice	Second Choice	Third Choice
Names of Candidates			
Commissioners	First Choice	Second Choice	Third Choice
Names of Candidates			

(Charter amendments, ordinances, or other referendum matters to be voted upon to appear here.)

"When the number of candidates is more than twice the number of offices to be filled, and not more than three times the number of offices to be filled, the ballot shall give the first and second choice columns only; and in such case the voter shall have no third choice; and the instructions on the ballot shall be modified accordingly. When the number of candidates is not more than twice the number of offices to be filled only one column for marking shall appear; and in such case the voter shall have no second choice; and the instructions on the ballot shall be modified accordingly."

The title of the referred act is as follows: "To amend an act of the Legislative Assembly of the state of Oregon entitled, 'An act to incorporate the city of Portland, Multnomah county, state of Oregon, and to provide a charter therefor, and to repeal all acts or parts of acts in conflict therewith,' filed in the office of the Secretary of State, January 23, 1903, amended by the Legislative Assembly of the state of Oregon in 1905 and subsequently amended by the people of the city of Portland, providing for a commission form of government."

The ballot title is as follows: "An act to amend and generally revise the city charter by providing a commission form of government vesting all legislative power in a council consisting of a mayor and four commissioners, distributing the executive business among five departments, the mayor or a commissioner being at the head of each department, abolishing ward representation, providing that the mayor, commissioners and auditor shall be elected, all other officers to be appointed. Shall the present charter of the city of Portland be amended by providing for a commission form of government? 100 Yes. 101 No."

The revision also contains the following clause: "This charter shall go into effect on the first day of July, 1913, except that the provisions hereof for election shall be in ef-



fect immediately upon its adoption and the election shall be held pursuant to such provisions on the first Monday in June, 1913. All nominations made under the charter of 1903 shall become void and of no effect on the adoption of this charter."

The revision was submitted to the voters upon May 3, 1913, upon the same date and coincidentally with the direct primary election held for the nomination of city officers under the provisions of the original charter. At the time of said election there were 73,259 registered voters in the city of Portland. The highest vote cast upon any office to be filled was 45,904. The total vote cast upon the amended charter was 34,342; 17,317 voting for the adoption of the measure, and 17,027 voting against its adoption. At the time the petition for a writ of mandamus was filed herein the returns of the election had not been canvassed, but it appears from defendant's answer to the writ that on May 19, 1913, the votes were canvassed, and that the mayor certified the result, and made proclamation of the adoption of the amendments, as required by law.

It was claimed by the relators that the amendments had not been legally adopted, and that, the old charter being still in force, it was the duty of the city auditor to place upon the ballots to be voted at the city election the names of the candidates who had been chosen at the direct primary election for the various city offices, and to omit from such ballots the names of candidates for mayor and commissioners nominated under the revised charter. The auditor, taking the reverse view of the matter, indicated his intention of placing upon the ballot the names of the candidates for mayor and commissioners selected under the provisions of the amended charter, and to omit therefrom the names of those candidates selected at the direct primary. Whereupon the relators sued out in this court an alternative writ of mandamus to compel the auditor to prepare the ballots in accordance with the provisions of the old charter. Other matters connected with the case appear in the opinion.

Ralph R. Duniway, of Portland, for petitioners. Frank S. Grant, City Atty., of Portland, and Richard W. Montague, of Portland (P. L. Willis, of Portland, on the brief), for defendants.

McBRIDE, C. J. (after stating the facts as above). It is to be regretted that the short time intervening between the hearing of this case and the Portland city election precludes an extended discussion of the important points raised in the briefs of counsel.

The principal contention of counsel for relators is that the amendments voted on May 3, 1913, and which for convenience we shall designate as the "commission charter," are now in effect, so that no nominations can be made under the commission charter for the

city officers provided for therein. By section 1a, art. 4, of the Constitution, as amended June 4, 1906, full powers of initiative are reserved to the people of all municipalities as to all local, special, and municipal legislation of any character. It was provided that the manner of exercising such powers should be prescribed by general laws, except that cities and towns might prescribe the manner of such exercise as to their municipal legislation. By section 2, art. 11, of the Constitution, as amended June 4, 1906, the legal voters of cities were given power to enact and amend their municipal charters subject only to the Constitution and to the criminal laws of the state. The subsequent amendment to this section, adopted November 8, 1910, makes no change as to the matters here considered. By the provisions of section 12 of ordinance No. 16311, approved March 26, 1907, it is provided that the votes on measures and charter amendments shall be counted, canvassed, and returned by the election boards, and that it shall be the duty of the auditor to canvass the votes given for each measure or amendment. The mayor is required within 30 days from the time of the election to proclaim the adoption of each measure or amendment which shall have received the affirmative majority of the total number of votes cast thereon, and thereafter such measure or amendment shall become and be in full force and effect. In these two constitutional provisions and in the ordinance referred to we have complete machinery for submitting charter amendments and declaring the result of the vote thereon, and these seem to have been complied with in every particular. In section 1 of art. 4, of the Constitution, as amended June 2, 1902, it is provided: "Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise."

[1] It may well be doubted whether it was in the power of the council of Portland to prescribe by ordinance the time when a measure referred to the people should become effective, but in our view of the case this matter is unimportant as applied to the case at bar. The act is now effective in any view of the law, and the petitions for nomination are now on file and ready to be acted upon, and whether they were signed before or after the law went into effect is a matter of no moment.

[2, 3] It is claimed that the proposed commission charter is void because it prohibits the designation of the political party or the affiliation of the candidates upon the ballot. This it is said is in effect a prohibition of political parties, and allows members of one political party to control or defeat the nominations of another political party. It is no doubt true that the people have an inalienable right to assemble themselves into politi-



cal parties, and that conventions and assemblies of a political party have a right to be protected from the interference of members of other political parties; but the revision in question does not prohibit political parties nor authorize interference with their councils. Any party may indorse, support, and work for the election of any candidate of its choice. The proposed charter assumes that a voter desiring to vote for a person of his own political faith will take interest enough to ascertain the name and status of such candidate without having to refer to the ballot when he comes to the voting booth. Some voters prefer to vote for candidates of their own religious faith or belonging to the same secret or benevolent societies, but that has never been advanced as an argument for the right to have a candidate designated on the ballot as a Methodist, a Catholic, a Mason, or an Odd Fellow. Religious associations are not destroyed by the failure to designate the peculiar religious faith of the candidate upon the ballot, and it would seem that, as a matter of abstract right, it would have as much place there as a designation of the candidate's political faith; nor were the rights of any political party invaded by the proposed change in the charter whereby the primary nominations were rendered nugatory.

[4] It is also claimed that the proposed revision is illegal and void because it submits a mass of amendments, having no relation to each other, to be voted upon in one vote, whereas they should have been submitted separately so that a vote could be taken upon each separate section or amendment. The authorities cited to sustain this proposition are: 21 Am. & Eng. Enc. Law (2d Ed.) 47; 28 Cyc. 1548, 1549; *City of Eugene v. Willamette Valley Co.*, 52 Or. 490, 97 Pac. 817; *Denver v. Hayes*, 28 Colo. 110, 63 Pac. 311. The subject under discussion in all these citations is concerning the proposition of the issuance of municipal bonds or creating municipal indebtedness, and each case cited turns upon some statutory or constitutional provision not found in this state. The premise assumed by relators in the case at bar is that a mass of amendments having no relation to each other are submitted for a single vote. An examination of the amendments, and of the charter as it would read as amended, shows the premise is incorrect. The principal object of the revision is to provide for a commission form of city government. To do this it was deemed necessary, and in fact was necessary, to so revise the charter as to adapt its provisions to the conditions involved by the change. It would not suffice to submit an amendment declaring that Portland should have a commission form of government consisting of a mayor and four commissioners without wiping out those provisions of the charter which divided the city into wards and provided for the election

of a councilman in each ward or that portion which provided for an executive board, and the other boards, officers, and commissions theretofore existing. It was wholly proper that in a general way the powers, authority, duties, and jurisdiction of the commission should be outlined; and, if any criticism is to be indulged in, it should be that the outline is not drawn as clearly as it should have been. The amendments amount to a general revision of the city charter, and are all germane to the general purpose sought to be accomplished. The following remarks of Mr. Justice Moore, in the case of *City of Eugene v. Willamette Valley Company*, supra, are applicable here: "As the Legislature could, heretofore, have changed a municipal charter or altered any part of it, except that vested rights could not be impaired or destroyed, it would seem necessarily to follow that, under the amended clause of the Organic Act quoted (referring to Constitution, art. 11, section 2, as amended June 4, 1906), the qualified voters of every town and city possessed the same measure of power. If the doctrine suggested is not applicable, the enactment or amendment of a municipal charter, by voting for separate sections, might destroy the efficacy of the proposed plan of city government, or very much delay its adoption." Without committing ourselves to the unqualified declaration that every amendment and part thereof is absolutely valid and unassailable, we content ourselves with saying that, taken as a whole, we discover no such omissions or discrepancies as would justify us in holding that the revision is void.

[5] Another contention is that there is no authority under our laws for a municipal corporation to repeal any portion of its charter. This, if true, would be an unique condition. It is settled that since the constitutional amendment last cited the Legislature cannot repeal or amend a municipal charter, and, if the municipality cannot do it, then it sits clothed in a suit of steel armor, riveted and bolted so securely that only by an appeal to the people of the whole state can the burden be removed. Happily, our municipal corporations labor under no such disability. The section of the Constitution last referred to provides: "The legal voters of every city and town are hereby granted power to enact and amend their municipal charter," etc. Now an amendment to a charter necessarily implies a change in a charter, and a change suggests a repeal of some part of that which is to be amended. "The term 'amendment' implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purposes for which it was framed." *Livermore v. Waite*, 102 Cal. 113, 36 Pac. 424, 25 L. R. A. 312; *State v. Wright*, 14 Or. 367, 12 Pac. 708; *Falconer v. Robinson*, 46 Ala. 340. A new bill may be in-



grafted by way of amendment on the words "Be it enacted," etc. *De Hay v. Berkeley County Commissioners*, 66 S. C. 229, 44 S. E. 790. We conclude, therefore, that a charter may be amended by repealing objectionable provisions with or without inserting other provisions in their places. It is true that in *McKeon v. Portland*, 61 Or. 385, 122 Pac. 291, we held that a municipal corporation could not commit suicide by wholly repealing its charter and going out of existence as a municipality, but that is not this case. Here the municipality continues to exist; its charter is merely amended by striking out certain provisions thought to be inapplicable to changed conditions or improved methods of city government and inserting others deemed to be applicable thereto.

[6, 7] The preferential system of voting provided for in the revision is attacked as being a violation of the Constitution. Section 18, art. 2, of the Constitution, as amended June 1, 1908, among other things, provides: "Provisions may be made by law for the voter's direct or indirect expression of his first, second or additional choices among the candidates for any office." Now a city charter enacted by the voters of the municipality is as much a law as if it were enacted by the Legislature. A provision, therefore, made in such charter for the expression by the voter of his first, second, or third choices among the candidates for any office is a "provision made by law" for that purpose, and within the Constitution. We have frequently held, and again hold, that within its boundaries and upon subjects relating purely to its municipal affairs a municipal corporation has the same power to legislate as the Legislature had before the passage of the amendment. Municipal elections and the choice of municipal officers are matters of purely municipal concern; and, as to these, the people of the city have ample power to legislate, subject only to the restrictions heretofore noted.

[8] It is objected that certain sections of the charter are repealed as charter provisions, but retained as ordinances, subject only to repeal by the commission council; and it is contended that this is a delegation of power to the council to repeal these provisions of the charter and unlawful for the reason that, if the right to repeal portions of the charter is granted, such right must be exercised by the people and cannot be delegated to the council. The effect of the clause in the revision objected to is to repeal the provisions as parts of the chapter and to re-enact them as ordinances. The people have already repealed them so far as they stood as charter provisions, but have re-enacted them as ordinances. There is no delegation of power here.

Other objections are urged, but in our judgment they go merely to the policy of

the proposed revision, and not to the authority to enact it.

[9] We think the true test is this: Could the Legislature before it was deprived of the power to enact or amend charters have enacted this revision? We are of the opinion that it could have done so, and that the courts would have held it valid. If the Legislature could lawfully have done this before the amendment, the people of the city of Portland can do the same within its corporate limits since the amendment. It must be confessed that the change is a tremendous one, and the centralization of all the powers of the city in the hands of five men is an experiment in which mistakes in the selection of the persons who are to wield this enormous grant of power might be fraught with serious consequences. But these are matters with which we have nothing to do; they were left to the decision of the voters of the city at the polls, and by a small majority they have decided to try the experiment. As to the 54 per cent. of the voters who did not take interest enough in this important matter to cast a vote either way, the only conclusion must be that they do not care how they are governed and are mere ciphers to be put in a column by themselves. This court cannot legislate a government for the city of Portland. It can only declare the judicial results of the election, and express the hope that the new experiment may prove a successful one.

The writ is dismissed.

(65 Or. 569)

#### WATSON et al. v. HAGEN.

(Supreme Court of Oregon. June 10, 1913.)

#### 1. EJECTMENT (§ 148\*)—DAMAGES—IMPROVEMENTS.

Defendant could litigate in ejectment the question of permanent improvements made by him while holding property under color of title adversely to plaintiffs, in good faith, under L. O. L. § 330, providing that permanent improvements made upon the property by defendant may be set off against damages for withholding, so that a cross-bill in equity for such purpose was unnecessary.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 509-515, 517-519, 522-524, 531; Dec. Dig. § 148.\*]

#### 2. TAXATION (§ 734\*)—TAX SALE—COMPLIANCE WITH LAW.

A tax sale, being a proceeding in invitum, must be conducted strictly according to law, and the buyer must take notice of all jurisdictional defects.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1408, 1470-1473; Dec. Dig. § 734.\*]

#### 3. EJECTMENT (§ 114\*)—RELIEF—POSSESSION.

The recovery of possession of realty is of the very essence of the action of ejectment, and possession and the fee should be both awarded against one claiming under void muniments of title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 352-370, 372, 374-378; Dec. Dig. § 114.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Action by John Watson and another, trustees, and others, against A. J. Hagen, in which defendant filed a cross-appeal. From a conditional judgment for plaintiffs, they appeal. Affirmed as modified.

This is an action in ejectment. It seems that one John Masson, a resident of Scotland, was the owner in fee of the real property in dispute. It is alleged that he died March 22, 1899, and left surviving him, as his only heirs, his widow, Rachel Watson Masson, and their son, William James Masson, and that, under a testamentary disposition made in Scotland, John Watson and William James Masson are trustees vested with legal title to the property for the use and benefit of the son and widow of the deceased. The widow, son, and trustees joined as plaintiffs against the defendant in the usual form of ejectment, claiming damages for the detention of the property in the sum of \$1,000. The defendant filed a cross-bill in equity by which he claimed to be seised of an estate in fee simple in the property and in possession thereof under certain tax deeds, three in number, upon each of which he bases a separate defense. He also alleges that, while in possession of the property, he caused sundry improvements to be made in the way of filling up the lot to the street grade at a cost of \$225, erecting a dwelling house, \$2,400, and fencing the property, \$100; and that, under compulsion of the city of Portland within which the property is situated, he had paid \$72.60 on account of sewer assessment, \$39.00 on account of street improvements, and \$75.00 for sidewalks. He also states that his predecessors in interest, under said tax deeds, paid \$50, and he himself \$45 as taxes on the property. This pleading was traversed by the plaintiffs in the ejectment action, and the allegations of the original complaint were reiterated as matter defensive in equity. There were also sundry defects in the tax proceedings detailed which, as the plaintiffs contended, made the same void. With the answer to the cross-bill the plaintiffs tendered the amount of taxes paid by the defendant and his predecessors, amounting to \$95. The new matter of the answer to the cross-bill was, in turn, traversed by the reply. After a hearing, the court entered a decree to the effect that William James Masson, the son of the original grantee, is the owner in fee simple of the property, subject to the dower of his mother therein, and further decreed that the defendant have a lien upon the property in the sum of \$1,826.43, with interest thereon at the rate of 6 per cent. per annum from the date of the decree; that the plaintiffs should pay that amount within 60 days, in default of which the property should be sold to satisfy the lien; and that until the payment was made the defendant might remain in the possession

of the property. From this decree the plaintiffs appeal.

Jerry E. Brounagh, of Portland, for appellants. F. E. Melvin and Claude Strahan, both of Portland, for respondent.

BURNETT, J. (after stating the facts as above). It was conceded at the argument that the tax titles, under which the defendant claims, are void. The only contentions urged by the appellants are against the allowances made by the court for taxes, street improvements, municipal assessments, and betterments of the property while the defendant was in possession thereof, and permitting the defendant to remain in possession of the property.

[1] It may well be doubted whether the cross-bill was cognizable in equity, for if the tax titles under which defendant claims were sufficient to vest him with the fee-simple title, as he alleged, he could have rested his defenses upon them at law. Furthermore, if he had made permanent improvements upon the property while holding under color of title adversely to the plaintiffs, in good faith, he could also have litigated that in the action of ejectment under section 330, L. O. L., which provides, in substance, that the plaintiff shall only be entitled to recover damages for withholding the property for the term of six years next preceding the commencement of the action; and that when permanent improvements have been made upon the property by the defendant they may be offset against such damages. The parties, however, have submitted themselves to the jurisdiction of the court of equity, and the case will be so determined.

[2] A tax sale being a measure in invitum, it must be conducted strictly according to law. If there is any proceeding in which a purchaser is affected with the principle of caveat emptor, it is in a tax sale. He must take notice of all the jurisdictional defects in the proceeding, and as against them he cannot be said to be a purchaser in good faith. In the face of such errors, when one makes voluntary improvements on real property, he does so at his peril. Equity in such case will do no more than follow the law as laid down in section 330, L. O. L., supra. Applied to this case, the improvements made of defendant's own motion will be offset against the damages for withholding the same, which would be the rental value for six years next prior to the commencement of the action; but no further allowance can be made in that behalf. The defendant will be allowed the sum of \$95 for taxes which he and his predecessors in interest have paid. The city of Portland has compelled him to pay on account of the Irvington District sewer, \$72.60, for the improvements of East Seventh street, \$39, and for a sidewalk, \$75. So far as disclosed by the record, these are public charges for which the realty would be



liable in any event and in whomsoever the title vested. The total of these amounts is \$281.60.

[3] The court was in error in allowing the defendant to remain in possession of the property. The recovery of possession of realty is the very essence of the action of ejectment. As against one claiming under void muniments of title, possession and the fee go together. It was not necessary for the defendant to retain possession of the premises in order to preserve the lien which the court awarded to him. The widow and son, being tenants in common of the fee, are also entitled to the possession of the property.

The decree of the circuit court will be modified so as to give the plaintiffs William James Masson and Rachel Watson Masson the immediate possession of the property, the former as owner in fee subject to the dower of the latter, the whole to be charged with the payment to the defendant of \$281.60, with interest thereon at the rate of 6 per cent. per annum from the date of this decree, and directing a sale of the premises for the satisfaction thereof, unless the same shall be paid within 60 days from the entry of the mandate in the court below.

(65 Or. 323)

#### HUGHEY et al. v. SMITH.

(Supreme Court of Oregon. June 10, 1913.)

#### 1. REFORMATION OF INSTRUMENTS (§ 36\*)— GROUNDS—PLEADINGS—SUFFICIENCY.

The complaint, in a suit to reform an instrument on the ground of mistake of facts, must distinctly allege what the original agreement was, or point out clearly wherein there was a misunderstanding, and that the mistake was mutual and did not arise from gross negligence of plaintiff, or that his misconception originated in the fraud of defendant.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 141-146; Dec. Dig. § 36.\*]

#### 2. CANCELLATION OF INSTRUMENTS (§ 37\*)— GROUNDS—MUTUAL MISTAKE—COMPLAINT— SUFFICIENCY.

A complaint in a suit to cancel a lease, which alleges that it was the opinion of the parties thereto that a prior lease would expire April 1, 1912, while in fact it did not expire until April 1, 1913, but which does not allege that the termination of the prior lease could not have been discovered by reasonable diligence, or that the parties intended to make the new term begin with the ending of the prior term, does not state a cause of action on the theory of mutual mistake, under the rule that to entitle one to relief on the ground of mutual mistake it must appear that the fact misapprehended could not have been discovered by the exercise of reasonable diligence.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 66-80; Dec. Dig. § 37.\*]

#### 3. CANCELLATION OF INSTRUMENTS (§ 37\*)— GROUNDS—INCAPACITY OF PARTIES.

A complaint in a suit to cancel a lease executed by husband and wife, which alleges that the wife was at the time of the making of the lease in failing health and memory, and that the husband was unable to read and write, does

not state a cause of action on the theory of incapacity of the lessors to make a lease.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 66-80; Dec. Dig. § 37.\*]

#### 4. PLEADING (§ 8\*)—MUTUAL MISTAKE—COM- PLAINT—CONCLUSION OF LAW.

An averment in the complaint, in a suit to cancel a lease on the ground of mutual mistake, that except for the mutual mistake the lessors would not have executed the lease is but a statement of a conclusion of law, and is insufficient for any purpose.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. § 8.\*]

Appeal from Circuit Court, Tillamook County; William Galloway, Judge.

Suit by James Hughey and another against Hiram W. Smith. From a decree of dismissal, plaintiffs appeal. Affirmed.

This is a suit by James Hughey and Wesley Rush, as administrators of the estate of Myra Hughey, deceased, against Hiram W. Smith to enjoin the prosecution of an action at law and to cancel a contract. The facts are that on June 28, 1911, James Hughey and Myra Hughey, his wife, being the owners of a farm in Tillamook county, Or., executed a lease thereof to the defendant for the term of 12 years from April 1, 1912, with the privilege on the part of Smith of renewing the lease at its expiration for another like term. It was thereafter discovered that a demise of the premises, made by Hughey and his wife to John Borba, did not expire until April 1, 1913, and that by reason thereof possession could not be delivered to the defendant at the time stipulated.

Mrs. Hughey died intestate; whereupon the plaintiff Wesley Rush was appointed administrator of her estate. Smith, not having been able to obtain possession of the farm as agreed upon, commenced an action against the plaintiffs to recover damages occasioned by the breach of the contract. An answer having been filed in that action, the defendants therein, as plaintiffs herein, commenced this suit in the nature of a cross-bill for the purposes hereinbefore stated. Their pleading sets forth the facts as here given, and contains the following averments: "That at the time of the execution of the lease to the defendant herein, the said James Hughey and Myra Hughey and Hiram W. Smith were of the opinion that the said lease to the said Borba would expire on the 1st day of April, 1912. That the said Myra Hughey, at the time of the execution of said lease to the defendant, was in failing health and memory, and the defendant well knew the same, and the said James Hughey was and is a man of limited education, and was and is unable to read or write, all of which was and is well known to the defendant herein, and that by reason thereof they were each laboring under a mutual mistake and a misapprehension of fact, and said lease to defendant was made and entered into under

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



a mutual misapprehension and mutual mistake of fact. That except for said mutual misapprehension and said mutual mistake of fact the plaintiff James Hughey, nor his wife, Myra Hughey, now deceased, would have made and entered into said lease."

A demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of suit, having been sustained, and the plaintiffs declining further to plead, the suit was dismissed, and they appeal.

Ralph R. Duniway, of Portland, and C. W. Talmage, of Tillamook, for appellants. T. B. Handley, of Tillamook (Webster Holmes, of Tillamook, on the brief), for respondent.

MOORE, J. (after stating the facts as above). [1] The right of a court of chancery to reform or annul a written contract, the execution of which was induced by the fraud of the defendant, or resulted from the mutual mistake of both parties, is a well-recognized principle of equitable jurisprudence. Such being the case, the only question to be considered is whether or not the complaint herein states facts sufficient to constitute a cause of suit. The rule is settled in this state that, in a suit to reform a written instrument on the ground of misapprehension of the facts involved, the complaint must distinctly allege what the original agreement of the parties was, or point out with clearness and precision wherein there was a misunderstanding, and that such mistake was mutual and did not arise from the gross negligence of the plaintiff, or that his misconception originated in the fraud of the defendant. *Evarts v. Steger*, 5 Or. 147; *Lewis v. Lewis*, 5 Or. 169; *Stephens v. Murton*, 6 Or. 193; *McCoy v. Bayley*, 8 Or. 196; *Foster v. Schmeer*, 15 Or. 363, 15 Pac. 626; *Hyland v. Hyland*, 19 Or. 51, 23 Pac. 811; *Meier v. Kelly*, 20 Or. 86, 25 Pac. 73; *Eppstein v. State Ins. Co.*, 21 Or. 179, 27 Pac. 1045; *Kleinsorge v. Rohse*, 25 Or. 51, 34 Pac. 874; *Osborn v. Ketchum*, 25 Or. 352, 35 Pac. 972; *Thornton v. Krimbel*, 28 Or. 271, 42 Pac. 995; *Mitchell v. Holman*, 30 Or. 280, 47 Pac. 616; *Sellwood v. Henneman*, 36 Or. 575, 60 Pac. 12; *Stein v. Phillips*, 47 Or. 545, 84 Pac. 793; *Bower v. Bowser*, 49 Or. 182, 88 Pac. 1104; *Smith v. Interior Warehouse Co.*, 51 Or. 578, 94 Pac. 508, 95 Pac. 499; *Howard v. Tettelbaum*, 61 Or. 144, 120 Pac. 373.

"The equitable jurisdiction for the correction of mistakes," says a text-writer, "is exercised only in order that the real intention of the parties is carried out; and if the particulars wherein there has been a failure to express correctly the intention of the parties are not pointed out the court will have nothing to guide it in making the correction." 14 Ency. Pl. & Pr. 42. See, also, 18 Ency. Pl. & Pr. 824.

[2] It will be remembered that it is alleged in the complaint that it was the opinion of the parties to the contract that the lease to Borba would expire on April 1, 1912. There is no averment anywhere in the plaintiffs' pleading that the termination of the Borba lease could not have been discovered by the exercise of reasonable diligence on the part of Mr. and Mrs. Hughey; not is it alleged that the parties intended to make the term begin with the ending of Borba's estate in the premises. To entitle a party to equitable relief in consequence of a mutual mistake, it should be alleged and proved that the fact misapprehended could not have been discovered by the exercise of reasonable diligence on the part of the party seeking the redress invoked. *Willard's Eq. 70*; *Lewis v. Lewis*, 5 Or. 169.

[3, 4] The allegation that Mrs. Hughey at the time of the lease was in failing health and memory does not show that she was mentally incapacitated from executing a valid agreement. So, too, the statement that her husband was a man of limited education and unable to read or write does not allege that he was incompetent, by reason of his illiteracy, to yield his assent to the contract; and hence the relief sought cannot be predicated on any intellectual disqualifications of the lessors. The declaration that except for the mutual mistake referred to Hughey and his wife would not have executed the lease to Smith is not an allegation of any material fact, but rather the statement of a conclusion of law sought to be deduced from the preceding averments, and insufficient for any purpose. *Hyland v. Hyland*, 19 Or. 51, 57, 23 Pac. 811.

Though this is a suit to cancel a contract, and not to reform an agreement, wherein possibly the averments of the complaint are not required to be so specific with respect to the original intent of the parties as in cases for the reformation of a written contract, yet after a careful examination and consideration of the complaint it is believed that the plaintiffs' pleading does not state facts sufficient to constitute a cause of suit, and that no error was committed in sustaining the demurrer. It follows that the decree should be affirmed; and it is so ordered.

(66 Or. 21)

#### OREGON MILL & GRAIN CO. v. KIRKPATRICK.

(Supreme Court of Oregon. June 3, 1913.)

#### 1. CONTRACTS (§ 330\*)—RIGHT OF ACTION BY THIRD PERSONS.

Where a debtor makes a valid contract with a third person to pay his debt, the creditor may sue on the contract and enforce it by an action in his own name.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1589, 1591-1594, 1596, 1597, 1602-1604; Dec. Dig. § 330.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



## 2. EVIDENCE (§ 419\*)—DOCUMENTARY EVIDENCE—PAROL EVIDENCE RULE.

Defendant purchased a business from plaintiff's debtor under a written contract providing for the payment of some cash and for the payment of certain debts of the seller due other persons than plaintiff. L. O. L. § 713, provides that, when the terms of an agreement have been reduced to writing, it is to be considered as containing all the terms, and therefore, between the parties and their representatives no evidence of the terms other than the contents of the writing is admissible, except where the validity of the instrument is in dispute or a mistake is alleged. *Held* that, even though section 798 declares that the truth of the facts recited in a written instrument is conclusively presumed between the parties and their successors, except as to the recital of a consideration, parol evidence was not admissible in absence of a pleading of mistake or invalidity to show that plaintiff's claim was included; the recital of the debts assumed by defendant being more than a mere recital of consideration, amounting to a contractual assumption of the original debtor's liability.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419; Contracts, Cent. Dig. §§ 229, 408.]

Appeal from Circuit Court, Baker County; Wm. Smith, Judge.

Action by the Oregon Mill & Grain Company against C. Kirkpatrick. From a judgment for defendant, plaintiff appeals. Affirmed.

The substance of the complaint is that about March, 1911, H. G. Hyde, being at the time indebted to the plaintiff for goods, wares, and merchandise sold to him, transferred to the defendant a retail grocery business in Baker, Or., and that as part of the purchase price the defendant agreed with Hyde to pay the amount due from the latter to the plaintiff. It is further alleged that at the same time, for a valuable consideration, the defendant assumed the account of this plaintiff against Hyde and promised and agreed to and with plaintiff to pay the balance due to plaintiff from Hyde for the merchandise sold to him. It is also averred in effect, but not as a separate cause of action, that, since the transfer of the stock to the defendant, the plaintiff had sold to him other goods at his special instance and request, and for which the defendant promised to pay to plaintiff the reasonable value thereof; that, including the goods sold to Hyde and those sold to defendant, they amounted to a reasonable value of a specified sum, no part of which has been paid, except a certain other stated sum, leaving a balance due to plaintiff from defendant in the sum of \$710.94, for which, with interest, the plaintiff demanded judgment. The answer traversed all the allegations of the complaint, except that Hyde sold the business to the defendant and that prior to the transfer the plaintiff had sold and delivered goods to Hyde. At the close of plaintiff's case the court directed a verdict for the defendant, upon which judgment was entered, and the plaintiff appeals.

A. A. Smith, of Baker (John L. Rand, of Baker, on the brief), for appellant. M. D. Clifford, of Baker (Clifford & Correll, of Baker, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). The plaintiff called Hyde as a witness, who testified to the effect that the sale to the defendant was made January 7, 1911, the inventory taken on the 8th, and the business turned over to him the next day. When the plaintiff began to inquire from the witness about the consideration to be paid, he was confronted with a written instrument which is here set out: "Know all men by these presents that H. G. Hyde, party of the first part, for and in consideration of the sum of five hundred (\$500.00) dollars to him in hand paid by Chauncey Kirkpatrick, the party of the second part, the receipt whereof is hereby acknowledged, and for the further consideration of the payment by the said party of the second part of the following wholesale accounts at or before the time the same become due, to wit: Allen & Lewis, \$395.58; Baker City Grocery Company, \$1-198.00; Clossett & Devers, \$30.72; J. A. Folger & Co., \$132.35; Hills Brothers, \$254.53; North Powder Milling Company, \$118.60; Pioneer Mill, \$213.25; and Schillings, \$28.20—the party of the first part does hereby grant, bargain, sell and set over unto the said party of the second part, his heirs, executors, administrators, successors and assigns, the following described personal property, to wit: All that certain stock of goods, wares and merchandise in store room now occupied by H. G. Hyde and in warehouses used in connection therewith, used in conducting a general grocery business known as H. G. Hyde's Grocery, and being situate on Center street in the city of Baker, Baker county, Oregon. To have and to hold the same unto the said party of the second part, his heirs, executors, administrators, successors and assigns forever. And the said party of the first part, for himself, his heirs, executors, administrators and assigns does hereby covenant and agree to and with the said party of the second part that he is the owner and in possession of the above described personal property, and that the same is free from all legal claims whatsoever except those above mentioned. In witness whereof the parties hereto have hereunto set their hands and seals this 10th day of March, 1911. H. G. Hyde. Chauncey Kirkpatrick."

The execution of this instrument having been admitted, as appears on its face, it was put in evidence, at the instance of the defendant, during the progress of the plaintiff's case. The plaintiff by various means endeavored to prove that its claim was one which the defendant had agreed to pay as part of the consideration of Hyde's sale to him. In particular, the plaintiff offered proof to the effect that, since the transfer of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the business, the defendant had stated orally to its officers that he would pay the amount due from Hyde to the plaintiff, but that afterwards, having found that the plaintiff's claim was not on the list set out in the instrument quoted above, he refused to pay. All of such offers were excluded by the court. Upon this ruling the plaintiff predicates error.

[1] It is well settled and indeed conceded that, where A. makes a valid contract with B. for the payment by B. of the debt of A. to C., the latter may sue upon the contract and enforce it by an action in his own name. *Baker v. Eglin*, 11 Or. 333, 8 Pac. 280; *Hughes v. O. Ry. Co.*, 11 Or. 437, 5 Pac. 206; *Feldman v. McGuire*, 34 Or. 309, 55 Pac. 872.

[2] But the question is whether the proof shows that such a contract was made between Hyde and the defendant for the benefit of the plaintiff. It is stated in section 713, L. O. L., that: "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases: (1) Where a mistake or imperfection of the writing is put in issue in the pleading; (2) where the validity of the agreement is the fact in dispute. \* \* \*"

The plaintiff, however, contends that the list of claims mentioned in the writing was a mere recital of the consideration, and that parol testimony is admissible to show that plaintiff's claim was in fact included in the actual consideration to be paid for the transfer of the business.

By section 798, L. O. L., the truth of the facts recited is conclusively presumed from the recital of a written instrument, as between the parties thereto, and their representatives or successors in interest by subsequent title, but, as there stated, this rule does not apply to the recital of a consideration. The fallacy of plaintiff's position consists in assuming that the list of claims supplied in the writing introduced in evidence was only a recital leaving it open to explanation or change by parol testimony. The expression on that point in the writing was more than a recital; it amounted to a contractual condition of the transfer of the business from Hyde to the defendant. It was one of the terms of the contract and operated to create a right in the persons on the list to collect their debts from the defendant. The plaintiff was not mentioned in that category, and to permit it now to show by parol testimony that its claim ought or was intended to have been included would be to import additional terms into that instrument contrary to the statute already quoted. The seller specified the conditions upon which

he sold his business, and the signature of the buyer, the defendant here, to the written instrument indicates his assent thereto. No question is made but that the writing was in fact executed, as it appears upon its face, and no issue is raised by the pleading about there being a mistake in the instrument; neither is it contended by the pleadings or otherwise that it was executed in the form in which it now appears with an intent to defraud the plaintiff. It is an instance where the parties to the contract have made a written memorial of their covenant. It is presumed, for aught that appears in this case, to contain all the elements of their stipulation, and the plaintiff, claiming under that agreement, cannot enlarge or vary its provisions under the guise of inquiring into the consideration. *Sutherland v. Bloomer*, 50 Or. 398, 93 Pac. 135; *Miller v. Edgerton*, 38 Kan. 36, 15 Pac. 894; *Baum v. Lynn*, 72 Miss. 932, 18 South. 428, 30 L. R. A. 441; *Davis v. Gann*, 63 Mo. App. 425; *Hubbard v. Marshall*, 50 Wis. 322, 6 N. W. 497; *Jackson v. Chicago R. Co.*, 54 Mo. App. 636; *McCreary v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; *Stillings v. Timmins*, 152 Mass. 147, 25 N. E. 50; *Sayre v. Burdick*, 47 Minn. 367, 50 N. W. 245.

The case of *Sayre v. Burdick*, supra, is also authority for the rule that "one who seeks to enforce a promise made to another for his benefit is bound, the same as the promisee would be, by the rule excluding parol proof to vary a written contract." On principle this is true, for the rights of the plaintiff here cannot rise above their source, which is the transaction between Hyde and the defendant. If they existed at all, they must be found in the contract between those individuals.

The court was right in excluding the testimony offered under the pleadings here, and the judgment is affirmed.

(65 Or. 403)

#### PLINSKY v. NOLAN et al.

(Supreme Court of Oregon. June 24, 1913.)  
APPEAL AND ERROR (§ 154\*)—JUDGMENTS APPEALABLE—"JUDGMENT BY CONFESSION."

Under L. O. L. § 549, providing that an appeal will lie only from a judgment or decree other than one by confession or for want of answer, the plaintiff's filing of a remitter amounted to an acceptance of the trial court's offer and a consent to its judgment, and was equivalent to "judgment by confession," and hence operated as a waiver of the right to appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 957-969; Dec. Dig. § 154.\*

For other definitions, see Words and Phrases, vol. 4, p. 3842; vol. 8, p. 7697.]

Department 1. Appeal from Circuit Court, Benton County; J. W. Hamilton, Judge.

Action by Frank Plinsky against J. M. Nolan and another. Judgment for plaintiff on remitter, and he appeals. Dismissed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



In an action to recover damages for breach of an alleged contract to employ him, the plaintiff obtained a verdict and judgment for \$135, which the defendants moved the court to set aside and to grant a new trial. The court entered an order to the effect that the verdict be set aside and a new trial granted, unless within 30 days the plaintiff should elect to rebate and accept a judgment against the defendants for \$90. Within the specified time, in accordance with the order, the plaintiff filed a remitter in the following language: "Comes now the above-named plaintiff and remits all of that certain judgment entered in the above-entitled case, over and above the sum of \$90, pursuant to the order of the court herein, giving plaintiff the opportunity to make such remitter or have the said judgment set aside." Judgment was thereupon entered for plaintiff and against the defendants for \$90, together with costs and disbursements, from which the plaintiff appeals, assigning as errors certain rulings of the trial court in the exclusion of testimony and about the instructions to the jury. The defendants move to dismiss the appeal, because the filing of the remitter operates as a waiver of the right to appeal.

W. C. Winslow, of Salem, for appellant. McFadden & Clark, of Corvallis, for respondents.

**PER CURIAM.** In effect, the trial court said to the plaintiff, "You are not entitled to \$135, but if you will accept a judgment for \$90 it will be entered in your favor for that amount." Filing the remitter quoted amounted to an acceptance of that offer and a consent to such a judgment. It was tantamount to an agreement that all alleged errors were waived and the case settled on the proposed basis of a judgment for \$90, with costs and disbursements. It is equivalent to a judgment by confession according to *Schmidt v. Oregon Gold Mining Co.*, 28 Or. 9, 40 Pac. 406, 1014, 52 Am. St. Rep. 759, and *Twitchell v. Risley*, 56 Or. 226, 107 Pac. 459. It is only from a judgment or decree other than one by confession or for want of answer that an appeal will lie. L. O. L. § 549. Having invited and accepted the judgment entered and so having consented to it, the plaintiff cannot appeal from it. The motion to dismiss the appeal is allowed.

McBRIDE, C. J., and MOORE and RAMSEY, JJ., concur.

(65 Or. 349)

PACIFIC MILLING & ELEVATOR CO. v. CITY OF PORTLAND et al.

(Supreme Court of Oregon. June 24, 1913.)

1. NAVIGABLE WATERS (§ 43\*)—GRANTS—CONSTRUCTION OF WHARVES.

L. O. L. §§ 5201, 5202, permitting the owner of land upon a navigable stream within

an incorporated town to construct a wharf and extend it into the stream below the low-water mark subject to regulation by the authorities, constitute a continuing grant; the wording being in the present tense and, revoked, will apply to land included within the limits of a city after its enactment.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 104, 256-265; Dec. Dig. § 43.\*]

2. STATUTES (§ 110½\*)—TITLE AND SUBJECT OF ACT—"SEASHORE"—"COAST"—"SALE."

Laws 1872, p. 129, entitled "An act to provide for the sale of tide and overflowed lands on the sea shore and coast," gave the owners of lands fronting on the seashore and coast the preference right to purchase the tide and overflowed land from the state. The act of October 26, 1874 (Laws 1874, p. 76), without changing the title, incorporated as an amendment that the Willamette river should not be deemed a river in which the tide ebbed and flowed, and granted the title of the state to tide and overflowed lands upon that river to the owners of adjacent lands. Laws 1876, p. 69, amended the act of 1874 so as to include within its provisions three other rivers. *Held*, that the amendatory acts were not contrary to Const. art. 4, § 20, requiring every act to embrace but one subject which shall be expressed in its title, since the words "seashore" and "coast" used in the title of the original act were broad enough to include tide and overflowed lands along rivers emptying into the ocean, and, while "sale" does not include the disposing of lands without a money consideration, their disposal in that manner is not foreign to the subject expressed in the title of the original act (citing *Words and Phrases*, vol. 7, pp. 6291-6306).

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 139, 161-163; Dec. Dig. § 110½.\*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1237, 1238; vol. 7, pp. 9361, 9362; vol. 8, p. 7793.]

3. CONSTITUTIONAL LAW (§ 48\*)—CONSTRUCTION—PRESUMPTIONS IN FAVOR OF CONSTITUTIONALITY.

Every presumption will be indulged to hold a statute valid, and it will not be pronounced void unless it is clearly repugnant to the Constitution, especially where the act has been in effect for a long time and has been acted upon by the officers and public so as to become a rule of property.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 46; Dec. Dig. § 43.\*]

4. STATUTES (§ 109\*)—TITLES OF ACTS—AMENDING ACT.

Where an act, entitled "An act for the sale of overflowed and tide lands," was subsequently amended to provide for the disposal without consideration of such lands along a particular river, and again amended to apply the first amendment to other rivers, and the title to the last amending act included the original act and the first amendment, there can be no mistake as to its meaning, and the statute is not unconstitutional as a violation of Const. art. 4, § 20, requiring the subject-matter of every act to be embraced in the title.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 136-139; Dec. Dig. § 109.\*]

5. NAVIGABLE WATERS (§ 43\*)—LEGISLATIVE GRANT—REPEAL—WHARVES AND DOCKS.

The Charter of the City of Portland, § 216, provides that all the wharves, water front, and harbor shall be under the control of the executive board, subject to ordinance, and section 73, subd. 78, gives the council power to provide for the construction of wharves. The department of public docks created by the amendment to the charter, section 18, adopted

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



in 1910, selected a wharf site on the Willamette river adjoining shore lands owned by the plaintiffs, who had not constructed a wharf in front of their premises under the right granted by the Wharf Act (L. O. L. §§ 5201, 5202), which was not expressly repealed by the charter. *Held*, that the charter does not repeal the wharf act by implication, since it does not necessarily authorize the city to use all portions of the state's property that might be reasonably necessary for the construction of wharves, but can be construed so as to authorize only the construction of wharves where the rights of others under the Wharf Act will not be interfered with.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 104, 256-265; Dec. Dig. § 43.\*]

**6. STATUTES (§ 159\*)—IMPLIED REPEAL—ACT PUGNANT ACT—"REPEAL BY IMPLICATION."**

For a repeal of a statute by implication there must be such a positive repugnancy between the new and old statutes that they cannot stand together; repeal by implication being not favored.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 229; Dec. Dig. § 159.\*]

For other definitions, see Words and Phrases, vol. 7, p. 6103.]

**7. STATUTES (§ 161\*)—IMPLIED REPEAL—ACT RELATING TO SAME SUBJECT.**

Where two statutes, apparently relating to the same subject, have an entirely different purpose, the former is not repealed by the latter.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230-234; Dec. Dig. § 161.\*]

**8. APPEAL AND ERROR (§ 1010\*)—FINDINGS OF FACT—CONCLUSIVENESS.**

Where the trial court made a finding as to the location of the line of ordinary high water after an examination of the premises, and the evidence indicated that the finding was correct, it will not be disturbed upon appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.\*]

**9. NAVIGABLE WATERS (§ 36\*)—"LINE OF ORDINARY HIGH WATER."**

The line of ordinary high water is the line to which the water rises in ordinary seasons or the line at which the water continues long enough to mark upon the soil and vegetation a distinct character.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180-200; Dec. Dig. § 36.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3289, 3290.]

**10. NAVIGABLE WATERS (§ 36\*)—LANDS UNDER WATER—OWNERSHIP BY STATE.**

The state of Oregon, upon its admission into the Union, became the owner of the bed and bank of the Willamette river up to the line of ordinary high water, subject only to the right of Congress to regulate interstate and foreign commerce thereon.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180-200; Dec. Dig. § 36.\*]

**11. NAVIGABLE WATERS (§ 43\*)—RIPARIAN RIGHTS—RIGHT TO CONSTRUCT WHARVES—SEVERANCE.**

Where owners of riparian lands plat them into lots and blocks and convey the lots with reference to the maps, the wharf rights are severed from the inner lots and attached to the outer lots.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 104, 256-265; Dec. Dig. § 43.\*]

**12. NAVIGABLE WATERS (§ 43\*)—RIPARIAN RIGHTS—GRANT OF AUTHORITY TO CONSTRUCT WHARVES.**

L. O. L. § 5201, authorizing the owners of land lying upon a navigable stream to construct a wharf and extend it into the stream below the low-water mark, subject to regulation, is a valid grant of a right of wharfage across the state land out to the harbor line fixed by state authority, since it is not inimical to, but in aid of, navigation.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 104, 256-265; Dec. Dig. § 43.\*]

**13. NAVIGABLE WATERS (§ 37\*)—LANDS UNDER WATER—TIDE LANDS AND FLATS.**

Under Laws 1874, p. 76, as amended by Laws 1876, p. 69, granting to riparian owners along the Willamette and other rivers the title to tide and overflowed lands, the owner of lots between a city street and the river, which originally consisted of a low flat, but which had been filled up and which the trial court found were above the line of ordinary high water, succeeds to the title of the state in such flats, subject to the right of navigation and to the reasonable regulation thereof by the state through the municipality.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201-226, 285; Dec. Dig. § 37.\*]

**14. EMINENT DOMAIN (§ 84\*)—NECESSITY OF COMPENSATION—RIPARIAN RIGHTS.**

The city of Portland cannot construct a public wharf below the ordinary high-water line of such lots without compensating the owners thereof or their wharfage right thereby taken.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 227-230; Dec. Dig. § 84.\*]

**15. NAVIGABLE WATERS (§ 37\*)—LANDS UNDER WATER—GRANT BY STATE—RESTRICTIONS.**

The restrictions upon the conveyance by the state of lands under navigable streams generally apply to lands below ordinary low-water mark or the bed of the stream proper and not to the bank or shore.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201-226, 285; Dec. Dig. § 37.\*]

Appeal from Circuit Court, Multnomah County; R. G. Morrow, Judge.

Action by the Pacific Milling & Elevator Company against the City of Portland and others. Decree for the plaintiff, and defendants appeal. Affirmed.

This is a suit to restrain the defendants from erecting a wharf on and in front of plaintiff's premises below the line of ordinary high water in the Willamette river. The defendants appeal from a decree of the circuit court adjudging plaintiff to be the owner of the premises and of the wharfage rights in front thereof.

Plaintiff avers that it is the owner and in the actual possession of the following described real estate, water frontage, and wharfage rights situated within the corporate limits of the city of Portland, to wit: The northerly 55 feet of lot 17, all of lots 18, 19, and 20 of Watson's addition to the city of Portland, and the southerly 40 feet of lot 21 of Doscher's addition to the above city; that the lots are 200 by 100 feet, extending from Front street at a point above

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.



and westerly of the line of ordinary high water in the left bank of the Willamette river easterly to the established harbor line; that plaintiff is entitled and desires to construct a wharf on and in front of the premises, and has applied to the defendant city of Portland for a permit to do so, but has been refused the same on the ground that the city asserts that it has the exclusive right of constructing a wharf on all that part of the premises below the line of ordinary high water; and that, pursuant to such claim, the dock commissioners of the defendant city have selected the premises for a wharf site, have entered upon such river frontage, have engaged in driving spiles therein preparatory to the construction of a wharf and dock, and threaten to occupy such premises permanently and to exclude plaintiff therefrom. The defendant city and its officers deny plaintiff's title and allege, among other things, that the property described in plaintiff's complaint has never been in the actual possession of any one; that the whole thereof, including all of North Front street adjacent thereto, has at all times been below the ordinary high-water line of the Willamette river, and that the same accrued and became vested in the state of Oregon at the time the state was admitted into the United States, and that it has never sold or conveyed the same to any one; that the state of Oregon by its Constitution and through the charter of the City of Portland adopted in 1903, and a certain amendment thereto, establishing a department of public docks and making provisions with reference thereto, adopted by the people of the city of Portland November 8, 1910, pursuant to the Constitution, granted unto the city the right, power, and authority to construct and maintain wharves, docks, and all appurtenances thereto upon the property of the state of Oregon lying below the ordinary high-water line of the Willamette river, particularly upon such portions thereof as a commission of the department of public docks of the city might select; that the commission has duly selected the property described in the complaint for that purpose, and intends to erect thereon a large dock extending from ordinary high-water line out to the harbor line, and to take possession of the whole of such frontage and premises without paying plaintiff any compensation therefor. The plaintiff asks that its title to the premises be quieted, and that defendants be enjoined from erecting or maintaining any structure thereon.

The state intervened and alleges, in substance, in addition to the facts stated by the defendant city of Portland, that it is the owner of all the land between the ordinary high-water mark and the harbor line in front of and on the river side of such lands; that the city of Portland and its dock commission are fully authorized by the grant in its charter to enter upon and construct below high-

water mark a public dock and wharf for the purpose of aiding and promoting the commerce and navigation of the Willamette river; that in attempting to construct a public dock the city of Portland is acting by virtue of such authority; that the plaintiff has no franchise or license to construct wharves or docks in front of such lands below ordinary high-water mark; that such license or franchise has been forfeited, abandoned, and lost for more than ten years prior to the commencement of this suit; and that plaintiff and its predecessors have in no wise attempted to use the same during such time. The state prays that it be declared to be the exclusive owner of the property, except as to the city of Portland, and that plaintiff be enjoined from driving piles in or building any structure upon the land below high-water mark or from asserting any claim to the land adverse to the intervenor.

The following matters are agreed to: (1) That Watson's addition to the city of Portland was platted March 7, 1871, by A. J. Watson, the owner of all the land included within its boundaries above the line of ordinary high water. (2) That Doscher's addition to said city was platted April 11, 1871, by John C. and Ann L. Doscher, the owners of all the land within its boundaries above ordinary high-water line. (3) That both of said additions were platted on a part of the donation land claim of Wm. Blockstone, and that the easterly boundary of said claim was the Willamette river, which is navigable. That said plats are contiguous, Doscher's addition joining Watson's addition on the north and being a continuation thereof so far as "river block" in the latter addition is concerned; "river block No. 2" of Doscher's addition being a continuation of "river block" in Watson's addition, and both of said additions being bounded on the west by Front street. (4) That the plat of Watson's addition shows the left boundary line of the Willamette river extending northerly and southerly practically through the middle of said "river block." (5) That, according to the field notes of the survey of the donation land claim, the meander line of said claim is located about 40 feet easterly of and practically parallel with Front street. (6) That plaintiff has succeeded by mesne conveyances to whatever title Watson and the Doschers had to lots 18, 19, and 20, and the northerly 55 feet of lot 17 of said "river block," and the southerly 40 feet of lot 21 of said "river block No. 2," and, if the lots are entirely below the ordinary high-water line of the river, plaintiff has nevertheless acquired and owns all the rights of the bank or upland property to such lots and parts of lots and the frontage thereof. (7) That all such title and right as the owner of the land adjacent to the line of ordinary high water in the Willamette river might have under the law is vested in the plaintiff so far as concerns the



premises in front of lots 26, 27, and 28 of terminal block in Watson's addition.

The evidence shows that there is a large area of similar land in the city, much of it occupied as private property, and all held in private ownership. D. B. Sigler, for about 14 years county assessor, testified that the land between ordinary high and low water marks has always been assessed; that there is \$25,000,000 or \$30,000,000 invested in such lands and structures thereon. It appears that the plaintiff paid \$137,000 for the lots five years ago. Since 1909 the assessed valuation has been from \$74,750 to \$91,250. In 1910 the taxes amounted to \$2,007.50. The land in question, in its original state, consisted of a low flat broken by a spring branch or creek, and for the last 25 years has been gradually filling up, so that much of it is now 15 feet higher than it was formerly. The lots immediately to the south, which are in the same class of property as the land in question, are occupied by a horse barn, blacksmith shop, engine house, a bridge company's plant, comprising an investment of several thousand dollars, and other buildings. The city first commenced an action to condemn the right to construct a wharf on the premises, which action was dismissed.

Frank S. Grant, F. W. Mulkey, and Lyman E. Latourette, all of Portland, for appellants. C. W. Fulton, of Portland (Fulton & Bowerman, of Portland, on the brief), for respondent. A. M. Crawford, Atty. Gen. (Wm. C. Benbow, of Portland, on the brief), for intervenor. J. B. Kerr and E. B. Seabrook, both of Portland (Charles H. Carey, Malarkey, Seabrook & Dibble, and Martin L. Pipes, all of Portland, on the brief), amici curiæ.

BEAN, J. (after stating the facts as above). The claims of the respective parties may be summarized as follows:

**Plaintiff claims:**

(1) Title in fee by patent from the government and subsequent conveyances as to the westerly 100 feet which plaintiff claims has always been above the ordinary high-water line, or is now above such line by reason of accretion.

(2) Title in fee from the state of Oregon granted by acts of the Legislature of 1874 and 1876, known as the Tide Land Acts, and subsequent conveyance to a strip about 100 feet wide east of and adjacent to the above, being between the ordinary high-water line and low-water line as claimed by plaintiff.

(3) Riparian or littoral rights and a wharf right to the portion between low water and the harbor line.

Defendants, in answer to the first claim, maintained that the locus in quo belongs to the state of Oregon because it is entirely below the ordinary high-water line, which is westerly of North Front street, although the apparent line is now near the easterly line of such street. Plaintiff's second claim is based

on the Tide Land Act as amended in 1874 and 1876, whereby the state purports to grant to the adjacent upland owners "any tide or overflowed lands upon said Willamette river." In answer to this claim defendants maintain: (1) That the locus in quo is river shore and not "tide or overflowed lands" within the meaning of this act, and (2) that, in any event, this portion of the act is void because not embraced in its title. In answer to plaintiff's third claim defendants maintain: (1) That the state's ownership of the bed and shores of a navigable river is absolute, admitting of no easement on the part of the adjacent upland owner; (2) that the Wharf Act creates only a permit or license to the upland owner to wharf out, but plaintiff, not having constructed a wharf, has acquired no vested right, and his license or permit has been revoked by the act of the city in selecting the locus in quo and proceeding to construct a public dock under legislative authority; and (3) that, in any event, littoral or wharf rights are subject to right of the state and its agencies to construct docks and other improvements in aid of navigation and commerce.

It is only fair to say that the learned counsel on both sides, as well as those appearing amici curiæ in their several briefs, have shed much light upon the question involved and have stated their positions with clearness. As a basis for a proper understanding, it may be well to observe that, by the common law of England, the title and dominion of the sea and of rivers and arms of the sea where the tide ebbs and flows; and of all the lands below high-water mark, within the jurisdiction of the Crown of England, are in the King. These waters and the land which they cover are not capable of ordinary occupation, cultivation, and improvement, and their primary uses are public in their nature, for highways of navigation and commerce, and for fishing purposes by all the King's subjects. Therefore the title *jus privatum* in such lands, as of waste and unoccupied lands, belongs to the King as the sovereign; and the dominion *jus publicum* is vested in him as the representative of the nation and for the public good. The English possessions in America were held by the King, and the exclusive power to grant them was vested in him in like manner. The English monarchs granted charters for large tracts of land on the Atlantic Coast, giving the grantees both the territory described and the powers of government, including the property and dominion of lands under tide waters. With the surrender of the British, all the rights of the Crown and of Parliament became vested in the several states, subject to the rights relinquished to the national government by the Constitution of the United States. In this manner the government of the colonies and the original states became vested with the title to lands under navigable waters. The states



admitted to the Union since the adoption of the Constitution have the same rights as the original states had in the tide waters and lands below the high-water mark within their respective jurisdictions. In this country the same principle applies to the Great Lakes, and in some states it has been extended to navigable rivers. In the early government of the colonies and later of the states, in order to induce persons to erect wharves for the benefit of navigation and commerce, the owners of land bounding on tide waters were allowed greater rights and privileges in the shore below high-water mark than in England. The nature and degree of the rights and privileges differed in the various states; in some they were regulated by statute and in others by usage only. Each state, according to its own views of policy and justice, has dealt with the lands under the water as it has deemed best for the public interests, reserving its own control over such lands or granting within its limits rights therein to individuals or corporations, whether owners of the adjoining upland or not. Therefore the title and rights of riparian owners in the soil below high-water mark are governed by the local laws of the several states, subject to the rights granted by the federal Constitution to the United States for regulating and improving navigation. The holdings have not been uniform in regard to the right of a riparian owner to establish a wharf on his own land extending over the shore between high and low water marks and lands under the water for the purpose of reaching a navigable point. In some states it is held, sometimes because of long usage, sometimes by statute, and sometimes upon the interpretation of the common law adopted by the courts, that, for the purpose of making available the right of a riparian owner to access to navigable waters, he may make a landing, dock, wharf, or pier, for his own use or that of the public, for the purpose of reaching the ordinary point of navigation, subject to whatever rules the Legislature may enact for the protection of the public, and also subject to the right of the United States to exercise its powers for regulating and improving navigation. The right of a riparian owner to construct a wharf or landing is founded largely upon equitable considerations. Where a wharf has been constructed by a riparian owner, in opposition to no statute, and without the interference of the state and without detriment to superior public rights, and large and valuable interests have been created, the owner has generally been held to have been justified in constructing such wharf. 1 Dillon, Mun. Cor. (5th Ed.) § 264.

The paramount right of navigation which is vested in the state and also in the general government of the United States by virtue of the authority conferred upon it to regulate commerce between the states and with foreign nations is receiving constant elucidation

by the courts, but no fixed rule can yet be laid down defining the extent to which the federal government or the state may interfere with the property of riparian and other owners without becoming liable for compensation. *Id.* § 265.

[1] Let us then consider what policy has been adopted by the state of Oregon and what has been done in confirmation thereof. In 1862 the legislative assembly, evidently deeming it for the best interests of the state to encourage private parties to construct docks, wharves, etc., for the convenience of and in aid of navigation, without the state, either directly or through its municipalities engaging in such enterprises, passed what is known as the Wharf Act (sections 5201, 5202, L. O. L.). The first section provides that: "The owner of any land in this state lying upon any navigable stream or other like water, and within the corporate limits of any incorporated town therein, is hereby authorized to construct a wharf or wharves upon the same, and extend such wharf or wharves into such stream or other like water beyond low-water mark so far as may be necessary and convenient for the use and accommodation of any ships or other boats or vessels that may or can navigate such stream or other like water." The other section confers upon the corporate authorities of the town wherein such wharf is proposed to be constructed the power to regulate the exercise of the privilege or franchise granted and to prescribe the mode and extent to which the same may be exercised beyond the line of low water, so that the same will not unnecessarily interfere with navigation. The premises in controversy were included within the limits of the city of Portland in 1883. The grant of the privilege mentioned in section 5201, L. O. L., is a continuing grant and speaks in the present tense as long as the statute continues in force; therefore the act, if it has not been revoked, applies to the land in question.

When a statute is expressed in general terms and in words of the present tense, it will, as a general rule, be construed to apply not only to things and conditions existing at the time of its passage but will also be given a prospective interpretation by which it will apply to such as come into existence thereafter. 36 Cyc. 1235.

[2] In 1872 the Legislature passed an act entitled "An act to provide for the sale of tide and overflowed lands on the sea shore and coast." Laws 1872, p. 129. This act gave the owners of land fronting upon such tideland the preference right to purchase the tideland belonging to the state in front of the land so owned. By an act approved October 26, 1874 (Laws 1874, p. 76), the following amendment was incorporated into the tideland act, without changing the title, namely: "That the Willamette river shall not be deemed a river in which the tide ebbs and flows within the meaning of this act,



or of the act to which this act is amendatory; and the title of this state to any tide or overflowed lands upon said Willamette river is hereby granted and confirmed to the owners of the adjacent lands, or when any such tide or overflowed lands have been sold, then in that case, to the purchaser or purchasers of such tide or overflowed lands from such owner of such adjacent lands, or some previous owner thereof, as the case may be." This act was further amended in 1876 (see Laws 1876, p. 69) so as to include in its provisions the Coquille, Coos, and Umpqua rivers.

The validity of the acts is attacked on the ground that the subject-matter of a grant of land on the Willamette river is not included in the title of the act of 1872, of which the acts in question are amendments. *L. 1872, p. 129.* Therefore the amendments are repugnant to the requirements of article 4, § 20, of the Constitution of Oregon, providing that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title." It is contended on behalf of plaintiff that the title of this act is broad enough to embrace tide and overflowed lands along rivers emptying into the ocean, and that this is established by decisions defining the meaning of the terms used. That "the shore of the sea is that part of the land covered by water in its greatest ordinary flux, the ports, bays, roadsteads and gulfs, and the rivers, although they may not be navigable \* \* \* their beds, mouths, and the salt marshes." *United Land Association v. Knight, 85 Cal. 448, 482, 23 Pac. 267, 270.* That the word "sea" has been held to mean "not only high sea, but arms of the sea, waters flowing from it into ports and havens, and as high upon rivers as the tide ebbs and flows." *Waring v. Clarke, 5 How. 440, 462 (12 L. Ed. 226).* That "tide waters" are waters, "whether salt or fresh, wherever the ebb and flow of the tide from the sea is felt." *Commonwealth v. Vincent, 108 Mass. 441, 447; Attorney General v. Woods, 108 Mass. 436, 439 (11 Am. Rep. 380).* That the word "coast" is defined to be the seaboard of a country." *Ravesies v. United States (D. C.) 35 Fed. 917, 919.* That that portion of the country which drains into the Pacific Ocean is frequently spoken of as the "Pacific Coast."

[3] It is well settled that every presumption will be indulged in to hold a statute valid, and it is only where an act is purely repugnant to the Constitution that the courts will hold it void. This is especially true where the act in question has been enacted for many years and acted upon by the officers of the state and by the people as valid so that it has become a rule of property. Millions of dollars have been invested upon the strength of the validity of these laws, and the value of lands have been thereby enhanced; therefore the acts should not be overturned unless it is necessary to do so in or-

der to avoid doing violence to the Constitution. Stability of land titles is an object of moment and worth to the people of the state of Oregon.

The subject-matter of the act of 1872, and the amendments of 1874 and 1876, is the disposal of the state's land on the seashore and coast, and any matter germane to or connected with that subject may be embodied in the act. The title does not use the word "disposal" but uses the word "sale." In discussing the question of title to a legislative act, Mr. Justice Bean, in *State v. Shaw, 22 Or. 287, at page 289, 29 Pac. 1028, at page 1029*, said: " \* \* \* The departure (from the title) must be plain and manifest, and all doubts will be resolved in favor of the law. \* \* \* If all the provisions of the law relate directly or indirectly to the same subject, are naturally connected, and are not foreign to the subject expressed in the title, they will not be held unconstitutional. \* \* \*"

The word "sale" used in the act of 1872 does not definitely refer to the matter of granting or confirming title to tide and overflowed lands upon the Willamette and other rivers and disposing of the same without a money consideration. See volume 7, *Words and Phrases*, p. 6291. We cannot say, however, that the matter is foreign to the subject expressed in the title.

[4] Be that as it may, and passing to the amendatory act of 1876, the title of this act was the whole of the act of 1874, including the amendments granting and confirming tide and overflowed lands on the Willamette and other rivers, which was referred to in the title of the act of 1876. There could certainly be no mistake in regard to this act. Many authorities support the rule that the title of an amendatory act is sufficient and will uphold any legislation that would have been permissible under the original title, when the law amended or enacted after the amendatory act refers by chapter or by section to the act amended, giving its title. This practice, however, has been criticised. *Fort Street Union Depot Co. v. Com'r of Railroads, 118 Mich. 340, 76 N. W. 631.* After the enactment of the amendment of 1874, had there been a "joker" in the act, the members of the Legislature and the people of the state would have had two years in which to consider the same and retrace their steps in 1876. Instead of so doing, the lawmakers re-enacted the measure. From this, in connection with the fact that the courts and people in general have sanctioned the grant as expressed by the Legislature for more than 25 years, and have acted thereon, and that the state, county, and city have treated the land as plaintiff's or its grantors, we conclude that the statute is a valid one, and that the grant and confirmation are complete.

In *Lewis v. City of Portland, 25 Or. 133,*



35 Pac. 256, 22 L. R. A. 736, 42 Am. St. Rep. 772, this court practically settled the question as to the statutes applying to lands between high and low water marks on the Willamette river. At page 162 of 25 Or., at page 262 of 35 Pac. (22 L. R. A. 736, 42 Am. St. Rep. 772), of the opinion Justice Lord said: "This grant conveyed the title to all such lands along these rivers, whether tide or overflowed, to the riparian owners, subject to the public trust. As the Willamette is a fresh-water river and only slightly affected by the tides a short distance from its mouth, there is no tideland at Portland, as held in *Andrus v. Knott*, 12 Or. 501, 8 Pac. 763, and therefore it results that if the submerged or overflowed lands described in the act include such as are not affected by the tides, and lie between the upland and navigable water, they belong to such owners, subject to the paramount right of navigation and commerce." See *Coquille Mill & Mercantile Co. v. Johnson*, 52 Or. 547, 98 Pac. 132, 132 Am. St. Rep. 716.

[5] The Charter of the City of Portland, § 216, provides that all the wharves, water front, and harbor within the city of Portland shall be under the management and control of the executive board, subject to ordinance. And subdivision 78 of section 73 provides that the council shall have power and authority to provide for the construction and maintenance of wharves, docks, and levees and all such other work as may be required for the accommodation of commerce. The people of Portland, by the popular vote in 1910, adopted an amendment to section 118 of the charter whereby the department of public docks was created with authority *inter alia* to exercise the powers above granted to the executive board and council. On August 29, 1912, this commission made a selection of a site for a public dock embracing the locus in quo, and it is contended on behalf of the city that the authorization of the municipality to construct public docks necessarily authorized it to use such portion of the state's property as might be reasonably necessary therefor. To this contention we are unwilling to accede. It is not contended that the charter of 1903 in terms repealed the Wharf Act of 1862.

[6] The rule that repeals by implication are not favored and will not be held to exist if there is any other reasonable construction is well settled. To repeal a statute by implication there must be such a positive repugnancy between the provisions of the new and the old that they cannot stand together or be harmonized. *Sutherland*, Const. (2d Ed.) 267; *Palmer v. State*, 2 Or. 66; *State v. Benjamin*, 2 Or. 125; *Booth's Will*, 40 Or. 154, 156, 61 Pac. 1135, 66 Pac. 710; *United States v. Greathouse*, 166 U. S. 601, 605, 17 Sup. Ct. 701, 41 L. Ed. 1130.

The authority of the city to provide for public landing places and to construct docks

and wharves only authorizes such action where the rights of others will not be interfered with thereby. The existence of such rights in private individuals is recognized by the statutory authorization to acquire them by condemnation or otherwise. From the whole tenor of the different statutes it does not appear that the later act was intended to revoke the provisions of the old acts of 1862, 1874, and 1876. A charter of the city which authorized it to lay out, open, and improve streets would not be held to authorize the city to open such street through a block, the title to which was vested in the state of Oregon. The city can construct docks and wharves on any property which it has previously acquired; therefore the provisions of the charter can be given effect without interfering with the rights conferred by the act granting and confirming title in the tide and overflowed lands to the riparian owners on the banks of the Willamette.

[7] One statute is not repugnant to another unless they relate to the same subject and are enacted for the same purpose. When there is a difference in the whole purview of two statutes apparently relating to the same subject, the former is not repealed by the latter. Undoubtedly the two statutes under consideration relate to different subjects. See *United States v. Clafin*, 97 U. S. 552, 24 L. Ed. 1082; *United States v. Gillis*, 95 U. S. 407, 416, 24 L. Ed. 503.

The case of *City of San Pedro v. S. P. R. Co.*, 101 Cal. 133, 35 Pac. 993, is a case in point. The state of California had granted the city the right to construct and maintain wharves, piers, etc., on any land bordering on any navigable bay within the corporate limits. The city claimed, as the defendants do in the case at bar, that the state had granted to it the right to construct and maintain wharves. It was held that the power and authority conferred did not convey to the city the state's land or clothe the city with the absolute right to construct a wharf at any point on its water front which it might select, irrespective of the rights of others, but granted the city the power to erect docks the same as a natural person.

[8] In regard to the high-water mark the circuit court found as follows: "That the line of ordinary high water in the left bank of the Willamette river at the present time and at the time of the commencement of this suit was and is located over and across the said river block in Watson's addition and the said river block No. 2 in Doscher's addition and easterly of the easterly line of said Front street, which said Front street was continued on its course through said Doscher's addition at the time of the platting thereof."

[9] The line of ordinary high water is the line to which the water rises in the seasons of ordinary high water or the line at which the presence of water is continued for such



length of time as to mark upon the soil and vegetation a distinct character. *Johnson v. Knott*, 13 Or. 308; 10 Pac. 418; *Sun Dial Ranch Co. v. May Land Co.*, 61 Or. 203, 119 Pac. 758. This line should be ascertained by an examination of the bed and banks of the river, and by taking into consideration all the circumstances and all the natural objects connected therewith, and by ascertaining where the presence and action of water are so common and usual and so long continued in all ordinary years as to mark upon the soil of the bed a character distinct from that of the banks. The learned judge who tried the case appears to have been acquainted with the locus in quo to a certain extent and, as we understand, examined the same. This would lend great weight to the findings. While we do not deem the question vitally material, from an examination of the evidence upon this point, we think that this finding was correct and manifestly should not be disturbed.

It is claimed by defendants that, even if plaintiff were considered as having a vested riparian right or wharf right, such right is subject to the implied reservation on the part of the state and its agencies to use the locus in quo for the purpose of constructing public docks, wharves, and other improvements in aid of navigation and commerce.

To further notice the trend of the decisions in the different states we note the following in the case of *State ex rel. v. Gerbing*, 56 Fla. 603, 47 South. 353, 22 L. R. A. (N. S.) 337, at page 343: The rights of the people of the state in the navigable waters and the lands thereunder, including the shores or space between ordinary high and low water marks in the state, are designed for the public welfare, and the state may regulate such rights and the uses of the waters and the lands thereunder for the benefit of the whole people of the state as circumstances may demand, subject to the right of navigation, the control of which was surrendered to the federal government by the Constitution. The shores of a navigable river are the spaces between high and low water marks, and the bed of a river includes the shores. Tideland is that daily covered and uncovered by water by the ordinary flux and reflux of normal tides (citing 1 *Farnham, Waters*, 227; *Baer v. Moran Bros. Co.*, 153 U. S. 287, 14 Sup. Ct. 823, 38 L. Ed. 718; *Baird v. Campbell*, 87 App. Div. 104, 73 N. Y. Supp. 617). In the above case it was also held that for the purpose of aiding navigation or commerce, or of encouraging new industries and the development of natural or artificial resources, the state may grant reasonable and limited rights and privileges to individuals to erect docks, wharves, and slips over shallow waters to reach navigable portions thereof, or to fill in shallow waters adjacent to navigable waters and erect structures thereon, for the purposes of commerce

incidental to navigation on the waters; or the state may grant reasonable and limited privileges for planting and propagating oysters or shellfish on land covered by waters of navigable streams; but such privileges should not unreasonably impair the rights of the whole people of the state in the use of the waters or the lands thereunder for the purposes implied by law (citing *State v. Black River Phosphate Co.*, 32 Fla. 82, 13 South. 640, 21 L. R. A. 189). It was further held in the case of *State v. Gerbing*, supra, which is cited and relied on by the state in the case at bar, that the title to lands under navigable waters, including the shores or space between ordinary high and low water marks, is held by the state, by virtue of its sovereignty, in trust for the people of the state for navigation and other useful purposes afforded by the waters over such lands, and the trustees of the internal improvement fund of the state are not authorized to convey the title to the lands of this character.

In the case of *Ill. C. R. Co. v. Illinois*, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018, it was held that the trust with which these lands are held by the state is governmental and cannot be wholly alienated. For the purpose of enhancing and improving the rights and interests of the whole people, the state may, by appropriate means, grant to individuals the title to limited portions of the lands or give individuals limited privileges therein, but not so as to divert them from their proper uses or so as to relieve the state of the control and regulation of the uses afforded by the land and water. In that case the state of Illinois had granted to the railroad company a right of way 200 feet wide from Cairo to Chicago over the lands and waters of the state, and by consent of the city the right of way was located along the margin of Lake Michigan and an embankment raised and so protected from the violence of storms on the lake as to make the way safe as a roadbed. From water front lots owned by it adjacent to this levy, the company built docks, extending out to deep water of the lake. Afterwards the Legislature of that state passed a law granting to the company the bed of the lake along a mile and a half of the city water front and extending a mile out into and including most of the outer harbor. This law was repealed by a subsequent Legislature. The Supreme Court of the United States held that the repeal was a valid exercise of legislative power for the reason that the law repealed undertook to invest the railroad company with rights inimical to navigation and commerce and assumed to grant lands subjacent to the navigable waters of the lake. The use and enjoyment of its embankment, which occupied part of the original margin of the lake and the water thereof and the maintenance of its docks by the company, were protected in that



case, subject to the condition that they should not extend into the lake beyond the point of practical navigability.

By an act of the Legislature the state of Florida, in aid of commerce, vests in the United States or citizens thereof, owning lands actually bounded by and extending to the low-water mark on navigable streams, bays, and harbors, title to the submerged lands in front of the abutting lands as far to the edge of the channel for the purpose of filling up from the shore, bank, or beach and of erecting structures thereon in aid of commerce, not obstructing the channel, but leaving the full space for the requirements of commerce. Gen. Stat. Fla. 1906, §§ 643, 644.

In a note to *Florida v. Gerbling*, 22 L. R. A. (N. S.) 337, it is said: "There seems little doubt of the correctness of the general proposition that the title to tidelands is in the state and may pass therefrom by grant. Such, indeed, was the specific conclusion reached in the following cases: *Pollard v. Hagan*, 3 How. 212, 11 L. Ed. 565; *Mumford v. Wardwell*, 6 Wall. 423, 18 L. Ed. 756; *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656 [8 Sup. Ct. 643, 31 L. Ed. 543] \* \* \*—and a long list of other cases.

In *Jones v. Oemler*, 110 Ga. 202, 35 S. E. 375, it was said that there could be no question but that the state owned the beds of all rivers within its jurisdiction, and that it had an absolute control over such lands as it had over any other property it might own, with the same power to grant, sell, or lease it, or any portion thereof, to any of its citizens upon terms or conditions which its Legislature might prescribe, to the same extent that it would have the right to dispose of its wild or other lands. This proposition, sometimes laid down in broad and unrestricted terms, must be understood with the qualifications that the right of a state to grant tidelands is subject to those provisions of the national Constitution giving Congress control of the waters upon which foreign and interstate navigation is conducted. *Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997; *United States v. Mission Rock Co.*, 189 U. S. 391, 23 L. Ed. 606, 47 L. Ed. 865; *Richardson v. United States (C. C.)* 100 Fed. 714; *Mobile Transportation Co. v. Mobile*, 128 Ala. 335, 30 South. 615, 64 L. R. A. 333, 86 Am. St. Rep. 143, affirmed in 187 U. S. 479, 23 Sup. Ct. 170, 47 L. Ed. 266.

In *Weber v. Harbor Commissioners*, 18 Wall. 57, 65, 21 L. Ed. 798, it was held that, upon the admission of a state into the Union upon equal footing with original states, absolute property in and dominion and sovereignty over all soil under tide waters within her limits passed to the state with the consequent right to dispose of the title to any part of the soil in such manner as she might deem proper, subject only to the paramount right of navigation of the waters so far as such navigation might be required by the

necessities of commerce with foreign nations or among the several states, the regulation of which was vested in the general government.

In *Eisenbach v. Hatfield*, 2 Wash. 236, 244, 26 Pac. 539, 12 L. R. A. 632, it was said that there was no doubt whatever but that tidelands belonged to the state in actual propriety, and that the state had full power to dispose of the same, subject to no restrictions save those imposed upon the Legislature by the Constitution of the state and by the Constitution of the United States. In a few earlier cases the courts attempted to impose a trust in favor of the public upon the state's title to tidelands, thereby, to some extent at least, restricting the right of the state to grant the same.

Thus in *Ward v. Mulford*, 32 Cal. 365, it was held that, while tidelands belong to the state by virtue of her sovereignty, yet the state held the same for the benefit of the people, and theoretically, at least, could make no disposal of such lands prejudicial to the rights of the public to use them for the purposes of navigation and fishery. This conclusion was quoted with approval in *People ex rel. Harbor Com'rs v. Kerber*, 152 Cal. 731, 93 Pac. 878, 125 Am. St. Rep. 93.

It has been said that the true limit of this trust doctrine has been best set forth in the New York decisions. In *People v. N. Y. & S. I. Ferry Co.*, 68 N. Y. 71, the court said: "The title to lands under tide waters in this country, which before the Revolution was vested in the King, became, upon the separation of the colonies, vested in the states within which they were situated. The people of the state in their right of sovereignty succeeded to the royal title and through the Legislature 'may exercise the same powers, which, previous to the Revolution, could have been exercised by the King alone, or by him in conjunction with Parliament, subject only to those restrictions which have been imposed by the Constitution of the state and of the United States.' Chancellor in *Lansing v. Smith*, 4 Wend. [N. Y.] 9 [21 Am. Dec. 89]. The public right in navigable waters was in no way affected or impaired by the change of title. The state, in place of the Crown, holds the title as trustee of a public trust, but the Legislature may, as the representative of the people, grant the soil, or confer an exclusive privilege in tide waters, or authorize a use inconsistent with the public right, subject to the paramount control of Congress. \* \* \*

Coming back to our own state, in *Hume v. Rogue River Co.*, 51 Or. 237, 83 Pac. 391, 92 Pac. 1065, 96 Pat. 865, 31 L. R. A. (N. S.) 396, 131 Am. St. Rep. 732, it was held that the state, by its admission into the Union by virtue of its sovereignty, became vested with the title to all tidelands, subject, however, to the public right of navigation and the common rights of the citizens of the state to fish therein.



In the early case of *Hinman v. Warren*, 6 Or. 408, 411, tideland on the Columbia river was involved and was described in a patent from the United States to John McClure and wife. The plaintiff claimed title to it by a chain of conveyances from the McClures, and the defendant by deed from the state. Mr. Justice McArthur said, in substance, that the tidelands which are covered and uncovered by the ebb and flow of the sea belong to the state of Oregon by virtue of its sovereignty, and, adopting the principle common in cases from *Pollard's Lessee v. Hagan*, 3 How. 212, 11 L. Ed. 565, *Barney v. Keokuk*, 94 U. S. 324, 24 L. Ed. 224, said: "As the state became the owner of the tidelands, it had the power, under the provisions of the act providing for the sale of such lands, \* \* \* to sell the same. It has, however, no authority to dispose of its tidelands in such a manner as may interfere with the free and untrammelled navigation of its rivers, bays, inlets, and the like. The grantees of the state took the land subject to every easement growing out of the right of navigation inherent in the public." This was quoted and approved in the leading case of *Bowlby v. Shively*, 22 Or. 410, 30 Pac. 154; *Shively v. Bowlby*, 152 U. S. 1, 54, 14 Sup. Ct. 548, 38 L. Ed. 331. Mr. Justice Lord, at page 417 of 22 Or., at page 156 of 30 Pac., of the opinion said: "Some contention is made that the phrase which describes the ownership of the state as being 'by virtue of its sovereignty' indicates that the title held by the state to such lands is as trustee for the public, and not as absolute owner, capable of conveying private rights therein, subject only to the paramount right of navigation; but the use of this phrase in that case was not designed to convey that meaning, when considered with reference to the whole decision. The contention was that the title of the tidelands, before the admission of the state into the Union, was in the United States and subject to its disposal; and, as it had granted away by its patent the tidelands in question before the state was admitted, no rights of the state ever attached to them. The court refused to accede to this view, but adopting the reasoning of *Pollard's Lessee v. Hagan*, supra, held that the state, upon its admission into the Union, became the owner of the tidelands, not as a grantee of the United States, but by virtue of its sovereignty; that the state had the right to dispose of such tidelands under the provisions of the statute referred to providing for their sale; and that its grantees took them subject only to the paramount right of navigation existing in favor of the public." In the same case it is declared that the prior adjudged cases in this state regarding the nature of the state's title to lands between high and low water marks are the foundation of the doctrine that the state may sell and convey its tidelands, and that its grantees take them free from any right therein from the upland owner, and subject only

to the paramount right of navigation inherent in the public.

Mr. Justice Boise, in *Parker v. Taylor*, 7 Or. 435, at page 446, said: "As has been before stated, the patent from the United States conferred on the patentee no right to the tidelands lying between high and low water. These were the property of the state and absolutely at its disposal. Its deed gives to them the same fee-simple title as the patent from the United States gave to the land above high tide. \* \* \* Land situated as this is, covered with shoal water, may, under proper regulations by the state and municipal authorities, be reclaimed from the sea by filling in or by driving piles and building on them and becomes private property and the subject of sale the same as any other property."

The view that the state is the absolute owner of the tidelands, subject only to the paramount right of navigation, is further illustrated in the case of *Parker v. Rogers*, 8 Or. 183. At page 189 of 8 Or. of the opinion Mr. Justice Boise, speaking for the court, said: "We are aware that it is a general rule that what is appurtenant to land passes with it, being an incorporeal hereditament, but the right to build a wharf on the land of the state below high water is a franchise which attaches to the tideland, and it is appurtenant to it rather than to the adjacent land, for it can be severed from the adjacent land and enjoyed without it."

In *Corvallis & Eastern R. Co. v. Benson*, 61 Or. 359, 121 Pac. 418, Mr. Justice Burnett, speaking for the court, after an examination of many authorities, held that the title to the tidelands between high and low water marks acquired by the state consisted of two elements: *Jus privatum*, or private right, and the *jus publicum*, or public right—the *jus privatum* being a species of private property which the state held the same as a private owner and might grant to any one, in any manner, or for any purpose not forbidden by the Constitution, the grantee thereby taking the title as absolutely as under a private conveyance; but the *jus publicum*, being the dominion of sovereignty in the state, by which it prevents any use of lands bordering on navigable waters which would materially interfere with navigation and commerce thereon, cannot be abdicated or granted.

Much reliance is placed by the defendants in the opinion in the case of *Sage v. Mayor*, 154 N. Y. 61, 47 N. E. 1096, 38 L. R. A. 606, 61 Am. St. Rep. 592, wherein it was held that the absolute power to improve a water front for the benefit of navigation exists in the state or in its municipal grantee as a trustee for the public, free from any interference by riparian owner whose sole right as against such authority was the statutory right of pre-emption in case of a sale; the riparian owner never having exercised such right of pre-emption, and having no title or interest



in the land under water in front of his premises.

In *Lewis v. City of Portland*, supra, 25 Or. at page 167, 35 Pac. at page 263 (22 L. R. A. 736, 42 Am. St. Rep. 772), in discussing the Wharfage Act, it was said: "It is doubtless true that, if the statute should be repealed or the adjacent tidelands disposed of, the privilege given the upland owner to build a wharf across the tidelands to deep water, unless acted upon or availed of, would be revoked."

In the case at bar the adjacent overflowed land has been conveyed by the state to the upland owner. However, an upland owner of land bordering on a navigable stream owns only to the high-water line and the stream and the river and its banks and bed belong to the state. *State v. Portland Gen. Elec. Co.*, 52 Or. 502, 95 Pac. 722, 98 Pac. 160.

In *Coquille Mill & Merc. Co. v. Johnson*, 52 Or. 547, at page 549, 98 Pac. 132, 132 Am. St. Rep. 716, it is held that as the land abutted upon the Coquille river, which is navigable at the point in question, by virtue of the act of October 21, 1876, of the legislative assembly of this state (Sess. Laws 1876, p. 69), Gilman's title was extended to low-water mark. At page 551 of 52 Or., at page 134 of 98 Pac. (132 Am. St. Rep. 716), the following is quoted with approval: "Riparian owners upon navigable fresh rivers and lakes may construct, in the shoal water in front of their land, wharves, piers, landings, and booms, in aid of and not obstructing navigation"—citing 2 Gould, Waters (2d Ed.) § 179; *Montgomery v. Shaver*, 40 Or. 244, 66 Pac. 923; *Stevens Point Boom Co. v. Reilly et al.*, 44 Wis. 295; *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206.

In regard to tideland, in *Grant v. Oregon Nav. Co.*, 49 Or. 324, at page 328, 90 Pac. 179, Mr. Justice Eakin said: "By the legislative acts of 1872 (Laws 1872, pp. 129, 130) and 1874 (Laws 1874, pp. 76, 77) the upland owner was given the preference right to purchase the tideland, and upon such purchase, if not already vested in another under section 4042, B. & C. Comp., he thereby acquired also the exclusive wharfage right to deep water, and also all accretions to his tideland and the right to fill up the shallows or flats, so long as he does not impede navigation or interfere with commerce over the same"—citing *Miller v. Mendenhall*, 43 Minn. 95, 44 N. W. 1141, 8 L. R. A. 89, 19 Am. St. Rep. 219.

In *Montgomery v. Shaver*, 40 Or. 244, at page 248, 66 Pac. 923, at page 924, Mr. Justice Wolverton, referring to the Wharf Act, said: "The statute is, however, declarative of the right or privilege which existed at common law, the exercise of which might be regulated by statute; but so long as it was not prohibited it existed as a private right derived from the passive or implied license by the public. Gould, Waters, § 176. So that the enactment of section 4227 [B. & C. Comp.]

gave positive authority where it previously existed passively and by implication."

In many states lands totally or partially submerged are made the subject of grant by the sovereign in order that they may be reclaimed for useful purposes. *Taylor Sands Fishing Co. v. State Land Board*, 58 Or. 157, 161, 108 Pac. 126; *Fowler v. Wood*, 73 Kan. 511, 549, 85 Pac. 763, 6 L. R. A. (N. S.) 162, 117 Am. St. Rep. 534.

A grant by the sovereign of land bounded by a navigable river limits the land conveyed to high-water mark and gives the grantee no private or exclusive right below that. In such case the grant is exclusively a grant of dry land and is to be construed without reference to the water just as if it were bounded on all sides by dry land. But when the sovereign state grants land under water, which cannot, in its natural state, be subjected to any of the uses to which dry land may be devoted, then a different rule of construction must be applied to the grant so as to make it effectual for some purpose. Such a grant may be made to enable the grantee to fill up the land for wharves, docks, or other buildings. If the purpose be not plainly expressed in the grant, then the intent of the parties must be ascertained from the nature and situation of the land granted and all the circumstances surrounding the grant which may properly be considered for the purpose of ascertaining such intent. *Langdon v. Mayor, etc., of New York*, 93 N. Y. 129, 144.

[10] In the light of the authorities, and upon principle, we conclude that the state of Oregon, upon its admission into the Union, became the owner of the bed and banks of the Willamette river up to the line of ordinary high water, subject only to the paramount right of navigation and the right of Congress to regulate commerce between the states.

[11] By the platting and dedication of Watson's and Doscher's additions by the former owners, thereby laying out the property in blocks and lots constituting definite metes and bounds as shown on the maps, and by the conveyances of lots with reference to the maps, the wharf rights were severed and disassociated from all the inside lots and attached to the outermost ones. *Grant v. Oregon Nav. Co.*, 49 Or. 330, 90 Pac. 178, 1099.

[12] The act of 1862 (section 5201, L. O. L.) grants the right of wharfage across the state's land out to the harbor line fixed by state authority to the riparian owner. This license has never been revoked by the state but has been reaffirmed by the lawmakers and upheld by the courts. The contemplated use of the land is not inimical to navigation. On the other hand, it is plain to any one that the industries of commerce and manufacture with which the shore of the Willamette in our metropolis teems, and the storing of the articles and products, as well as the construction of docks and wharves,



are an acceleration to navigation. The Legislature, considering that the lands adjacent to the Willamette, Coquille, Coos, and Umpqua rivers were subject to erosion and inundation, deemed it wise and just to recognize rights in the riparian owners on such streams and grant and confirm to them all the title of the state to any tide and overflowed lands upon said rivers. This, no doubt, among other reasons, in order that the owners of land adjacent to such rivers might be encouraged and protected in building structures thereon and riprapping and conserving the banks of the rivers for the purpose of saving their lands from loss or destruction.

[13] The acts of 1874 and 1876 were a valid exercise of the legislative will and granted and confirmed the title of the state to the tide and overflowed land upon said rivers to the upland owners. Plaintiff has succeeded to the title which the state formerly had in the lots described. Its title is subject to the paramount right of navigation existing in the public and subject to such reasonable regulation as the state through its municipality may prescribe.

[14] To allow this property to be taken for public use without just compensation would work a great injustice and do violence to the Constitution of Oregon.

[15] The restrictions upon the state conveying land subjacent to the waters of navigable rivers should, we think, generally speaking, apply to lands under navigable waters, or below ordinary low-water mark, or the bed proper of a river as distinguished from its bank or shore as in the Chicago Water Front Case.

These considerations lead to an affirmance of the decree of the lower court, and the decree is therefore affirmed.

(65 Or. 405)

**SUBBO v. PACIFIC COAST CONST. CO.**  
(Supreme Court of Oregon. June 24, 1913.)

**1. MASTER AND SERVANT (§ 216\*)—ASSUMED RISK—NEGLIGENCE OF FELLOW SERVANT.**

An employé assumes the risk of injury from the negligence of a fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 567-573; Dec. Dig. § 216.\*]

**2. MASTER AND SERVANT (§ 190\*)—FELLOW SERVANT—TEST OF RELATIONS.**

Whether an employé, whose act injured another employé, is a fellow servant depends on the character of such act rather than upon the rank of the negligent employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. § 190.\*]

**3. MASTER AND SERVANT (§ 190\*)—FELLOW SERVANT.**

The act of the superintendent of railroad construction work and of the powderman in charging a blasting hole with powder by using an iron rod was a detail of the work, so that in doing such work they were fellow servants

of the workman injured by a premature explosion caused thereby, so that the employer was not liable for such injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. § 190.\*]

In Banc. Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Action by John Subbo against the Pacific Coast Construction Company. From a judgment for defendant, plaintiff appeals. Affirmed.

See, also, 123 Pac. 1070.

This is an action to recover damages for personal injuries. The defendant was engaged in excavating a cut for a railroad track through a rock bank. Calvin, as superintendent for the company, was in charge of the work. Stiles was a powderman who directed the work as to the drilling and as to the use of the blasting powder. Plaintiff and two or three other men were aiding in the work of drilling the holes for blasting and charging them with powder. Shortly before the injury complained of plaintiff was directed to clean off the surface of the cut 20 or 25 feet away from and a little below the hole being charged with powder and out of sight of it. When Stiles and another were attempting to charge it, it prematurely exploded, greatly injuring plaintiff. It was usual for the men to tamp the powder into the holes with wooden rods provided for that purpose, but in case the powder lodged in the hole, in attempting to force it down, they resorted to the use of an iron bar or drill. It is alleged by plaintiff that the defendant did not furnish wooden rods for tamping the powder, but furnished iron rods for that purpose; and the question involved on this appeal arises upon the following instruction given by the court: "If you find that the company furnished wooden tamping rods and appliances for the men to use in loading these powder holes, and the men used an iron rod instead, then you must find a verdict for the defendant, and this would be the case even though you find the superintendent, Mr. Calvin, and the powderman, Mr. Stiles, used these iron rods, and the act of the superintendent, Mr. Calvin, and the powderman, Mr. Stiles, in using the iron tamping rods, if they did, instead of the wooden tamping rods, would be the act of a fellow servant for which the company would not be responsible, so that the only question for you to consider is whether the company furnished wooden tamping rods for use in loading these holes, and if you find that they did then your verdict must be for the defendant."

The appeal depends upon the question whether Calvin, the superintendent, and Stiles, the powderman, in charging the hole with powder and using the iron bar for that purpose were fellow servants with the plain-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



tiff. There were plenty of wooden rods available for tamping purposes, but when the powder lodged in the hole the men sometimes used an iron bar to force it down; and one of plaintiff's witnesses says that when Calvin came there the powder was stuck, that there was an iron bar then in the hole, and that Calvin said to Stiles to drive it down. Calvin denies this, but the weight of the evidence was for the jury, and the trial court instructed upon plaintiff's theory that Calvin did say to use the iron bar, but that that made no difference, for as to the work in hand Calvin was a fellow servant. There were other exceptions, but they related to the same point. The verdict was for defendant, and from a judgment thereon plaintiff appeals.

H. H. Riddell and H. Daniel, both of Portland, for appellant. F. S. Senn, of Portland, (Rauch & Senn, of Portland, on the brief), for respondent.

EAKIN, J. (after stating the facts as above). [1] The rule is that an employé assumes as incident to the employment certain risks, among them being the risk of injury caused by the negligence of a fellow servant. It is necessary to determine whether this injury was occasioned by the negligent act of a fellow workman or was the result of the failure of the master to perform some duty which it owed to the employé. As shown by Mr. Justice Bean in *Mast v. Kern*, 34 Or. 247, 54 Pac. 950, 75 Am. St. Rep. 580, there are two lines of decisions upon the question of who is a fellow servant for whose negligence the employé assumes the risk, as distinguished from the negligence of the master. One line of authorities holds that when the master has given to an employé supervisory control of his business, or some particular department of it, such person, while so acting, stands in the place of the master as to those under his direction, and that for his negligence the master is liable. Under this rule the liability of the master is made to depend upon the rank or grade of the person whose negligence caused the injury. The other line of authorities holds that the master's liability depends upon the character of the act in the performance of which the injury arises and not upon the rank or grade of the negligent employé.

[2] The former rule is followed in Ohio, Kentucky, Illinois, and Washington; but the weight of authorities holds that the master's liability depends upon the character of the act rather than upon the rank of the negligent workman. This is the recognized rule in this jurisdiction. See *Allen v. Stand-*

*ard Box & Lumber Co.*, 53 Or. 10, 96 Pac. 1109, 97 Pac. 555, 98 Pac. 509; *Kovachoff v. St. Johns Lumber Co.*, 61 Or. 174, 121 Pac. 801. It is held in *New England R. Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 86, 44 L. Ed. 181: "The employer is not liable for an injury to one employé occasioned by the negligence of another engaged in the same general undertaking; that it is not necessary that the servants should be engaged in the same operation or particular work; that it is enough, to bring the case within the general rule of exemption, if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes, or, in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end; \* \* \* that the question turns rather on the character of the act than on the relations of the employés to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but, if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor."

So that the question to be determined here is whether the defendant omitted to perform some duty the master owed to the servant. The plaintiff complains that it neglected to furnish wooden tamping rods, but that it furnished iron ones for the purpose of tamping the powder. It is shown by the testimony of plaintiff that proper wooden rods were furnished by defendant, but that it furnished no iron rods for tamping the powder; that the act of dislodging the powder in the hole which was being charged was a detail of the work; and that carelessness in the performance of the work was carelessness of a fellow workman for which the defendant was not liable. It may be that the act adopted by the people November 8, 1910, providing for the protection of persons engaged in construction work (Laws 1911, p. 16), was intended to change the rule in Oregon to conform to what is referred to as the Ohio rule; but that act was adopted subsequent to the injury complained of here and is not relied on by the plaintiff.

[3] The work being done that caused the premature explosion was a detail of the work. *American Bridge Co. v. Seeds*, 144 Fed. 605, 75 C. C. A. 407, 11 L. R. A. (N. S.) 1041. And for negligence of those performing the work the master is not liable. We find no error in the instruction complained of.

The judgment is affirmed.



65 Or. 506)

**STATE ex rel. BLUM et al. v. PORT OF BAYOCEAN et al.**

(Supreme Court of Oregon. June 10, 1913.)

**1. MUNICIPAL CORPORATIONS (§ 1034\*)—EXISTENCE—ADMISSION BY SUING AS SUCH.**

Where, in a proceeding in the nature of quo warranto to test the legality of the organization of a port as a municipal corporation, it was described, not as a corporation, but as a pretended corporation, and the persons claiming to be officers and joined as defendants were not described as officers, but as individuals, the filing of the complaint against the pretended corporation by name was not an admission of the existence of the corporation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2203-2205; Dec. Dig. § 1034.\*]

**2. MUNICIPAL CORPORATIONS (§ 12\*)—ESTABLISHMENT—ELECTION NOTICE—DESCRIPTION OF BOUNDARIES.**

Where the notice of an election for the organization of a proposed port omitted one call from the description of the boundary, thus leaving a hiatus, the proceeding was void, there being no way in which the misdescription could be corrected or reformed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 22-32; Dec. Dig. § 12.\*]

**3. MUNICIPAL CORPORATIONS (§ 7\*)—ESTABLISHMENT—BOUNDARIES OF CORPORATION.**

A proceeding to organize a proposed port was void where the boundaries of the proposed port included a part of the watersheds of two other bays so extensive that it passed beyond a mere technical deviation from the statute, and became a matter of substance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 11-13; Dec. Dig. § 7.\*]

**4. ELECTIONS (§ 118\*)—CONDUCT OF ELECTIONS—PROOF OF QUALIFICATIONS.**

Under L. O. L. § 3449, prescribing a form to be subscribed by nonregistered persons claiming the right to vote at an election, in which they are required to set forth particularly their place of residence and length of residence in the state, and which the judge may require to be attested by not more than six witnesses, who must swear that they are each personally acquainted with the proposed voter and his residence as stated by him, such subscribing witnesses are not qualified as such, unless they have actual personal knowledge of the voter's residence and actual personal acquaintance with him, and they cannot base their affidavit on the statements of the proposed voter or of other persons.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 113; Dec. Dig. § 118.\*]

Appeal from Circuit Court, Tillamook County; William Galloway, Judge.

Proceeding in the nature of quo warranto by the State, on the relation of Edward Blum and others, against the Port of Bayocean, a pretended quasi municipal corporation, and others. From a judgment in favor of relators, defendants appeal. Affirmed.

This is a proceeding in the nature of quo warranto to test the legality of the organization of the port of Bayocean, an alleged municipal corporation claiming to have been organized under the provisions of the statutes providing for the organization of ports.

The petition for an order for an election to determine whether the proposed port should be organized is in proper form and specifies the boundaries of the proposed port with convenient certainty. In the notice of the election, after specifying the place of beginning and several calls not necessary here to observe, occurs the following indefinite call: "Thence north five miles to the southwest corner of section 3, township 2 south range 10 west of the Willamette Meridian, thence west one half mile, thence north along the quarter section line in section 4, township 2 south range 10 west of the Willamette Meridian, and sections 33 and 28 to the north line and section 28, township 1 south range 10 west of the Willamette Meridian"—the indefinite call being italicized. The proposed boundaries also included portions of the watershed tributary to Nestucca Bay, and a portion of the watershed tributary to Netarts Bay. The relators brought this proceeding alleging these errors and also fraud and irregularity in the conduct of the election, which matters are stated in the opinion. The court declared the proceeding void, and the defendants appeal.

Webster Holmes, of Tillamook, for appellants. Gale S. Hill, Dist. Atty., of Albany, and S. S. Johnson and T. B. Handley, both of Tillamook, for respondents.

MCBRIDE, C. J. (after stating the facts as above). [1] The first contention of appellant is that by filing a complaint against the corporation eo nomine relators have admitted the existence of the corporation, and in support of this proposition they cite 2 Spelling, *Extraordinary Remedies*, § 1844; 3 Abbott, *Mun. Cor.* § 1145, and numerous decisions. These do not apply in this case, as the defendant is described, not as a corporation, but as a pretended corporation, and the persons claiming to be the officers are not described nor impleaded as such, but as individuals only.

[2] We do not believe the notice of election sufficiently describes the exterior boundaries of the proposed port. The omission of one call from the description of the boundary leaves a hiatus to be supplied by the imagination of the person reading the notice. A defective description of a boundary in a deed may be corrected by a suit to have it reformed according to the true intent of the parties, but a misdescription in an election notice cannot be corrected nor reformed by any sort of proceeding. It must be absolutely definite in itself. This notice lacks that quality, and the proceeding is void.

[3] We are also of the opinion that the inclusion of part of the watersheds of two other bays renders the proceeding void. In *State ex rel. v. Port of Bay City*, 129 Pac. 496, we held that a substantial and not a technically mathematical compliance with

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the statute is sufficient; but the area of watershed tributary to other ports is so extensive in this instance that it passes beyond a mere technical deviation from the statute, and becomes a matter of substance. It is not contemplated that inhabitants of other ports shall be bound by the notices posted in the district proposed to be included, and their rights can only be protected by the courts refusing to sanction any substantial deviation from the area which the statute permits the inhabitants of any particular locality to include within their port boundaries.

[4] The two propositions above discussed settle the case, but we deem it proper to call attention to the irregular manner in which the attestation of the qualifications of non-registered voters was conducted. Section 3449, L. O. L., prescribes a form, designated as "Blank A," to be subscribed by a non-registered person claiming the right to vote at an election, wherein he is required to set forth particularly his place of residence and the length of time he has resided in the state. This the judges may require to be attested by not more than six witnesses, who must be freeholders of the county and who are required to subscribe to the following oath: "We, the undersigned witnesses, do swear that our names and signatures are genuine; that we are each personally acquainted with the elector and his residence as stated, that we believe all his other statements are true, and that we are each freeholders in the county."

It will be seen that there are two facts of which the witness must have actual and personal knowledge: (1) Of the actual residence of the person offering his vote; and (2) that he has resided in the state for six months immediately preceding the election. The statements of the intending voter, or of other persons, to the subscribing witness to the affidavit, are not sufficient to qualify him to testify as to the residence of the voter. He must know at first hand that the voter resides in the precinct and that he has resided in the state for six months; and this, of course, involves actual acquaintance with the voter for that period. It does not appear that the subscribing witnesses to the affidavits referred to had any such acquaintance with the persons whose qualifications they vouched for. The witnesses did not even reside in the district where the vote was taken, and did not know of their own knowledge where any of the proposed voters had lived for the six months next preceding the election. There was a large number of these persons, all employes of the Potter Realty Company, which appears to have been the active agent in the project of creating the port of Bayocean in connection with its business interests at that place; and most if not all of them it is conceded voted in favor

of the organization of the port. There being no machinery provided by which the county court can investigate the legality of the votes cast at a port election, it is perhaps competent for citizens whose property is included within a proposed port to question the legality of the vote by which it is claimed to have been established by a proceeding in the circuit court. However, it is not necessary to pass upon this question in the present case, but the frequent practice of persons acting as witnesses to the residence of non-registered voters upon a mere introduction or vouchment by other persons, and without actual personal knowledge of such residence and actual personal acquaintance with the proposed voter, is not warranted by law, and in fact is a violation thereof.

The judgment of the circuit court is affirmed.

(65 Or. 551)

#### MILLER v. MILLER.

(Supreme Court of Oregon. July 8, 1913.)

#### 1. DIVORCE (§ 231\*)—DISPOSITION OF PROPERTY—VALIDITY OF DECREE.

Conceding that a decree in a divorce proceeding granting alimony to a party in fault is absolutely void, a decree granting a divorce to the husband for the wife's fault, transferring the legal title to certain real estate from the wife to the husband, and requiring the husband to pay the wife \$50 a month, although possibly irregular, was not void.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 658-661, 664; Dec. Dig. § 231.\*]

#### 2. DIVORCE (§ 286\*)—APPEAL—PRESUMPTIONS IN SUPPORT OF JUDGMENT.

Where a decree granting a divorce to the husband transferred the legal title to land from the wife to the husband, and required the husband to pay the wife \$50 a month, it would be assumed where the testimony was not in the record on appeal that the evidence showed such equities in the realty in favor of the wife as justified the court in decreeing her the sum of \$50 a month out of such property.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 769, 770; Dec. Dig. § 286.\*]

On petition for rehearing. Former opinion modified, and order of the circuit court affirmed.

For former opinion, see 131 Pac. 308.

McBRIDE, C. J. [†] Upon filing their petition for rehearing herein plaintiff, to supply omission in the transcript, obtained leave to have filed in this court the findings made by the court below, which findings recite the fact that testimony was actually taken on the trial. Assuming this recitation to be correct, the court had jurisdiction to grant the divorce. It may be conceded for the purposes of this case that a decree in a divorce proceeding granting alimony to a party in fault is absolutely void; but that question is not involved here. It appears from the transcript that several pieces of real estate were held in the name of the defendant, and that the court after, as we must assume, hear-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index;



ing all the evidence and weighing the equities between the parties, came to the conclusion that a fair and equitable settlement of property rights would be to transfer the legal title of the property from the defendant to plaintiff, and to require plaintiff to pay defendant \$50 per month as her rightful income from such property. Such a decree might be irregular, but it is not void; and, if plaintiff was not satisfied with it, he should have appealed, and not resorted to the pretext of waiting until the time for appeal had expired, and then seeking to hold the benefits of the decree so far as it is in his favor and repudiating that part which is to his disadvantage.

[2] Following the line of argument found in the briefs of both parties, we assumed in our former opinion that the sum of \$50 a month decreed to defendant was alimony pure and simple; but in view of the fact that she held the legal title to a large quantity of real estate of which she was divested by the decree, and in view of the further fact that the court declared the sum of \$50 a month a lien on the said property, the testimony not being before us, we will make every intendment in favor of the decree, and therefore assume that the evidence which seems to have been adduced in the circuit court showed such equities in favor of defendant in the realty held by her as justified the court in decreeing to her the sum of \$50 a month out of the property to which she held the legal title.

The order of the circuit court is therefore affirmed, and our former opinion in so far as it directed the retrial of the case is modified. The defendant will recover costs and disbursements in the circuit court and in this court.

(65 Or. 413)

**LUMBERMEN'S NAT. BANK OF PORTLAND v. MINOR et al.**

(Supreme Court of Oregon. June 24, 1913.)

**1. LANDLORD AND TENANT (§ 30\*)—LEASE—RIGHT TO TERMINATE.**

Where the right to terminate a lease on 60 days' notice reserved by the lessor could only be exercised in case he sold or leased for a term of years, it constituted a valid lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 86, 87; Dec. Dig. § 30.\*]

**2. CONTRACTS (§ 282\*)—PERFORMANCE—SATISFACTION OF PARTY.**

A contract binding a party to deliver to the adverse party a lease of a storeroom in the retail district of a city for a retail store, the lease to be satisfactory to the adverse party, is performed where the party secures an unexpired lease of a store by assignment with the consent of the lessor and tenders the same to the adverse party, who is satisfied with the location and the building, and he may not arbitrarily or unreasonably declare that the lease is not to his satisfaction.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1284-1289; Dec. Dig. § 282.\*]

In Banc. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Bill of interpleader by the Lumbermen's National Bank of Portland against Wirt Minor, executor of H. O. Stickney, deceased, and against George L. Greenfield. From a decree for defendant George L. Greenfield, defendant Wirt Minor, executor appeals. Reversed and entered.

This is a proceeding upon a bill of interpleader disclosing the following state of facts: Defendants Stickney and Greenfield deposited in escrow with the plaintiff a certificate of stock of the Railway Exchange Building Company of the par value of \$1,000, accompanied with an escrow agreement, by which it was provided that Stickney, the first party, for a valuable consideration, agreed to deliver to Greenfield, the second party, on or before November 1, 1910, "a good and sufficient lease to second party \* \* \* of a storeroom in the retail district of Portland, Or., to be used as and for a retail shoe store. Said lease to be satisfactory to second party, the evidence of which is to consist of the written agreement of second party to accept said lease and to release the security it is hereinafter provided shall be given by first party. \* \* \* It is further agreed and provided that in case said lease \* \* \* shall not have been delivered to second party and his written agreement to accept the same and to release the security above provided for has not been presented to said bank before November 1, 1910, then \* \* \* the said shares of stock \* \* \* shall on the 1st day of November, 1910, be delivered \* \* \* to said second party; \* \* \* it being understood and agreed that the said security shall in such case be retained by said second party as agreed and liquidated damages." After November 1st each of the defendants demanded of the plaintiff the delivery of said certificate of stock to him; and plaintiff brings this suit asking that defendants be required to interplead and that the certificate of stock be determined between them. With the complaint plaintiff tendered into court the said certificate of stock and the escrow agreement. Thereupon defendants interpleaded thereto, and the issues so made were tried. Stickney secured an unexpired lease of the building at 132 Third street, which was given by the owners, Strode and others, to the New York Central & Hudson River Railway Company, its successors and assigns, covering the time from May 31, 1909, to May 31, 1912, at \$175 per month rental, which was assigned by the lessee to Stickney on September 16, 1910. About that time Stickney exhibited it to Greenfield and tendered it to him in fulfillment of the escrow agreement, and on October 28, 1910, it was again tendered to Greenfield, duly assigned to him by Stickney, which Greenfield testifies he refused to accept "because it was no lease, ac-



cording to my idea; it was not satisfactory to me, and I did not consider it any lease at all"—which seems to have been the only objection made thereto at the time it was tendered to him. He relies upon the fact that, if he said it was unsatisfactory to him, that decision was conclusive against Stickney regardless of the question of good faith, and by his pleadings he says that Stickney has failed to perform the terms of the escrow agreement and did not deliver to him any lease of any kind whatsoever. Upon the trial a decree was rendered that defendant Greenfield is entitled to the certificate of stock as liquidated damages. Stickney appeals.

Jesse Stearns and F. E. Martin, both of Portland (John H. Hall, of Portland, on the brief), for appellant. H. C. King and Wm. A. Williams, both of Portland (Platt & Platt and Palmer L. Fales, all of Portland, on the brief), for respondent.

EAKIN, J. (after stating the facts as above). If the objection to the lease "that there was no lease at all" may be held to include the sufficiency and form of the assignment, then it appears that Jerome, who executed the assignment in the name of the lessee, was the agent of the lessee, who negotiated and executed the lease in the name of the company in the first place, and who therefore had apparent authority to execute the assignment. This conclusion is confirmed by the testimony. It also appears by the evidence that Jerome had the oral consent of the lessors to assign it.

[1] The right to terminate the lease upon 60 days' notice reserved by the lessors is not an arbitrary right, but is only to be exercised in case the lessors sell or lease for a term of years all of lot 5, block 19, city of Portland, upon which the storeroom at 132 Third street is situated. Therefore the objection that the instrument tendered was not a valid lease is without merit.

[2] It is objected in the brief that the building was occupied, and therefore not available to Greenfield; but this contention is without foundation as the lessee vacated the building on October 8th, and Greenfield at the time of the tender made no valid objection to the lease, nor has he done so at any time since.

The location and the building certainly were satisfactory to Greenfield. It is practically so admitted in the brief, and it appears that he tried to circumvent Stickney and to procure a lease for the same property from another source, well knowing that Stickney held an unexpired lease thereon, and that F. E. Smith & Co., with whom he sought to deal, had no power to make another lease covering the time of Stickney's lease; but, by agreement with Stickney and before consummating a lease with Greenfield, Smith did obtain the co-operation of Stickney and

executed with Greenfield a lease covering the interest held by Stickney. As said in Greenfield's brief: "Honest dissatisfaction prevents recovery."

Both parties cite and rely upon the case of *Livesley v. Johnston*, 45 Or. 30, at page 48, 76 Pac. 946, at page 950 (65 L. R. A. 783, 106 Am. St. Rep. 647), in which it is said: "In a sale like the one at bar the buyer must also accept, unless in his honest judgment, exercised in absolute good faith, the commodity is not such as was contracted for. If so exercised, his determination becomes final, because the parties have so agreed; but if he exercises his judgment arbitrarily, capriciously, or fraudulently, with the sheer purpose of avoiding his obligation to accept, it will not avail him, as the actual quality and condition of the hops may then be inquired into, notwithstanding his adverse determination." This we understand to be a correct statement of the law. In *Zaleski v. Clark*, 44 Conn. 218, 26 Am. Rep. 446, cited by Greenfield upon this point, there was no question of defendant's honest dissatisfaction raised either in the pleadings or by the proof. The court expressly says: "The case shows that she was not satisfied with it [the bust]." While the same court in *Hawken v. Daley*, 85 Conn. 21, 81 Atl. 1053, makes the defense depend on an honest dissatisfaction. In the case of *Lynn v. Baltimore & Ohio R. R. Co.*, 60 Md. 404, 45 Am. Rep. 741, it is held that, no matter how erroneous or mistaken was the judgment of the party to be satisfied, it was conclusive between the parties unless tainted with fraud or bad faith; but, if the party rejected the tender in bad faith, plaintiff can recover. In *Doll et al. v. Noble*, 116 N. Y. 230, 22 N. E. 406, 5 L. R. A. 554, 15 Am. St. Rep. 398, it is held that defendant cannot defeat a recovery by arbitrarily or unreasonably declaring that the work was not done to his satisfaction. Greenfield's bad faith in the refusal of the lease tendered by Stickney is shown in his attempt to circumvent that tender by endeavoring to get a lease and the possession of the same property from another source. It is apparent that a refusal to accept the lease tendered was not made in the exercise of an honest judgment in the premises. We conclude that Greenfield was satisfied with the lease, but that he arbitrarily and for the purpose of taking an unfair advantage of Stickney feigned a dissatisfaction with it, and that he has no right to the certificate of stock.

The decree of the lower court should be reversed and one entered here directing that the certificate be delivered to Stickney, that he recover his costs, and that the costs of plaintiff as established by the circuit court be adjudged against Greenfield.

McBRIDE, C. J., and BEAN and McNARY, JJ., concur.



(55 Or. 581)

**OLD MILL DITCH & IRRIGATION CO. v. BREEDING.**

(Supreme Court of Oregon. July 8, 1913.)

**1. WATERS AND WATER COURSES (§ 232\*)—CORPORATE POWERS—INCIDENTAL POWERS.**

A corporation empowered to construct a ditch for irrigation and to acquire water rights has the power, both as an incident of its ownership and under L. O. L. § 6686, subd. 4, providing that a corporation has the right to purchase, possess, and dispose of such real estate as may be necessary to carry into effect the objects of the corporation, to convey to an individual a perpetual right to water, to be delivered at his headgate through the company's ditch.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 321, 322; Dec. Dig. § 232.\*]

**2. INJUNCTION (§ 192\*)—PERSONS RESTRAINED—STOCKHOLDERS OF CORPORATION.**

A decree sustaining a water right acquired under a conveyance from a ditch company cannot restrain the stockholders from interfering with such right, where they were not made parties to the action.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 412; Dec. Dig. § 192.\*]

Department 2. Appeal from Circuit Court, Jackson County; F. M. Calkins, Judge.

Action by the Old Mill Ditch & Irrigation Company against William Breeding. Decree for defendant, and plaintiff appeals. Decree modified.

This is a suit to quiet title. The matters alleged by plaintiff material to an understanding of the controversy are that the plaintiff is the owner of and in possession of a certain irrigation ditch known as the Old Mill Ditch & Irrigation Company's ditch, having its headgate in the northwest quarter of section 4, township 36 south, range 4 west of the Willamette meridian, Jackson county, Or., at a point on Evans creek, the main canal of which ditch runs from said point to a point known as Sugar Pine gulch; that the plaintiff is the owner of a water right taken out of Evans creek at the point aforesaid, where the water is divided and conducted through the ditch to lands of persons holding stock in plaintiff's corporation; that for a period of 10 years immediately prior to the institution of this suit, plaintiff charges that said property has been in the actual possession of and the beneficial uses enjoyed by plaintiff and its predecessors in interest. Concluding, plaintiff alleges that defendant claims an estate and interest in said irrigation ditch adverse to plaintiff, and that the same is without right whatever. In due time defendant appeared in said court and cause, and made answer to the complaint, and after admitting the corporate existence of plaintiff, and that he claimed an estate and interest in the irrigation ditch and water right described in plaintiff's complaint, asserted by way of a further and separate answer that he is the owner of a tract of land in Jackson county, irrigated by means of a private ditch lateral

to the one in question, that said Old Mill Ditch & Irrigation Company's ditch has a carrying capacity of (1,000) miners' inches of water under a six-inch pressure, and that he is the absolute owner of the following interest in said water ditch and water rights: "The perpetual right to (20) miners' inches of water (being an opening two inches by ten inches under a pressure or head of six inches above the top of said 2x10 inch opening)," said water to be delivered to defendant from said Old Mill Ditch & Irrigation Company's ditch to the private ditch of defendant. Defendant further alleges that during the irrigating season of each year for the past six years he has required for irrigating purposes the amount of water to which he is entitled; that he has used said water during those years without interruption, save when prevented by plaintiff in 1910, and that during all of the time plaintiff has recognized his right to the use of said water; that his title to the water is held by him under deeds of general warranty and mesne conveyances from the original locators and owners of said ditch to the grantors of defendant, and thence to defendant. Lastly, defendant avers that without the use of the quantity of water to which he is entitled his lands would be of little value, but with the use of said water, his premises are of much value. A reply denying the new matter alleged in plaintiff's answer concluded the pleadings. After a hearing was had upon the issues, the trial court entered a decree affirming defendant's interest in the Old Mill Ditch & Irrigation Company's ditch and water rights as recited in defendant's answer, and decreed that plaintiff, its officers, stockholders, and successors in interest be perpetually enjoined from diverting any water from said ditch that would prevent the flow to the head of the ditch owned by defendant. Plaintiff, feeling displeased with the decree of the court, effects this appeal, assigning as error a number of grounds, the significant ones being considered in the opinion which follows.

Boggs & Wilson, of Medford, and A. C. Hough, of Grants Pass, for plaintiff. A. E. Reames, for appellant on appeal. Clarence L. Reames, of Medford, for respondent.

McNARY, J. (after stating the facts as above). The facts presented show that during the month of April, 1904, plaintiff corporation was the owner of a certain irrigation ditch euphoniously denominated the Old Mill Ditch & Irrigation Company's ditch, having its headgate at a point on Evans creek in the northwest quarter of section 4, township 36 south, range 4 west of the willamette meridian in Jackson county, Or.; that at a time contemporaneous plaintiff, for a valuable consideration to it, paid, made, executed, and delivered a deed to one of defendant's predecessors in interest, containing the following

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



description: "The amount of 10 per cent. of all water at present carried or that may hereafter be carried in said Old Mill Ditch & Irrigation Company's ditch from and including April 15th until and including September 15th of each year, and from and including September 16th until and including April 14th of each year the amount of 16 $\frac{2}{3}$  per cent. of same." A brief time prior to the institution of this suit plaintiff corporation attempted a reorganization, and called upon defendant and others similarly situated to reconvey their interest in the ditch to plaintiff, and to accept corporate stock in lieu thereof. Following the refusal of the defendant to accede to the proposition this suit was initiated.

[1] The principal contention made by plaintiff is that it was without power, under its articles of incorporation, to execute a deed to defendant's grantors of any interest in the water ditch and water rights. The sole powers of the corporation are set forth in article 2 of its articles: "The object of this incorporation and the business in which it proposes to engage, is to establish, construct and operate a water ditch for irrigation and other purposes; and to acquire, own and hold real and other property and water rights necessary to carry said object into effect; together with such powers as may be needed for the accomplishment of said object." The claim is made that the officers of the corporation were wholly without power to execute the deed. As a general incident to the ownership of land, whenever a corporation has the power to own land it has the power to dispose of it in like manner as a natural person might do. Yet we need not rely upon the decided cases, for our statute, L. O. L. § 6686, subd. 4, provides that a corporation has the right "to purchase, possess, and dispose of such real and personal property as may be necessary and convenient to carry into effect the objects of the incorporation." We think the articles of incorporation and the general power conferred by statute clothed the plaintiff corporation with plenary power to execute the deed under consideration, and that by the instruments of conveyance forming the chain of title between plaintiff corporation and defendant, the latter acquired the right to the beneficial use of the water thereby conveyed, independent of the physical structure of the ditch, the legal title to which did not pass from plaintiff corporation.

[2] We think the court was without jurisdiction to enter a decree touching the rights of the stockholders of the corporation, as they were not made parties of defendant, nor was it necessary or proper in order to determine the respective rights of plaintiff and defendant by virtue of the conveyance in question.

We do not think the decree of the court is

susceptible of the construction that plaintiff is required to deliver water beyond the defendant's ditch. This the court could not decree, for the instrument conveying the water rights simply contained the measure of defendant's interest, apart from any legal duty with respect to the delivery of the water beyond the private ditch of defendant.

We think the decree of the court should be modified to conform to this opinion.

MCBRIDE, C. J., and BEAN and EAKIN, JJ., concur.

(65 Or. 586)

#### OLD MILL DITCH & IRRIGATION CO. v. ESTELL.

(Supreme Court of Oregon. July 8, 1913.)

Department 2. Appeal from Circuit Court, Jackson County; F. M. Calkins, Judge.

Action by the Old Mill Ditch & Irrigation Company against Barbara E. Estell. Decree for defendant, and plaintiff appeals. Decree modified.

This is a suit to quiet title to an irrigation ditch owned by plaintiff in the northwest quarter of section 4, township 36 south, range 4 west of the Willamette meridian in Jackson county, Or. Defendant asserts a perpetual right to the use of a specified flow of the water therein.

Boggs & Wilson, of Medford, and A. C. Hough, of Grants Pass, for plaintiff. A. E. Reames, for appellant on appeal. Clarence L. Reames, of Medford, for respondent.

MENARY, J. The legal questions presented by this appeal are identical with those in the case of the Old Mill Ditch & Irrigation Company v. William Breeding, 133 Pac. 89, in which an opinion has just been rendered.

For the reasons indicated in that case, the decree of the trial court is modified as therein set forth.

MCBRIDE, C. J., and BEAN and EAKIN, JJ., concur.

(69 Or. 73)

#### STATE v. GODDARD.

(Supreme Court of Oregon. July 8, 1913.)

##### 1. CRIMINAL LAW (§ 1026\*)—APPEAL—DECISIONS REVIEWABLE—EFFECT OF PAROLE.

Under L. O. L. § 1588, providing that when any adult person not previously convicted of a felony shall be convicted of any felony or misdemeanor, the maximum punishment of which does not exceed ten years' imprisonment, or in the case of a minor 20 years' imprisonment, the court may in its discretion parole such person under the supervision of the court or of any prisoners' aid society, and section 1589 providing that when any prisoner fails to observe all the conditions and requirements of the parole and order of the court, or shall again be convicted of a felony, the parole shall be revoked, and the prisoner committed to the penitentiary to serve out the original sentence to be counted from the day of his delivery to the warden of the penitentiary, a provision in a judgment of conviction paroling defendant on condition that he would not leave the jurisdiction of the court, violate the laws of the United States, this state, or any municipality, would at all times lead an honorable and upright life and report once a month to the presiding judge

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



his whereabouts, with such other information as might be desired or demanded by the judge, did not defeat such defendant's right to appeal where he had not requested such parole and had not by any affirmative act accepted the conditions imposed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2615-2618; Dec. Dig. § 1026.\*]

## 2. PARDON (§ 4\*)—"CONDITIONAL PARDON."

A parole by the court is not a "conditional pardon," as Const. art. 5, § 14, vests the pardoning power in the Governor, and with such power the courts have nothing to do.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. §§ 4-6½; Dec. Dig. § 4.\*]

For other definitions, see Words and Phrases, vol. 2, p. 1408.]

Appeal from Circuit Court, Multnomah County; J. U. Campbell, Judge.

John B. Goddard was convicted of rape, and he appeals. On motion to dismiss appeal. Overruled.

The defendant was indicted for the crime of rape, and upon trial was convicted by a jury who recommended him to the mercy of the court. The court thereupon sentenced him to the penitentiary for a period of 20 years, and in the same judgment paroled him; the parole condition being as follows: "The court taking into consideration the recommendation of the jury that the defendant be paroled, it is ordered that the sentence in this cause be suspended, and the defendant is allowed to go at large on parole, on conditions that he will not leave the jurisdiction of this court, and that he will not violate the laws of the United States or of this state or of any municipality in which he may live, and that he will at all times lead an honorable and upright life, and that he shall report in person or writing once a month to the presiding judge of this court his whereabouts with such other and additional information as may be desired or demanded by said judge."

Section 1589, L. O. L., is as follows: "If any prisoner when required shall fail to give such bail, bond, or security, or shall fail to observe all and every of the conditions and requirements of said parole and order of said court, or shall be again convicted of a felony, then said parole shall be by order of said court revoked with or without notice to such prisoner, and said prisoner shall be committed to the penitentiary to serve out the original sentence imposed in the same manner as though said parole had not been granted. The clerk shall deliver to the sheriff a certified copy of the sentence, together with a certificate that such person had been paroled and his parole has been terminated, and the sheriff shall, upon the receipt of such certified copy of sentence, immediately arrest such person and transport and deliver him or her to the warden of the penitentiary, and the time such person shall have been at large upon parole shall not be counted as

part of the sentence, but the time of sentence shall be counted from the day of delivery to the warden of the penitentiary."

Nothing appears to indicate that the defendant requested a parole, nor is any request or acceptance provided for in section 1589, L. O. L., which is as follows: "When any adult person who has not previously been convicted of a felony shall be convicted in any circuit court of this state of any felony or misdemeanor, the maximum punishment of which does not exceed ten years' imprisonment in the penitentiary, or any minor person who has not previously been convicted of a felony shall be convicted in any circuit court of this state of any felony or misdemeanor, the maximum punishment of which does not exceed twenty years' imprisonment in the penitentiary, and sentence shall have been pronounced, the court before whom the conviction shall have been had, if satisfied that such person, if permitted to go at large, would not again violate the law, may, in its discretion, by order of record, parole such person and permit him or her to go and remain at large under the supervision of the court, or under the supervision of any prisoners' aid society now organized or hereafter to be organized under the laws of the state of Oregon, subject always, however, to the order of such court as such court may deem best until such parole shall be terminated as hereinafter provided, but such court shall have no power to parole any person after he or she has been delivered to the warden of the penitentiary or where it shall be made to appear to said court before such parole shall have been granted that such person has been before convicted of a felony."

The defendant appealed from the judgment, and a motion is now made to dismiss the appeal on the ground that by accepting the parole he has waived his right of appeal.

King & Saxton and Jay Bowerman, all of Portland, for appellant. Geo. J. Cameron, of Portland, and W. D. Evans, Dist. Atty., of Portland, for the State.

McBRIDE, C. J. (after stating the facts as above). [1] Beyond the fact that the defendant has not attempted to break into the penitentiary *vi et armis*, there is nothing to indicate that he has accepted the parole. It was made a part of the judgment, and its conditions in themselves constitute a semi-imprisonment. The defendant may not leave the jurisdiction of the court; he must report his whereabouts to the judge every month; he must submit to the judgment of the court as to his conduct; and he must obey strictly every municipal ordinance of any town in which he resides, and all these under penalty of having his parole revoked and being imprisoned for 20 years in case he violates a single one of the conditions.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



All these conditions constitute a very serious abridgment of the liberty of a citizen; and, until it is shown that he has accepted them affirmatively, we think that he should not be held to have waived his right of appeal. Had he affirmatively accepted the conditions imposed, a different question would arise; but, under the circumstances, he was *inter canem et lupum*. Had he accepted by matter of record the parole given him, he would probably have been held to have waived his right of appeal. Had he voluntarily insisted that he be received into the penitentiary, his request would probably have been refused, and the fact that he had so insisted might with equal plausibility have been urged as a waiver of his right of appeal.

[2] A parole by the court is not and cannot be a conditional pardon. Under section 14, art. 5, of the Constitution, the pardoning power is vested in the Governor. It is a power with which courts have nothing to do. This also marks the distinction between the case at bar and the case of *Odom v. State*, 35 Okl. —, 120 Pac. 445, which arose upon parole granted by the Governor, and not upon one constituting a part of the original judgment. To adopt the theory of that state in this case would place it in the power of any judge to prevent an appeal by paroling the prisoner. While in most instances it transpires that only guilty men are convicted by juries, yet, so long as appeals are permitted at all, the right to appeal should be open to any one who does not waive it by some affirmative act.

The motion to dismiss is overruled.

(65 Or. 417)

#### MOUNTAIN TIMBER CO. v. CASE.

(Supreme Court of Oregon. June 24, 1913.)

#### 1. PLEADING (§ 345\*)—JUDGMENT ON PLEADINGS.

Judgment on the pleadings on motion will not be rendered, where the answer sets up an issuable defense.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1055-1059; Dec. Dig. § 345.\*]

#### 2. JUDGMENT (§ 253\*)—PLEADINGS TO SUPPORT—ATTORNEY'S FEES.

Plaintiff cannot be allowed attorney's fees, where his cross-bill to enjoin defendant from prosecuting an action at law upon promissory notes did not contain any allegations as to attorney's fees, and there was no proof thereof; plaintiff only being entitled to the attorney's fees allowed by L. O. L. § 561, given to the prevailing party as costs.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 443, 444; Dec. Dig. § 253.\*]

#### 3. APPEAL AND ERROR (§ 984\*)—REVIEW—DISCRETION—COSTS.

Taxation of costs and disbursements in equitable proceedings rests in the court's sound discretion, and is only reviewable upon abuse thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3815, 3881-3888; Dec. Dig. § 984.\*]

#### 4. CORPORATIONS (§ 90\*)—SUBSCRIPTIONS—ACTIONS—CONDITIONS PRECEDENT.

Where a contract subscribing for corporate stock provided that the price should be paid on or before a specified day, no demand for payment of subscription was necessary as a condition to sue to recover it; the subscriber being bound to pay on demand, or on the day specified without demand.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 245, 383-419; Dec. Dig. § 90.\*]

#### 5. CORPORATIONS (§ 88\*)—STOCK SUBSCRIPTION—INTEREST.

L. O. L. § 6028, providing that the rate of interest shall be 6 per centum per annum on all moneys after the same became due, applies to balances due on subscriptions to corporate stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 337-364, 425-428; Dec. Dig. § 88.\*]

Department 2. Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Action by the Mountain Timber Company against Willard Case. From a decree for defendant, plaintiff appeals. Affirmed as modified.

Plaintiff brings this suit by means of a cross-bill to enjoin the defendant from the prosecution of an action at law upon an instrument denominated a promissory note for \$37,500, attorney's fees, costs, and disbursements, and invokes the court for affirmative relief against defendant. The facts and circumstances inducing the litigation are both complex and voluminous, and for that account the statement herein will be limited to an exposition of the legal propositions involved by this appeal, namely, did the court err in overruling plaintiff's motion for judgment on the pleadings, and in decreeing that no attorney's fees or interest be allowed either party, and that each party pay its own costs? During the summer of 1910, the defendant brought the action mentioned against the plaintiff in the circuit court of the state of Oregon for Multnomah county. Plaintiff appeared and filed a cross-bill in equity, wherein among other things, it alleged the foundation of the cause of action was not a promissory note, but a memorandum of a subscription agreement whereby defendant was bounden to purchase, at its par value, \$125,000 of the capital stock of plaintiff, and to surrender said written obligation in part payment thereof on March 1, 1910, at which time plaintiff asserted a demand was made for the payment of such subscription. An order of injunction restraining defendant from proceeding further in the law action was prayed; likewise a demand for interest on the alleged stock subscription of \$37,500, from the time of maturity of payment, with interest at the rate of 6 per cent. per annum, and costs and disbursements. Defendant responded to the cross-bill and filed an answer containing certain admissions, denials, and matters in the nature of a separate defense,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



and asserted there was \$37,500 unpaid on his subscription to the capital stock of plaintiff, but denied the amount was due March 1, 1910, or that same was due or had been demanded at the time of the institution of this suit. A reply brought the issues to a close. After trial, the court entered a decree ordering defendant forthwith to bring the written note into court, that the same be canceled, and defendant be credited with the payment of \$37,500 upon his subscription to the capital stock of plaintiff, and that neither party be allowed attorney's fees, interest, or costs. Seasonably thereafter plaintiff served upon defendant and filed in the lower court a notice of appeal which specified its displeasure to that part of the decree which adjudged "that no attorney's fees or interest be allowed to either party herein, and that each party should pay its own costs."

C. F. Saunders, of Portland (E. C. Strode and Abel & Burnett, all of Portland, on the brief), for appellant. W. G. Drowley, of Vancouver, Wash. (A. L. Miller, of Vancouver, Wash., on the brief), for respondent.

MENARY, J. (after stating the facts as above). [1] The first assignment of error made by plaintiff is directed to the refusal of the trial court to sustain a motion for judgment on the pleadings. The motion was properly denied, as the pleadings presented issues of fact, and while they remained undetermined, no judgment could have been entered on the motion. Such a judgment cannot be given when the answer sets up an issuable defense. *Willis v. Holmes*, 28 Or. 268, 42 Pac. 989; *Watkins v. Southern Pacific Ry.* (D. C.) 38 Fed. 712, 4 L. R. A. 239; 23 Cyc. 769.

[2] No error was committed by the court in refusing to allow plaintiff to recover attorney's fees, as the cross-bill contains no allegations relative thereto, nor was any proof offered in support thereof. The only assistance the court could give plaintiff in the remuneration of his attorney's fees was that allowed by section 561, L. O. L., which is often called prevailing or statutory attorney's fees, but comprehended under the term "costs."

[3] Plaintiff takes the position that the court erred in its refusal to give plaintiff a judgment for its costs, and argues the denial thereof was an abuse of judicial discretion. It is admitted that the taxation of costs and disbursements in an equitable proceeding rests within the sound discretion of the court, and that only an abuse thereof is reviewable. We find nothing in the record indicative of an abuse of discretion. We think the court exercised a sound judgment upon all the facts and circumstances of the case, and that the judgment requiring each

party to pay its own costs and disbursements did not work an injustice.

[4] Finally, it is urged by plaintiff that the court committed error in not allowing interest on the stock subscription of \$37,500. from March 1, 1910, at the rate of 6 per cent. per annum. In his answer defendant admits the amount of his subscription and the non-payment thereof, but denies that it was due on the aforesaid day, or that payment had been demanded at the time plaintiff's cross-bill was filed. The written contract of subscription signed by defendant provides, in substance, that the capital stock of plaintiff was to be paid in cash upon demand of the treasurer of the company, and on or before March 1, 1910. Some conflict exists in the evidence concerning whether the plaintiff made demand on the defendant for the payment of the stock subscription on March 1, 1910. The trial court made findings to that effect, and which in the light of the testimony we believe should not be disturbed. However, it is our opinion no demand for payment of the subscription was necessary as a condition precedent to the right to recover from defendant, as he had agreed to pay the amount subscribed on or before a certain specified day.

Defendant had the privilege of paying the subscription on or at any period of time anterior to March 1, 1910, unless plaintiff sooner matured payment by a demand through its proper officer. The duty rested on defendant to meet the subscription, either on demand of plaintiff or in the absence thereof, not later than the time agreed upon and specified therefor. 2 *Clark & Marshall on Corp.* § 498; *Davis v. Glenn*, 72 N. C. 519; *Cook on Corp.* (6th Ed.) § 106.

[5] Holding to the view that the subscription contract imposed a legal obligation upon defendant to make payment not later than March 1, 1910, we think the additional obligation lay upon defendant to pay interest on the subscription from the time of default in payment at the statutory rate of 6 per cent. per annum. Section 6028, L. O. L. provides: "The rate of interest in this state shall be six per centum per annum, and no more, on all moneys after the same becomes due." In the case of *Hawkins v. Citizens' Incorporation Company*, 38 Or. 554, 64 Pac. 320, the court held this section applied to balances due on corporate subscriptions. This view seems to be in accord with the great weight of authority. 2 *Clark & Marshall on Corp.* § 502; 1 *Cook on Corp.* (6th Ed.) § 112.

We think the court erred in refusing to allow plaintiff interest as prayed for in its complaint; and, in consequence thereof, the decree of the circuit court will be modified in respect thereto.

McBRIDE, C. J., and BEAN and EAKIN, JJ., concur.



(66 Or. 27)

GREIG v. MUELLER et al.

(Supreme Court of Oregon. June 10, 1913.)

## 1. CHATTEL MORTGAGES (§ 32\*)—CONSIDERATION—PRE-EXISTING DEBT.

A pre-existing debt is a sufficient consideration for a chattel mortgage given to secure it.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 78-82; Dec. Dig. § 32.\*]

## 2. CHATTEL MORTGAGES (§ 188\*)—FRAUD AS TO CREDITORS.

Where an automobile dealer offered to give a chattel mortgage covering all his stock in trade, as well as other property, to a bank to which he was indebted, to enable him to effect a settlement with another creditor, and the bank accepted the mortgage with knowledge of its purpose, and thereafter permitted him to sell the stock covered by the mortgage in regular course of business without accounting to the bank as required by the mortgage, the mortgage was void as a fraud upon creditors.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 393-404; Dec. Dig. § 188.\*]

Appeal from Circuit Court, Malheur County; Dalton Biggs, Judge.

Action by E. M. Greig against C. C. Mueller and others. Judgment for the defendants, and plaintiff appeals. Reversed, and decree entered for plaintiff.

Howard H. Ford, a dealer in autos, auto goods, and sundries, in connection with his auto repair shop, being in failing circumstances, was adjudged a bankrupt. The plaintiff was appointed assignee of his estate, and as such brought this suit to have canceled a certain chattel mortgage given by Ford to Mueller for the benefit of the defendants, the First National Bank of Vale, hereinafter referred to as the Vale bank, and the First National Bank of Ontario, hereinafter referred to as the Ontario bank. The mortgage was given on May 11, 1911, at which time Ford was indebted to the Vale bank in the sum of \$6,700 as evidenced by certain promissory notes and overdrafts, and to the Ontario bank in the sum of \$3,500. New notes were executed by Ford to Mueller for said amounts secured by the said mortgage. The mortgage covered "three 40 horse power Oakland automobiles; one 30 horse power Oakland touring car; one 30 horse power Oakland roadster; one 40x45 horse power Pierce Arrow touring car; one lathe, one drill press, one electric motor, two gasoline tanks, of about 300 and 500-gallon capacity, respectively; all tools, fixtures, appliances, and all stock in trade, goods, wares, and merchandise, and sundries \* \* \* including all furniture and furnishings, office safe \* \* \* all of the foregoing mentioned and described property now being in that certain brick building on the east side of the Main street in Ontario \* \* \* occupied by the party of the first part under the name and style of Ontario Auto Company. \* \* \*"

It is provided in the mortgage that, "and these presents are on the express condition that if the said party of the first part, his executors, administrators, and assigns, shall well and truly account on the third Saturday of each and every month hereafter during the life of these presents unto the said party of the second part \* \* \* for all of the receipts of said business and pay over the net profits thereof after the running expenses thereof shall have been paid, as may be approved by the party of the second part, and the replacement of said stock shall have been provided for in the pleasure of the said party of the second part \* \* \* then these presents shall be void." At the time of the execution of the mortgage Ford was largely indebted to the Oakland Motor Car Company, of Detroit, Mich. It appears that one purpose of Ford in making the mortgage was to put himself in a position that he might force a satisfactory compromise or settlement with the Oakland Motor Car Company as well as to secure the mortgagees. Ford made two informal reports under the mortgage to Mueller, which were indefinite and incomplete, but did not pay over any of the proceeds of the business, and continued to sell the goods at retail in the usual way, keeping no specific account of his transactions. He paid his personal expenses as well as the expenses of the business out of the receipts, but kept no account thereof. The Ontario bank was made a defendant, but disclaims any interest in said mortgage. The Vale bank answered, setting up the notes of Ford to Mueller in the sum of \$6,700 as given for its benefit for a pre-existing debt, and that they with the mortgage were taken in Mueller's name for the benefit of the said Vale bank. Upon the trial the court found that the mortgage was a valid, subsisting lien in defendant's favor, enumerating the items of goods covered by the mortgage as consisting of more than 400 items, and adjudged that plaintiff is not entitled to any relief. Plaintiff appeals.

J. W. McCulloch, of Ontario (McCulloch & Eckhardt, of Ontario, and H. C. Eastham, of Vale, on the brief), for appellant. C. M. Crandall, of Vale, for respondents.

EAKIN, J. (after stating the facts as above). [1] It is first contended that defendant parted with no consideration for the mortgage at the time of its execution. That contention may be briefly answered by the statement that a pre-existing debt secured by mortgage is a sufficient consideration for it. Currie v. Bowman, 25 Or. 364, 35 Pac. 848; Jolly v. Kyle, 27 Or. 95, 39 Pac. 999; Mendenhall v. Elwert, 36 Or. 375, 52 Pac. 22, 59 Pac. 805; Hesse v. Barrett, 41 Or. 202, 68 Pac. 751.

[2] It is next claimed that Ford made the mortgage for the purpose of hindering

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



and delaying creditors. According to Ford's own statement he feared trouble with the Oakland Motor Car Company, which held a claim against him for about \$8,000; and for the purpose of getting a settlement with it he proposed to the Vale bank and to the Ontario bank that, in order to protect them, he would give them a chattel mortgage. He says that neither the Vale bank nor the Ontario bank requested the mortgage. The Ontario bank did not agree to accept it, but said they were satisfied with the paper they had; that Monroe, the cashier of the Vale bank, said, "He was willing to (accept it) if it was any benefit to me"—thus showing a fraudulent purpose on the part of Ford, which was acquiesced in by the Vale bank. Monroe admits knowledge of Ford's purpose and acquiesced in the mortgage, and although the mortgage contains no reservation in favor of Ford, and is in form valid, it is clear that the Vale bank nominally accepted the mortgage to benefit Ford, and thereafter with a tacit understanding permitted him to continue the business unrestrained and for his own benefit. It is said in *Sabin v. Columbia Fuel Company*, 25 Or. 15, 34 Pac. 692, 42 Am. St. Rep. 756: "Where a mortgage is designed and made for the benefit of the mortgagor, and to enable him to continue in business by placing his property beyond the reach of legal process, it is void as to creditors." Where the mortgage on its face contains no evidence of being made for the benefit of the debtor, yet, as said in *Sabin v. Wilkins*, 31 Or. 450, 48 Pac. 425, 37 L. R. A. 465, note: "As it is a thing capable of modification by subsequent agreement, either expressed or implied by co-operative and willful disregard of its terms and conditions, it is a prerequisite to its continuing validity that good faith and fair dealing be maintained toward those whose interests may be affected by it." If the parties by their subsequent treatment of it and of the property covered by it converted it into an instrument calculated to delay or defraud creditors, it will be thus rendered fraudulent and void from that time. In *Orton v. Orton*, 7 Or. 478, 33 Am. Rep. 717, it is held that where by the provisions of the mortgage, or by an agreement between the mortgagor and the mortgagee, the mortgagor is to remain in possession of the property and may sell the mortgaged property for the benefit of the mortgagor, the mortgage is void as to purchasers and attaching creditors. And in *Bremer v. Fleckenstein*, 9 Or. 266, where there was a parol agreement between the mortgagor and mortgagee that the former might sell the goods at retail and use the proceeds for his own expenses, expense of the business, and to replenish the stock, it is said that such an agreement renders a mortgage void as to other creditors of the mortgagor. This court has recognized that

by agreement or provision in the mortgage the mortgagor may remain in possession of the stock of goods and continue to make sales, strictly accounting to the mortgagee for the proceeds of the sales less the expense of making the sales; but by agreement and connivance in disregard of the terms of the mortgage Ford was permitted to use it to ward off his creditors, and yet to proceed to use the goods exclusively for his own benefit without paying the mortgage debt therefrom. Thus with the acquiescence of the mortgagee the mortgage became an instrument to hinder and delay creditors, in violation of the terms of the statute. To maintain his preference the mortgagee under such a mortgage must be diligent to require observance of its terms and spirit. This duty is well stated in *Sabin v. Wilkins*, supra, and in *Currie v. Bowman*, supra. The Vale bank knew Ford was selling at retail and for credit as well as for cash, keeping no account of such sale nor of the receipts therefrom, although by the mortgage both the expense of making the sales and the purchase of new stock were to be made only on approval of the mortgagee. As beneficiary of the mortgage the Vale bank did not require nor receive any monthly account provided for, or payment to it of the receipts from sales, neither did it control the expenditure of the receipts. In fact, it acquiesced in Ford's methods of conducting the business as he pleased, in total disregard of the mortgage or of its requirements and without even keeping an account of his doings.

We conclude that the mortgage was executed by Ford for a fraudulent purpose; that the Vale bank accepted it with knowledge of that purpose and for Ford's benefit, and permitted him to conduct the business as he had formerly done and for his own benefit; and that as to other creditors the mortgage was void.

The decree is reversed and a decree will be rendered here adjudging the mortgage to be void.

(65 Or. 497)

#### WALK v. HIBBERD.

(Supreme Court of Oregon. June 3, 1913.)

#### 1. TRIAL (§ 252\*)—INSTRUCTIONS—"ATTORNEY"—APPLICABILITY TO EVIDENCE.

In an action by the wife of a vendor against the purchaser on an alleged promise by a third person that the purchaser would pay her a specified sum as consideration for her joining in the deed, where the only testimony to show that the third person had authority to make such contract was that he was an attorney for the purchaser, instructions that if he was authorized to represent the purchaser, and if he made such offer, to find for plaintiff, and that, if he was the duly authorized and acting attorney for the purchaser, plaintiff was justified in dealing with the purchaser through him, and the attorney's acts and contracts would bind the purchaser, were erroneous, in view of L. O. L. § 1074, defining an "attorney" as a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep' Indexes



person who has a right to appear for and represent a party in a written proceeding in any action, suit, or proceeding, and section 1083, providing that an attorney has authority to bind his client in any of the proceedings in an action, suit, or proceeding by an agreement filed with the clerk or entered upon the journal of the court, and not otherwise, and to receive money or property claimed by his client in an action, suit, or proceeding, and to discharge the claim, or acknowledge satisfaction of a judgment or decree.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.\*

For other definitions, see Words and Phrases, vol. 1, pp. 630-634; vol. 8, p. 7586.]

## 2. FRAUDS, STATUTE OF (§ 116\*) — AGREEMENTS RESPECTING REAL PROPERTY.

Under L. O. L. § 808, providing that an agreement concerning real property made by an agent of the party sought to be charged is void unless the agent's authority is in writing, the wife of a vendor could not enforce an agreement by the agent of the purchaser to pay her a specified sum for joining in a deed, where the agent's authority was not in writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 251-260; Dec. Dig. § 116.\*]

Bean, J., dissenting.

Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

Action by Althea G. Walk against C. R. Hibberd. Judgment for plaintiff, and defendant appeals. Reversed.

The substance of the complaint is that about October 27, 1911, this plaintiff entered into a contract and agreed with the defendant that in consideration that the plaintiff and her husband, G. M. Walk, at the request of the defendant, would convey to him certain lands owned by the husband and in which the plaintiff had an inchoate right of dower, the defendant as part of the purchase price agreed to assume all the record liens and incumbrances against the land shown by the records of the county in which it is situated, and promised the husband and the plaintiff to pay plaintiff \$3,000 and a like amount to the husband; that she and her husband conveyed the land as agreed upon; that the defendant has not paid plaintiff the sum of \$3,000 or any part thereof. The answer admits the marital relation between the plaintiff and her husband, the ownership of the land by the husband, and the conveyance mentioned, but otherwise traverses the whole complaint. The answer alleges in effect that the deed was made and delivered to the defendant by the plaintiff and her husband in pursuance of separate contracts with the grantors therein; that as to the plaintiff she signed the deed and caused the same to be delivered to the defendant in pursuance of an agreement made between the plaintiff and the defendant whereby the latter was to pay the plaintiff \$500 in cash, pay plaintiff's obligation to her attorneys in a sum not exceeding \$500, and credit the sum of

\$2,000 upon certain notes of the plaintiff and others which the defendant held and which were secured by a mortgage upon a hotel at North Powder, Ore.; and that the defendant fully performed all of his part of the agreement last mentioned. The reply admits that the defendant paid the attorneys of plaintiff the sum of \$500 and credited \$2,000 on the notes of plaintiff, but denies that she consented to or authorized the same to be done. The plaintiff also denies that the defendant paid her the sum of \$500 in any way except that he gave her a check for that amount which she has never cashed. She offered to return the check, and brought it into court for the defendant. There are other denials and allegations in the reply made by referring to lines and pages of the defendant's original answer, but these are unintelligible because that pleading is not before us. A jury trial resulted in a verdict and judgment for the plaintiff for the full amount claimed, and the defendant appeals.

George T. Cochran, of La Grande (Cochran & Cochran, of La Grande, and Leroy Lomax, of Portland, on the brief), for appellant. R. J. Green and Eugene Ashwill, both of La Grande (W. E. White, of Baker, and C. A. Small, of La Grande, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). It appears in the records that the plaintiff had sued her husband for a divorce. He was the owner of a heavily incumbered farm, the property included in the deed. He also was selsed of a two-thirds interest in fee in certain hotel property in North Powder, which was subject to a mortgage amounting to about \$9,500. The plaintiff and her husband were makers of the note secured by that mortgage, and these notes were held by the defendant. Pending the suit for divorce both the plaintiff and her husband were desirous of settling their property affairs. They were living apart, and were not on speaking terms with each other. She claims that in a large part her attorney of record in the divorce case managed and conducted the matter of settling the property rights between her and her husband. She claims, too, that her attorney was also the attorney for the defendant here in those transactions, and seeks to bind the latter in this action by certain declarations which she imputes to the attorney, but which both he and the defendant deny. The conveyance of the farm is admitted, and the plaintiff contends that the consideration moving to her and which she was to receive was \$3,000 in cash, while the defendant maintains that the consideration inuring to her was the payment by him to her of \$500 cash, payment of her liability to her attorneys amounting to \$500, and a reduction of her indebtedness to himself in the sum of \$2,000. It appears that the notes and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



mortgage on the hotel were originally given to Toy L. Young, a man of Chinese descent, who indorsed them to the defendant. One of the attorneys for the plaintiff in this action gave evidence to the effect that about October 27, 1911, the defendant, Toy L. Young, R. J. Green, and himself were together in the office of the witness, and, continuing, testified thus: "Mr. Hibberd came up there to get our consent as attorneys of Toy Young to sign some notes and continue as indorser on those hotel notes which were secured by a mortgage on the North Powder hotel, and he said that he and Mr. Cochran had been to North Powder and he had just about got a deal completed by which Mrs. Walk was turning all she had over to him, and that he was very anxious for this deal to be completed, and he said that if Toy Young did not consent to the giving of these notes as an indorser that he would simply start legal proceedings and that he was willing to do that because it would not cost him any more. He said he had his attorneys, Cochran & Cochran, employed by the year." The Chinaman testified vaguely to the same conversation. The plaintiff's brother declared as a witness that prior to October, 1911, the defendant had told him that Mr. Cochran was his attorney. The plaintiff herself related a conversation which she said she had with the defendant thus: "'Why,' he said—I had made some allusion to Mr. Cochran—he said, 'Is he your attorney?' I says, 'Yes.' 'Oh, well, 'that's good,' he says, 'he is my attorney, too.' 'He says, 'It's good for your attorney to be my attorney,' or 'that your attorney is my attorney,' is the way he had it." This is all the testimony disclosed by the record in any way tending to show that Cochran was acting for Hibberd in the dealings respecting the land in question. The testimony of the plaintiff herself given with a view of charging Hibberd by the declarations of Cochran is here set down. Asked to state the conversation she had with Cochran, she said: "He said that he had been communicating with Mr. Mount, Mr. Walk's attorney, and Mr. Walk in regard to it, and that they had agreed that, if I was willing to exempt Mr. Walk from further payment on the notes on the hotel and mortgage, they would turn the notes and mortgage; no, that if I was willing that the property should be sold, and—I don't know. My mind has been so much worked upon that at times I cannot remember. Well, he said he would have Mr. Hibberd to take the ranch at \$50 an acre. I said, 'Mr. Cochran, that is very little considering how long I have stayed there and worked and gone through what I have on that ranch.' Then, after talking a little while, he says, 'Why, Mrs. Walk, you had better take \$4,000.' 'No,' he said he had had a long talk with the judge, and that they had decided—well, Mr. Mount and Mr. Walk and all had agreed that the ranch was to be sold for \$50

an acre and all of Mr. Walk's indebtedness paid not exceeding \$13,000 which would leave \$5,000 for Mr. Walk and \$5,000 for me the way he then figured the ranch, and that I—and that he would have Mr. Hibberd to take the ranch or that Mr. Hibberd was going to take the ranch at \$50 an acre. 'But,' he says, 'you had better take \$4,000 than go to court; and after a while he says, 'Mrs. Walk, you had better take \$3,000 than go to court'—and I believing then that Mr. Cochran, his being my attorney as well as Mr. Hibberd's and had often said he would do what was right by me, I believed that he was trying to do the best he could, and I trusted him solely. I knew nothing about law." The foregoing is all the evidence of declarations of Cochran imputed to him by the plaintiff. It may be remarked in passing that Cochran repudiates all these declarations, and the defendant denies flatly that Cochran represented him in any way in the transaction.

[1] On this phase of the testimony the court gave the following instructions to the jury:

"(1) I instruct you, gentlemen of the jury, that if you find from the evidence that Charles Cochran was acting as the attorney or agent of the defendant in the purchase of these lands by the defendant, and if you find from the evidence that he was authorized to represent the defendant in the negotiations for the purchase of the land described in plaintiff's complaint, and if you further find from the evidence that said C. E. Cochran, acting as the agent of said Hibberd, offered plaintiff the sum of \$3,000 for her interest in the said lands, and if you further find from the evidence that the plaintiff accepted said offer, and that said offer was not revoked by defendant, and that thereafter this plaintiff, in conjunction with G. M. Walk, executed a deed to the defendant of said lands, and, if you find that said \$3,000 has never been paid for, you will find for the plaintiff in the sum of \$3,000, and the interest thereon from the 29th day of April, 1912, at the rate of 6 per cent. per annum."

"(2) I instruct you, gentlemen of the jury, that if you find from the evidence in this case that the defendant, Hibberd, told the plaintiff that C. E. Cochran was his attorney, and if you find from the evidence that C. E. Cochran was the duly authorized and acting attorney of the said Hibberd in the negotiations between the plaintiff and the defendant for the purchase of the lands described in the complaint, then the plaintiff would be justified in dealing with the defendant by and through said C. E. Cochran, and the acts and contracts, if any, made by said C. E. Cochran for himself and said Hibberd would bind the defendant."

The question to be determined is whether there was enough in this testimony upon which to predicate the instructions to the jury which have been quoted. The utmost



that can be derived from the testimony on behalf of the plaintiff is that Cochran was an attorney for Hibberd. It is not pretended that Hibberd ever said that he was an agent or that he had intrusted him with the duty of negotiating the sale of the land in question. The term "attorney" is defined by our Code thus: "An attorney is a person" who has a right "to appear for and represent a party, in the written proceedings in any action, suit, or proceeding, in any stage hereof." L. O. L. § 1074. "An attorney has authority: (1) To bind his client in any of the proceedings in an action, suit, or proceeding, by his agreement, filed with the clerk or entered upon the journal of the court, and not otherwise. (2) To receive money or property claimed by his client in an action, suit, or proceeding, during the pendency thereof, or within three years after judgment or decree, and upon the payment or delivery thereof, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment or decree." L. O. L. § 1083. The representative capacity of an attorney is thus defined and limited by these statutes. When nothing more is shown as in this case, a party dealing with one who is only an attorney must take notice of the limitations of his authority as just defined. Under the circumstances as disclosed by the bill of exceptions the court was in error in giving license to the jury, as the instructions did, to impute to Cochran more authority than the statute gives him as an attorney.

The argument of the plaintiff that Cochran was the attorney of Hibberd, and hence that his representations as such attorney made to the plaintiff would bind Hibberd, proves too much; for confessedly Cochran was her attorney in the same transaction. If the rule is what plaintiff contends it is, it would work both ways. Hence, conceding Cochran, for the sake of this discussion, to have been Hibberd's attorney so that the representations of Cochran would bind Hibberd it is equally true that the representations of Cochran as attorney for the plaintiff would bind her, with the result that as between the plaintiff and the defendant the transaction must stand as finally completed through the negotiations of the attorney. The fallacy of plaintiff's contention on this point is apparent.

[2] Further, as respects Cochran, plaintiff here is trying to enforce an agreement concerning real property made by an agent of the party sought to be charged, the defendant in this instance. In other words, plaintiff contends that Cochran as agent of the defendant made with her an agreement concerning real property. The conditions of this contract are now in dispute between the parties. Plaintiff asserts that the terms of payment to her were cash, while the defendant maintains that the stipulations of the contract provided for the extinguishment of

some of the plaintiff's indebtedness. To prove her contention, the plaintiff must establish the terms of that agreement. It is said in section 808, L. O. L., that: "In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents, in the cases prescribed by law: \* \* \* (7) An agreement concerning real property, made by an agent of the party sought to be charged, unless the authority of the agent be in writing. \* \* \* " There is no pretense that Cochran had any written authority whatever from the defendant to act for him, and for this reason, likewise, the court erred in submitting the question of Cochran's agency to the jury.

The judgment of the circuit court is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

BEAN, J., dissents.

(14 Ariz. 564)

GILA VALLEY COPPER CO. v. GILPIN et al.†

(Supreme Court of Arizona. June 28, 1913.)

1. APPEAL AND ERROR (§ 864\*)—REVIEW—EXTENT OF REVIEW DEPENDENT ON NATURE OF DECISION APPEALED FROM.

Assignments of error requiring a consideration of the evidence cannot be considered on an appeal from the judgment alone, as a failure to perfect an appeal from an order refusing a new trial precludes consideration of questions properly reviewable upon the trial of such a motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1765-1767, 3456-3461; Dec. Dig. § 864.\*]

2. PLEADING (§ 201\*)—DEMURRER—FORM.

Notwithstanding Civ. Code 1901, par. 1354, providing that the plaintiff may demur to the answer or to any defense or counterclaim therein contained upon the ground that it does not state facts sufficient to constitute a defense or counterclaim, a demurrer to an answer in an action to quiet title, which was in the form of a cross-complaint and demanded affirmative relief, on the ground that it did not state facts sufficient to constitute a cause of action, was sufficient.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 473-479; Dec. Dig. § 201.\*]

Appeal from Superior Court, Graham County; A. G. McAllister, Judge.

Action by the Gila Valley Copper Company against W. C. Gilpin and others. From a judgment for defendants, plaintiff appeals. Affirmed.

This was an action commenced by appellant as plaintiff to quiet its title to nine mining claims located in the Lone Star min-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied September 23, 1913.



ing district in Gila county. The appellees as defendants alleged that plaintiff had forfeited its title to the ground by failure to perform the necessary assessment work for the year 1911, and set up a claim to the larger portion of the ground covered by the nine claims, and alleged a mining title there-to acquired by a relocation of five claims thereon. The cause was tried before the court and a jury, and a verdict and judgment in favor of the defendants resulted.

From such judgment the plaintiff appeals.

Stratton & Lynch, of Safford, for appellant. W. R. Chambers, of Safford, and John H. Campbell, of Tucson, for appellees.

CUNNINGHAM, J. (after stating the facts as above). The appellees move to strike appellant's briefs and dismiss the appeal, relying upon subdivision 5 of rule 4 of the rules of this court (126 Pac. x), effective November 16, 1912. The motion was filed November 27, 1912. Evidently counsel overlooked an amendment to the rule, made to conform to the requirements of section 21 of chapter 74, Laws of 1907. The appellant is within the rule, and the motion must be denied.

There is but one assignment of error that we may consider. It is, the court erred in overruling appellant's demurrer to the cross-complaint.

[1] The other assignments are too general and indefinite to be considered, but, if such assignments were not obnoxious to this objection, they could not be considered for the reason they call for a consideration of the evidence and the appeal is from the judgment alone. *Miami Copper Co. v. Strohl*, 130 Pac. 605. A failure to perfect an appeal from the order refusing a new trial deprives this court of jurisdiction to consider any question properly reviewable upon the trial of such motion.

[2] The assignment challenges the order of the court overruling plaintiff's demurrer to the appellees' cross-complaint. The demurrer alleges that the cross-complaint does not state facts sufficient to constitute a cause of action. An examination of the pleading attacked discloses a demand for affirmative relief; it is in form a cross-complaint, but in substance it is the adverse claim of defendants referred to in the complaint, setting forth the nature of the defendants' title to the property. The demurrer is not in the language of the statute (paragraph 1354, Rev. St. Ariz. 1901); but, where affirmative relief is demanded, the language used is generally considered to be sufficient for all purposes. 31 Cyc. 320, authorities cited in note 1. We have carefully examined all the pleadings in the cause to which the demurrer is applicable, and find them sufficient as against such attack.

We have found no reversible error upon

the face of the record, and the appellant has failed to point out such error; therefore, the judgment is affirmed.

FRANKLIN, C. J., and ROSS, J., concur.

(14 Ariz. 540)

# FERTIG v. STATE.

(Supreme Court of Arizona. June 4, 1913.)

## 1. STATUTES (§ 226\*)—CONSTRUCTION.

The construction placed upon the statutes adopted from the state of California by the California courts is entitled to great weight in construing them.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 307; Dec. Dig. § 226.\*]

## 2. CRIMINAL LAW (§ 209\*)—ARREST—NECESSITY OF COMPLAINT.

A complaint is necessary in order to authorize a magistrate to issue a warrant of arrest.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 415-418; Dec. Dig. § 209.\*]

## 3. INDICTMENT AND INFORMATION (§ 41\*) — COMPLAINT—DESCRIPTION OF OFFENSE.

Since under the direct provisions of Pen. Code 1901, § 769, as amended by Laws 1912, c. 35, § 3, a magistrate may hold accused for any public offense which he has no jurisdiction to try so that an order of commitment may be made for a different offense than that charged in the complaint on which an information is issued, the prosecuting officer cannot look to the complaint for the offense to be charged in the information, but must look to the commitment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 152, 163-169; Dec. Dig. § 41.\*]

## 4. CRIMINAL LAW (§ 241\*) — PRELIMINARY PROCEEDINGS — COMMITMENT—DESCRIPTION OF OFFENSE.

Description of a well-known offense by its generic name, as the offense of arson, murder, etc., reasonably charges the existence of all essential elements of the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 458, 501-508; Dec. Dig. § 241.\*]

## 5. CRIMINAL LAW (§ 241\*)—PRELIMINARY PROCEEDINGS — COMMITMENT — DESCRIPTION OF OFFENSE.

It is not sufficient to describe the crime for which accused is committed in the order of commitment merely as a "felony."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 458, 501-508; Dec. Dig. § 241.\*]

Appeal from Superior Court, Yuma County; Frank Baxter, Judge.

Paul Fertig was convicted of rape and he appeals. Reversed and remanded.

Peter T. Robertson and Clement H. Coleman, both of Yuma, for appellant. G. P. Bullard, Atty. Gen., and Leslie C. Hardy, Asst. Atty. Gen., for the State.

ROSS, J. Appellant was prosecuted by information charging him with the crime of rape. Upon his arraignment he moved the court to set aside the information on the ground that before the filing thereof the defendant had not been legally committed



by a magistrate. The motion to set aside was denied and the trial resulted in the conviction of appellant. In his brief herein he assigns many errors, but we shall consider only the one denying the motion to set aside the information.

An inspection of the records as made up in the preliminary hearing discloses: That appellant was, on December 9, 1912, by a sufficient complaint, charged with the crime of rape. That on the 11th of December, 1912, the defendant being present in person and by counsel, a hearing was had in which witnesses on behalf of the state were sworn and testified. That the defendant offered no testimony. Whereupon the magistrate made the following order: "It appearing to me that the crime of felony has been committed on or about the 7th day of December, 1912, in the county of Yuma, state of Arizona, and that there is sufficient cause to believe that Paul Fertig is guilty thereof, I order that he, the said Paul Fertig, be held to answer the same, and that he be admitted to bail in the sum of one thousand dollars and that he be committed to the sheriff of the county of Yuma, until he give such or be otherwise legally discharged." The appellant contends that this order of commitment is void in that it fails to show the crime for which he was held, or that he was held for any crime.

Paragraph 769, Pen. Code 1901, as amended by section 3, c. 35, 1st Session State Legislature, reads as follows: "If, however, it appears from the examination that any public offense which the justice's court has no jurisdiction to try and determine has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate shall enter an order in his docket to the following effect: 'It appearing to me that the crime of (stating generally the nature thereof, and as nearly as may be the time and place where the same was committed) has been committed and that there is sufficient cause to believe A. B. guilty thereof, I order that he be held to answer the same.' When a defendant has been examined and committed as heretofore provided in this section, it shall be the duty of the county attorney, within thirty days thereafter, to file in the superior court of the county in which the offense is triable, an information charging the defendant with such offense. The information shall be in the name and by the authority of the state of Arizona, and subscribed by the county attorney, and shall be in form like an indictment for the same offense." The first sentence of the above section is the same as section 872 of the Penal Code of California, except that in the latter it is provided that the order may be indorsed on the complaint, instead of being entered in the docket. The last sentence in the above section is in all material ways identical with section 809 of the California Penal Code.

Paragraph 862, Pen. Code 1901, as amended by section 33, c. 35, Laws 1912, 1st Sess.,

is as follows: "The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases. \* \* \* If it be an information: 1. That before the filing thereof the defendant has not been legally committed by a magistrate. \* \* \* This last section is the same as section 995, California Penal Code."

[1] Prosecutions by information were not permitted under territorial rule, but upon admission to statehood, our Constitution having provided for prosecutions by information, the Legislature amended our criminal laws in the respects above indicated, and in doing so adopted the California statutes on that subject. The construction placed upon these statutes by the California courts we regard as very persuasive, and, indeed, entitled to great weight. 36 Cyc. 1154, 1155, and 1156.

[2] If the information were based on the complaint filed with the committing magistrate and not on the order of commitment, the action of the trial court in denying motion to set aside was correct. A complaint in the first instance is necessary in order to confer jurisdiction on the magistrate to issue a warrant of arrest. *Ex parte Dimmig*, 74 Cal. 164, 15 Pac. 619.

[3] The order of commitment may be for an entirely different offense from that charged in the complaint. The magistrate may hold defendant for "any public offense" of which he has no jurisdiction to try and determine. As was said in *People v. Staples*, 91 Cal. 23, 27 Pac. 523, "Even if the offense charged in the information was, as claimed, totally different from that laid in the complaint, it would not affect the sufficiency of the information, since, as we have seen, the information does not depend on the complaint, but upon the commitment. \* \* \* It is not claimed, and it cannot be, that the commitment must follow the complaint, for the statute and the decisions of this court are directly to the contrary. It is the duty of the magistrate to hold the defendant to answer for the offense proved, whatever may have been the offense charged." *People v. Wheeler*, 73 Cal. 255, 14 Pac. 796. It is clear, therefore, that the prosecuting officer could not look to the complaint in this case and rely solely upon it as to the offense to be charged in the information. This has always been the rule in California, and was first announced in *People v. Lee Ah Chuck*, 66 Cal. 662, 6 Pac. 859, in which the court said: "If the depositions are not returned, the district attorney must proceed by information for the offense designated by the magistrate, for the reason that there is no testimony on which he can exercise his judgment." The later decisions of California are to the effect that the prosecuting officer in preparing an information is a mere ministerial officer exercising no discretion or judgment as to the offense to be charged,



and is restricted to filing information for the offense designated by the magistrate in his commitment. *People v. Nogiri*, 142 Cal. 596, 76 Pac. 490; *Ex parte Fowler*, 5 Cal. App. 549, 90 Pac. 958. This latter rule is adhered to by the following courts: *State v. Boulter*, 5 Wyo. 236, 39 Pac. 883; *Yaner v. People*, 34 Mich. 286; *Brown v. People*, 39 Mich. 37; *People v. Evans*, 72 Mich. 367, 40 N. W. 473; *People v. Bechtel*, 80 Mich. 623, 45 N. W. 582; *People v. Pichette*, 111 Mich. 461, 69 N. W. 739; *State v. McGreevey*, 17 Idaho, 453, 105 Pac. 1047; *Williams v. State*, 6 Okl. Cr. 373, 118 Pac. 1006.

Section 30, Declaration of Rights, Arizona Constitution, reads: "No person shall be prosecuted criminally in any court of record for felony or misdemeanor, otherwise than by information or indictment; no person shall be prosecuted for felony by information without having had a preliminary examination before a magistrate or having waived such preliminary examination."

In *State v. McGreevey*, supra, the court said: "After an examination of the various constitutional and statutory provisions of the different states on this subject and the construction placed upon them by the highest courts of the states, we conclude that the general and prevailing opinion is to the effect that where the statute or Constitution says that 'no information shall be filed against any person until such person shall have had a preliminary examination,' or until 'after a commitment by a magistrate,' such provision has the effect of prohibiting the filing of an information for any other offense than that for which the accused was held by the committing magistrate."

If then the prosecuting officer in this case must look to the commitment for his authority to file the information, he will find therein that the defendant was committed on a charge of "felony." The word "felony" has reference to the grade of crime and not its nature or ingredients. Our statute, Penal Code 1901, § 17, defines a felony as a crime which is punishable with death or by imprisonment in the territorial (state) prison. Among the crimes denounced as felonies in the Penal Code are treason, bribery, rescues, escapes, perjury, murder and its degrees, mayhem, kidnapping, robbery, rape, forgery, larceny, and many others. How then can this officer, whose duty it is to file the information, determine from the order of commitment, where it commits, as in this case, simply for a "felony," which one of the many crimes defined by statute as felonies was intended by the magistrate? He may not look to the complaint to aid him, for the magistrate may hold the defendant for any public offense the merits of which he cannot try. Paragraph 769, supra, requires the magistrate to enter an order in his docket that a crime has been committed "stating generally the nature thereof," etc.

[4] The word "felony" as used in the commitment in this case clearly does not state the "nature" of the crime for which the defendant was held. However, the law seems to be well settled that "the description of an offense well known to the law by its generic name, as the offense of arson, burglary, larceny, or murder, by reasonable inference indicates the existence of all the essentials of the offense. That is just as true of a mere statutory offense when it has a name which individualizes it and points with reasonable certainty to the statute on the subject." *State v. Huegin*, 110 Wis. 189, 230, 231, 85 N. W. 1046, 62 L. R. A. 700; *Collins v. Brackett*, 34 Minn. 339, 25 N. W. 708; *In re Kelly* (C. C.) 46 Fed. 653; *People v. Johnson*, 110 N. Y. 134, 17 N. E. 684.

[5] But it is not sufficient to describe the crime for which the defendant is committed, in the order of commitment, merely as a felony. *State v. Huegin*, supra.

Appellant has assigned errors in the admission of evidence, but, if error was committed in that respect, it is not likely to occur again upon another prosecution.

The judgment is reversed and the case remanded for proper action under the law.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

(18 N. M. 35)

#### DAUGHTRY v. MURRY et al.

(Supreme Court of New Mexico. May 31, 1913.)

(Syllabus by the Court.)

#### 1. TAXATION (§ 417\*)—ASSESSMENT—UNKNOWN OWNER.

It is impracticable for the assessor to obtain the name of the real owner of a tract of land, from the official county records, as available for his inspection, and, in the absence of fraud, an assessment against unknown owners is not invalid, because of the fact that the assessor might have ascertained the name of the real owner from the records of conveyances in the office of the county recorder, in those cases where the owner has failed to list his property for taxation.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 699; Dec. Dig. § 417.\*]

#### 2. TAXATION (§ 442\*)—PRESUMPTIONS—OFFICIAL ACTS—ASSESSMENT—UNKNOWN OWNERS.

It must be presumed, in the absence of a showing to the contrary, that the assessor did his duty, and that, inasmuch as he made the assessment to unknown owners, it was impracticable to obtain the real owner's name.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 774-780; Dec. Dig. § 442.\*]

Appeal from District Court, Quay County; Leahy, Judge.

Action by J. R. Daughtry against Clara Murry and others. Judgment for plaintiff, and defendants appeal. Affirmed.

See, also, 133 Pac. 1070.

The plaintiff, J. R. Daughtry, brought this action in the district court of Quay county, to quiet title to lots 9 and 10 in block 1, Russell addition to Tucumcari, N. M., against the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes



appellants, Clara Murry and Sarah Jane Murry, asserting a fee simple title based upon a tax certificate acquired by him at a tax sale of the property in question had on May 8, 1906, for taxes assessed against unknown owners for the year 1905, and a tax deed subsequently procured by him after the expiration of the period of redemption. On the 1st day of March, 1905, the title to said property was in the Texas & New Mexico Investment Company, which company made a sworn rendition of its property for the year 1905, but in which return the property was described as situate in block 7, instead of in block 1; the evidence not being clear as to whether the return was made by the agent of the company correctly, or whether the error was attributed to a third person, no evidence being introduced tending to show that the error was chargeable to the assessor. The property was not redeemed from said tax sale, and was subsequently mortgaged by T. M. Murry, who purchased from the townsite company on May 6, 1906, and Clara Murry, his wife, to Sarah Jane Murry. Prior to the institution of this action and on October 23, 1909, appellee herein, J. R. Daughtry, obtained a judgment against said T. M. Murry, quieting in himself the title to said property as against any claim of said Murry; the appellants in this case not being joined as parties in said action.

Appellant Clara Murry filed a separate answer, denying ownership in appellee, and alleging a community interest in the property, and also alleging that the property had been returned for taxation and taxes paid thereon before delinquency, for the period for which the property was sold at tax sale; that her husband and herself had made certain improvements, utilizing therefor community funds in the sum of \$1,100 (\$750 agreed upon by stipulation of counsel as the value of such improvements). Sarah Jane Murry filed a separate answer, setting up an interest in said property as mortgagee, pleading certain irregularities in the tax title and payment of taxes before sale. The court held that the tax title was valid, and quieted appellee's title to the said property as against appellants. Judgment was rendered, however, in favor of appellant Sarah Jane Murry, in the sum of \$375, less one-half the costs of the action, on the theory of subrogation as mortgagee to the community rights of appellant Clara Murry in the improvements placed on said property subsequent to the tax sale.

From the judgment in favor of appellee, this appeal was granted.

C. C. Davidson, of Tucumcari, for appellants. H. H. McElroy, of Tucumcari, for appellee.

HANNA, J. (after stating the facts as above). [1] The first assignment of error relied upon by the appellants is that the trial court erred in its conclusion that the tax

sale was in all things regular and valid; the appellants contending that the assessment to unknown owners was an invalid assessment.

Section 3956, C. L. 1897, provides that it shall be the duty of probate clerks to enter in a reception book all instruments affecting the title to real estate, in the name of the persons, alphabetically arranged, whose title is affected thereby. Section 3936 was amended by section 1, c. 22, Laws of 1899, by adding thereto the provisions that it should also be the duty of the probate clerk "to notify the assessor, in writing, of the filing of such conveyance, the date thereof, the names of the grantor and grantee, the description by metes and bounds, if possible, of the property conveyed, and the date of recordation, which notice shall be given without charge therefor"; the said amendatory section further providing as follows: "And the assessor shall file such notice with the papers in his office, relating to the precinct in which said property is located and be guided thereby in making his assessments against the real owner of the property."

By section 4026, C. L. 1897, it is provided that: "All taxable property shall be listed, assessed and taxed each year, in the name of the owner thereof, on the first day of March."

By section 4031, C. L. 1897, it is further provided that: "When the name of the owner of any real estate is unknown, by reason of the failure of the owner to list the same, and the assessor finds it impracticable to obtain the name, it shall be lawful to assess such real estate without connecting therewith any name, but inscribing at the head of the page the words, 'Owners Unknown,' and such property, whether lands or town lots, shall be listed as near as practicable, in the order of the numbers thereof, and in the smallest subdivision thereof possible."

The question now before us seems to turn upon the point of whether it was necessary for the assessor to turn to the records of deeds of his county and there ascertain the name of the "real owner" of the property here involved, and, failing so to do, an assessment against unknown owners is void. It may well be argued that such was the legislative intent, so far as the same may be gathered from the acts quoted above. But it also clearly appears that the Legislature intended that property should not escape taxation in those cases where "the assessor finds it impracticable to obtain the name" of the owner.

From an examination of our statute law pertaining to the recording of conveyances, and especially with respect to the indices thereof, it is apparent that no provision has been made for an index, or other form of record, as to tracts, but that an index, alphabetically arranged as to grantees and grantors, has been deemed sufficient. See section 782, C. L. 1897; section 23, c. 80, S. L. 1899; chapter 87, S. L. 1903.



With this condition, as to our public records, which the Legislature is presumed to have had full knowledge of, can it be said that it intended to require the assessor to make a page by page examination of our record of conveyances for the purpose of ascertaining the real owner of a given tract of land? That the Legislature well understood the impossibility of such requirement is evidenced by the fact that it attempted to provide an independent set of records, in the office of the assessor, by the provisions contained in section 1 of chapter 22 of the Session Laws of 1899, *supra*.

If no transfer of a given tract of land occurred between the date of the enactment of the statute, last referred to, and its repeal by chapter 84 of the Session Laws of 1913, this attempt to put the assessor in possession of a means of ascertaining the name of the "real owner" would prove futile.

From the record of the case now before us it does not appear that the assessor had access to any record other than the county records, and, for the reasons given, it cannot be assumed that he could have ascertained the name of the real owner of the lots in question, by an examination of the indices of such record which are required to be kept in the names of grantors and grantees alphabetically arranged. In other words, the assessor must of necessity know a present or former owner of the property, in order to search the records for the real owner.

We are, therefore, of the opinion that it is impracticable for the assessor to obtain the name of the real owner of a tract of land, from the official county record, as available for his inspection, and, in the absence of fraud, an assessment against unknown owners is not invalid, because of the fact that the assessor might have ascertained the name of the real owner from the records of conveyances in the office of the county recorder, in those cases where the owner has failed to list his property for taxation. It must be presumed, in the absence of a showing to the contrary, that the assessor did his duty, and that, inasmuch as he made the assessment to unknown owners, it was impracticable to obtain the real owner's name.

Our opinion concerning the validity of this assessment makes it unnecessary for us to pass upon the curative provisions of chapter 22, Sess. Laws 1899, and we, therefore, hold that this assignment of error is not well taken.

The second and third assignments predicate error upon the admission in evidence of the tax sale certificate and deed, on the theory that these instruments did not contain the recital of prerequisites material to the sale. The objections are clearly disposed of by the case of *Straus v. Foxworth*, 16 N.

M. 442, 117 Pac. 831, and we, therefore, deem it unnecessary to further discuss these alleged errors.

[2] The remaining assignments of error are not separately treated in the brief of appellants, and are apparently waived, except as to the seventh and eighth. The latter assigns error in holding that the taxes assessed against the lots in question had not been paid prior to the date of sale.

The mistake as to the return of the property, if one was made, and in the payment of taxes on the wrong property subsequently, are not shown by the record in this case to have been the fault of the taxing officer, but rather the fault, mistake, or neglect of the agent of the owner. The burden was upon the appellants to prove the error, or mistake, if it existed, and they failed in this proof.

This court, and the territorial Supreme Court, has frequently held that it will not disturb the findings of the trial court where there is substantial evidence to support them. We think there is substantial evidence in this respect.

We note the only remaining point urged by appellants under the seventh assignment, alleging error "in finding for the appellant for one-half of the value of the improvements on the lots in question." We do not understand the trial court so found in this case, but that the learned district judge, by his twelfth finding of fact, in substance found that, by a former judgment in an action instituted by appellee against T. M. Murry (the husband of appellant Clara Murry), the title of appellee, to the lots in question, was quieted as against said T. M. Murry. To consider the merits of this assignment would be to collaterally inquire into the merits of the former suit against T. M. Murry. We understand the argument of appellants, in this connection, that Sarah Jane Murry, as mortgagee, was entitled to judgment for the full value of the improvements; the mortgage being executed after the improvements were made, she not being a party to the first suit to quiet title. We are of the opinion that she cannot now raise this point and urge its favorable consideration. Her answer and cross-complaint are silent upon the question of improvements. The money judgment obtained by her, in the court below, was obtained, apparently, on the theory of her subrogation to the rights of Clara Murry's interest in the improvements.

The trial court disposed of the case upon the issues as presented by the pleadings, and we cannot now consider a new issue presented here for the first time.

Finding no error in the record, the judgment is affirmed.

ROBERTS, C. J., and PARKER, J., concur.



(12 N. M. 1)

**FARMERS' DEVELOPMENT CO. v. RAYADO LAND & IRRIGATION CO.**

(Supreme Court of New Mexico. May 17, 1913.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 731\*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.**

Assignments of error that "the court below erred in affirming the decision of the board of water commissioners," and that "the court below erred in rendering judgment herein in favor of said appellee, affirming the said decision of the board of water commissioners," are not sufficiently specific to present any question for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3017-3021; Dec. Dig. § 731.\*]

**2. APPEAL AND ERROR (§ 731\*)—WATERS AND WATER COURSES (§ 12\*)—APPROPRIATION—HEARING ON APPLICATION—ASSIGNMENTS OF ERROR—SUFFICIENCY.**

Under chapter 49, Sess. Laws 1907, from any act or refusal to act of the state engineer, the aggrieved party may appeal to the board of water commissioners, and may likewise appeal from the decision of said board to the district court. The statute contemplates a hearing or trial de novo before each board or tribunal, and not a review of the order or decision of the inferior tribunal. An assignment of error, in such a proceeding, upon appeal from a judgment of the district court, that "the court below erred in finding and adjudging that the said board of water commissioners had and was possessed of the right, warrant, and authority to review the discretion of the said state engineer in the matter of the approval of permits to appropriate," is therefore not well taken, because the record in this case fails to show that the district court so held, or that any such issue was presented, or could have been involved, in the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3017-3021; Dec. Dig. § 731;\* Waters and Water Courses, Cent. Dig. § 5; Dec. Dig. § 12.\*]

Appeal from District Court, Colfax County; T. D. Lleb, Judge.

Application by the Rayado Land & Irrigation Company to appropriate certain waters for irrigation purposes, as to which the Farmers' Development Company protests. From a judgment in favor of applicant, protestant appeals. Appeal dismissed.

J. C. Gunter and H. E. Lutz, both of Denver, Colo., and H. L. Bickley, of Raton, for appellant. Jones & Rogers, of East Las Vegas, for appellee.

ROBERTS, C. J. On May 27, 1907, the appellee filed its application with the territorial engineer, as authorized by chapter 49, S. L. 1907, to appropriate the waters of the Rayado river and certain tributary streams, for the purpose of irrigating certain lands in Colfax county, New Mexico, in said application described. In August thereafter the territorial engineer ordered notice to be given by appellee of a hearing on said application on October 11th following. Notice was published as required by said act, and the appellant filed with said engineer a protest

against the approval of appellee's application. The territorial engineer, after a hearing had, declined to act upon appellee's said application, and an appeal was taken from such refusal to act to the board of water commissioners. Upon a hearing had, the board of water commissioners approved the application, with the proviso "that the permit thereunder shall not be exercised to the detriment of any person, firm, corporation, or association having prior rights to the use of waters of said stream system." From the decision of the board of water commissioners, appellant appealed to the district court of Colfax county, where the cause was heard, as required by the statute, de novo, and upon such hearing the issues were found for appellee and judgment entered in its favor, from which judgment appellant prosecutes this appeal.

[1] The assignments of error filed by appellant are as follows:

"1. That the court below erred in affirming the decision of the board of water commissioners, directing and ordering the state engineer to approve the application of the appellee herein for the appropriation of water of and from the Rayado river.

"2. That the court below erred in finding and adjudging that the said board of water commissioners had and was possessed of the right, warrant, and authority to review the discretion of the said state engineer in the matter of the approval of permits to appropriate water.

"3. That the court below erred in rendering and entering judgment in favor of the said appellee, affirming the said decision of said board of water commissioners."

Appellee contests the sufficiency of each of the above assignments of error, on the ground that they are too general, indefinite, and not sufficiently specific, and each error relied upon is not stated in a separate paragraph, and further, with respect to the second assignment, that it attempts to raise a question in the appellate court which was not raised nor considered in the district court, and that the assignment, even if good in form, is without merit.

The first and third assignments are in general terms and do not point out the specific error relied upon. The first assignment does not state whether the alleged error was predicated upon the failure of the court to decide in accordance with the weight of the evidence, or whether upon some point of law the decision was erroneous. Under this general assignment the appellant might well argue many different propositions in support of a reversal of the judgment. For instance, it might contend that the district court did not have jurisdiction of the cause; that it was without power to try the cause de novo; that there was a failure of proof as to some material point which appellee would be re-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



quired to establish in order to secure the approval of its application, such, for instance, as that there was unappropriated water available for its application; that as a matter of law, upon the facts proven, the court should not have approved the application; and other reasons might be urged in addition to the above. The third assignment, for the same reasons, is also insufficient. It does not point out wherein the judgment rendered is erroneous, unless it be contended that the judgment affirming the decision of the board of water commissioners, because of its form and language, was improper; but no such contention is urged, and no objection is made to the form or sufficiency of the judgment. This being true, this court will not examine the judgment for the purpose of passing upon its form or legal sufficiency, but will treat it, as both parties to this appeal have elected to consider it, as a final judgment, regular in form and finally disposing of the cause. This being true, the effect of the third assignment is that the court erred in rendering judgment for the appellee. An assignment of error partakes of the nature of a pleading, and should be sufficiently specific, so that a joinder in error will present a specific issue for trial. Tested by a well-established rule, adhered to in many of the decisions of the territorial Supreme Court, and followed by practically all of the states, the first and third assignments are too general to present any issue for determination.

In the case of *Cevada v. Miera*, 10 N. M. 62, 61 Pac. 125, Chief Justice Mills, speaking for the court, said: "Five errors are assigned. The first is purely formal ('The judgment of the court is contrary to the law'), as it does not point out in what particular such judgment is contrary to the law, and this court has held in the cases of *Pearce v. Strickler*, 9 N. M. 467, 54 Pac. 748, and in *Schofield v. Territory*, 9 N. M. 526, 53 Pac. 306, that such a general assignment of error is not good ground for review."

In the case of *Melini v. Freige*, 15 N. M. 455, 110 Pac. 503, the territorial Supreme Court considered the sufficiency of the following assignments of error, viz.: "That the said verdict is contrary to the law and the evidence;" "that the said verdict was rendered against the weight of evidence;" and "for many other manifest errors in the trial of this cause, which appear in the record and were prejudicial to the plaintiff"—and said: "It has been repeatedly held by this court that an assignment of error must point out the specific error complained of;" and the court refused to consider them. Similar assignments are also condemned and held insufficient in the following cases: *McRae v. Cassan*, 15 N. M. 406, 110 Pac. 574; *Territory v. Clark*, 13 N. M. 59, 79 Pac. 708; *Candelaria v. Miera*, 13 N. M. 360, 84 Pac. 1020; *Maxwell v. Tufts*, 8 N. M. 390, 45 Pac. 979, 33 L. R. A. 854.

The rule adopted in this regard, and so consistently adhered to by the territorial Supreme Court, finds ample and almost universal support in the other states. An assignment of error that the trial court erred in entering judgment for one party, or against another, presents no question for review. *Wales v. Graves*, 72 Conn. 355, 44 Atl. 480; *Clerks' Invest. Co. v. Sydnor*, 19 App. D. C. 89; *Hunter v. French*, 86 Ind. 320; *Wheeler, etc., v. Walker*, 41 Mich. 239, 1 N. W. 1035; *City of Houston v. Potter*, 41 Tex. Civ. App. 381, 91 S. W. 389. And see other cases collected in note 92, 2 Cyc. 997. For the reasons stated, we must hold that the first and third assignments of error present no question for review.

[2] Passing now to the consideration of the second assignment of error, which appears to be specific, we find that it predicates error upon the assumption that the lower court held that the board of water commissioners had and was possessed of the right, warrant, and authority to review the discretion of the state engineer in the matter of the approval of permits to appropriate water. We have searched the record in vain for such a holding by the trial court, and indeed we cannot conceive how any such question would or could be involved in the case.

Sections 27 and 28 of chapter 49 of the Irrigation Code of 1907 read as follows:

"Sec. 27. Upon the receipt of the proofs of publication, accompanied by the proper fees, the territorial engineer shall determine from the evidence presented by the parties interested, from such surveys of the water supply as may be available, and from the records, whether there is unappropriated water available for the benefit of the applicant. If so, he shall indorse his approval on the application, which shall thereupon become a permit to appropriate water, and shall state in such approval the time within which the construction shall be completed, not exceeding five years from the date of approval, and the time within which the water shall be applied to a beneficial use, not exceeding four years in addition thereto; Provided, that the territorial engineer may, in his discretion, approve any application for a less amount of water, or may vary the periods of annual use, and the permit to appropriate water shall be regarded as limited accordingly.

"Sec. 28. If, in the opinion of the territorial engineer, there is no unappropriated water available, he shall reject such application. He shall decline to order the publication of notice of any application which does not comply with the requirements of the law and the rules and regulations thereunder. He may also refuse to consider or approve an application or to order the publication of notice thereof, if, in his opinion, the approval thereof would be contrary to the public interest."



Section 62 of the same act creates a board of water commissioners and provides for the appointment of the members thereof by the Governor.

Section 63 is in part as follows: "It shall be the duty of said board to hear and determine appeals from the actions and decisions of the territorial engineer in all matters affecting the rights, priorities and interests of water users and owners of, or parties desiring to construct canals, reservoirs, or other works for the conveyance, storage or appropriation of waters in this territory. Any applicant or other party dissatisfied with any decision, act or refusal to act of the territorial engineer may take an appeal to said board." The remainder of the section provides for the procedure required to get the cause before the board for hearing.

Section 65, in so far as material to the question under discussion, reads as follows: "The decisions of said board, upon any such appeal, shall be filed in the office of the territorial engineer, who shall thereafter act in accordance with such decision. The decision of said board shall be final, subject to appeal to the district court of the district wherein such work, or point of desired appropriation, is situated," etc.

Section 66 provides for certifying to the district court, in causes appealed, the record of all proceedings in the matter by the board of water commissioners, and also provides for a hearing de novo in the district court, "except that evidence which may have been taken in the hearing before the territorial engineer and said board, and transcribed, may be considered as original evidence in the district court."

The act in question, as shown by the above excerpts, clearly shows that in each instance, where a hearing is provided for, or required, the same shall be de novo, or an original hearing, where the engineer, board of water commissioners, or the court hears such competent proof as may be offered by the parties interested in the proceeding, and forms his or its own independent judgment relative to the issues involved. The board of water commissioners does not, nor is it called upon, to review the discretion of the engineer. Upon appeal to it, it determines for itself the question as to whether the application should be approved or rejected. It is not bound, controlled, or necessarily influenced, in any way, by the action of the engineer. It hears, or may hear, additional evidence, and upon the record, and such evidence as is properly before it, it decides the question presented. Likewise in the district court the hearing is de novo. The court may consider such evidence as has been introduced before the board and engineer, and transcribed and filed with it; but it also hears additional evidence, and is not called upon to determine whether the engineer or the

board of water commissioners erred in the action taken and order entered, but must form its own conclusion and enter such judgment as the proof warrants and the law requires. It does not review the discretion of the engineer or the board, but determines, as in this case it was required by the issue presented, whether appellee's application to appropriate water should be granted. The court, in order to form a conclusion upon the issues, was necessarily required to determine, for itself, whether there was unappropriated water available, whether the approval of the application would be contrary to the public interest, and all other questions which the engineer was required, in the first instance, to determine. In such case the question recurs anew as to whether the application shall be granted. This being true, the second assignment of error must fail, because it is not well taken.

Appellant having presented no available error for review, the appeal will be dismissed; and it is so ordered.

HANNA and PARKER, JJ., concur.

(47 Mont. 471)

#### DOWNS v. CASSIDY.

(Supreme Court of Montana. June 13, 1913.)

#### 1. PLEADING (§ 236\*)—AMENDMENTS—DISCRETION.

In an action for slander, the court was given discretion by Rev. Codes, § 6589, to permit plaintiff, when the case was called for trial, to amend the complaint over defendants' objection by changing the allegation of the slanderous words as laid from the third to the second person.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. § 236.\*]

#### 2. CONTINUANCE (§ 14\*) — AMENDMENT OF COMPLAINT.

The amendment of a complaint for slander at the trial so as to change the allegation of the slanderous words from the third to the second person did not entitle defendant to a postponement where defendant's counsel did not show that the amendment presented any issue which they were not fully prepared to meet, or that they were not ready to introduce all the evidence available in support of the defense.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 25, 99-112; Dec. Dig. § 14.\*]

#### 3. APPEAL AND ERROR (§ 1032\*)—REVIEW—DISCRETION—POSTPONEMENT OF TRIAL—DENIAL.

Denial of an application for a postponement of trial within the discretion of the trial court, as provided by Rev. Codes, § 6729, is not subject to review, in the absence of an affirmative showing that the complaining party suffered prejudice.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047-4051; Dec. Dig. § 1032.\*]

#### 4. TRIAL (§ 91\*)—RECEPTION OF EVIDENCE—MOTION TO STRIKE.

Where a party has permitted evidence to go in without objection, he cannot complain that the court's refusal to strike it out was prejudicial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 242-244, 252; Dec. Dig. § 91.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



# 5. LIBEL AND SLANDER (§ 104\*)—EVIDENCE—WORDS SPOKEN ON OTHER OCCASIONS.

In an action for slander consisting of words charging plaintiff with unchastity, evidence that defendant had made similar statements concerning plaintiff on other occasions subsequent to the time charged in the complaint was admissible to show malice.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 284-291; Dec. Dig. § 104.\*]

# 6. TRIAL (§ 109\*)—OPENING STATEMENT—REPUTED WEALTH OF DEFENDANT.

Where, in an action for libel, plaintiff claimed punitive damages, a statement by plaintiff's counsel in opening to the jury that plaintiff could show that defendant's reputed wealth in the neighborhood was \$40,000 was not improper though for some reason plaintiff's counsel concluded during the trial not to introduce such evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 91, 270, 367, 388, 395; Dec. Dig. § 109.\*]

# 7. LIBEL AND SLANDER (§ 121\*)—DAMAGES—EXCESSIVENESS.

Plaintiff, a married woman, sued defendant in four counts, alleging that defendant had charged her on each of several occasions with immorality and lack of chastity. It was shown that the parties were persons of humble position in the community and that the slanders were circulated among a small number of people in the community; but it also appeared that defendant was actuated by a spirit of malevolence toward plaintiff and had repeated the slanders many times without any justification. *Held*, that the verdict allowing plaintiff \$250 on each count, making \$1,000 in all, sustained by the trial court was not excessive as a matter of law.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 353, 354; Dec. Dig. § 121.\*]

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

Action by Sarah Jane Downs against Charlotte Cassidy. Judgment for plaintiff, and defendant appeals. Affirmed.

Jesse B. Roote, W. A. Jackson, and John A. Shelton, all of Butte, for appellant. McCaffery & Tyler, of Butte, for respondent.

BRANTLY, C. J. Action for slander. Plaintiff had verdict and judgment. The defendant has appealed from the judgment and an order denying her motion for a new trial.

The complaint alleges four causes of action, each counting upon slanderous words spoken falsely and maliciously of and concerning the plaintiff, in the presence of persons named and unnamed, at various times between August 20 and September 12, 1910. The first count, as originally drawn, charged that the words spoken of and concerning plaintiff were: "She is a bloody whore and a thief; her son is a bastard; and she and her family live like a pack of dogs." The words laid in the other three counts are of like import. The questions submitted for decision arise upon exceptions to the action of the trial court in permitting plaintiff to amend the first count of her complaint and

in refusing the defendant a postponement of the trial, to its rulings in admitting and excluding evidence, and to its refusal to grant defendant a new trial on the grounds that counsel for plaintiff was guilty of misconduct during the trial prejudicial to defendant, and that the amount of damages awarded by the jury is excessive.

[1] 1. When the cause was called for trial the plaintiff was permitted, over objection by defendants, to amend the complaint by changing the statement of the slanderous words laid in the first count from the third to the second person. Thereupon counsel for defendant orally moved the court for a postponement of the trial. The ground alleged was surprise, but no showing was made other than a statement by counsel that they had made preparation to meet the charge as laid in the original complaint, and that they were not ready with their defense to the charge as laid in the amendment. The court overruled the application and ordered the trial to proceed. Defendant alleges prejudicial error. It is argued that, since the amendment amounted to the introduction of an entirely new cause of action, it ought not to have been permitted. The substance of the charge as laid was that the plaintiff was unchaste. The change wrought by the amendment was not to introduce into the complaint a charge of a different slander at another time and place, but merely to modify the language used by the defendant in making the same charge in order to avoid the consequences of a fatal variance at the trial. It was clearly within the discretion of the court under the statute (Rev. Codes, § 6589) to permit the amendment in that it amounted to no more than the correction of a mistake in the pleading as originally drawn. *Bates v. Harrington*, 51 Vt. 1; *Weston v. Worden*, 19 Wend. (N. Y.) 648; *Snediker v. Poorbaugh*, 29 Iowa, 488; *Baldwin v. Soule*, 72 Mass. (6 Gray) 321; *Barber v. Barber*, 33 Conn. 335; *Conroe v. Conroe*, 47 Pa. 198; *Lister v. McNeal*, 12 Ind. 302; 13 Ency. Pl. & Pr. 96; 25 Cyc. 471; *Newell on Slander and Libel*, 759. The case is within the rule which this court has constantly observed under similar circumstances. *Dorais v. Doll*, 33 Mont. 314, 83 Pac. 884; *Sandeen v. Russell Lumber Co.*, 45 Mont. 273, 122 Pac. 913, and cases cited. The fact that this is an action for slander does not make the rule any less applicable.

[2] The court did not, under the circumstances disclosed, err in refusing a postponement of the trial. Counsel did not offer to show that the amendment presented an issue which they were not fully prepared to meet or that they did not have at hand and were ready to introduce all the evidence available in support of the defense.

[3] The power to grant or refuse a postponement on any ground is vested in the discretion of the court. Rev. Codes, § 6729. Its exercise in any case is not subject to



review by this court, in the absence of an affirmative showing that the complaining party has suffered prejudice. *Dorais v. Doll*, supra; *Jorgenson v. Butte, etc., Co.*, 13 Mont. 288, 34 Pac. 37; *Montana Ore Pur. Co. v. Boston & Mont., etc., Co.*, 27 Mont. 288, 70 Pac. 1114; *Christiansen v. Aldrich*, 30 Mont. 446, 76 Pac. 1007.

2. During the examination of Mary Heaney, a witness for the plaintiff, she was asked to rehearse statements which she had heard defendant make concerning the plaintiff on other occasions than those alleged in the complaint. Her answer was: "She [defendant] called Mr. Downs a 'son of a bitch' and Mrs. Downs a 'damned whore.'" Being asked whether she heard defendant repeat these words concerning the plaintiff or any of them subsequent to that time, she answered: "Why, very often, very often." Counsel then interposed the objection that words uttered on any other occasion than those charged in the complaint were irrelevant and incompetent for any purpose. The objection was overruled. The witness Margaret Brooks, having been asked similar questions, made similar answers. She was then asked: "Well, would it occur once a week, or (that is, as near as you can recollect) about how often?" Counsel thereupon interposed the same objection as that interposed to the testimony of Mary Heaney. Assuming that the evidence was incompetent and that the objection of counsel was tantamount to a motion to strike it from the record, the ruling was not erroneous.

[4] When a party sits by and allows evidence to go in without objection, he cannot complain that the refusal of the court to strike it out is prejudicial. *Poindexter & Orr L. S. Co. v. Oregon S. L. R. Co.*, 33 Mont. 338, 83 Pac. 886.

[5] That in so far as the evidence in question cast upon the plaintiff an imputation of unchastity it was competent as tending to show that the words laid in the complaint were spoken with malice, all the courts agree. The rule is well established both in this country and in England (25 Cyc. 496; *Newell on Slander and Libel*, 349, 350; *Odgers on Libel and Slander*, 275 et seq.); and many of the courts hold that any publication importing ill will and hatred, made before or after the date of the charge laid, may be admitted to show malice, whether it might be made the basis for recovery in a separate action or not. 25 Cyc. 498, 499, and note. Complaints as to other rulings upon questions of evidence we do not find of sufficient merit to require special notice.

[6] 3. During the course of his opening statement to the jury, Mr. McCaffery, one of counsel for plaintiff, said: "We will show you, gentlemen of the jury, that the reputed wealth of this defendant is in the neighborhood of \$40,000; and if Mr. Roote [one of counsel for defendant] objects to this we will

bring it [more] closer than that." Counsel for defendant took exception to this statement as misconduct. It is argued that, since evidence either of the wealth or reputed wealth of defendant is not admissible for any purpose during the trial, the statement of counsel was such an irregularity as prevented the defendant from having a fair trial. The plaintiff did not offer any evidence as to the actual or reputed financial condition of the defendant. Indeed, so far as there is any evidence on the subject, it tends to show that the defendant is in comparatively modest circumstances. While the decisions of the courts are not entirely harmonious, by the great weight of authority evidence of the financial condition of the defendant is admissible on the ground that his wealth is an element which aids in determining his social rank and influence in society, and therefore tends to show the extent of the injury suffered by his words; and, where punitive damages are allowed, it aids the jury in determining the extent of the punishment to be inflicted upon the defendant. *Newell on Slander and Libel*, 878, and cases cited in footnote. See, also, *Jones v. Greeley*, 25 Fla. 629, 6 South. 448; *Kidder v. Bacon*, 74 Vt. 263, 52 Atl. 322; *Buckley v. Knapp*, 48 Mo. 152; *Burckhalter v. Coward*, 18 S. C. 435; *McAlmont v. McClelland*, 14 Serg. & R. (Pa.) 359; *Adcock v. Marsh*, 30 N. C. 360; *Brown v. Barnes*, 39 Mich. 211, 33 Am. Rep. 375, and notes. In *Stanwood v. Whitmore*, 63 Me. 209, it was said: "We think, however, that the wealth of a defendant should be proved by general evidence rather than by particular facts. It is the defendant's position in society which gives his slanderous statements character and weight. Reputation for wealth, rather than its possession, generally confers position. Therefore the more proper inquiry is as to the reputation of a defendant for wealth. Of course a presiding justice would have considerable discretion as to the form of a question in such a case, to be exercised according to circumstances." Under these authorities, counsel was justified in his opening statement in proceeding upon the assumption that the evidence would be admitted, if offered, and it cannot be held to be misconduct on his part that he then expressed the intention to introduce it but later changed his mind, whatever reason he may have had for his subsequent action.

[7] 4. The jury fixed the amount of damages on each count at \$250, making the amount of the verdict \$1,000. It is argued that since it appears from the evidence that the slanderous words were heard by comparatively few persons, that all the witnesses who gave testimony against the defendant were unfriendly, that the parties are persons of humble position in the community in which they reside, that the defendant had some provocation because the plaintiff and



her husband, who had been tenants of defendant, abandoned their tenancy, leaving a balance of the rent and a small debt for borrowed money unpaid, and that it does not appear that defendant is in affluent circumstances, the amount of the verdict is manifestly excessive. It is true that the parties are of comparatively humble station and that the slanders were circulated among a small number of people in the community; yet, as was remarked by the court of the defendant in *Casey v. Hulgan*, 118 Ind. 590, 21 N. E. 322, the defendant was not troubled with a stammering tongue nor was she slow of speech. She was evidently actuated by a spirit of malevolence toward plaintiff, as appears from the many repetitions of words of the same import as those laid in the complaint. While she may have had some cause to complain that plaintiff's husband did not promptly pay the balance of the indebtedness due her, the jury were justified in the conclusion that his delinquency in this regard was to be attributed to his inability rather than any disinclination to do so. His income consisted of his daily incomes as a miner, and during the latter part of the tenancy his expenses had been materially increased by the illness and death of a son. In any event, his failure to discharge his debt was no justification for the vicious, groundless assault made by the defendant upon the character of the plaintiff, to this extent destroying the only possession of substantial value which she apparently had. She was entitled upon the evidence to recover substantial damages and, in the discretion of the jury, punitive damages also. In such cases there is no accurate standard by which to measure the injury. The amount to be awarded is peculiarly within the discretion of the jury after taking into consideration all the circumstances appearing from the evidence. The court ought not to interfere unless the sum awarded is so large as to raise a presumption that the amount fixed was due to some gross error on the part of the jury, arising out of a misconception of the case or the result of undue motives. *Newell on Slander and Libel*, 848. Furthermore the discretion of the trial court in granting or refusing a new trial on the ground urged here is moved by several considerations which this court cannot take into account. Among these is a personal view by the trial judge of the parties and their witnesses. His action must therefore be accepted as final, unless, after making due allowance for the superior position he occupies toward the case, this court is compelled to the conclusion that he has been guilty of an abuse of discretion. While upon the whole case disclosed by the evidence we doubt whether the jury should not have found a less sum, the existence of this doubt is itself sufficient to rebut any presumption, which might otherwise be indulged, that the

trial court was guilty of a manifest abuse of discretion in refusing to grant a new trial. The judgment and order are affirmed. Affirmed.

HOLLOWAY and SANNER, JJ., concur.

(47 Mont. 447)

STATE ex rel. BENNETTS v. DUNCAN, Mayor.

(Supreme Court of Montana. June 3, 1913.)

1. MANDAMUS (§ 143\*)—LACHES.

Though the only limitation applicable to mandamus is the five-year statute of limitations (Rev. Codes, § 6451), the court may, in its discretion, deny relief when there has been a long delay, and there is no excuse or explanation.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 282-285; Dec. Dig. § 143.\*]

2. MANDAMUS (§ 143\*)—LIMITATION—LACHES.

Where the mayor of a city discharged 14 police officers at the same time, and 13 of them instituted proceedings to secure reinstatement, and the fourteenth, acting on the assumption that the proceedings would determine the issues involved, notified the mayor that he would not acquiesce in his removal, but would hold himself in readiness to be restored to active service in case it was determined that the removal was illegal, and the proceedings resulted in reinstatement of the officers instituting it, a delay of 13 months by the fourteenth officer before instituting proceedings to compel reinstatement did not amount to laches justifying denial of relief; the proceedings being instituted 15 days after the order of reinstatement in the proceedings by the other officers.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 282-285; Dec. Dig. § 143.\*]

3. OFFICERS (§ 55\*) — DUTY TO QUALIFY — "VACANCY."

Under Rev. Codes, § 3234, providing that if any one elected or appointed to office fails to qualify as required by law within 10 days the office becomes vacant, and section 3248, requiring officers elected or appointed to take the constitutional oath of office before entering on office, the failure of one appointed to office to qualify within 10 days by taking the oath of office creates a vacancy, which may be filled by the appointing power.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 76-84; Dec. Dig. § 55.\*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7259-7264.]

4. MUNICIPAL CORPORATIONS (§ 144\*)—POLICE OFFICERS—APPOINTMENT—OATH OF OFFICE.

Under Rev. Codes, §§ 3306, 3309, providing that police officers shall first be appointed for a probationary term of six months, and thereupon the mayor may appoint them to hold during good behavior, and requiring applicants to take an examination as to their qualifications to fill the office, and providing for the removal of police officers on charges after trial by the examining and trial board, the mayor must appoint each probationer to permanent service at the expiration of six months, unless during that time he has demonstrated his want of fitness, and he may not be removed except on charges and trial; and a permanent appointment is but a confirmation of the original appointment, and does not mark the beginning of a new term by the appointee, and an appointee receiving a permanent appointment need not qualify by again taking the official oath.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 316-318; Dec. Dig. § 144.\*]



Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

Mandamus by the State, on the relation of Henry Bennetts, against Lewis J. Duncan, as Mayor of the City of Butte, to compel the reinstatement of relator to the office of policeman of the city. From a judgment granting relief, defendant appeals. Affirmed.

H. Lowndes Maury, John A. Smith, and N. A. Rotering, all of Butte, for appellant. W. E. Carroll, of Butte, for respondent.

BRANTLY, C. J. This is an appeal by defendant from a judgment awarding to the relator a peremptory writ of mandate, commanding defendant to reinstate him in the office of policeman of the city of Butte, from which he alleged he was unlawfully removed by Charles P. Nevin, the predecessor of defendant. The statement of facts out of which the controversy grew may be found by reference to the opinion in *State ex rel. Rowling v. District Court*, 41 Mont. 532, 110 Pac. 86. The relator herein was not a party to that proceeding, nor to another which resulted in a final determination that the relators therein were entitled to be restored to active duty. *State ex rel. Rowling v. Mayor*, 43 Mont. 331, 117 Pac. 604. When, by the final judgment entered in the latter proceeding, a peremptory writ of mandate was awarded, the defendant, who had in the meantime succeeded Mayor Nevin, reinstated the relators in their offices and restored them to active duty. The relator herein had theretofore made repeated demand upon Mayor Nevin for reinstatement, but the demand had as often been refused. When the defendant made the order of reinstatement in obedience to the writ, the relator herein demanded that he also be reinstated. The demand was refused. Thereupon this proceeding was commenced. Referring to the statement in *State ex rel. Rowling v. District Court*, 41 Mont. 532, 110 Pac. 86, supra, it will be noted that the relator received his permanent appointment from Mayor Corby, the predecessor of Mayor Nevin, after undergoing examination and performing probationary service as required by the Metropolitan Police Law (Rev. Codes, §§ 3304-3312), and that he was one of the members of the police force peremptorily discharged by Mayor Nevin on December 18, 1909, and restored by him to active duty and retired to the eligible list without pay on April 28, 1910. Counsel for defendant base their contention that the district court erred in awarding the writ on two grounds, viz.: (1) That it affirmatively appears that the relator was guilty of laches in failing to apply for relief until the lapse of more than one year after his removal; and (2) that it is not shown by the evidence that he took and subscribed the oath of office required by law within ten days after he received his permanent appointment from Mayor Corby.

[1, 2] In support of their first contention counsel rely upon the rule that those who would avail themselves of the assistance of the writ of mandamus must be prompt in demanding the enforcement of their rights, or they will be held to be barred by laches. The rule invoked by counsel has heretofore been recognized and enforced by this court. *Territory ex rel. Tanner v. Potts*, 3 Mont. 364; *State ex rel. Beach v. District Court*, 29 Mont. 265, 74 Pac. 498. The word "action," as used in the provisions of the Revised Codes relating to the time of commencing actions, is to be construed, when necessary, as including special proceedings of a civil nature. Rev. Codes, § 6476. An application for mandamus is classed as a special proceeding of a civil nature. Part 3, tit. 1, c. 2. The only limitation applicable to such proceedings is found in section 6451, which is a general provision applicable to all actions for which special provision is not otherwise made. It was pointed out in *State ex rel. Bailey v. Edwards*, 40 Mont. 313, 106 Pac. 703, that notwithstanding this provision the courts may, in their discretion, deny relief when there has been a long delay in applying for it, in the absence of excuse or explanation. It was held that the propriety of granting relief in any case will be determined, not merely by the lapse of time permitted by the relator before making his application, but that the writ will go, unless the delay has resulted in prejudice to the rights of the adverse party, or the relief sought depends upon doubtful and disputed questions of fact. Accordingly, though the application in that case had been delayed for about 10 months, in the expectation that the final judgment in the case of *State ex rel. Quintin v. Edwards*, 40 Mont. 287, 106 Pac. 695, 20 Ann. Cas. 239, would settle and determine the question of law upon which the relator's rights depended, the writ was allowed to go. In this case the following facts are shown as excusatory of relator's delay: Mayor Nevin discharged him, with 13 others, from the force at the same time. The others at once instituted proceedings to secure their reinstatement. The relator, acting upon the assumption that these proceedings would determine the controverted questions of law involved, notified Mr. Nevin that he would not acquiesce in his removal, and that he would hold himself in readiness to be restored to active duty service, in case it was determined that Mr. Nevin's action was illegal. When it was finally determined that Mayor Nevin was without authority to reduce the force by summary removals therefrom (*State ex rel. Rowling v. Mayor*, 43 Mont. 331, 117 Pac. 604), the relator demanded of the defendant, who had in the meantime succeeded to the office of mayor, that he be reinstated. The defendant refused the demand. The order reinstating the other members of the force was made May 31, 1911. This proceeding was brought on June



15th. These facts are not disputed. Under the circumstances we do not think the district court abused its discretion in holding that the relator was not open to the imputation of laches, though he delayed his application for relief from April 28, 1910, the date of his final removal, to June 15, 1911, a period of more than 13 months. The institution of proceedings at any earlier date would not have hastened the settlement of the controversy as to the correctness of the action of Mayor Nevin in the first instance, or his power to reduce the force without authority from the city council. The contention of counsel is therefore overruled.

[3] In the Revised Codes we find these provisions:

"Sec. 3234. Each officer of a city or town must take the oath of office, and such as may be required to give bonds, file the same, duly approved, within ten days after receiving notice of his election or appointment; or, if no notice be received, then on or before the date fixed for the assumption by him of the duties of the office to which he may have been elected or appointed; but if any one, either elected or appointed to office, fails for ten days to qualify as required by law, or enter upon his duties at the time fixed by law, then such office becomes vacant.  
\* \* \*

"Sec. 3248. Before entering upon office, all officers elected or appointed must take and subscribe the constitutional oath of office."

It is alleged in the affidavit for the writ that the relator duly qualified as required by these provisions, both upon his appointment for the probationary term and upon his permanent appointment. These allegations are denied by the defendant. The evidence shows that the relator qualified regularly as a member of the police force upon entering upon the probationary term, but does not show that he again qualified when he received his permanent appointment. When questioned on this point, he stated that he did not remember whether or not he had qualified, and the fact that he did so was not made to appear from the files in the clerk's office. The contention of counsel for defendant proceeds upon the assumption that the burden was upon the relator to show his title to the office, and that since he thus failed to show that he had qualified in conformity with the provisions of the statute the presumption must obtain that the office became vacant at the expiration of 10 days after his permanent appointment. Giving to section 3234, *supra*, the force and effect which the Legislature evidently intended it should have, we think that it should be construed to mean that the failure of the person elected or appointed to office to qualify within the time prescribed creates a vacancy in the office, which may be filled by the appointing power. The courts are somewhat at variance in the construction of such stat-

utes (Throop on Public Officers, § 173; 29 Cyc. 1388); but it seems to us inconceivable that when an office "becomes vacant" it may still be regarded as being occupied by a legal incumbent. The office of relator, therefore, must be deemed to have become vacant by his failure to take and subscribe the official oath as required by the statute, unless the taking of the official oath at the time of his appointment for the probationary term was sufficient.

[4] Section 3 of the Metropolitan Police Law (Rev. Codes, § 3306) provides that all members of the police force shall first be appointed for a probationary term of six months, and thereupon the mayor may appoint them to hold during good behavior, or until by age or disease they become permanently incapacitated. Section 4 (section 3307) provides for the establishment of an examining and trial board. Section 5 (section 3308) requires all applicants to take an examination as to their legal, mental, moral, and physical qualifications and ability to fill the position of member of the force. It then provides that no member shall be removed, except upon charges preferred and after a trial by the examining and trial board. There is not anywhere in the statute any distinction made as to the official character of those serving as probationers and those serving under permanent appointment. Nor is there any special method provided for the removal of those members who are serving as probationers. Both alike seem to be regarded as members of the force. At the time the legislation was enacted, men who served as policemen were frequently appointed to service by the mayor and council without reference to their qualifications, except as to their party affiliations; very frequently those who were most ready to act as political agents of the city administration being given preference. They were expected to attend caucuses, primaries, and conventions and to work at the polls at election time—not so much to preserve order as to influence voters in favor of the administration candidates and measures. For this reason with every change of administration there was a change of the personnel of the force, in order to reward the partisans of the prevailing party or faction for their faithful and efficient service as political agents, rather than as guardians of the peace and safety of the citizen. Under these conditions inefficient services and corrupt practices were the rule rather than the exception. The purpose of the Legislature in enacting the legislation was to remedy this condition by removing the police force as far as possible from the control of partisan political influences by putting it under civil service rules, and thus raise the standard of efficiency. *State ex rel. Quintin v. Edwards, supra*. While the language of section 3 seems to imply discretionary power in the mayor to appoint probationers to permanent



service or otherwise to consider their places vacant when this term is completed, yet when we keep steadily in view the purpose sought to be accomplished by the legislation this cannot be its meaning. If this section should be so construed, the result would be that the necessity for the creation of an effective, permanent force would depend entirely upon the personal views of him who happens at any time to occupy the office of mayor, and his partisan preferences could be exercised without restraint, except that he would be compelled to appoint the probationers from the eligible list provided for in section 7. In view of the purpose sought to be accomplished, we think it was the intention of the Legislature to make it obligatory upon the mayor to appoint each probationer to permanent service at the expiration of six months, unless during this period he has demonstrated his lack of fitness for such service, and that, being a member of the force, he may not be removed, except upon charges made and trial had before the examining and trial board as in other cases, under the provisions found in sections 5 and 6 (sections 3308, 3309). This conclusion seems necessary in view of the fact that those appointed to probationary service are deemed to be members of the force, and that no other method is provided by which they may be removed from it. The permanent appointment, therefore, is nothing more nor less than a confirmation of the original appointment, and does not mark the beginning of a new term of service by the appointee, as though he had been appointed for another term or to another office. In other words, the appointee has fulfilled the conditions attached to his probationary appointment, viz., the rendering of efficient service for the period of six months, and is, by operation of law speaking through the mayor, continued in the same office. It was therefore not necessary for the relator, upon receiving his permanent appointment, to qualify by again taking and subscribing the official oath.

We know of no authority directly in point; but it has, we believe, been the uniform practice in this state since its foundation for the lieutenant governor, when he has succeeded to the office of Governor, temporarily or for an unexpired term, to enter upon the discharge of his duties without taking a new oath. Indeed, such an act would be an idle ceremony, since in contemplation of the Constitution the qualification for the office for which he is elected is a qualification for the office of Governor, to which, upon certain conditions, he may by operation of law succeed. Opinion of Justices, 70 Me. 593. The practice, we think, should control here.

The judgment is affirmed.

Affirmed.

HOLLOWAY and SANNER, JJ., concur.

(21 Idaho, 200)

**PICKETT v. BOARD OF COMRS OF FREMONT COUNTY.**

(Supreme Court of Idaho. June 10, 1913.)

**1. SCHOOLS AND SCHOOL DISTRICTS (§ 42\*)—ORGANIZATION OF DISTRICT—REQUISITES.**

Under the provisions of an act of the Legislature for the organization of rural high school districts (Session Laws 1909, p. 73), the two jurisdictional requisites for the creation of such districts are, first, filing with the board of county commissioners the requisite petition, and, second, the submission of the question to a vote of the electors; and, if a majority of the votes cast at such election are in favor of creating the district, the district is thereby created.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 81-85; Dec. Dig. § 42.\*]

**2. SCHOOLS AND SCHOOL DISTRICTS (§ 42\*)—ORGANIZATION OF DISTRICT—ELECTION.**

That act of the Legislature vested the power in the electors to determine whether or not a rural high school district should be organized.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 81-85; Dec. Dig. § 42.\*]

**3. ELECTIONS (§ 228\*)—VALIDITY—ACTS OF ELECTION OFFICERS.**

The rights of electors should not be prejudiced by the errors or wrongful acts of the election officers, unless it be made to appear that a fair election was prevented by reason of such irregularities.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 198; Dec. Dig. § 228.\*]

**4. SCHOOLS AND SCHOOL DISTRICTS (§ 42\*)—ORGANIZATION OF DISTRICT—MINISTERIAL ACTS.**

The duties of such boards under that act are ministerial.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 81-85; Dec. Dig. § 42.\*]

**5. SCHOOLS AND SCHOOL DISTRICTS (§ 28\*)—ORGANIZATION OF DISTRICT—PRESUMPTION OF LEGALITY.**

After a rural high school district has exercised the functions of such district for a period of nearly two years, its legal organization will be presumed, whatever may have been the defects and irregularities in the formation or organization of such district.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 46; Dec. Dig. § 28.\*]

**6. SCHOOLS AND SCHOOL DISTRICTS (§ 28\*)—DE FACTO CORPORATION.**

Under the facts of this case, *held*, that said rural high school district existed as a corporation de facto if not de jure.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 46; Dec. Dig. § 28.\*]

**7. SCHOOLS AND SCHOOL DISTRICTS (§ 24\*)—ORGANIZATION OF DISTRICT—VALIDITY—ATTACK.**

*Held*, that the order appealed from was not necessary to the organization of said district and that the valid organization of said district could not be inquired into or attacked on an appeal from said order.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 42, 45, 47-49; Dec. Dig. § 24.\*]

Appeal from District Court, Fremont County; James G. Gwinn, Judge.

Action by John W. Pickett against the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Ke; -No. Series & Rep'r Indexes



Board of Commissioners of Fremont County. Judgment for plaintiff, and defendant appeals. Reversed.

Richards & Haga, of Boise, and Soule & Soule, of St. Anthony, for appellant. Geo. H. Lowe and N. D. Jackson, both of St. Anthony, for respondent.

SULLIVAN, J. This is an appeal concerning an order made by the board of county commissioners of Fremont county confirming the acts done in creating rural high school district No. 3 and the acts of the board of trustees of such district, which order of the board was taken on appeal to the district court, and the district court set aside the order of the board of county commissioners and held that said rural high school district had no existence de jure or de facto. From that judgment this appeal is taken.

It appears from the record that prior to March 3, 1910, there existed in Fremont county organized school districts Nos. 8, 48, 55, 60, 63, 66, and 74, and on March 3, 1910, a petition was filed with the board of county commissioners pursuant to an act of the Legislature of March 3, 1909 (Sess. L. p. 73), praying for the organization of rural high school district No. 3. At its meeting held on May 23, 1910, the board of commissioners made an order calling an election for the purpose of organizing said high school district. The parties interested having failed to post notices required by said act, the matter was again brought before said board at its meeting on July 12, 1910, and the board made an order calling an election for the 23d of July, 1910. Said election was held on that date, the vote canvassed, and a board of trustees of said district was organized on August 1, 1910, which board certified to the clerk of the board of county commissioners the result of the election. One of the respondents here was one of said trustees.

Said high school district has conducted school, issued warrants in the usual way, which have been paid by the county treasurer, bonds of the district were issued and sold in the sum of \$20,000 for the erection of a schoolhouse, the warrants of such district for the expense of running such school for about two years were issued and paid, taxes were levied and collected, and the proceeds of such bonds were paid to the district for the purpose of building a schoolhouse. On July 5, 1912, it was discovered that the return showing the votes cast at said election had been duly canvassed and required to be sent to the board could not be found on file with the clerk of the board of county commissioners. Thereupon two affidavits were filed in the office of the clerk of said board, showing that 50 votes were cast for the organization of said district at said election, and no votes were cast against it. On July 8, 1912, the matter came before the board, and the board made the order from which this appeal is

taken, and under date of July 23, 1912, the clerk of said board filed two certificates and mailed a copy thereof to the clerk of said rural high school district. On July 26, 1912, respondent filed with the clerk of said board a notice of appeal from said order on behalf of himself and others. Said appeal came on to be heard before the district court, when a motion was made by the board of county commissioners to make such notice of appeal more definite and certain and to strike out a certain portion of the same. A demurrer was also filed. The court sustained the motion to strike out a portion of said notice of appeal and overruled the motion to make more definite and certain certain parts thereof, and also overruled the demurrer of appellant. After trial a judgment as above stated was entered.

[1] It is first contended by counsel for appellant that said rural high school district No. 3 was a legally organized and existing high school district prior to the making of said order of the board of county commissioners from which this appeal was taken. This contention is based on the ground that, under the provisions of said act of the Legislature above referred to, the required petition for the organization of said district had been presented to the board and the board had made the required order calling an election to be held to determine whether such district should be organized, which election resulted in a unanimous vote in favor of the district, and that the board of trustees of such district organized on August 1, 1910, and that the district has continued to exist and to exercise the powers and privileges of a high school district since that time, and for those and other reasons the court erred in holding that said district had no existence de jure or de facto.

Section 1 of said act provides that when the heads of five or more families in each of two or more regularly organized school districts, not having within their limits an incorporated city, shall petition the board of county commissioners of their county to unite them in a rural high school district for the purpose of maintaining a high school therein, said board shall submit the question to a vote of the qualified electors of the district so petitioning at a special election called for that purpose.

Section 2 provides that such election shall be held at the most centrally located schoolhouse in the several districts petitioning, also provides the form of ballot of such election.

Section 3 provides that, if more votes are cast in favor of such rural high school district than against it, the boards of school trustees of the districts included in such rural high school district, if there are but two, and, if there are more than two districts so included, then the chairman of each board of trustees, shall within 10 days after such election meet and organize as the board of trustees of such rural high school district by



electing one of their number president and electing a clerk or secretary; that such board, when so organized, shall at their first meeting certify to the clerk of the board of county commissioners the result of the election so held, and the clerk of the board of county commissioners shall designate the said district as "rural high school district No. ———," and so certify it to the clerk or secretary of said rural high school district, and also to the board of county commissioners at their next meeting.

Section 4 provides for the time of holding regular meetings of such board of trustees and their powers.

It appears that the two jurisdictional requisites for creating a rural high school district under said act are, first, the filing with the board of county commissioners of the requisite petition, and, second, the submission of the question to a vote of the electors; and, if a majority of the votes cast at such election is in favor of creating such district, the district is created. Those jurisdictional requirements having been complied with, the district was brought into existence.

[2] That act of the Legislature vested the power in the electors to determine whether a rural high school district should be organized or created. To "create" means to cause to exist; to bring into existence. Under the provisions of said act, if more votes were cast in favor of such rural high school district than against it, the chairman of each board of trustees of the several districts included were required to meet and organize a board of trustees of such rural high school district by electing one of their number president and electing a clerk. This step was not the cause of the existence of the district but was a step resulting from the existence of the district, and the certifying of the result of the election by such board of trustees was required because of the creation of the district, and that part of the act requiring the clerk of the board of commissioners to designate the district by number was something required to be done by an officer after the organization of the district. These several steps were simply directory and not vital to the creation of the district, and, if not done in strict accordance with the terms of the statute, that would not invalidate the existence of the district.

[3] In *Murphy v. City of Spokane*, 64 Wash. 681, 117 Pac. 476, the court said: "The principle underlying all these decisions is that the rights of the voters should not be prejudiced by the errors or wrongful acts of the election officers, unless it be made to appear that a fair election was prevented by reason of the alleged irregularities." See *Paine v. Port of Seattle*, 70 Wash. 294, 126 Pac. 628.

The failure of an officer to perform acts directory in their nature cannot nullify the

will of the electors expressed by their vote at an election.

[4] In *People v. Van Cleve*, 1 Mich. 362, 53 Am. Dec. 69, the court said: "The duties of these boards are simply ministerial."

In *State v. Burkholder*, 42 Kan. 641, on page 646, 22 Pac. 722, on page 724, the court said: "And no effort, it would seem, was ever made until this action was commenced to contest the election, or to set it aside, or to have it declared illegal or void; but, on the contrary, it was treated as legal and valid, and the rights of third parties have now intervened. And for all these reasons we think that the election should now be held to be valid." See, also, *School Directors v. School Directors*, 73 Ill. 249; *Crabb v. Celeste Ind. School Dist.* (Tex. Civ. App.) 132 S. W. 890; 15 Cyc. 378 et seq.

[5] The record in the case at bar shows that said district was created, and from the time of such creation it has exercised all of the rights and privileges of a rural high school district, such as levying and collecting taxes, employing teachers, conducting school, paying the expenses thereof in the usual way by drawing warrants on the county treasurer, by authorizing the issuance of bonds and selling the same and receiving the proceeds for the purpose of constructing a high school building. Under the continued user of corporate powers and public acquiescence therein, the law will indulge all presumptions in favor of the legal establishment and existence of a municipal corporation.

In *State v. School Dist. No. 19*, 42 Neb. 499, 60 N. W. 912, the court said: "After a school district has exercised the franchises and privileges thereof for the period of one year, its legal organization will be conclusively presumed, whatever may have been the defects and irregularities in the formation or organization of such district." *Koekrow v. Whiseand*, 88 Neb. 640, 130 N. W. 287; *People v. Maynard*, 15 Mich. 463.

There was no appeal taken from the order of the board of county commissioners entered in July, 1910, ordering an election for the creation of said district, and the district having exercised its corporate functions for nearly two years without objection, before the order appealed from was made, there was really nothing on which the board of county commissioners could act at the time the order was made, so far as the legal organization of said district was concerned. In other words, the validity of the existence of the district could not be affected by any order of the board, and the question as to the legal organization of the district could not be raised on an appeal from said order.

[6] In 10 Cyc. at page 253, the author states that: "A corporation de facto exists when there is: (1) A charter or statute under which a corporation with the powers assumed might have been organized. (2) A bona fide attempt to organize a corporation



under such a charter or statute. (3) An actual user of the corporate powers, or some of them, which might have been rightfully used by such an organization."

Under the facts of this case, a corporation de facto certainly existed, if not one de jure. There was the actual user of the corporate powers of a rural high school district for nearly two years, as shown by the facts above stated, and under the authorities above cited its legal organization will be presumed, whatever may have been the defects and irregularities in the formation or organization of the district. The record shows that one of the persons interested in this appeal has been a member of the board of trustees of said rural high school district No. 3 since its organization, and is or should be fully conversant with all of the acts and things done by said school district, and, if one desires to contest the validity of the organization of a municipality, he should proceed to do so within a reasonable time after its organization. One or more of the school districts included in said rural high school district have withdrawn therefrom and the residents thereof have no interest in this case.

[7] It was not necessary for the complete organization of said district for the board of county commissioners to make the order appealed from in this case, and under the facts of this case, on an appeal from that order, the organization of said district could not be attacked.

It is evident from the record that, on the trial of the case in the district court, the court proceeded upon the theory that he could determine the validity of the organization of said school district on said appeal; and it also appears that those who appealed from said order of the board of county commissioners prosecuted their appeal for the sole purpose of testing the validity of the organization of said district; and, since we have herein held that the question of the organization of said school district could not be attacked on said appeal, the judgment of the district court must be reversed and the cause remanded, with instructions to the district court to dismiss said appeal. Costs are awarded to the appellant.

AILSHIE, C. J., and STEWART, J., concur.

(24 Idaho, 329)

#### STATE v. CUTTS.

(Supreme Court of Idaho. June 28, 1913.)

#### 1. BANKS AND BANKING (§ 61\*)—FALSE REPORT—"MADE"—CRIMINAL RESPONSIBILITY.

Where a report, purporting to show the true condition of a state bank, is prepared in typewritten form ready for the signature of the cashier of the bank, by other officers or clerks, and the cashier thereupon signs said report and

delivers it to another person, said cashier has "made" such report, in contemplation of section 7128 of the Revised Codes of Idaho.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 121; Dec. Dig. § 61.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4269, 4270.]

#### 2. BANKS AND BANKING (§ 61\*)—MAKING FALSE REPORT—"KNOWINGLY"—PROSECUTION.

Where a cashier has voluntarily signed such a report as is referred to in section 7128 of the Revised Codes, knowing what it was, such making of said report was "knowingly" done; and he is responsible for the truth of the statements therein, unless he can show that he was himself deceived, without undue fault or negligence on his part.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 121; Dec. Dig. § 61.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 3937-3939.]

#### 3. BANKS AND BANKING (§ 61\*)—MAKING FALSE REPORT—PROSECUTION—DEFENSE.

It is no defense to an information charging a cashier of a state bank with the making of a false report of its condition for him to plead that he signed the report at the request of a superior officer of such bank, without knowledge or investigation on his part as to the truth of the facts therein stated.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 121; Dec. Dig. § 61.\*]

#### 4. CRIMINAL LAW (§ 444\*)—EVIDENCE—DOCUMENTARY EVIDENCE.

Entries in the books of a state bank connected with or related to the portions of a report of the condition of such bank alleged in an information to be false are admissible in evidence against the cashier of such bank who assists in or supervises the keeping of such books, when the cashier is on trial charged with making such false report, without the necessity of any foundation being laid relative to their accuracy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1028; Dec. Dig. § 444.\*]

#### 5. CRIMINAL LAW (§ 681\*)—BANK BOOKS AS EVIDENCE—PRELIMINARY EVIDENCE.

Oral testimony regarding the contents of bank books is not properly admissible in evidence before the portions of such books connected with the subject of inquiry are identified and admitted in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1611, 1612; Dec. Dig. § 681.\*]

#### 6. BANKS AND BANKING (§ 62\*)—MAKING FALSE REPORT—PROSECUTION—EVIDENCE.

Evidence in this case examined, and held, that there is sufficient competent evidence in the record to sustain the verdict, especially inasmuch as the defendant admits signing the report charged in the information to be false, and evidence to the effect that such report was false is uncontradicted, and it appears clearly that the defendant signed said report without examining it, and in entire disregard of whether it was true or false.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 122-124; Dec. Dig. § 62.\*]

#### 7. CRIMINAL LAW (§ 1109\*)—APPEAL—HARMLESS ERROR—EVIDENCE.

In a prosecution of a cashier of a state bank for making a false report, the erroneous admission of oral testimony relative to contents of bank books, before material portions of the books were introduced in evidence, was harmless, where the books were subsequently

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



introduced after a proper foundation had been laid for their admission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. § 1169.\*]

Appeal from District Court, Blaine County; E. A. Walters, Judge.

Arthur B. Cutts was convicted of making a false report of the condition of a state bank, and he appeals. Affirmed.

A. A. Fraser, of Boise, and R. M. Angel and W. J. Lamme, both of Hailey, for appellant. J. H. Peterson, Atty. Gen., J. J. Guheen and T. C. Coffin, Asst. Attys. Gen., and H. F. Ensign, of Hailey, for the State.

DAVIS, District Judge. This is an action wherein the plaintiff is charged by an information filed in the district court in Blaine county with the crime of making a false report concerning the affairs, financial condition, and property of the Idaho State Bank in violation of section 7128 of the Revised Codes of Idaho.

On appeal to this court from a verdict and judgment of conviction the defendant relies principally upon the following contentions: That he did not prepare said report or aid in its preparation in any way, but merely signed it at the request of a superior officer of the bank, without any actual knowledge as to whether it was true or false; that the trial court erroneously admitted oral testimony and documentary evidence relative to the condition of the books of said bank, without any sufficient foundation being laid as to the accuracy thereof; and that the evidence was insufficient to prove that the defendant made said report, or was guilty of the offense charged in said information.

[1] The first question that arises, therefore, is as to whether or not a cashier of a state bank, who merely signs a false report which has been prepared in full in typewritten form, except the signature, by others of their own volition and not under his supervision, can be legally convicted for the making of such report under section 7128 of the Revised Codes of this state. This court is of the opinion that a cashier, who signs such a report and delivers it to another person, has made said report in contemplation of said section. Of course, many acts by different persons may contribute to the preparation and making of such a report, but the final effective act to give it credence and make it a report is for some one to vouch for its accuracy, either orally or in writing, and the action of the cashier in signing the typewritten statement was certainly such an act. The placing of his signature at the end of the report, under the circumstances, amounted to more than an approval of its contents (State v. Paulsen, 21 Idaho, 686, 123 Pac. 588) or the acts of others; it was a vital part of the preparation and execution of the paper that thereafter amounted to a

report of the condition of said bank. Such signature was equally as important a part of the making of the report as the mere placing of a list of figures on paper without any certificate as to their accuracy. And it may reasonably be contended that the making of the report consisted not only in the actual preparation thereof, but also in the passing of the signed paper containing the data on to others and out of the control of the person who signed the report. The evidence is clear that the defendant not only signed said false report, but that he delivered it to another person, without imposing any conditions upon the manner of its use by such other person, which clearly establishes that the defendant made said report under either definition of the word "make."

[2] Where a cashier of a state bank signs a paper purporting to show the condition of such bank, knowing what it contains, he knowingly makes said report, and should be held responsible for the truth of the statements therein, unless he was himself deceived through no fault or negligence on his part.

[3] It is not sufficient for a cashier of a state bank to offer as a defense to the making of a false report that he signed it at the request of a superior officer, without any actual knowledge as to the truth of the statements made in such report, and without making any investigation himself to determine whether or not such statements were true. U. S. v. Allen (D. C.) 47 Fed. 696. Every person is responsible to the law for the rectitude of his own acts, and it is no defense to plead that a criminal statute was violated at the request of another, even under tempting circumstances. Such a plea may properly be made to a trial court or the pardon board in support of an application for clemency, but can have no weight with an appellate court when determining the legality of the conviction of a defendant.

[4] The defendant bases several of his alleged errors upon what he contends was the improper admission of evidence, and while he objected to the admission of the books of the bank of which he was cashier because no foundation was laid as to their accuracy, their admission was not error, especially inasmuch as it appeared to be clearly established that the defendant participated in the keeping of the books admitted, was an executive officer of the bank of which the books formed a part, and was acquainted with their contents to a considerable extent. And since the law enjoins upon the officers of state banks the keeping of an accurate record of their condition in books, and a rebuttable presumption arises that its books show the true condition of the bank, it is proper to admit in evidence the entries in such books which relate to the portions of a report of the condition of a state bank alleged to be false, on the trial of a cashier of such bank.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



charged with the making of a false report of the condition thereof. It was said by the Circuit Court of Appeals, Eighth Circuit, in *Bacon v. U. S.*, 97 Fed. 35, 38 C. C. A. 37: "In view of the provisions of the National Banking Act requiring the books of a national bank to be truthfully kept, by making it an offense to make false entries therein, proof that books are those of a national bank in which the record of its daily business was kept raises a presumption that they were properly kept, which renders them admissible in evidence without further proof, when offered by the government in a criminal suit against an officer of the bank for making false reports."

[5] A general statement as a conclusion by an expert witness, to the effect that such books were not correctly kept, without explaining wherein they were not correctly kept, will not overcome such presumption so as to require the exclusion of other testimony by the same witness, showing what the books contained in detailed form relative to the actual condition of the bank's affairs. Because it may be said of almost any set of books that they were not correctly kept in every particular, and yet, notwithstanding such fact, it may reasonably be possible for detailed figures from such books to make a correct record of the bank as to particular matters. Such a statement by an expert may also refer to the manner of bookkeeping, instead of to the results attained. The condition of the books of the bank, therefore, under such a state of facts, is competent evidence for the jury to weigh, in connection with other relevant evidence, in determining the real condition of the bank at the time of the making of the report, in order to ascertain whether the report was, in fact, true or false.

[7] And although the court was in error, in this case, in admitting oral testimony relative to the contents of the bank books before the books, or the portions thereof connected with the inquiry, were admitted in evidence, this was not prejudicial error, because the foundation to justify their admission was laid later, and the original books were subsequently offered and admitted in evidence. Of course, the portions of the books not related to the inquiry were not properly admissible in evidence on the trial of this case, but it does not appear that the defendant's defense was in any way affected by the admission of the books in their entirety.

[8] There is sufficient uncontradicted, competent evidence in the record to establish that the defendant made the report as alleged in the information; that he made it knowingly; that such report was false; and while it is not clear that he knew it to be false at the time of signing such report, it is undoubtedly true that he signed it in entire disregard of whether it was true or false,

and voluntarily passed it out of his possession in condition to misrepresent the true condition of the Idaho State Bank, and he thus violated said section of the law. The instructions of the trial court to the jury were more favorable to the defendant than the law justified and there was no error therein against him.

The judgment is affirmed.

AILSHIE, C. J., and STEWART, J., concur.

(24 Idaho, 198)

#### MEEKER et al. v. TRAPPETT.

(Supreme Court of Idaho. June 10, 1913.)

APPEAL AND ERROR (§ 1001\*)—VERDICT—EVIDENCE.

Evidence in this case examined, and held sufficient to support the verdict and judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

Appeal from District Court, Bear Lake County; Alfred Budge, Judge.

Action by M. I. Meeker and others against J. J. Trappett. From judgment for defendant, plaintiffs appeal. Affirmed.

Thomas L. Glenn, of Montpelier, for appellants. John A. Bagley, of Montpelier, for respondent.

AILSHIE, C. J. This action was instituted by the appellant to recover commission for the sale of real estate. Defendant answered, and filed a cross-complaint, claiming a balance of \$15 due from plaintiff to defendant on account. The case went to trial, and a verdict was returned against the plaintiff and in favor of the defendant on his cross-complaint, and judgment was thereupon entered.

The only question presented on this appeal is the sufficiency of the evidence. The preponderance of the evidence on the cause of action set forth in the plaintiff's complaint is decidedly in favor of the appellant, but there is substantial evidence supporting the contention of the respondent, and under the statute (Rev. Codes, § 4824) and the established rule in this state, this court would not be justified in reversing the judgment on this account.

There is also a sharp conflict in the evidence concerning the cause of action set forth in defendant's cross-complaint. The jury, however, has also found that issue in favor of the defendant, and there is evidence which supports the verdict.

For these reasons, the judgment in this case must be affirmed, and it is so ordered. Costs awarded in favor of respondent.

SULLIVAN and STEWART, JJ., concur.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



(24 Idaho, 210)

**McELROY v. WHITNEY.**

(Supreme Court of Idaho. June 11, 1913.)

**1. EXECUTORS AND ADMINISTRATORS (§ 255\*)—JUDGMENT AGAINST ADMINISTRATOR.**

Under the provisions of section 5474, Rev. Codes, a judgment rendered against an executor or administrator upon a claim for money against the estate of his testator or intestate only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the probate judge, and the judgment must be that the executor or administrator pay in due course of administration the amount ascertained to be due.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 907-909; Dec. Dig. § 255.\*]

**2. EXECUTORS AND ADMINISTRATORS (§ 256\*)—TIME FOR APPEAL—AMENDMENT TO JUDGMENT.**

Where a judgment was entered on the 1st day of May, 1912, and no appeal was taken therefrom within 60 days from the entry thereof, under the provisions of section 4807, Rev. Codes, as amended by Sess. Laws 1911, p. 367, and thereafter on the 26th day of October, 1912, said judgment was amended by adding thereto the following words: "And that said judgment be paid in due course of administration of the estate of W. G. Whitney, deceased"—an appeal taken from such judgment on December 21, 1912, is too late to have said judgment reviewed on appeal, so far as any errors are concerned alleged to have been made during the trial of said cause, as said amendment made no change in the amount or effect of said judgment.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 850-856, 860-863, 910-919; Dec. Dig. § 256.\*]

**3. EXECUTORS AND ADMINISTRATORS (§ 255\*)—JUDGMENT AGAINST ADMINISTRATOR—CONSTRUCTION.**

*Held*, that without such amendment, said judgment must be "paid in due course of administration," as provided by said section 5474, Rev. Codes.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 907-909; Dec. Dig. § 255.\*]

**4. APPEAL AND ERROR (§ 82\*)—APPEALABLE ORDERS.**

An order made after a final judgment is an appealable order.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 674, 676-678; Dec. Dig. § 82.\*]

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Action by H. E. McElroy, administrator, against Mamie L. Whitney. From judgment for plaintiff, defendant appeals. Motion to dismiss appeal sustained, and judgment affirmed.

N. M. Ruick and B. W. Oppenheim, both of Boise, for appellant. Martin & Martin and H. E. McElroy, all of Boise, for respondent.

**SULLIVAN, J.** This is an appeal from a modified or corrected judgment rendered and entered on the 26th of October, 1912. The original judgment was entered on the 1st day of May, 1912, in favor of the respondent, as administrator of the estate of John G. Whitney, and against Mamie L. Whitney, as

administratrix of the estate of W. G. Whitney, deceased, for the sum of \$11,034.07. On October 9, 1912, Hugh E. McElroy, as administrator, moved to have said judgment amended by adding thereto the following: "And that said judgment be paid in due course of administration of the said estate of W. G. Whitney, deceased." Notice of said motion was properly served on counsel for the appellant, and a hearing thereof was had before the court on October 26, 1912, and said motion granted, and the court directed the clerk to make said amendment by interlineation, which was accordingly done, and the clerk added to the last sentence of said judgment the following words: "And that said judgment be paid in due course of administration of the said estate of W. G. Whitney, deceased." This case was before this court on a former appeal, and the judgment reversed and the cause remanded for further proceedings. See 12 Idaho, 512, 88 Pac. 349. In limine, a motion was made to dismiss this appeal, and to strike out certain portions of the transcript. The ground of the motion to dismiss the appeal is that the appeal was not taken within the time provided by law, to wit, within 60 days after the rendition of judgment. The judgment as entered on the 1st day of May, 1912, provided as follows: "That the plaintiff, Hugh E. McElroy, as administrator of the estate of John G. Whitney, deceased, do have and recover of and from the said defendant, Mamie L. Whitney, as administratrix of the estate of W. G. Whitney, deceased, the sum of \$11,034.07, and his costs and disbursements incurred herein, taxed at \$731.15."

[1] This is a judgment in favor of an administrator against an administratrix. The judgment is not against Mamie L. Whitney individually or personally, but against her as administratrix of the estate of W. G. Whitney, deceased. Under the provisions of section 5474, Rev. Codes, a judgment rendered against an executor or administrator upon any claim for money against the estate of his testator or intestate only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the probate judge, and the judgment must be that the executor or administrator pay in due course of administration the amount ascertained to be due.

[2, 3] Out of an abundance of caution, we suppose, counsel for respondent moved to have said judgment amended as above stated. This addition or amendment did not in any manner change or affect said judgment or the parties thereto, for said judgment as entered on the 1st of May was required to be "paid in due course of administration," under the provisions of said section 5474. That section of the statute became a part of the judgment without inserting it therein. The judgment entered in said case had re-

\*For other cases, see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.



mained a valid judgment without any change or modification up to October 26, 1912, and no appeal had been taken therefrom and became final. Section 4807, Rev. Codes, as amended by Session Laws 1911, p. 367, fixes the time within which an appeal may be taken from a final judgment in an action commenced in the court in which the same is rendered at 60 days after the entry of such judgment, and as said amendment to said judgment made on October 26, 1912, did not in any manner affect or change said judgment, this appeal from the judgment taken on December 21, 1912, nearly seven months after the entry of the final judgment, is too late, and the motion to dismiss must be sustained.

The judgment entered on May 1, 1912, was the final judgment in this action, and the amendment merely a correction, which was in fact not necessary to make the judgment conform to said provisions of the statute. In other words, the amendment in no manner changed the judgment or its effect, and it was not made for the purpose of changing or revising said judgment. The court on said motion simply incorporated the words of the statute, which were in fact a part of the judgment without such incorporation.

In *Racouillat v. Sansevain*, 32 Cal. 376, the court said: "As against Requena, executor, the judgment is not technically in proper form. It should be that he 'pay in due course of administration' the amount found to be due from the estate of Vignes (Prob. Act, § 140). The form is that the plaintiffs do have and recover 'against Manuel Requena, as executor of the last will and testament of J. L. Vignes, deceased, the sum of,' etc. Perhaps, though not in the form prescribed by the statute, the legal effect may be the same, and possibly, under the law, the plaintiffs may not be authorized to enforce the judgment against the property of Requena. To avoid any doubt, the judgment had better be corrected. This may be done by adding at the end of the judgment the words: 'And it is ordered and adjudged that the said Requena, executor, pay the said sums in due course of administration.'"

The judgment in the case at bar was a money judgment, and the amount of the judgment, interest, and costs was the same when it was rendered on May 1st as it was when said amendment was made on October 26th.

[4] Every question that it was possible to review on an appeal could have been reviewed on an appeal from the judgment entered May 1st, except the question as to whether the court erred in allowing said amendment; and, if it had been desired to present any of the questions that could be raised on an appeal from said judgment of May 1st, an appeal should have been taken from that judgment, and if the appellant

had desired to contest the action of the court in granting said amendment to the judgment, she should have appealed from that order, and not from the judgment itself. Subd. 8, sec. 4807, Rev. Codes.

However, since a large sum of money is involved in this case, we have gone through the record and the briefs with a view of ascertaining whether the record contained any reversible error, and from said examination we are satisfied that there is no error in the record that would justify a reversal of the judgment.

For the foregoing reasons, the appeal is dismissed. Costs are awarded to the respondent.

AILSHIE, C. J., concurs. STEWART, J., did not sit at the hearing or take any part in the decision.

(24 Idaho, 242)

HILLOCK et al. v. IDAHO TITLE & TRUST CO., Limited.

(Supreme Court of Idaho. June 13, 1913.)

1. ABSTRACTS OF TITLE (§ 3\*)—LIABILITY OF ABTRACTOR—MISTAKE.

Where an abstract company is employed to prepare an abstract of title to certain real estate and a mistake is made by it in the preparation of such abstract and the person for whom it is made is damaged thereby, the abstract company is liable for all legal damages sustained by such person.

[Ed. Note.—For other cases, see Abstracts of Title, Cent. Dig. §§ 2-6; Dec. Dig. § 3.\*]

2. ABSTRACTS OF TITLE (§ 3\*)—LIABILITY OF ABTRACTOR—DAMAGES—EVIDENCE.

Held, that the evidence shows that the respondents were damaged in the sum of \$500 and costs of suit by reason of such mistake, and that the abstract company is liable therefor.

[Ed. Note.—For other cases, see Abstracts of Title, Cent. Dig. §§ 2-6; Dec. Dig. § 3.\*]

3. INSTRUCTIONS GIVEN AND REFUSED.

The court did not err in giving certain instructions and in refusing to give certain other instructions requested by appellant.

4. ABSTRACTS OF TITLE (§ 3\*)—LIABILITY OF ABTRACTOR—DEFENSES.

An abstract company cannot escape liability for damage caused by its failure to show the existence of a tax deed by claiming that the deed was invalid.

[Ed. Note.—For other cases, see Abstracts of Title, Cent. Dig. §§ 2-6; Dec. Dig. § 3.\*]

5. ABSTRACTS OF TITLE (§ 3\*)—LIABILITY OF ABTRACTOR—DAMAGES.

An abstract company failing to show the existence of a tax sale certificate or tax deed on an abstract is liable to the person ordering the abstract for money expended in obtaining a quitclaim deed from the tax title holder, which was necessary to remove the cloud from the title.

[Ed. Note.—For other cases, see Abstracts of Title, Cent. Dig. §§ 2-6; Dec. Dig. § 3.\*]

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Action by Charles Hillock and another against the Idaho Title & Trust Company,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes



Limited. From a judgment for plaintiffs, defendant appeals. Affirmed.

See, also, 22 Idaho, 440, 126 Pac. 612, 42 L. R. A. (N. S.) 178.

Wyman & Wyman and Harry S. Kessler, all of Boise, for appellant. J. C. Johnston, of Boise, for respondents.

SULLIVAN, J. This action was brought to recover damages in the sum of \$500 alleged to have occurred because of a mistake and false abstract of title to certain land; the appellant having certified that there were no tax sales, tax deeds, or other liens and incumbrances against said land except what appeared on said abstract of title. The appellant by its answer set up by way of affirmative defense that the land in question was the property of the United States and was not subject to assessment in the year 1904 when the taxes were assessed against said land for which said land was sold and a tax certificate issued therefor which resulted in a tax deed, and averred that said sale and tax deed were null and void. The cause was tried by the court with a jury and resulted in a verdict and judgment in favor of the plaintiffs in the sum of \$500 and costs. This case was before this court on a former appeal, when the judgment of the trial court was reversed and the cause remanded for a new trial. See 22 Idaho, 440, 126 Pac. 612.

The giving and refusing to give certain instructions are the only errors assigned. There is no material conflict in the evidence. It shows that the plaintiff on April 15, 1907, secured an abstract of title from the appellant company for certain land in Ada county, and the certificate of said abstract was to the effect that "there are no taxes due and unpaid upon the said land, \* \* \* and that there are no tax sales on said land unredeemed; that no tax deeds have been given therefor." It further appears that the plaintiffs purchased the land in question, relying upon the abstract, and that in October, 1911, they learned that Belle M. Smith had a tax deed for the land in question, which said deed had been procured from Ada county on a tax sale for taxes assessed against the land in 1904. It further appears that respondents notified the manager of the defendant corporation of all the facts in regard to said tax deed and requested appellant to have said matter adjusted and protect them from said tax deed. Said manager told respondent Hillock to go to the attorney of the company and that he would look after the matter for him; that it would not cost him anything. Thereupon said respondent saw the attorney in regard to the matter, who informed him that the company would do what was right about the matter, and requested respondent to bring the abstract of title up to his office. Respondent Hillock thereafter saw the manager of

the company several times in regard to the adjustment of the matter, and Hillock testified that the manager laughed at him and told him the statute of limitations had run and there was no liability on the part of appellant. The manager testified that Hillock seemed to be very excitable about the matter and seemed to want the appellant to settle the matter with the party holding the tax title, which appellant refused to do, and that Hillock became abusive and the interview ended very unsatisfactorily.

The record shows that negotiations were carried on between the attorney for the person holding the tax title and Hillock from six weeks to two months trying to settle the matter, and finally the holder of the tax deed offered to settle for \$500 and give the respondent a quitclaim deed to said property and stated that, unless they paid it within three days, a suit would be brought to quiet her title to said property. The appellant failed and refused to adjust said matter, and the respondents concluded to pay it and accept a quitclaim deed, which they were fully justified in doing.

[1, 2] Under the facts of this case it is clear that the appellant corporation was liable to the respondents for the damages sustained by reason of said false abstract, and it is clearly indicated that said company did not intend to right the matter, except at the end of a lawsuit. It no doubt has cost the respondent that amount to prosecute said two appeals to the Supreme Court of this state, aside from his payment of the \$500 for the quitclaim deed, and appellant did not attempt to show that the matter could have been settled for a less amount.

[3] Upon an examination of the instructions given, we find no error in them and there was no error in refusing to give the instruction requested by the appellant.

[4] The appellant contends that no title was conveyed by said tax deed for the reason that the land was not subject to assessment for the year 1904. If that be true, it was the company's duty to remove the cloud cast by said tax deed upon the title and not require the respondents to do so. An abstract company cannot escape liability by claiming that a tax deed is invalid which ought to have but did not appear on the abstract as abstracts of title should show every instrument affecting the title which is a matter of record, and if an abstract fails to show certain instruments that cast a cloud upon the title, and the person who procures such abstract is damaged thereby, the abstract company is liable.

[5] If the abstract of title had been correct and had shown, as it should, said tax sale certificate or tax deed, respondents would not have purchased said land with that cloud upon the title, and it was the mistake of the abstract company that caused the trouble, and it was its duty to proceed



with diligence to remove said cloud after it was notified by the respondents of the mistake in the abstract. Under the facts of this case, the plaintiffs were entitled to recover the \$500 paid to Smith for a quit-claim deed to said premises.

No error appearing in the record, the judgment of the district court must be affirmed, with costs in favor of the respondents.

AILSHIE, C. J., and STEWART, J., concur.

(24 Idaho, 186)

#### TRITTHART v. TRITTHART.

(Supreme Court of Idaho. June 7, 1913.)

#### 1. BILLS AND NOTES (§ 120\*)—CONSTRUCTION—LIABILITY OF SIGNERS.

Where a promissory note is executed and delivered to a bank by two persons, and the note upon its face contains the following language: "We promise to pay"—such note upon its face is a joint and several liability, and such note is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 257; Dec. Dig. § 120.\*]

#### 2. EXECUTORS AND ADMINISTRATORS (§ 221\*)—CLAIMS—NOTE—EVIDENCE.

In an action by G. W. T. against the administratrix of C. F. T., deceased, to recover upon an implied contract, where it is claimed that G. W. T. signed as surety upon a note wherein C. F. T. was principal, and such note was executed for a debt of C. F. T., and the evidence shows that the note was in the possession of G. W. T., and was introduced in evidence, and that there was indorsed upon said note "Paid by G. W. T.," such note and the indorsement, with other evidence that the same was paid by G. W. T., is sufficient to establish a prima facie case, and it is error of the trial court to grant a nonsuit.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 901-903½, 1858, 1861-1863, 1865, 1866, 1871-1874, 1876; Dec. Dig. § 221.\*]

#### 3. APPEAL AND ERROR (§ 241\*)—SCOPE OF REVIEW—GRANTING NONSUIT.

Where a motion for a nonsuit is made at the conclusion of plaintiff's evidence, and certain grounds are assigned in such motion, and the motion is sustained, and an appeal is taken from the order and judgment of the court upon said motion, this court will not consider errors, assigned by counsel in their brief, which were not included in the motion for a nonsuit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1413-1416; Dec. Dig. § 241.\*]

#### 4. LIMITATION OF ACTIONS (§ 24\*)—PRINCIPAL AND SURETY—ACTION FOR REIMBURSEMENT.

A principal's obligation to reimburse his surety is not founded upon a written instrument within the statute of limitations; Rev. Codes, § 4052, providing that an action founded upon a written instrument must be commenced within five years.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 112-117; Dec. Dig. § 24.\*]

Sullivan, J., dissenting.

Appeal from District Court, Blaine County; Edward A. Walters, Judge.

Action by G. W. Tritthart against Martha Tritthart, administratrix, etc. From an order granting a nonsuit, plaintiff appeals. Reversed.

J. G. Hedrick, of Halley, for appellant. McFadden & Brodhead, of Halley, for respondent.

STEWART, J. This is an action upon an implied contract for the recovery of the sum of \$722.65 and interest. The complaint alleges that on the 26th day of August, 1906, the plaintiff, G. W. Tritthart, and Charles F. Tritthart, deceased, delivered to the First National Bank of Centralla, Ind. T., their joint and several promissory note for the sum of \$788.45, dated August 26, 1906; that the plaintiff received no consideration for the note, but signed the same as an accommodation for the said C. F. Tritthart; that C. F. Tritthart did not pay the note at maturity, and that plaintiff was compelled to pay the same, and did, on the 13th day of June, 1907, pay the sum of \$788.95 in discharge of said note, and that no part of said note has been paid to the plaintiff, except the sum of \$150 on the 9th day of January, 1909, and \$150 on the 10th day of February, 1910, and that there is due \$722.65; that G. W. Tritthart died on the 28th day of July, 1911, and that Martha Tritthart was duly appointed administratrix of said estate, and that letters of administration were duly issued to her. Then follows an allegation to the effect that on the 6th of January, 1912, the claim set forth, duly verified by the oath of the attorney for the claimant, and upon which this action is founded, was duly presented in writing by the plaintiff to the defendant as such administratrix, for allowance, and that the same was rejected on the 22d day of January, 1912. The defendant, as administratrix, filed an answer, and denied all the allegations of the complaint, except the death of the deceased, her appointment as administratrix, and the presentation of the claim as alleged in the complaint. Upon these issues a jury was called and the evidence taken, and upon the conclusion of the plaintiff's evidence the respondent made a motion for a nonsuit, upon the ground that plaintiff had failed to sustain the material allegations of the complaint, and the jury was dismissed and judgment ordered for the defendant. This appeal is from that judgment.

It seems from the allegations of the complaint, and also the brief of counsel for appellant, that the appellant considered the action as an action upon a written contract. The answer of the respondent also indicates that the defendant considered the action to be an action upon a written contract, for in the answer the defendant has pleaded as a defense the statute of limitations. Section 4052, Rev. Codes. This section prescribes the period within which actions other than



for the recovery of real property shall be commenced: "Within five years: An action upon any contract, obligation, or liability founded upon an instrument in writing." Counsel for respondent, however, in their brief and upon oral argument, contend and argue that the insertion in the answer of section 4052 was intended to have been section 4053. This latter section prescribes: "Within four years: An action upon a contract, obligation, or liability, not founded upon an instrument of writing"—and that under this contention this action cannot be sustained, because the claim of plaintiff is barred by the statute of limitations, section 4052. This allegation, however, was not amended in the lower court, and the appellant does not contend in his brief, and did not upon oral argument contend, that a mistake was not made by the designation of section 4052 instead of section 4053. We are of the opinion that respondent cannot urge this question in this court, because the same was not presented to the trial court. From the record it appears that the action is not barred by the statute of limitations if the action is upon a written instrument; upon the other hand, if the action is upon an implied contract, the action is barred by section 4053. This question, however, was not raised in the lower court, and cannot be raised upon this appeal. The respondent is bound by the answer.

[4] As to the character of the action, we think there can be no question. In paragraph 2 of the complaint it is alleged that the plaintiff received no consideration for the note, and it is alleged that he signed the same as an accommodation for the said C. F. Tritthart, at his request and upon his promise to pay the note at maturity. The rule of law under such facts is generally recognized to be that a surety who pays a note may sue the maker at law upon an implied promise to indemnify him, or in equity upon the note, as being subrogated to the rights of the payee. The allegations of the complaint above quoted are not denied in the answer, and the allegations show that the plaintiff's obligation upon the note was that of suretyship. The right of action, therefore, was the right of action of a surety to recover reimbursement from his principal, which accrues when the surety pays the debt, and the obligation of the principal to repay the surety is not founded upon a written instrument within the meaning of the statute of limitations. 25 Cyc. 1113; *Miller v. Zeigler*, 3 Utah, 17, 5 Pac. 518; *Chipman v. Morrill*, 20 Cal. 130; *Guild v. McDaniels*, 43 Kan. 548, 23 Pac. 607; *Richter v. Henningsan*, 110 Cal. 530, 42 Pac. 1077; *Faires v. Cockerill*, 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 528; *Sparks v. Childers*, 2 Ind. T. 187, 47 S. W. 816. We think, therefore, that there can be no question in this case but that the action is upon an implied promise, and not

upon a written instrument. The note may be received in evidence for what it shows, but the right of recovery is not upon the note.

[1, 2] The evidence consists entirely of the introduction of the promissory note and parts of a deposition. The note reads as follows:

"\$788.45. Centralia, Ind. Ter., Aug. 26, 1906.

"6 months after date we promise to pay to the order of First National Bank of Centralia, I. T., seven hundred eighty eight 45/100 dollars, for value received, payable at the office of Bank of Centralia, Ind. Ter., with interest thereon at the rate of 8 per cent. per annum from maty. until paid, payable annually, and if the interest be not paid when due, the same shall become a part of the principal and bear the same rate of interest. We, the makers, sureties, guarantors and indorsers, severally waive presentment for payment, protest and notice of protest, and nonpayment of this note, and consent that time of payment may be extended without notice thereof.

"P. O.: Coaday Bluff, I. T.

"Due 2-26-1907.

"No. 1256.

[Signed] C. F. Tritthart  
G. W. Tritthart."

The indorsements upon the note are as follows:

"June 13, 1907.

Int. to date.. \$ 10.50  
Prin. .... 788.45

"Paid by G. W. Tritthart..... \$788.95  
"By cash, \$150.00, January 9, 1909. By cash \$150.00,  
Feb. 10, 1910."

It is admitted that the note was in the possession of the plaintiff when this action was commenced, and that he presented the same in evidence. The evidence shows, and the trial court in passing upon the motion for a nonsuit found, by "evidence in the deposition [of G. W. Tritthart] that G. W. Tritthart signed the note as surety."

Counsel for appellant relies solely upon the ruling of the trial court in granting a nonsuit, and contends that the introduction of the note itself was sufficient to prove the cause of action alleged in the complaint, and that the note itself is sufficient, under the issues, to show due execution, and that plaintiff paid the note, and, in the absence of evidence of nonpayment, was sufficient to require the court to submit the question of payment to the jury, and that it was error of the trial court to sustain a motion of nonsuit. To sustain this position our attention is called to two cases: *Sheffield v. Cleland*, 19 Idaho, 612, 115 Pac. 20, and *Light v. Stevens*, 159 Cal. 288, 113 Pac. 659.

The case of *Sheffield v. Cleland* was a case where a promissory note was executed by McBee to Cleland, and Cleland, after maturity, indorsed said promissory note and assigned the same to Sheffield. Sheffield brought the action against Cleland, the indorser. In that case this court held that the introduction in evidence of the note was prima facie evidence that the debt evidenced thereby was unpaid.

In the case of *Light v. Stevens*, supra, the Supreme Court of California, in a case very similar to the one now considered, with the exception that the court in that case seemed to rely principally upon the provisions of sec-



tions 1961 and 1963 of the Civil Code of California, held: "Defendant's contention in regard to the counterclaim is fully answered by the presumption declared by subdivision 7 of section 1963, Code of Civil Procedure, viz.: 'That money paid by one to another was due to the latter.' There is absolutely nothing in the evidence to contradict this presumption; and, 'unless so controverted, the jury are bound to find according to the presumption.' Section 1961, Code Civ. Proc."

The two sections of the statute referred to above are not incorporated in the Code of this state. The court in the California case further discusses the question: "Upon the question of payment of the note we think that the evidence must be held sufficient to support the verdict. Owing to the fact that the lips of one of the parties to the transaction are closed by death and those of the other party by the law, the evidence on this question is somewhat unsatisfactory. Nevertheless we believe that it sufficiently presented a pure question of fact for the jury, and that it cannot be held, as a matter of law, that any portion of the amount evidenced by the note was in fact paid by the debtor. Admittedly the burden of proving payment of the note was on defendant. It is elementary that the possession of the note by the payee, bearing no indorsement of payment, raises a presumption of nonpayment of any portion of the amount thereof." The court then refers to section 1963 of the Code of California, and observes: "And the converse of this, viz., that possession by the payee is prima facie evidence of the nonpayment, is universally held." The court then discusses the facts in that case and the presumption arising from the note itself, and upon whom the burden of proof rests, and says: "It is the ordinary course of business, on the part of reasonably careful persons, to require the delivery of their written obligations upon discharge thereof, or if this cannot be obtained, to require some written evidence of the discharge, and it would be quite a departure from 'the ordinary course of business,' which is presumed to have been followed (Code Civ. Proc. § 1963, subd. 20), to pay the full amount due on a note without receiving the note from the payee or, if it cannot be delivered, some other evidence of payment. \* \* \* The burden of proving payment resting on defendant, he must introduce evidence which warrants the conclusion of not only the mere delivery of money to the creditor, but the conclusion of the delivery of money on account of the particular obligation in suit, for this is involved in the term 'payment' when applied to any particular obligation. This much seems very clear, and is well supported by the authorities. The question about which there is more difficulty is as to what evidence warrants such conclusion. While it is one of the presumptions declared by our Code 'that money paid

by one to another was due to the latter,' and was therefore paid on account of some legal obligation of the payer to the payee (see, also, Lawson's Law of Presumptive Evidence, p. 419), if two or more such obligations are shown, and one of such obligations is a note held by the payee bearing no indorsement of payment, and there is nothing but the mere payment of money, which could have been applied upon either obligation, there would be nothing to overcome the presumption of nonpayment of the note. The payer would not have satisfied the requirement of furnishing evidence warranting the inference that the payment was on account of the note rather than on account of other obligation or obligations." The court then quotes a number of authorities, and says: "If, on the other hand, it is made to affirmatively appear that there was but one obligation or transaction, and a payment of money by the debtor to the creditor is shown, it would follow, by reason of the presumption that money paid was due to the payee, that the money was paid on account of that obligation. There is apparently some confusion in the authorities as to the situation where the only obligation of the debtor expressly shown is the one in suit, the debtor having failed to introduce evidence tending to show that there was no other obligation, and there is nothing in the evidence bearing on that question. On the one hand, it is strongly maintained that the burden is on the debtor to produce evidence warranting the inference that there was no other obligation or transaction on which the money paid might properly be applied. \* \* \* While on the other hand it appears to be intimated that, the payment being shown, the burden shifts to the payee to affirmatively show that there was some other obligation to which the money paid might properly be applied, and that in the absence of such showing the conclusion is inevitable that the payment was on account of the debt in suit." In the above case the court held that the case was one for the jury to determine upon the evidence.

The authorities above referred to approve principles of law applicable to the facts of this case. The note upon its face shows that the plaintiff and the deceased signed the same as joint principals. The complaint alleges that at the time G. W. Tritthart signed the note he signed the same for the accommodation of the deceased, and that he received no consideration for the signing of said note. This allegation is denied upon belief. No evidence, however, was introduced in support of this denial. It is also alleged in the answer, upon belief, that the note was not paid; there was no evidence offered by the defendant in support of this allegation of the answer. The defendant rests wholly upon the motion for a nonsuit, that the plaintiff had not introduced evidence sufficient to justify the court in submitting the cause to the jury.



There is indorsed upon the back of the note the following: "Jan. 13, 1907. Int. 10.50. Prin. 788.45," making a total of "798.95, paid by G. W. Tritthart." This writing appear to have all been done by the same scrivener. Who this scrivener was does not appear from the evidence. It may have been G. W. Tritthart, the plaintiff, or it may have been the cashier of the bank; but whoever the scrivener was, the indorsement clearly shows that G. W. Tritthart paid the note and paid the sum of \$798.95. This, in our opinion, under the authorities cited above, supports the findings of the trial court, and establishes a prima facie case of payment on the part of G. W. Tritthart, and his being in possession of the note was sufficient, and the trial court erred in taking the case from the jury. Upon this evidence the question was not one of law, but of fact, and the question of fact was one for the jury, and not the trial court.

[3] It will be observed from this opinion that this court has passed only upon the questions that were involved in the motion for a nonsuit, which have been indicated in the opinion. The other errors assigned in the brief of counsel for appellant are errors not included in the motion for a nonsuit.

For these reasons the judgment is reversed, and a new trial granted. Costs awarded to appellant.

AILSHIE, C. J., concurs.

SULLIVAN, J. (dissenting). I am unable to concur in the conclusion reached by the majority of the court. This is an action against an administratrix of the estate of a deceased person, and under subdivision 3, of section 5957, Rev. Codes, the plaintiff could not testify in this case as to any matter of fact occurring before the death of the deceased person mentioned in the complaint. All of the material allegations of the complaint were put in issue by the denials in the answer. On the trial the deposition of one Montgomery, or a part of it, was introduced in evidence, and it appears from the evidence in that deposition that said promissory note, which appears to be a joint note on its face, was signed by G. W. Tritthart as surety and C. F. Tritthart as principal, and that C. F. Tritthart failed to pay the same when it became due, and that G. W. Tritthart paid it on June 13, 1907. The promissory note was then introduced in evidence, with certain indorsements thereon. The evidence does not show by whom said indorsements were made, and plaintiff rested. Thereupon counsel for respondent moved that the court instruct the jury to bring in a verdict in favor of the defendant on several grounds, which motion was granted by the court, or the case was taken from the jury.

The trial court in rendering its decision said: "I find evidence in the deposition that G. W. Tritthart signed the note as surety,

and it was paid by G. W. Tritthart. I don't find evidence in the deposition or the case that C. F. Tritthart has not repaid the note to G. W. Tritthart, and that it is now due and owing to G. W. Tritthart." Counsel for appellant thereupon stated: "There is no evidence except the note itself, which shows on the face of it, on account of Tritthart not being permitted to testify." The Court: "There is where the mind of counsel and court do not join; that the note is sufficient. I shall grant the motion for nonsuit."

Conceding that the appellant paid said promissory note on the 13th of June, 1907, there is not a particle of evidence showing or tending to show that the deceased did not furnish the money to pay said indebtedness, or that he had not repaid plaintiff prior to his death, which occurred on July 28, 1911, over four years after G. W. Tritthart claimed he had paid said note. There is no evidence whatever to show the amount due on said note, if any, to the plaintiff. His possession of it cannot in this case show the amount due. It is a joint note, and he had the right to the possession of it even though he were surety, and his possession of it does not establish the fact that there was still due him \$722.65, the amount claimed in the complaint, or any other sum. Under the provisions of said section 5957, Rev. Codes, Tritthart himself is not permitted to testify against the administratrix, and the majority of the court holds that simply because he has possession of the note with certain indorsements thereon, without showing by whom said indorsements were made, the note and such indorsements established the fact that he had paid said note, and also the amount due him because of such payment. The handwriting would indicate that G. W. Tritthart had made at least two of said indorsements himself. Said statute prohibits the plaintiff from testifying, but the majority opinion in effect holds that he, or some person for him, may make a written statement or indorsement on the back of a note, which will be received as evidence to prove what he is not permitted to testify to himself. This, I think, is a clear evasion and nullification of the provisions of said statute. If this rule is established, all that a person need do is to make a statement in writing on the back of a promissory note, and that would be received in evidence to prove the amount due on such note as against the estate of a deceased person.

And again: It is alleged in the complaint that the appellant's claim in this action was presented to the administratrix for allowance, and that she rejected the same. A copy of said claim was attached to the complaint, and in part is as follows:

"Estate of Charles F. Tritthart, Deceased, to G. W. Tritthart, Dr.

"1912.

"Jan. 6. Balance due on note, with interest to date ..... \$722.63."



Under the holding of the majority of the court, said claim as presented was not a legal claim against said estate; it was not the balance due on said note that this action was brought to recover, but on an implied contract to repay appellant what he paid for and on behalf of said deceased, and the administratrix was fully justified in rejecting said claim. The majority holds that "a surety who pays a note may sue the maker at law upon an implied promise to indemnify him." That is the action at bar. Said claim against the estate was therefore based upon said implied promise, and not on said promissory note, and this action, according to the allegations of the complaint, is clearly based on said promissory note, and not on an implied promise to pay. The majority opinion states as follows: "In paragraph 2 of the complaint it is alleged that the plaintiff received no consideration for the note, and it is alleged that he signed the same as an accommodation for the said C. F. Tritthart, at his request and upon his promise to pay the note at maturity. \* \* \* The allegations of the complaint above quoted are not denied in the answer, and the allegations show that the plaintiff's obligation upon the note was that of suretyship." Turning to the answer, the second paragraph is as follows: "That as to whether or not the plaintiff received any consideration for said note for signing the same, as an accommodation for the said C. F. Tritthart, at his request and upon his promise to pay the same at maturity, this defendant has no knowledge or information sufficient upon which to base a belief, and therefore denies the same." That certainly is a good denial upon information and belief, but the majority holds that it is not a denial. The third paragraph of the answer is, in part, as follows: "As to whether or not the said C. F. Tritthart did not pay said note at maturity, and that plaintiff was thereupon compelled to and did, on the 13th day of June, 1907, pay the sum of \$798.95 in discharge of the said note, and that no part of said sum has been paid to plaintiff, \* \* \* or whether or not there is any sum due as alleged in said paragraph 3 of plaintiff's complaint, this defendant has no knowledge sufficient upon which to base a belief, and therefore denies the same." This also is a good denial, and sufficient to require the plaintiff to prove the allegation thus denied; and, as I view it, to hold that such allegations are established by the introduction of said promissory note, with certain indorsements made thereon, is a clear evasion of said section of the statute.

My Associates lay stress upon the fact that said promissory note was in the possession of the plaintiff, but I am unable to see why they should do so, as it was a joint note, and G. W. Tritthart was one of the makers and had a right to the possession of it if he had

paid it. Nevertheless it was obligatory upon him, by competent evidence, to show that he was only surety on the note, also that he had paid it, and what was the balance due and unpaid. The note itself does not show the balance due and unpaid.

It is stated in the majority opinion that the respondent denied certain allegations of the complaint, but that she introduced no evidence in support of her denial. She did not need to do so until there was some evidence introduced to sustain the allegations so denied.

But as I view it, the main objection to the rule laid down by the majority is that an indorsement upon a promissory note may be introduced to establish a fact in a person's favor wherein he is not permitted to testify in regard to such fact. There is not a particle of evidence to show the balance due the plaintiff.

The judgment ought to be affirmed.

(24 Idaho, 246)

#### KISSLER v. BUDGE, Judge.

(Supreme Court of Idaho. June 14, 1913.)

#### 1. Costs (§§ 110, 137\*)—SECURITY—NECESSITY.

Under the provisions of section 4915 of the Revised Codes, when the plaintiff in an action resides out of the state or is a foreign corporation, the defendant may require such plaintiff to give security for costs and charges which may be awarded against such plaintiff, and a demand for security in such case stays all proceedings in the action until an undertaking, executed by two or more persons, is filed with the clerk of the court to the effect that they will pay such costs and charges as may be awarded against the plaintiff by the judgment or in the progress of the action, not exceeding the sum of \$300.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 427-438, 444, 448, 449, 456, 537-548; Dec. Dig. §§ 110, 137.\*]

#### 2. Costs (§ 118\*)—SECURITY—AMOUNT—CONDITIONS.

Under the provisions of section 4915, Rev. Codes, the court has nothing to do with fixing the amount of the bond or the conditions to be contained in the bond. In such case the bond must be in the sum of \$300, conditioned that the sureties will pay all costs and charges that may be awarded against the plaintiff not exceeding the amount of the bond, namely, \$300.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 477, 478; Dec. Dig. § 118.\*]

#### 3. Costs (§ 137\*)—SECURITY—DISMISSAL.

Where a defendant demands security for the payment of costs under the provisions of section 4915, Rev. Codes, and the plaintiff fails, neglects, or refuses to give the required undertaking for a period of 30 days, the defendant is thereafter entitled to have the action dismissed upon proof that the demand has been made, and that the plaintiff has failed and neglected to give the statutory bond.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 537-548; Dec. Dig. § 137.\*]

#### 4. Costs (§ 136\*)—SECURITY—WAIVER.

The undertaking provided for by sections 4915 and 4916, Rev. Codes, may be waived by the defendant, either by failing to demand the same or by proceeding in the action or with

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the trial of the case to such an extent as to render it unfair or inequitable to allow him to thereafter make the demand, and stop the trial or proceedings in the case.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 531-536; Dec. Dig. § 136.\*]

**5. Costs (§ 134\*) — SECURITY — FAILURE TO FILE—EFFECT.**

Where a demand has been made under the provisions of section 4915, Rev. Codes, for security for costs, and the plaintiff has misconstrued and misapprehended the requirements of the statute as to the amount of the bond and has filed a bond in the sum of \$100, and after a lapse of 30 days the defendant has moved for a dismissal of the action, and the trial court denied the application, and thereafter required the plaintiff to immediately file an undertaking in the sum of \$300, and the plaintiff forthwith complied therewith and filed such an undertaking, *held*, that the failure to file the \$300 bond within the 30-day period did not ipso facto oust the court of jurisdiction, and that the subsequent filing of the required bond prior to a dismissal of the action will entitle the plaintiff to proceed with the prosecution of its action.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 518-528; Dec. Dig. § 134.\*]

Original action by Conrad Kissler against Alfred Budge, Judge, for writ of prohibition. Alternative writ issued, and upon return and hearing writ quashed and action dismissed.

O. M. Hall, of American Falls, for plaintiff. W. G. Bissell, of Gooding, for defendant.

AILSHIE, C. J. Plaintiff applied to this court for a writ of prohibition, and an alternative writ was issued and an answer and return has been filed, and defendant has also moved to dismiss on the ground that the petition does not state sufficient facts to justify the issuance of the writ.

It appears that on the 12th day of February, 1913, a complaint was filed in the district court of the Fifth judicial district in and for Oneida county by the Union Iron Works, a foreign corporation, as plaintiff, against Conrad Kissler, as defendant. A writ of attachment issued and certain property belonging to the defendant was levied upon, and thereafter and on the 21st day of February a motion was filed by the defendant to dissolve the writ of attachment, and a hearing was had thereon on the 10th day of March following. On the 17th day of March the motion to dissolve the attachment was denied. On the 24th day of February, 1913, the defendant filed his answer, and on the 12th day of March served notice on the Union Iron Works, under the provisions of section 4915 of the Revised Codes, requiring security for costs on the grounds that the plaintiff Union Iron Works was a foreign corporation, and this notice was filed with the clerk of the district court on the 16th day of March. Thereafter, and on the 24th day of March, the Union Iron Works filed a bond for costs in the sum of \$100, but no notice

thereof was given to the defendant, Kissler, or his attorney. Thereafter and on the 19th day of April, 1913, O. M. Hall, Esq., attorney for the defendant, Kissler, wrote to the judge of the district court at Malad, advising the judge that he had served notice on the Union Iron Works requiring it to give security for costs under the provisions of section 4915, Rev. Codes, and that he had received no notice of the company's having complied with that provision of the statute, and suggesting to the court that as counsel understood the statutes the service of such a demand stayed all proceedings until the required undertaking was given, and that it was his intention to move the dismissal of the action under the provisions of section 4916, Rev. Codes, when the court convened at American Falls. On the same day that the foregoing letter was written, the judge of the district court, sitting at Malad, made an order transferring the case of Union Iron Works v. Conrad Kissler to the newly organized county of Power, and ordered and directed that all the papers in the case be transmitted to the clerk of the district court at American Falls in Power county. Thereafter, and on the 19th day of May, upon the convening of court at American Falls, counsel for Kissler moved the court for an order dismissing the case of Union Iron Works, Plaintiff, v. Conrad Kissler, Defendant, upon the grounds that the plaintiff had been required under the provisions of section 4915, Rev. Codes, to give security for costs, and that it had failed and neglected to comply with the statute in that respect, and that more than 30 days had elapsed since the service of notice requiring security for costs, and that under the provisions of section 4916, Rev. Codes, the defendant was entitled to have the action dismissed. The court denied the motion, and set the case for trial on the 28th day of May, 1913, at 10 o'clock a. m. Counsel for Kissler thereupon applied to this court for a writ of prohibition, prohibiting the trial court from further proceeding with the action.

The return made by the district judge shows that subsequent to the issuance of the writ from this court, but prior to service thereof, the judge reached the conclusion that the bond of \$100 was not sufficient to meet the requirements of section 4915 of the Rev. Codes, and thereupon vacated the setting of the case for hearing on May 28th, and required that the plaintiff forthwith file a statutory bond in the sum of \$300, which bond was immediately filed, and that subsequent to the making of the foregoing order and filing of the bond the alternative writ of prohibition issued herein was served upon the district judge. The question with which we are now confronted is the proper order to be made by this court under the foregoing circumstances.

[1-3] 1. Under the provisions of section

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



4915, Rev. Codes, it was imperative upon the plaintiff Union Iron Works, on demand therefor being made, to file a good and sufficient undertaking in the sum of \$300 as security for costs before it could further proceed with the action, and on failure to do so within 30 days after the service of notice and upon proof of service thereof the defendant was entitled to have the action dismissed. Under the provisions of section 4915, the district judge has nothing to do with the fixing of the amount of the bond or conditions thereof. The statute fixes the amount of the bond and its conditions. It must be an undertaking providing for the payment of "such costs and charges as may be awarded against the plaintiff by the judgment or in the progress of the action" to any amount that may be incurred therein "not exceeding the sum of \$300." In other words, the sureties on such an undertaking must obligate themselves to pay all the costs and charges incurred up to the sum of \$300. The Supreme Court of California in *Meade County Bank v. Bailey*, 137 Cal. 447, 70 Pac. 297, have passed directly on the same statute in that state and have directly held that "the court has no power to fix a less sum, or to change the amount and condition of the bond fixed by the statute; and after the lapse of thirty days without the giving of the statutory bond," the action may properly be dismissed.

[4] 2. It is argued on behalf of the trial judge that the defendant Kissler, having appeared in the trial court and moved for a dismissal of the attachment and having filed an answer in the case, has waived the right to demand security for costs under the provisions of section 4915. In support of this argument counsel rely on *Sciutti v. U. P. Coal Co.*, 30 Utah, 462, 85 Pac. 1011, 8 Ann. Cas. 942. In that case the Supreme Court of Utah was considering the provisions of section 3354 of the Rev. Statutes of that state, which seems to be the same as our statute, and held that where a defendant knew that the plaintiff was a nonresident, and thereafter filed an answer in the case, and made no demand for security for costs until the day the case was called for trial, and after his application was denied proceeded to the trial of the case without excepting to the action of the court ordering the trial to proceed, he thereby waived the right to demand the undertaking as authorized by the statute. We think that case states a sound principle of law, but the facts are very different in this case. Here it clearly appears from the record that the demand was made long before the case was set for trial, or there was any probability of trying the case. The defendant followed this demand up from time to time, and subsequently moved a dismissal of

the action on the ground that no bond had been given, as required by statute, and this motion was made before any order was made setting the case for trial. Clearly the defendant did not waive his right to demand security for costs.

[5] 3. The only remaining question to be determined is whether a failure to give the bond required by the statute for the period of 30 days ipso facto ousts the court of jurisdiction, or if a bond may thereafter be given, provided it is done before the case is finally dismissed. Section 4916, Rev. Codes, provides as follows: "After the lapse of thirty days from the service of notice that security is required, or of an order for new or additional security, upon proof thereof, and that no undertaking as required has been filed, the court or judge may order the action to be dismissed." It will be seen that the foregoing section of the statute authorizes the district judge to dismiss such an action after the lapse of 30 days, upon proof being made that the required notice has been served on plaintiff, and that the period of 30 days has elapsed, and that the necessary bond has not been given. This is clearly a matter which may be waived. A defendant might not make such a demand, or, if he did make a demand, he might waive the length of time the plaintiff is given to furnish the bond. We are of the opinion that, even though the party required to give the bond should fail to give it within the 30-day period, he might nevertheless give the bond thereafter, if he did so prior to the dismissal of the action by the district court. On the other hand, the defendant in such case is clearly entitled to have the action dismissed upon motion and proof at any time after the lapse of 30 days from the date of demand and a failure to give the bond. The required bond having been given in this case prior to the service of the writ, we do not feel that this court should further stay the proceeding in the district court except as hereinafter specified. That court has not lost jurisdiction and the alternative writ heretofore issued will be quashed, and the proceedings herein will be dismissed. All the costs of this proceeding, including the expenses of counsel for the plaintiff, Kissler, in attending upon this court and procuring the writ, and also for appearance upon the return day, shall be taxed against the Union Iron Works, and the district court will require that the same be paid as a condition precedent to taking any further proceedings in the trial court. Upon failure to pay the costs, as above taxed, within a reasonable time, the trial court will dismiss the action. Judgment ordered accordingly.

SULLIVAN and STEWART, JJ., concur.



(43 Utah, 61)

**STATE ex rel. WIGHT v. PARK CITY SCHOOL DIST. NO. 12 OF SUMMIT COUNTY et al.**

(Supreme Court of Utah. June 2, 1913.)

**1. SCHOOLS AND SCHOOL DISTRICTS (§ 42\*)—CREATION.**

Laws 1911, c. 31, § 1, provides that each county shall constitute a high school district until subdivided as hereinafter provided. Section 2 provides that within 60 days after the approval of the act each county superintendent shall report to the board of county commissioners whether, in his opinion, the county shall remain one high school district; and if, in his opinion, it should be subdivided into two or more districts, then he shall recommend to the board of county commissioners a plan of subdividing the county into high school districts. Section 3 provides that upon the receipt of such report and recommendations the board of county commissioners shall set a day for hearing the same. Section 4 provides that any registered voter and taxpayer may object to such recommendations. Section 5 provides that the board must hear said recommendations and objections, getting all of the facts before it, so it may determine the question in such manner as to permit the establishment of high schools at the best places. Section 6 provides that after a full hearing of the question the board shall enter an order, either continuing the county as one high school district or subdividing it. *Held*, that the provisions of section 2 requiring a report and recommendations of the county superintendent were merely advisory, and such report and recommendations do not control the action of the county commissioners in determining whether the county shall be subdivided.†

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 81-85; Dec. Dig. § 42.\*]

**2. OFFICERS (§ 110\*)—DUTIES—"DIRECTORY STATUTE."**

As a rule a statute prescribing the time within which public officers are required to perform an official act is merely directory, unless it denies the exercise of power after such time, or the nature of the act, or the statutory language, shows that the time was intended to be a limitation.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 176-179, 182-184; Dec. Dig. § 110.\*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2078, 2079.]

Action by the State, on the relation of L. B. Wight, against the Park City School District No. 12 of Summit County, Utah, and others, trustees of such school district, to prohibit defendants from levying a high school tax. Writ denied.

A. R. Barnes, Atty. Gen., and E. V. Higgins and Geo. C. Buckle, Asst. Attys. Gen., for plaintiff. Snyder & Snyder, of Salt Lake City, for defendants.

MCCARTY, C. J. This is an action to prohibit Park City school district No. 12 and the trustees of said district from proceeding to levy a tax to maintain a high school separate and apart from the other school districts of Summit county. It appears, from the facts alleged in and admitted to be true by the pleadings, complaint, and answer filed herein, that during the month of February,

1913, the county superintendent of district schools of Summit county made his recommendation in writing to the board of county commissioners of said county that all common school districts in said county north of the town of Rockport be incorporated into one high school district, and that all common school districts south of and including the town of Rockport, except Park City and Parley's Park districts, be incorporated into another high school district; that the board of county commissioners, at its regular meeting held on the 5th day of March, 1913, considered the recommendation made by county superintendent of district schools, as aforesaid, and deeming the same practicable and advisable, caused a notice to be published in each of three weekly newspapers published and having a general circulation in Summit county, reciting that the recommendation of the county school superintendent would be considered and acted upon at a regular meeting of the board of county commissioners to be held April 9, 1913; that the recommendation of the superintendent was considered by the board at the meeting of April 9, 1913; that a full presentation was had at the meeting by all parties interested and who desired to be heard orally or in writing for or against the recommendation made by the county school superintendent; that after a careful consideration of the arguments of all parties who desired to be heard the board of county commissioners adopted, with a slight modification, the recommendation of the superintendent; that the board of county commissioners, in acting upon said recommendation, also considered, acted upon, and ratified a previous action of the board had about August 5, 1912, in which it was determined and ordered that Park City common school district be set apart as a common school district maintaining a high school; that at said meeting it was represented to the board of county commissioners that the students of Parley's Park school district, of whom there were only a few, have always been permitted to attend the high school of Park City without charge or expense for tuition, and that it is the intention of all parties interested that such students be permitted to continue to attend the Park City high school as they have done in the past.

The principal ground upon which plaintiff asks for a writ of prohibition is set forth in his complaint as follows: "That no action of any kind looking to the division of said Summit county into two or more high school districts or setting apart said Park City as a common school district maintaining a high school was taken by the county superintendent of schools, or the board of county commissioners, within 60 days after said chapter 31 (Laws Utah 1911) was approved, or within 60 days after it became a law, and no action of any kind, either by said superin-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

†Tanner v. Nelson, 25 Utah, 228, 70 Pac. 884.



tendent or said board of commissioners, was taken or had until about nine months after said act became a law. \* \* \* That the respective boards of trustees of the other school districts of said Summit County, Utah, exclusive of said Park City district, are ready to organize into high school districts embracing the whole of said county, and to levy and collect the necessary tax for the support and maintenance thereof, as directed by said chapter 31, and that, by reason of said threatened wrongful acts of defendants hereinbefore enumerated, this affiant and other taxpayers of said Park City school district will be compelled to pay the taxes levied," etc. "That affiant, as a taxpayer in said high school district, is beneficially interested in this controversy, and that he has not, nor have any of the other taxpayers of said school district, any plain, speedy, or adequate remedy in the ordinary course of law for the prevention of the wrongful acts threatened by said defendants as herein set forth."

Chapter 31, Session Laws Utah 1911, so far as material here, provides:

"Section 1. Each county within the state, except such counties as are constituted school districts of the first class, shall constitute a high school district until subdivided as hereinafter provided. \* \* \*

"Sec. 2. Within sixty days after the approval of this act each county superintendent of district schools shall report to the board of county commissioners as to whether or not, in his opinion, the county should remain one high school district. If, in his opinion, the county should be subdivided into two or more high school districts, then he shall recommend to the board of county commissioners a plan of subdividing such county into high school districts.

"Sec. 3. Upon receipt of such report and recommendations the board of county commissioners shall set a day for hearing the same, which shall be not less than thirty days nor more than sixty days from the day of setting, and shall give public notice of such hearing by publication at least twenty days before the day of hearing in a newspaper published in such county.

"Sec. 4. Any registered voter, who is a taxpayer within such county, may on or before the day set for hearing the recommendations of the county superintendent file written objections to such recommendations. \* \* \*

"Sec. 5. Upon the day set, or upon such other day to which the hearing may be adjourned, the board of county commissioners must hear the said recommendations and objections, if any; at which hearing the fullest latitude must be given, for the purpose of getting all the facts before the board so it may determine the question in such manner as to permit the establishment of high schools at such place or places within the county as will best accommodate the prospective students at such high schools.

"Sec. 6. After a full hearing of the question the board of county commissioners shall enter an order, either continuing the county as one high school district or subdividing the county into two or more high school districts. \* \* \*

Plaintiff contends that the provisions (sections 2 and 3) of chapter 31 are mandatory; and that, as the report and recommendations of the county superintendent of schools were not submitted to the board of county commissioners until long after the expiration of the 60 days from the time the law went into effect, they, the county commissioners, acted without jurisdiction in subdividing the county into high school districts. Upon the other hand, defendants contend that the provisions of the statute are directory only, and that the board of county commissioners have substantially complied with the provisions of chapter 31, supra.

[1] By a casual reading of the statute (chapter 31) it will be seen that the report and recommendations of the county school superintendent mentioned in section 2 are advisory only, and do not bind or control the action of the board of county commissioners in determining whether the county shall continue as one or be subdivided into two or more high school districts. The board may follow or it may reject the recommendations made by the county school superintendent. The determination of the question rests solely with the board of county commissioners. The fact that the recommendations of the county school superintendent is advisory only, and not binding upon the board of county commissioners, is at least persuasive that the statute designating the time in which such recommendations shall be submitted is directory and not mandatory.

[2] The general rule is that a statute, prescribing the time within which public officers are required to perform an official act, is directory only, unless it contains negative words denying the exercise of the power after the time specified or the nature of the act to be performed, or the language used by the Legislature shows that the designation of time was intended as a limitation. In *Suth. Stat. Const.* § 448, the author says: "Provisions regulating the duties of public officers and specifying the time for their performance are, in that regard, generally directory. Though a statute directs a thing to be done at a particular time, it does not necessarily follow that it may not be done afterwards." Again (section 451): "Statutes directing the mode of proceeding by public officers are directory, and are not to be regarded as essential to the validity of the proceedings themselves, unless so declared in the statutes."

In *Black, Interpretation of Laws*, p. 343, the rule is stated as follows: "When a statute specifies a time at or within which an act is to be done by a public officer or body,



it is generally held to be directory only as to the time, and not mandatory, unless time is of the essence of the thing to be done, or the language of the statute contains negative words, or shows that the designation of the time was intended as a limitation of power, authority, or right." Again, on page 346, it is said: "Irregularities in official action, consisting in the neglect or lack of strict compliance with statutory directions should not be allowed to vitiate the proceedings taken under a statute, when the objects and ends of the statute have been substantially accomplished, and neither the public nor private persons are injured by the course of proceedings."

The case of *State v. Smith*, 67 Me. 328, contains the following broad statement of the general rule: "In general where a statute imposes upon a public officer the duty of performing some act relating to the interests of the public, and fixes a time for the doing of such act, the requirement as to time is to be regarded as directory, and not a limitation of the exercise of the power, unless it contains some negative words denying the exercise of the power after the time named; or from the character of the act to be performed, the manner of its performance, or its effect upon public interests or private rights, it must be presumed that the Legislature had in contemplation that the act had better not be performed at all than be performed at any other time than that named."

This rule of construction was adopted and followed by this court in the case of *Tanner v. Nelson*, 25 Utah, 226, 70 Pac. 984, and the rule is also supported by the following authorities: 26 Ency. L. 689; 36 Cyc. 1160; *People v. Allen*, 6 Wend. (N. Y.) 486; *State v. Lean*, 9 Wis. 279; *Fay v. Wood*, 65 Mich. 390, 32 N. W. 614; *City v. Burney* (Tex. Civ. App.) 145 S. W. 311; *Gallup v. Smith*, 59 Conn. 354, 22 Atl. 334, 12 L. R. A. 353; *People v. Earl*, 42 Colo. 238, 94 Pac. 294.

There is nothing in the nature of the duty to be performed either by the county school superintendent or the board of county commissioners, under the statute in question, that justifies the inference that the Legislature intended that if it were not performed within the time specified it should not be performed at all. But it is manifest that if the statute should be given the construction contended for by plaintiff, the purpose of the statute—which is to enable the several counties not constituted high school districts to create and maintain two or more high school districts—would be defeated in every county in which the county school superintendent has for any reason omitted to make his report and recommendations to the board of county commissioners, as provided in section 2 of the act in question within 60 days after it went into effect.

We are clearly of the opinion that the time

specified in which the county school superintendent shall report to the board of county commissioners as to whether, in his opinion, the county shall be subdivided into two or more high school districts is directory, and not a limitation on the exercise of the power to make such report and recommendations, and that the board of county commissioners of Summit county have substantially complied with the provisions of chapter 31, supra.

The writ is denied. Costs of this proceeding to be taxed against plaintiff.

STRAUP and FRICK, JJ., concur.

(42 Utah, 575)

CRONQUIST et al. v. SMITH et al.

(Supreme Court of Utah. May 8, 1913.)

1. PRINCIPAL AND AGENT (§ 22\*)—EVIDENCE. Declarations of the alleged agent are not admissible to prove his agency.

[Ed. Note.—For other case, see *Principal and Agent*, Cent. Dig. § 40; Dec. Dig. § 22.\*]

2. PRINCIPAL AND AGENT (§ 23\*)—EVIDENCE—SUFFICIENCY.

In an action to recover the value of alfalfa seed alleged to have been purchased by defendants' agent, evidence held insufficient to establish the agency.

[Ed. Note.—For other case, see *Principal and Agent*, Cent. Dig. § 41; Dec. Dig. § 23.\*]

Appeal from District Court, Cache County; W. W. Maughan, Judge.

Action by Olof Cronquist and another against W. H. Smith and David Andrew. From a judgment for plaintiffs, defendant Smith appeals. Reversed and remanded.

George Q. Rich, of Logan, for appellant.  
A. A. Law, of Logan, for respondents.

STRAUP, J. This is an action to recover the value of alfalfa seed alleged to have been sold and delivered to the defendants. The case was tried to the court and a jury. The plaintiffs had judgment, from which the defendant Smith has appealed.

It is conceded that the seed was not sold directly to Smith and that his liability is wholly dependent upon proof of agency between him and the defendant Andrew; the plaintiffs contending in this respect that Andrew was the agent of Smith, and as such purchased the seed for him. The assignments in such particulars present questions of the sufficiency of the evidence, the admission of testimony over Smith's objections, and the charge.

The evidence shows Smith was in the employ of the W. O. K. Elevator Company at Smithfield, Cache county, and was one of its purchasing agents in buying farm products, including alfalfa seed. The company there maintained a storage plant for seed and a storage warehouse. About three weeks before the time in question Andrew approached Smith at the warehouse and told him that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



they (Smith and the company) were paying too much for alfalfa seed and that he believed "he could make some money buying seed and selling it to you fellows." Smith told him, "All right, just so that the seed equals the condition that we are buying right here every day, we will take all there is left in Cache Valley—it don't make any difference whether it is by you or through a firm or anybody else—and receive it here at our warehouse." Andrew inquired and was told the price that would be paid, providing the seed came up to samples then exhibited to him, one price for first-class and another for second-class seed. About three weeks after that Andrew, by wagon, brought to the warehouse alfalfa seed which he had purchased from the plaintiffs and from one Mr. Watkins, in Cache Valley. The seed was in different sacks. Smith examined it and found portions of it, that purchased from the plaintiffs, of an inferior quality, "nothing but tailings," and declined to buy it and told Andrew to take it away. Andrew then informed him that he had given the plaintiffs and Watkins checks and had signed Smith's name to them for the purchase price of the seeds. Smith at once took him to task for that, told him that he had no authority to give checks, and that they would not be honored. Smith immediately telephoned the plaintiffs and Watkins that Andrew had no authority to give the checks; that they would not be honored; and that payment on them would be stopped, which was done. He, however, told Watkins that the company would buy the seed which he had delivered to Andrew but would give the company's check for it. That was agreeable to Watkins and the matter was fixed up with him that way. Smith, in telephoning the plaintiffs, told them that the company would not buy their seed because of its inferior quality and requested them to come to the warehouse, inspect the seed, and take it away, and "straighten the matter out." This the plaintiffs declined to do and stated that they had nothing "to fix up." Andrew left the seed at the warehouse and went away. Smith thereupon had it placed in the warehouse for safe-keeping and held it in the sacks as it came to the warehouse, subject to the orders of the plaintiffs, and so informed them. Later the plaintiffs saw Smith at the warehouse. They asked him if Andrew was not his agent and stated that they thought he was because he had signed his name to the checks. Smith told them that he was not his agent; that he had no authority whatever to give checks; and that he (Smith) had not bought the seed and was not "a party to the deal." The plaintiffs replied that they could not see why he was not "a party to the deal," with his name signed to the checks. One of the plaintiffs testified that Smith then also said, "Andrew came to him and wanted to buy seed for him and told him he could

buy seed for him if he could bring the seed I (Smith) wanted and that Andrew said, 'I have got no money;' and Smith said, 'You go ahead; it will be all right.'" Smith showed them the "tailings" Andrew had brought to the warehouse. The plaintiffs testified that they could not tell whether the seed so shown them was the seed they had sold and delivered to Andrew. They, however, admitted that some of the seed delivered to Andrew was first grade, some second grade, and some tailings. In selling and delivering the seed to Andrew one of the plaintiffs acted for the other. Several days before the sale Andrew told one of the plaintiffs that he was buying seed, and that "he wanted it to go to Smithfield to Smith." Outside of that nothing is made to appear that in the negotiations anything was said that Andrew was acting or buying for any person other than himself until the seed had been loaded on the wagon and Andrew had written the check and handed it to the plaintiff transacting the business. Then, according to the testimony of the plaintiff so receiving the check, Andrew said, "The man who is back of this, whose name is on this, makes that check good." The plaintiff replied, "That is good;" and testified: "When I seen Mr. Smith's name on the check, that settled it with me, so he (Andrew) fixed up the check again. (In making it out it had been blurred.) When he got it correct he got his seed and I took the check. So when I saw Mr. Smith's name on the check for that seed that settled it with me, so far as I was concerned. The seed would never have rolled out of the yard (except for Smith's name on the check). I would not have taken Andrew for the money." One of the plaintiffs also testified that some three weeks before the sale he inquired of Smith the price of alfalfa seed, and that later Smith made him an offer which the plaintiff declined. But nothing was said by either concerning Andrew.

[1, 2] This is substantially all the evidence bearing on the assignment under consideration. The testimony showing Andrew's statement to one of the plaintiffs that "Smith was behind this" was received over Smith's objection. Of course agency cannot be shown by the declaration of the alleged agent. That is elementary. That testimony was improperly admitted. But with it in we think the evidence insufficient to show agency between Smith and Andrew. This is so apparent that nothing further need be said about it. Smith's motion for a nonsuit and for a direction of a verdict in his favor ought to have been granted. With this view, we find it unnecessary to consider the questions concerning the charge.

The judgment of the court below as to the defendant Smith is reversed, and the cause as to him remanded for a new trial. Costs to the appellant.

McCARTY, C. J., and FRICK, J., concur.



(42 Utah, 579)

**WHEELWRIGHT v. NATIONAL COPPER BANK OF SALT LAKE CITY (BEN LOMOND ORCHARD CO., Intervener).**

(Supreme Court of Utah. May 8, 1913.)

**1. CORPORATIONS (§ 560\*)—RECEIVERS—RIGHT TO ASSETS.**

While ordinarily a receiver is entitled to the assets of an insolvent corporation to the exclusion of the others, he is not always so entitled.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2253-2260, 2282; Dec. Dig. § 560.\*]

**2. PLEADING (§ 205\*)—GENERAL DEMURRER.**

A general demurrer only reaches defects of substance appearing upon the face of the pleading.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 491-493, 495, 496, 498-510; Dec. Dig. § 205.\*]

**3. EXECUTION (§ 403\*)—ACTION BY CREDITOR—INTERVENTION.**

Under Comp. Laws 1907, § 2925, authorizing any person claiming an interest in the subject-matter of the pending action to intervene at any time before trial, a judgment creditor who had an execution which was served upon a bank holding funds of the debtor and returned unsatisfied could intervene in an action by the debtor against the bank to recover such money.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1131-1140; Dec. Dig. § 403.\*]

**4. EXECUTION (§ 403\*)—ACTION BY CREDITOR—INTERVENTION.**

Comp. Laws 1907, § 3240, provide that all property not capable of manual delivery may be attached on execution in like manner as on writs of attachment. Section 3074 provides for the attachment of property controlled by a third person, by serving upon the person having control thereof the copy of the writ and a notice that such property or debts are attached pursuant to such writ, and section 3075 provides that all persons having under their control any credits, etc., belonging to defendant, or owing any debts to him at the time of service upon them of the copy of the writ and notice, shall be liable to the plaintiff until the attachment be discharged, unless such property be delivered to the officer. *Held*, that where a bank holding funds belonging to a judgment debtor refused to surrender such fund to the officer upon a service on it of the execution issued upon a judgment obtained by intervener against the judgment debtor, intervener could bring an action against the bank to recover such money by intervening in a pending action by the judgment debtor against the bank.†

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 1131-1140; Dec. Dig. § 403.\*]

Appeal from District Court, Salt Lake County; Geo. G. Armstrong, Judge.

Action by David R. Wheelwright, as receiver of the McGriff Orchard & Canning Company, against the National Copper Bank of Salt Lake City, Utah, in which the Ben Lomond Orchard Company attempted to intervene. From a judgment sustaining demurrers to the complaint in intervention, intervener appeals. Reversed and remanded, with directions to overrule demurrers, and for further proceedings.

Skeen Bros. & Wilkins, of Salt Lake City, for appellant. Halverson & Pratt, of Ogden, for respondent Wheelwright. M. E. Wilson, of Salt Lake City, for respondent bank.

FRICK, J. The receiver of the McGriff Orchard & Canning Company, hereinafter styled canning company, brought this action to recover the sum of \$1,011.66 from the National Copper Bank of Salt Lake City, which it is alleged said bank had in its custody as the depository of said canning company. The complaint is in the usual form in such cases, with an allegation of a demand and refusal. The Ben Lomond Orchard Company, a corporation, and the appellant here, hereinafter called appellant, pursuant to Comp. Laws 1907, § 2925, filed its complaint in intervention in the aforementioned action, in which it in substance alleged that it was a judgment creditor of said canning company for the sum of \$1,040, with accrued interest thereon at the rate of 8 per cent. per annum from the 1st day of November, 1908; that on the 30th day of October, 1911, execution was duly issued upon a judgment theretofore obtained against said canning company by appellant's assignor, and on said day was delivered to the sheriff of Salt Lake county; "that said execution was duly served by the said sheriff on the 30th day of October, 1911, and by virtue thereof the said sheriff attached and levied upon all money due from the said National Copper Bank of Salt Lake City, Utah, to the said McGriff Orchard & Canning Company," stating the manner of service, which was as provided by our statute. It is further alleged that said bank rendered a statement to the sheriff, wherein it acknowledged that it was indebted to said canning company in the sum of \$1,011.66, but refused to pay the same to the sheriff, or to apply it in satisfaction of the judgment aforesaid, and that the sheriff has returned said execution as wholly unsatisfied. It is further alleged in the complaint that the said \$1,011.66 is the identical money or indebtedness that the receiver aforesaid seeks to recover in his action. General demurrers were interposed to the complaint in intervention, both by the receiver and the bank. The court sustained the demurrers, and, the appellant electing not to plead further, judgment was entered against it, from which this appeal is prosecuted.

Appellant insists that the court erred in sustaining the demurrers and in entering judgment dismissing its complaint in intervention.

As we read the contentions of the attorneys for the receiver, the only grounds upon which they seek to sustain the rulings of the trial court, in substance, are: (1) That the appellant cannot recover in this action because a receiver has been appointed to administer the assets of the canning company,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Bristol v. Brent, 36 Utah, 108, 103 Pac. 1076, 140 Am. St. Rep. 804, 21 Ann. Cas. 1125.



and that he is entitled to the exclusive possession of said assets for the benefit of all the creditors of said company; (2) because the appellant in no event had the right to intervene in this action; and (3) that the appellant has mistaken its remedy if it has any under our statute.

[1] The first ground is clearly untenable. While it may be conceded that ordinarily a receiver is entitled to the assets of an insolvent corporation to the exclusion of all others, yet such is not under all circumstances necessarily the case. But it does not appear upon the face of the complaint that a receiver has been appointed, or that he is entitled to the assets of the canning company.

[2] A general demurrer reaches only defects of substance appearing upon the face of the pleading to which it is directed. It does not appear upon the face of the complaint in intervention that a receiver has been appointed for the canning company, nor that the appellant is not or may not be entitled to the deposit; hence the ruling of the court cannot be sustained upon the first ground.

[3] Nor can the second reason urged by counsel be sustained. We think the facts alleged in the complaint in intervention bring the case squarely within our statute (Comp. Laws 1907, § 2925), which authorizes any person claiming an interest in the subject-matter of a pending action to intervene therein at any time before trial. This is precisely what the appellant did by filing its complaint in intervention.

[4] The third ground urged by counsel for the receiver, in our judgment, should also be overruled. The appellant predicates its claim to the money involved in this action upon a lien which it insists it acquired by levying upon or attaching the money under the execution mentioned in its complaint, which was served pursuant to Comp. Laws 1907, § 3240. That section, among other things, provides that "all other property not capable of manual delivery, may be attached on execution in like manner as on writs of attachment." The money in question, it is alleged, was owing by the bank to the canning company. What was sought to be reached by serving the execution, therefore, and the notice on the bank, was not the money in specie, but rather the indebtedness due by the debtor, the bank in this instance, to its creditor, the canning company. This could have been done by serving a writ of garnishment, but in this state an indebtedness may also be attached upon execution by proceeding "in like manner as on writs of attachment." Comp. Laws 1907, § 3074, provides how property or credits in the possession or under the control of third parties may be attached on writs of attachment. The manner provided for there is by serving upon the person who has in his possession or under his control property belonging to the de-

fendant in an action, or who is indebted to him, "a copy of the writ and a notice that such credits or other property or debts, as the case may be, are attached in pursuance of such writ." Comp. Laws 1907, § 3075, reads: "All persons having in their possession or under their control any credits or other personal property belonging to the defendant, or owing any debts to the defendant at the time of service upon them of a copy of the writ and notice, shall be, unless such property be delivered up or transferred, or such debts be paid to the officer, liable to the plaintiff for the amount of such credits, property or debts, until the attachment be discharged, or any judgment recovered by him be satisfied." These provisions also apply to executions.

The appellant therefore pursued, or at least attempted to pursue, the remedy pointed out by the sections of the statute which do not relate to the issuance and service of a writ of garnishment. The bank, so it is alleged, recognized the service upon it by rendering a statement in which it stated the amount of money it had in its possession belonging to the canning company, the judgment debtor of appellant, but refused to surrender the same to the sheriff. In view of this, what is appellant's remedy? It seems to us that the only one open to it is an action against the bank to recover the money, if any, owing from it to the canning company when the copy of the execution and notice aforesaid was served upon it. It is true that under our statute, as we pointed out in *Bristol v. Brent*, 36 Utah, 108, 103 Pac. 1076, 140 Am. St. Rep. 804, 21 Ann. Cas. 1125, a creditor under the circumstances the appellant was in may pursue one of two remedies. If he desired to proceed directly against the person who is in possession of property belonging to the judgment debtor, or who is indebted to the latter, the creditor may obtain a writ of garnishment, and serve it upon such person and make him a party to the action as garnishee. If this be done the garnishee must answer the statutory interrogatories served with the writ; and, if he fails to do so within the time fixed by the statute after service is made upon him, judgment may be entered against him by default, as provided by Comp. Laws 1907, § 3098, and such judgment may be enforced as therein provided. In such event the garnishee becomes a party to the action, and may appeal from any judgment rendered therein affecting him or his rights. Again, if he answers that he is indebted, judgment may be entered against him for the amount stated by him, and the same may be enforced in the usual way. Where, however, as in this case, the judgment creditor does not seek to make the debtor of his judgment debtor a party to the action, he may proceed, as was done by the appellant; and, if the person upon whom a copy of the execution is served, together with the notice provided



for in sections 3073 and 3074, fails to surrender the money or property in his possession or under his control, an action may be commenced against such person to recover judgment for the money due or the value of the property in his possession or under his control, as the case may be. Counsel for the receiver do not dispute the right of appellant to bring such an action. Indeed they contend that that is the remedy he should have pursued. But it seems to us that if it be once conceded that the appellant has a right of action against the bank for the amount of money it admitted it had in its possession belonging to the canning company, appellant may intervene in any action wherein that money is the subject thereof. This is clearly contemplated by our statute, and is fair to the bank, the custodian of the money, and certainly in no way interferes with any legal rights of the canning company. In such cases, after the intervention is allowed, the court has all the parties before it—those who claim the money as well as the one who holds it as debtor, depositary, trustee, or bailee, as the case may be—and the court may then determine the rights of all concerned and end the whole controversy in that proceeding. This cannot be as expeditiously nor as equitably done in any other way.

What we decide, and all that we decide, therefore, is that the complaint in intervention states a cause of action, and requires the court to allow the appellant to establish the facts alleged if it can. Whether the appellant is entitled to the money in question, or whether the receiver is, cannot now be determined, but must be determined from all the facts as they are disclosed on a trial of the issues and in view of the law applicable thereto.

The judgment is reversed, and the case is remanded to the district court, with directions to overrule the demurrers and to proceed with the case in accordance with this opinion. Appellant to recover costs on appeal.

MCCARTY, C. J., and STRAUP, J., concur.

(21 Wyo. 421)

In re THORNTON'S ESTATE.

MERRILL v. STATE et al.

(Supreme Court of Wyoming. June 30, 1913.)

WILLS (§ 137\*)—NUNCUPATIVE WILLS—RIGHT TO MAKE.

Laws 1891, c. 70, defining the procedure for the probate of wills, including nuncupative wills, if construed to so modify Laws 1882, c. 107, § 4 (Rev. St. 1887, § 2237), providing that all wills, to be valid, must be in writing, witnessed, and signed by testator, as to make nuncupative wills valid, is modified by Laws 1895, c. 20, amending section 2237, so as to declare that all wills, to be valid, must be in writing or

typewritten, witnessed and signed by testator, and nuncupative wills are not valid.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 348; Dec. Dig. § 137.\*]

Error to District Court, Uinta County; David H. Craig, Judge.

Proceedings by J. W. Merrill for the probate of the nuncupative will of Rody Thornton, deceased, in which the state of Wyoming and John R. Arnold, administrator of the deceased, filed objections. There was a judgment denying probate, and petitioner brings error. Affirmed.

A. B. Gough, of Montpelier, Idaho, and Clark & Budge, of Pocatello, Idaho, for plaintiff in error. John R. Arnold, of Evanston, C. P. Arnold, of Laramie, and Bailey D. Berry, of Lexington, Ky., for defendant in error Arnold.

BEARD, J. The plaintiff in error, J. W. Merrill, filed a petition in the district court of Uinta county, alleging in substance that one Rody Thornton died at Bennington, Idaho, on the 4th day of May, 1912; that at the time of his death he was a resident of Uinta county, Wyo., and that he left in said Uinta county an estate consisting of personal and real property; that the real estate left by the deceased was of the estimated value of \$30,000, and the personal property of the value of about \$40,000; that deceased left a nuncupative will, in which the petitioner is named as the sole legatee; that deceased died without issue, and was an unmarried man; and that there are no heirs resident in the state of Wyoming or elsewhere, so far as petitioner knows.

The writing alleged to be the nuncupative will of said deceased, and which the petitioner prayed might be admitted to probate as the last will and testament of said Rody Thornton, deceased, is in words and figures as follows, to wit: "In the matter of the nuncupative will of Rody Thornton, deceased. On the 4th day of May, 1912, at Bennington, in Bear Lake county, Idaho, Rody Thornton of Midway, Uinta county, Wyoming, being in the immediate expectation of death from hemorrhage of the lungs due to pulmonary tuberculosis, and being there and then informed by his attending physician that he could live but a short time, and there and then not being physically able to make and execute a written will, in the presence of the undersigned subscribers, did declare his last will and wishes concerning the disposition of his property, in the following words, or substance thereof, viz.: 'I desire that J. G. Merrill of Bennington, Idaho, have all of my property and estate, and I give and will it all to him.' At the time the said Rody Thornton stated the foregoing as his will, he was of sound mind and memory, and not under any restraint, and he at that time desired us to bear witness that such was his

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



wish, desire, and will. Reduced to writing and sealed by us this 7th day of May, 1912. [Signed] Dr. D. W. Poynter (S). Samuel R. Hall." (This instrument is referred to in the findings of the court as Exhibit 1.)

The Attorney General, on behalf of the state of Wyoming, filed objections to admitting said alleged will to probate on the grounds: That said deceased left no heirs at law so far as known. That the instrument purporting to be a nuncupative will was no will at all. That the same was not made, attested, and executed as required by the laws of Wyoming, in this: "That said instrument was not made in writing or typewritten. That said instrument was not witnessed by two competent witnesses. That said instrument was not signed by the deceased, nor by a person in his presence, by his express direction."

Upon the trial the court found the facts to be, and stated its conclusions of law, as follows:

"First. That Rody Thornton died at Bennington, Bear Lake county, Idaho, on the 4th day of May, A. D. 1912, and that at the time of his death he was a resident of Uinta county, Wyo., and left in said county and state an estate consisting of real and personal property.

"Second. That the said Rody Thornton left no heirs within the state of Wyoming or elsewhere, so far as known.

"Third. That a few hours before his death on the said 4th day of May, A. D. 1912, the said Rody Thornton called to his bedside one Samuel R. Hall, and made the following declaration and statement to said Hall, and to Dr. D. W. Poynter, then and there present, to wit: 'I desire that J. G. Merrill have all of my property, and I will it to him.' That at the time said statement and declaration was made, said Thornton was in imminent danger of death, and made said statement with the understanding that he could not live.

"Fourth. That at the time said statement was made by said Thornton he was of sound and disposing mind.

"Fifth. That the said declaration and statement of the said Rody Thornton, so made to said Samuel R. Hall and Dr. D. W. Poynter was thereafter within three days after the death of the said decedent, to wit, on the 7th day of May, A. D. 1912, reduced to writing, and signed by the said Hall and Poynter, and is identified herein as Petitioner's Exhibit No. 1, offered for probate as the nuncupative will of the said Rody Thornton, deceased.

"Sixth. That the statement and declaration offered for probate, purporting to be the last will and testament of the said Rody Thornton, deceased, was not made in writing nor typewritten. That the said statement and declaration was not witnessed by two competent witnesses. That said statement and declaration so offered was not sign-

ed by the deceased, nor by a person in his presence, at his express direction, at or prior to the time of his death.

"As a conclusion of law from the foregoing facts, the court finds that said instrument, purporting to be the last will and testament of the said Rody Thornton, deceased, does not conform to chapter 355, and particularly to section 5397, of the Revised Statutes of Wyoming, and is not such an instrument as complies with the requirements of said chapter and section aforesaid, and cannot be admitted to probate, and the court therefore rejects and denies the application and petition of said J. G. Merrill filed herein for the probate of said will."

From the judgment of the court, refusing to admit to probate the instrument presented as the nuncupative will of said Rody Thornton, deceased, the proponent brings error.

It appears from the record filed in this court that after the decision of the district court, refusing to admit to probate said instrument as the will of said Rody Thornton, deceased, certain persons, claiming to be heirs at law of said deceased, appeared and petitioned the court for the removal of James W. Chrisman, who had been appointed as administrator of said estate, and for the appointment of John R. Arnold as such administrator, and that such proceedings were had that said Chrisman was removed and said Arnold appointed as such administrator, that he duly qualified, and on motion in this court it was ordered that he be substituted as defendant in error in this action in the place of said Chrisman.

It is conceded by counsel for plaintiff in error that the right to dispose of one's property by will "is not a constitutional right, but one depending entirely upon the sanction of the Legislature, and subject to the restrictions which the lawmaking power may see fit to impose." It is contended, however, that by chapter 28, Comp. Laws 1876, now section 3588, Comp. Stat. 1910, the common law of England, which recognized nuncupative wills as valid as to personal property, was adopted by that section of our statutes, and that such wills are valid in this state, at least to that extent. The section reads as follows: "The common law of England as modified by judicial decisions, so far as the same is of a general nature and not inapplicable, and all declaratory or remedial acts or statutes made in aid of or to supply the defects of the common law prior to the fourth year of James the First (excepting the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth, and ninth chapter of thirty-seventh Henry the Eighth), and which are of a general nature, and not local to England, shall be the rule of decision in this territory when not inconsistent with the laws thereof, and shall be considered as of full force, until repealed by legislative authority."



For the purposes of this case it may be conceded that if there is no statute of this state inconsistent with the common law, as adopted by the above-quoted section, then a nuncupative will is valid in this state for all the purposes that it would have been valid at common law. But by an act approved February 8, 1882, entitled "An act to provide the manner in which wills shall be executed in the territory of Wyoming and for other purposes," it was provided: "All wills to be valid must be in writing, witnessed by two competent witnesses, and signed by the testator or by some person in his presence and by his express direction," etc. Section 4, c. 107, S. L. 1882. Since the passage of that act it cannot be reasonably maintained that the common law with respect to nuncupative wills is still in force in this state, unless that statute has been modified or repealed by subsequent legislation. It declares in no uncertain terms that *all wills must be in writing and signed by the testator or by some person in his presence and by his express direction*. No statute of the territory or state mentioned a nuncupative will, prior to the act of 1891; and it is upon that act that counsel for plaintiff in error chiefly rely. That act was approved January 10, 1891, and is entitled "An act providing for probate jurisdiction and procedure, and prescribing the duties of courts and the officers in connection therewith." That act relates solely and exclusively to probate procedure. It provides how wills shall be proved; but not one word can be found in the entire chapter (covering 75 pages of the Session Laws) prescribing in any form the requisites of a will, who is competent to make a will, or what properly may be devised or bequeathed thereby. There is nothing in the act which would enable the court to determine whether or not the instrument propounded for probate was in law a valid will; and recourse would necessarily have to be had to the statute prescribing what persons are competent to make a will, and the formalities necessary to be employed in its execution; and these we find in a separate and distinct part of the statutes. The provisions of the act relied upon to sustain the contentions of plaintiff in error are found in chapter 70, subc. 4, §§ 5, 6, and 7, S. L. 1890-91, entitled as above, and are as follows:

"Sec. 5. Nuncupative wills may, at any time within six months after the testamentary words are spoken by the decedent, be admitted to probate, on petition and notice, as provided herein for the probate of other wills. The petition, in addition to the jurisdictional facts, must allege that the testamentary words, or the substance thereof, were reduced to writing within thirty days after they were spoken, which writing must accompany the petition.

"Sec. 6. The court, or judge thereof in vacation must not receive or entertain a petition for the probate of a nuncupative will,

until the lapse of ten days from the death of the testator, nor must such petition at any time be acted on until the testamentary words, or their substance, is reduced to writing and filed with the petition, nor until the surviving husband or wife (if any) and all other persons resident in the state or county, interested in the estate, are notified as hereinbefore provided.

"Sec. 7. Contests of the probate of nuncupative wills and appointments of executors and administrators of the estate, devised thereby, must be had, conducted, and made as hereinbefore provided in cases of the probate of written wills."

These provisions, and in fact the entire chapter in which they appear, were taken almost literally from the Code of California, and seem to have been adopted by the Legislature without discovering that the laws of that state on the subject of wills provided for nuncupative wills as follows:

"A nuncupative will is not required to be in writing, nor to be declared or attested with any formality.

"To make a nuncupative will valid, and to entitle it to be admitted to probate, the following requisites must be observed: 1. The estate bequeathed must not exceed in value the sum of one thousand dollars. 2. It must be proved by two witnesses who were present at the making thereof, one of whom was asked by the testator, at the time, to bear witness that such was his will, or to that effect. 3. The decedent must, at the time, have been in actual military service in the field, or doing duty on shipboard at sea, and in either case in actual contemplation, fear, or peril of death, or the decedent must have been, at the time, in expectation of immediate death from an injury received the same day." Civ. Code Cal. §§ 1288, 1289.

Such a will being provided for in the substantive law of that state, the rules of procedure for its proof have something to act upon; but not so here, where our statute contains no such provision. In the case of *Neer v. Cowhick*, 4 Wyo. 49, 31 Pac. 862, 18 L. R. A. 588, the olographic will of Cowhick was offered for probate. It was not witnessed; but it was contended by the proponent that by another provision of the chapter we are now considering, viz.: "An olographic will may be proved in the same manner as other private writings are proved"—the will was valid, although not witnessed. The court said: "This act repeals in express terms many provisions of the former law made obsolete under the constitutional provision conferring the powers and jurisdiction of probate courts under the territorial régime upon district courts. The former statute relating to the competency of testators, the devises of lands, the passing of after-acquired property by the will, and the provisions relating to the execution and attestation of such instruments were not repealed, although a number of sections relating to the



proof of wills succeeding these sections of the Wills Act were repealed expressly. There is no general repeal of inconsistent laws, and the intent of the Legislature is plain to preserve unimpaired section 2237 of the Revised Statutes (now, as amended, section 5397, Comp. Stat. 1910). requiring all wills to be in writing, signed by the testator or by some person in his presence by his express direction and by two competent witnesses." And it was held that because the will was not witnessed it was invalid. If this provision relating to the proof of olographic wills did not repeal the former act requiring all wills to be witnessed, it would seem to imply that the provision we are considering did not repeal the requirement of the former act that "all wills must be in writing and signed by the testator," etc.

But if it be assumed that the act of 1891 validated nuncupative wills, being the later expression of the legislative will, what is the situation? In 1895 the Legislature passed an act which was approved February 6, 1895, entitled "An act to amend section two thousand two hundred and thirty-seven (2237) of the Revised Statutes of Wyoming, relating to wills," which act is as follows:

"Section 1. That section 2237 of the Revised Statutes of Wyoming is hereby amended so that it shall read as follows: 'Section 2237. All wills to be valid must be in writing, or typewritten, witnessed by two competent witnesses, and signed by the testator or by some person in his presence and by his express direction, and if the witnesses are competent at the time of attesting the execution of the will, their subsequent incompetency, from whatever cause it may arise, shall not prevent the probate and allowance of the will. No subscribing witness to any will can derive any benefit therefrom unless there be two disinterested and competent witnesses to the same, but if without a will such witness would be entitled to any portion of the testator's estate, such witness may still receive such portion to the extent and value of the amount devised.'"

"Sec. 2. Any typewritten wills, which may have been executed prior to the passage of this act, shall be admitted to probate, notwithstanding the fact that they are typewritten, if in all other respects they are legally executed.

"Sec. 3. This act shall not apply to olographic or holographic wills.

"Sec. 4. This act shall take effect and be in force from and after its passage."

We have set out this act in full for the reason that it is the latest legislation on the subject of wills, and to clearly show that, if the former Wills Act was modified by the Probate Procedure Act of 1891, that act was again modified by the act of 1895, and since that date all wills are governed by its provisions. We are clearly of the opinion that,

at least since the taking effect of the act of February 6, 1895, nuncupative wills are not recognized as valid wills by the laws of this state, and that the instrument offered for probate as the will of said Rody Thornton, deceased, was invalid as a will, and that the district court committed no error in refusing to admit it to probate as such.

The judgment of the district court, therefore, is affirmed.

Affirmed.

SCOTT, C. J., and POTTER, J., concur

(21 Wyo. 447)

#### DEMPLE v. CARROLL

(Supreme Court of Wyoming. June 30, 1913.)

1. EVIDENCE (§ 400\*) — DOCUMENTARY EVIDENCE—PAROL EVIDENCE TO VARY.

A written memorandum of the terms of a sale which obligated defendant to assume all of the debts and obligations of the seller incurred on behalf of a corporation cannot, in the absence of fraud, accident, or mistake, be varied by parol evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1778-1793; Dec. Dig. § 400.\*]

2. PLEADING (§ 236\*)—AMENDMENTS—ALLOWANCE.

Under Comp. St. 1910, § 4437, providing that the party applying to amend shall be required to show that the amendatory facts were unknown to him prior to the application unless the court in its discretion shall relieve him, a defendant sued upon an agreement to assume certain debts incurred by the seller of corporate stock on behalf of the corporation may properly be denied permission to amend his answer at trial by inserting averments that he was induced to enter into the agreement owing to the fraud and misrepresentations of plaintiff, for the amendment would introduce a new issue, and the facts sought to be averred must have been known to defendant at the time of filing his answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. § 236.\*]

3. NEW TRIAL (§ 90\*)—SURPRISE—FAILURE OF WITNESS TO TESTIFY—PRESUMPTION.

Where a witness was not interrogated on matters to which he said he would testify, it cannot be presumed that he would not have testified as he stated for the purpose of allowing defendant a new trial on the ground of surprise.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 181-183; Dec. Dig. § 90.\*]

4. NEW TRIAL (§ 97\*)—ABSENCE OF WITNESS—DILIGENCE.

Where no continuance was asked because of the absence of a witness duly summoned, his absence is not after judgment ground for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 195-198; Dec. Dig. § 97.\*]

5. NEW TRIAL (§ 102\*)—NEWLY DISCOVERED EVIDENCE.

A defendant is bound to make inquiry of all persons from whom he is likely to elicit facts necessary to establish his defense, consequently he is not entitled to a new trial on the ground of newly discovered evidence found in the books of a corporation, where they were open to him, but he made no investigation before trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 207, 210-214; Dec. Dig. § 102.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**6. CONTRACTS (§ 332\*)—ACTIONS—PLEADING.**

A petition averring, in substance, that plaintiff was the owner of a large part of the capital stock of a milling company, and that he sold the stock to defendant in consideration of a cash payment and the assumption by defendant of all obligations incurred by plaintiff on behalf of the company, and that defendant executed the written agreement reciting those facts, but refused to pay a note given by plaintiff on behalf of the milling company which note plaintiff was compelled to pay, states a cause of action for breach of a written contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1615-1639; Dec. Dig. § 332.\*]

Error to District Court, Sheridan County; Carroll H. Parmelee, Judge.

Action by George G. Carroll against Peter Demple. Judgment for plaintiff, and defendant brings error. Affirmed.

Camplin & O'Marr, of Sheridan, for plaintiff in error. H. W. Nichols, of Sheridan, for defendant in error.

BEARD, J. The defendant in error, George G. Carroll, brought this action in the district court of Sheridan county against the plaintiff in error, Peter Demple, to recover the sum of \$1,000 and interest alleged to be due on a certain written agreement. The case was tried to the court without a jury and judgment rendered against the defendant below (Demple), and he brings error.

The plaintiff, Carroll, alleged in his petition, in substance: That prior to May 16, 1911, he was the owner of a large interest in, and a large part of the capital stock of, the Sheridan Manufacturing Company, a Wyoming corporation, engaged in the business of purchasing wheat from farmers and others, and manufacturing it into flour; that on said date he sold his interest and stock in said company to the defendant Demple for the consideration of \$1,000 cash and the assumption by the defendant of all the obligations incurred by plaintiff for and on behalf of said company, and as evidence of such sale and agreement the defendant executed the following written contract: "This 16th day of May, 1911, know all men by these presents, that said G. G. Carroll has this day sold unto Peter Demple his right, title, and interest in the Sheridan Manufacturing Company for the sum of (one thousand dollars) \$1,000.00 cash. Said Peter Demple agrees to assume all of said G. G. Carroll obligations of the Sheridan Mfg. Co. [Signed] Peter Demple." That one of the obligations incurred by the plaintiff for and in behalf of said company and which was unpaid and owing at the time said contract was made was the sum of \$1,000, and interest which had been advanced by plaintiff for said company about December 7, 1908, in payment for wheat sold and delivered to said company by W. S. Metz, which sum the plaintiff borrowed from the First National Bank of Sheridan on his personal note.

That defendant had failed and refused to pay said note in accordance with his contract, and that plaintiff was compelled to and did pay said note, alleged the payment of the \$1,000 cash.

The defendant in his answer admitted the purchase of the interest and shares of stock in the company, that he paid plaintiff \$1,000 as part of the consideration therefor, and that he signed the instrument set out in the petition; alleged "that at the time of making the contract and agreement set out in paragraph 1 of said petition and the purchase by defendant from plaintiff plaintiff's interest and stock in said Sheridan Manufacturing Company it was fully agreed, understood, and intended by the plaintiff and defendant that as part of the consideration for such sale the defendant was to assume and pay certain debts and obligations of plaintiff and the said Sheridan Manufacturing Company, which were at said time specified and agreed upon by the parties, which said specified debts and obligations are as follows, to wit: One note given to Citizens' State Bank of Sheridan, Wyo., in the amount of \$1,200, one note given to the Bank of Commerce of Sheridan, Wyo., in the amount of \$1,400, and small quantities of flour due various persons who had furnished wheat to said Sheridan Manufacturing Company's mill, and were to receive flour in return therefor; that by said agreement in said petition set forth it was agreed, understood, and intended by the parties thereto, the plaintiff and defendant herein, that the above debts and obligations were the only debts and obligations to be assumed by said defendant; that the defendant did not at the time of signing said agreement know of the existence of the obligation of plaintiff to the First National Bank of Sheridan, Wyo., mentioned in said petition, and that defendant did not at said time, or at any time, agree with plaintiff that he, the said defendant, would pay or assume the payment of the said obligation of plaintiff to said First National Bank; that it was fully understood, agreed, and intended by the parties to this suit that the full and complete consideration for the sale of plaintiff's interest and stock in the said Sheridan Manufacturing Company was the sum of \$1,000, and the assumption of the specified debts and obligations hereinabove set forth." The other allegations of the petition were denied. A reply was filed denying the new matters set up in the answer.

[1] We have set out at length the allegations of the answer containing what the defendant sought to prove by way of an affirmative defense to the action, in order that the rulings and decision of the court may clearly appear. We think it clearly appears by the answer and the defendant's evidence that the obligation sued upon was one of the class or

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



character of debts and obligations a part of which defendant admits he was to assume and pay as a part of the consideration for the transaction. The answer contains no allegations of any false or fraudulent representations with respect to, or fraudulent concealment of the debts or obligations to be assumed by the defendant, made by the plaintiff to induce or which did induce the defendant to sign the agreement which he admits in his testimony he read before he signed it. The defendant sought to prove by parol testimony that the contract was different from that contained in the writing. This the court refused to permit, and rightly so under the pleadings. No rule of law is better settled than the one which excludes, as incompetent, parol testimony to vary the terms of a written instrument, or to prove a parol contemporaneous agreement at variance from the writing, in the absence of any allegation of fraud, accident, or mistake.

[2] On the trial and while the defendant was introducing his evidence, he asked leave to amend his answer, and be permitted to plead that defendant's signature to the agreement was procured by fraud, deceit, and false representations made by plaintiff. The court refused to permit the amendment to be made, but stated, in substance, that he would permit the defendant, subject to the objection of plaintiff, to introduce his evidence on that matter. We think there was no abuse of discretion on the part of the court in refusing leave to so amend the answer at that stage of the case. To have done so would have introduced a new and important element of defense not pleaded in the answer upon which the case went to trial, and a defense which the defendant must necessarily have known to exist, if it did exist, at the time he filed his answer; and no showing was made excusing the failure or neglect to so plead in the original answer, or that the amendatory facts were unknown to the defendant prior to the application. The statute (section 4437, Comp. Stat. 1910) provides: "The party applying to amend during the trial shall be required to show that the amendatory facts were unknown to him prior to the application, unless in its discretion the court shall relieve him from so doing." Aside from the statute, the rule is quite uniform that it is not an abuse of discretion for the court to refuse to allow an amendment on the trial which materially changes the cause of action or defense. *Gale, Adm'r. v. Foss*, 47 Mo. 276; *Wixon v. Devine*, 91 Cal. 477, 27 Pac. 777; *Pierce v. Brennan*, 88 Minn. 50, 92 N. W. 507; *Moyers v. Fogarty*, 140 Iowa, 701, 119 N. W. 159; *Barrett v. Kansas & T. Coal Co.*, 70 Kan. 649, 79 Pac. 150; *Phenix Ins. Co. v. Stocks et al.*, 149 Ill. 319, 36 N. E. 408; *Deline v. Ins. Co.*, 70 Mich. 435, 38 N. W. 298.

While the court refused to allow the defendant to amend his answer, he did per-

mit him to introduce his evidence tending to prove fraud and misrepresentations on the part of the plaintiff as to the indebtedness of the company, and tending to prove that he was only to assume certain specified debts. But on those matters the evidence was conflicting, and to our minds was insufficient to sustain the charge of fraud or misrepresentations had the amendment been allowed. At the close of the evidence the court on motion of plaintiff excluded all testimony offered by defendant attempting to alter or vary the terms of the written agreement. In this there was no error. Under the pleadings, such testimony was clearly inadmissible. Many rulings of the court sustaining objections to testimony are assigned as error in the motion for a new trial, but as they related to the testimony offered to vary the terms of the writing need not be considered separately. It is also assigned as error that the court excluded the testimony of one Whitney, a witness for defendant. Counsel are mistaken in this. The record shows that but one question asked this witness was objected to by counsel for plaintiff, and that objection was overruled, and at the end of his examination in chief counsel for plaintiff moved to strike out all of his testimony as incompetent, irrelevant, and immaterial, which motion was denied.

[3] It is also made a ground in the motion for a new trial that defendant was surprised that this witness did not testify to certain matters which it is stated in the affidavit in support of the motion he had said he would testify to; but he was not interrogated as to those matters, and it cannot be assumed that he would not have so testified had he been examined as to them.

[4] A new trial is also urged for the reason that one Traphagen, a witness for defendant and who had been summoned, did not appear at the trial on account of a death in his family. But no continuance of the case or postponement of the trial was asked for that reason and in those circumstances it was too late to complain after judgment.

[5] Another ground of the motion for a new trial is alleged newly discovered evidence. This new evidence consists of the testimony of persons who were interested in the company before, at the time of, and subsequent to the transaction and what could be shown by the books of the company. Some of this evidence would be inadmissible under the pleadings and much of it merely cumulative. In preparing his case for trial, it was the duty of defendant to make inquiry of those persons whom he knew would be most likely to know the facts necessary to establish his defense. It does not appear that these persons were consulted about the matter, or the books of the company examined before the trial, nor is any reason for the failure to do so stated, or that any effort was made to produce such evidence on



the trial. A party cannot neglect to exercise such reasonable diligence in the preparation of his case as the circumstances would reasonably suggest and as will enable his attorneys to take the necessary steps to procure the evidence, go to trial without it, and when defeated be entitled to a new trial for the lack of evidence which could have been produced had proper diligence been exercised.

[8] It is further contended that the court erred in permitting the plaintiff to introduce any evidence for the reason that the petition did not state facts sufficient to constitute a cause of action. With that contention we do not agree. The substance of the petition is set out at the beginning of this opinion, and we think it unnecessary to discuss that question more at length. We think the case was fairly tried upon the issues presented by the pleading and a correct judgment entered on the evidence.

Finding no prejudicial error in the record, the judgment is affirmed.

Affirmed.

SCOTT, C. J., and POTTER, J. concur.

(55 Colo. 105)

**In re SALARIES OF COMMISSIONERS  
AND EMPLOYÉS OF STATE  
LAND BOARD.**

(Supreme Court of Colorado. June 27, 1913.)

**PUBLIC LANDS (§ 145\*)—LANDS OF STATE—  
ADMINISTRATION—LAND COMMISSIONERS'  
SALARY—"INCOME."**

Const. art. 9, § 9, as amended (see Laws 1909, p. 322), creates the State Board of Land Commissioners, prescribes its powers, fixes the salaries of its members, and declares that the salary of each member shall be paid out of the income of the board. Rev. St. 1908, § 5172, authorizes the board to collect certain fees to be paid to the State Treasurer and by him credited to the commissioners' cash fund and paid out on warrants drawn in payment of such vouchers as may be ordered and allowed by the board and certified by the Governor and Register; section 5194 declares that the funds arising from the sale of public school, university, and agricultural college lands shall be held intact for the benefit of the funds for which such lands were granted, and the interest and rentals only shall be expended for the purposes of the grant, and that funds arising from the sale, leasing, and income of all other state lands shall be disposed of as provided by law, but in the absence of any provision may be invested in the same manner as the school fund; section 5195 provides that all moneys arising from the leasing of agricultural college, university, or public school lands shall be treated in the same manner as interest on the proceeds arising from the sale of the same class of lands; and section 5198 declares that all purchase money from the sale of lands shall be paid to the State Treasurer and by him credited to the permanent fund to which it belongs, and all interest on purchase money and rents from lands leased shall be credited by him to the income fund, and all such funds, whether permanent or income, unless otherwise provided by law, shall be invested. *Held*, that the word "income," as used in the constitutional provision, does not include moneys received for interest, rents, royalties, or the purchase price of lands ceded

to the state, nor any of such items, nor can any of such receipts be applied to the payment of salaries and expenses of the Land Commissioners, but that such term has reference to and includes only the moneys received by the board from fees specified by section 5172.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. § 400; Dec. Dig. § 145.\*

For other definitions, see *Words and Phrases*, vol. 4, pp. 3501-3507; vol. 8, p. 7685.]

On questions certified by the Governor concerning the payment of salaries of the Commissioners and Employés of the State Land Board.

Fred Farrar, Atty. Gen., Francis E. Bouck, Deputy Atty. Gen., Norton Montgomery, Asst. Atty. Gen., and Davis, Whitney & Mothersill and William B. Tebbets, all of Denver, amici curiæ.

**PER CURIAM.** His excellency, the Governor of the state, has addressed to this court a communication wherein, after a statement of certain facts and references to certain statutes and sections of our Constitution, particularly section 9 of article 9, the following questions are asked:

"(1) Should the word 'income' as used in section 9 of article 9 of the Constitution, as above quoted, be construed to mean and include moneys received for interest, rents, royalties, or the purchase price of lands ceded to the state or to include any one or more of these items?

"(2) Should the salaries and expenses of the State Board of Land Commissioners, aside from the salaries of the Commissioners themselves and the expenses provided for by section 5172, Revised Statutes of 1908, be paid from rents, royalties, interest, or the purchase price of state lands, or must such salaries and expenses be paid from the general fund of the state?"

In order to answer the questions of his excellency, it is not necessary for us to discuss the various provisions of the enabling act and the Constitution, relating to the public lands of the state and funds arising therefrom. Section 9 of article 9 of the Constitution, as amended (see Laws 1909, p. 322), creates the State Board of Land Commissioners, prescribes its powers, fixes the salaries of its members, and provides that "the salary of each member of this board is to be paid out of the income of the said State Board of Land Commissioners." What does the word "income" in the above-mentioned section include? If the salary of a sheriff is payable out of the income of his office, it cannot in any proper sense be said that the money he may collect on executions to satisfy judgments would be income of the office. If the law prescribes that the sheriff shall receive certain fees for doing certain things, and a certain percentage of the money that he collects as compensation for the collection, the fees and percentage might properly be termed "income of the office." If a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



private corporation sells and leases the lands and loans the money of others, and collects the purchase money, principal, interest, and rents, it cannot be said in a proper sense that the money the corporation receives from the sale of lands or the loans collected when due, or the interest that is paid to it, or the rents collected by it, are the income of the corporation. If the corporation charges commissions on the sales, loans, and collections, these commissions would be the income of the corporation. So with the State Board of Land Commissioners. It sells and leases the public lands of the state, collects royalties and rentals therefrom and interest on deferred payments, but it cannot, in any proper sense, be said that the moneys arising from sales, royalties, rentals, or interest are the income of the board. They are income, it is true, but income of the lands and funds under their management. What the board receives in fees, commissions, or the like for doing this work is what is properly its income. The Constitution provides that the salaries of the Commissioners shall be paid out of the income of the State Board of Land Commissioners, but it does not prescribe how or from what source this income shall arise. It remained, then, for the Legislature to provide in what manner and from what source this income should arise.

Section 5172, R. S. 1908, c. 116, provides that the board may collect certain fees; that when these fees are collected they are to be paid to the State Treasurer and by him credited to the Land Commissioners' cash fund, and shall be paid out on warrants drawn against that fund in payment of such vouchers as may be ordered and allowed by the board and certified by the Governor and Register. This Land Commissioners' cash fund is the only income of the board provided for by existing statutes and of course can be augmented only from the sources indicated in the statutes.

Section 5194 provides that: "The funds arising from the sale of public school, university and agricultural college lands, shall be held intact for the benefit of the funds for which such lands were granted, and shall be known as permanent funds, and the interest and rentals only shall be expended for the purposes of the grant. The funds arising from the sale, leasing and income of all other state lands shall be disposed of as shall be provided by law, but, in the absence of any other provision, may be invested in the same manner as the school fund."

Section 5195 provides that: "All moneys arising from the leasing of agricultural college, university or public school lands which are now, or may hereafter be, received by the State Treasurer, shall be treated in all respects in the same manner as is provided by law for the disposition of the interest on the proceeds arising from the sale of the same class of lands."

Section 5198 provides: "All purchase moneys arising from the sale of lands shall be paid by the Register of the State Board of Land Commissioners to the State Treasurer, who shall receipt for same, and the sum shall be by him credited to the permanent fund to which the land belonged. All interest on purchase money and all rents received from lands leased shall be paid by the Register of the State Board to the State Treasurer, and by him credited to the income fund to which the land belonged. All such funds, whether permanent or income, unless otherwise disposed of by law, shall be invested." Then follow provisions for the investment.

It is thus provided, not that the proceeds of sales shall go into the permanent fund, but that all the funds arising from sales shall go into that fund, and that all the interest and rentals received shall go into an income fund, not an income fund of the State Board of Land Commissioners, but the income fund to which the land belonged. No provision is made by existing law that any portion of the purchase money or of the interest or rentals shall go into the income fund of the board or the Land Commissioners' cash fund. If any portion of the funds arising from sales, interest, or rentals can be used for the purposes of paying the costs and expenses of executing the trust imposed upon the state by the enabling act and other acts of Congress and the Constitution, including the salaries of the Commissioners (which we do not determine), the Legislature has not so provided, but on the contrary has provided that the money arising from the sales, rentals, royalties, and interest shall not be so used. The first interrogatory must therefore be answered in the negative.

It also follows that in answer to the second interrogatory it must be said that under existing law no salaries or expenses of the board can be paid from the rents, royalties, interest, or the sale price of state lands, but must be paid either from the income of the board or, if appropriation is made therefor, from the general fund, except the salaries of the Commissioners, which can only be paid from the income.

HILL, J., not participating.

(55 Colo. 33)

MILLER v. OWENS.

(Supreme Court of Colorado. June 2, 1913.)

1. JUDGMENT (§ 445\*)—EQUITABLE RELIEF—ADEQUATE REMEDY AT LAW—FAILURE TO APPEAL.

Where defendant, in an action at law, denied jurisdiction of the court on the ground that the term had expired, and that the court was illegally reconvened, and the court ruled against him, and his appeal from the judgment was dismissed for want of prosecution, such ruling was res judicata of the question whether the court was properly in session and could not

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes



be retried in a suit in equity to set aside the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 841-844; Dec. Dig. § 445.\*]

**2. JUDGMENT (§ 407\*)—EQUITABLE RELIEF—ADEQUATE REMEDY AT LAW—LOSS OF REMEDY.**

Relief will not be granted in equity against a judgment at law, where the party has an adequate remedy as to the matters complained of by appeal or error, and makes no effort to avail himself of it, or has lost such remedy by failing to take proper steps to secure or perfect his appeal or writ of error.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 768-771, 773, 774; Dec. Dig. § 407.\*]

Error to District Court, Rio Blanco County; John T. Shumate, Judge.

Action by W. H. Miller against Mary E. Owens, administratrix of Hugh R. Owens, deceased. Judgment for defendant, and plaintiff brings error. Affirmed.

Plaintiff in error commenced an action in equity to annul and set aside what was alleged to be a voidable judgment rendered against him and in favor of Hugh R. Owens, since deceased. His right to this relief was based upon the ground that the district court of Rio Blanco county, in which the judgment was rendered, was without jurisdiction to render it. The allegations of the complaint relied upon to establish this want of jurisdiction are to the effect that Owens, in his lifetime, commenced an action against plaintiff in the district court upon which the judgment complained of was rendered, and that this cause was tried against the protest of plaintiff in error at a time when the term which it was claimed was then being held had ceased and determined, and when, in fact and in law, the court was not in session, and had been adjourned for the term, but which the judge thereafter attempted to reconvene; and (quoting from the complaint): "That before proceeding with said trial of said cause, as aforesaid, this plaintiff, by his attorneys, then and there entered his protest of record against the trial thereof, and because and on the ground and for the reason that the said term of said district court so adjourned as aforesaid, and so attempted or pretended to be reconvened, was without right, authority, or jurisdiction in law, and without notice of any kind or character to this plaintiff, and contrary to and regardless of his right, and against his interests in the premises." It is further charged in the complaint that the records of the court showing that the court was regularly and legally convened at the time of the trial of the case was not true, or correct. The complaint then alleges that plaintiff prayed and was granted an appeal to the Supreme Court from the judgment rendered against him; that he gave the required bond, but abandoned his appeal in favor of this action, as being more speedy and direct. For answer, so far as material to consider, the

defendant alleged facts from which it appears the court was regularly in session when the case against the plaintiff was tried, and avers that his appeal to the Supreme Court was dismissed because of failure to prosecute it as by law provided. For reply the plaintiff set up the proceedings in the Supreme Court on his appeal, from which it appears that it was dismissed without prejudice for failure to prosecute. On these pleadings the defendant interposed a motion for a judgment, which was sustained, and the action dismissed. Plaintiff comes here on error.

B. F. Montgomery and E. C. Stimson, of Denver, for plaintiff in error. James C. Gentry, of Meeker, for defendant in error.

GABBERT, J. (after stating the facts as above). [1] The judgment of the district court is right. It fairly appears from the pleadings that the very question upon which plaintiff relied to establish want of jurisdiction of the district court was presented to that tribunal in the action in which the judgment complained of was rendered and ruled on adversely to his contention. This ruling is *res judicata* of the question which plaintiff now seeks to raise in the case at bar, and can only be reviewed on appeal or error from the judgment in the action in which this ruling was made. *McCord v. McCord*, 24 Wash. 529, 64 Pac. 748; *Hyatt v. Bates*, 35 Barb. (N. Y.) 308.

[2] It also appears from the pleadings that if the ruling of the court on the subject of jurisdiction in the case in which the judgment attacked was erroneous, then plaintiff, by prosecuting an appeal from or writ of error to that judgment, could have had the identical question reviewed which he has attempted to raise by his action to annul the judgment. He prayed and was granted an appeal, gave the required bond, but, according to the averments of his complaint, voluntarily abandoned it. From his replication it appears that it was dismissed for failure to prosecute. For these reasons, he is precluded from resorting to equity to accomplish that which he could have accomplished by pursuing one or other of the remedies at law which the Code affords. *Hoover v. Bartlett*, 42 Or. 145, 70 Pac. 378; *Flanneken v. Wright*, 64 Miss. 217, 1 South. 157; *Henion v. Pohl*, 113 Ill. App. 100; 23 Cyc. 977.

Or, as stated in 23 Cyc., at page 983: "Relief will not be granted in equity against a judgment at law, where the party has an adequate remedy as to the matters complained of by appeal or error, and makes no effort to avail himself of it, or has lost such remedy by failing to take proper steps to secure or perfect his appeal or writ of error."

The judgment of the district court is affirmed.

Judgment affirmed.

MUSSER, C. J., and HILL, J., concur.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



(24 Colo. App. 149)

**W. H. PEEPS FIXTURE CO. v. GOVE.**

(Court of Appeals of Colorado. April 14, 1913.)

On Rehearing, June 10, 1913.)

**1. JURY (§ 28\*)—JURY TRIAL—RIGHT TO—MOTIONS—RULINGS OF COURT.**

Under the rule of the district court providing that all notices to have cases set shall indicate whether the case requires a trial to the court or jury, and in the absence of such indication it shall be assumed by the court that it shall be tried by the court, a defendant entitled to a jury trial cannot be deprived of it because plaintiff's notice did not state that the case required trial by jury, and defendant's counsel did not immediately move for jury trial; it not appearing that plaintiff was in any way prejudiced.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 176-196; Dec. Dig. § 28.\*]

**2. JURY (§ 28\*)—JURY TRIAL—RIGHT TO.**

Where a defendant entitled to jury trial failed to seasonably move therefor, his right should not be denied, but the motion should be granted upon terms required by justice.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 176-196; Dec. Dig. § 28.\*]

On Rehearing.

**3. APPEAL AND ERROR (§ 714\*)—RECORD.**

The appellate court cannot consider anything not contained in the abstract of the record, and so cannot consider a rule of the district court contained solely in the briefs of one of the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2958-2963; Dec. Dig. § 714.\*]

**4. JURY (§ 28\*)—JURY TRIAL—RIGHT TO.**

Under the district court rule requiring the notice for setting a cause for trial to specify whether a jury trial is necessary, and providing that, whenever it shall appear to the court that a cause in which a jury trial has been waived ought properly to be tried by jury, the court may direct it to be so tried, the failure of plaintiffs' notice to specify a jury trial cannot deprive defendant of the right to trial by jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 176-196; Dec. Dig. § 28.\*]

**5. JURY (§ 9\*)—RIGHT TO JURY TRIAL—NATURE OF RIGHT.**

The right of a party to have his cause tried by jury is a substantial one.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 14; Dec. Dig. § 9.\*]

Appeal from District Court, City and County of Denver; Harry C. Riddle, Judge.

Action by Frank E. Gove against the W. H. Peeps Fixture Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Gobin Stair, of Tompkinsville (Arthur Pearson, of Denver, of counsel), for appellant. George P. Steele, of Denver, for appellee.

**CUNNINGHAM, P. J.** Appellee Gove, as plaintiff below, recovered judgment in the district court against the Peeps Fixture Company, appellant, on a promissory note which it was alleged was executed by the Fixture Company and delivered to one Frazier, who assigned the same to plaintiff. The answer sets up several defenses; but, in

the view we take of the case, it is not necessary to give any particular consideration to these defenses, or to the defects therein. The answer stated a good defense; indeed, it is not contended on behalf of plaintiff that it did not do so.

[1] Under the pleadings and the evidence, the case was clearly one for a jury, but the defendant was denied the right to a jury trial; said denial being based upon the following facts, so far as we are able to glean them from the record: On the 20th day of November, 1909, the plaintiff's counsel served written notice upon defendant's counsel that he would ask to have the case set down for trial. Defendant's counsel signed a receipt for a copy of the notice, or indicated thereon that he had received a copy of the same, on the date last aforesaid. The case was set down for trial on December 8, 1909. On December 2d, six days before the trial, counsel for defendant filed a motion asking that the order setting the case for trial on December 8th, be vacated, and that an order be entered setting the case for trial at the convenience of the court, but at a time when the jury was in attendance. In his motion defendant's counsel specifically demanded and insisted upon the right of his client to a jury trial. The court took this motion under advisement, and did not rule thereon until the date of the trial, December 8th, when it denied the motion. Upon the overruling of defendant's motion the following colloquy occurred between the court and the counsel for defendant, which we quote without abridgement:

"The Court: Under a rule of this court, when notice is served setting a case for trial upon its merits, the rules of the court require that the notice shall indicate whether it is a trial to the court or a trial to a jury, and if the notice doesn't indicate whether it is a trial to the court or a trial to a jury, and if the notice doesn't indicate on the part of the counsel serving the notice upon counsel recelpting for the notice, it is set for trial to the court.

"Mr. Stair [attorney for defendant]: The defendant excepts for the reason that the original notice had no indication as to whether or not a jury would be asked for; that counsel for the defendant was not aware of a rule of court to that effect, and in order to remedy the error put in a specific motion [six days before the trial] for a jury.

"The Court: The rule to which the court has called counsel's attention is printed and published in the rules of this court, and you are bound to take notice of them."

All that we know with reference to the rule of the trial court referred to is what appears in the colloquy just quoted, from which it would appear that there was a rule of the Denver district court requiring that all notices to have cases set should indicate



whether the case required a trial to the court or a trial to the jury, and, if the notice did not so indicate (and the notice in this case did not, apparently), then it would be assumed by the trial judge that it was a trial for the court and the case would be set down for trial accordingly. If the rule of the district court has been correctly stated, and we must so assume, since no objection is taken on this point, then it is within the power of the attorney who serves notice upon his opponent to force the case to be tried without a jury simply by omitting from the notice any statement with reference to whether the case was or was not a jury case. We think it is too clear for argument that such a rule is more honored in the breach than in the observance. Courts are not made for rules, but rules are made for the courts, and for litigants appearing therein. It might have been the duty of defendant's counsel when this notice was served upon him to immediately demand a jury, instead of delaying until six days before the case was called for trial, but, according to the rule as stated by the court, his demand would have been just as unavailing if made immediately upon receipt of the notice, as it was held to be when he made it a full week in advance of the trial.

[2] If the court had reason to believe that the delay of counsel for defendant in making his demand for a jury had occasioned the other side or the court any inconvenience, still his motion could have been, and we think ought to have been, granted, terms being imposed if the ends of justice so required. The suit, however, was brought upon a promissory note. The record discloses that the plaintiff had no witness whatever at the trial save himself. The slight dereliction of the defendant's counsel, under such circumstances, on a matter of no more importance, is not sufficient to warrant a denial of the constitutional right of the defendant to a trial by jury.

There are other matters discussed in the brief, to which we shall not allude; our silence, however, must not be construed as indicating that we found no other error in the record than that to which we have already adverted.

The judgment is reversed, with leave to either party to amend their pleadings as they may be advised.

Reversed and remanded.

#### On Rehearing.

[3] Counsel for appellee in his brief on petition for rehearing challenges the accuracy of the statement of the trial judge concerning the rule of the district court referred to in the original opinion, and in his brief sets forth what purports to be the rule in full. As stated in the original opinion, our only knowledge of the rule of the district

court was what appeared in the abstract. Indeed, there was no other proper source of information to which we could resort. Counsel for appellee with commendable frankness admits that, if the rule of the district court had been as stated by the trial court, our condemnation thereof was warranted. Without intending or meaning to impugn the good faith of counsel for appellee, we cannot consider the rule of the district court as set forth by him in his brief on rehearing as though the same had been established by competent proof on the trial. We cannot consider for evidentiary purposes that which is called to our attention for the first time by brief.

[4] But if we were to accept the rule as stated in the brief, and treat it as though it were properly before us for our consideration, we are still disposed to think that the trial court erred in refusing to grant the request of defendant for a jury trial. The last clause of the rule itself, as it appears in appellee's brief on rehearing, reads as follows: "Whenever it shall appear to the court that any case in which a jury trial has been waived ought properly to be tried by a jury, the court may direct that the case shall be tried to a jury, in which event the case may be continued to a time when the jury is present, and trial shall proceed in all respects as though the jury had not been waived." As stated in the original opinion, this case was one pre-eminently for a jury. The defendant clearly had not intentionally waived its right to a jury. The waiver, at best, was but an oversight on the part of its counsel, due to his lack of familiarity with the rules of the trial court. We think the trial court abused its discretion in this case in arbitrarily enforcing a waiver thus unwittingly and unwillingly made.

[5] Nor can we yield assent to counsel's contention that the application and enforcement of the rule in question by the trial court, under the circumstances disclosed by the record in this case and referred to in the original opinion, deprived the defendant of no substantial right, for the right of a trial by jury is universally regarded as an important one.

Rehearing denied.

(24 Colo. App. 252.)

#### GIBSON v. FOSTER.

(Court of Appeals of Colorado. June 9, 1913.)

#### 1. TIME (§ 9\*)—SERVICE OF SUMMONS—TIME OF RETURN.

In view of Mills' Ann. Code, § 382, contained in the chapter on "notices," providing that the time within which an act is to be done as provided in the act shall be computed by excluding the first and including the last day, fractions of days are disregarded in computing the time within which summons is required to be served, so that 10 full days need not intervene between the day a summons is issued and the day it is returned, and a return of a sum-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



mons on May 11th which was issued on May 1st was sufficient.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 11-32; Dec. Dig. § 9; Process, Cent. Dig. § 74.]

2. STIPULATIONS (§ 18\*)—MISTAKE.

While the trial court might in its discretion relieve a party from the effect of a mutual mistake of fact in a stipulation upon timely request, the parties are bound by a stipulation that a certain person was a party to a suit, where the trial court's attention was not directed to the fact that such person was not a party, making the stipulation was erroneous as to that fact.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 41-54; Dec. Dig. § 18.\*]

Appeal from District Court, Kiowa County; J. E. Rizer, Judge.

Action by Charles Gibson against George S. Foster. From a judgment for defendant, plaintiff appeals. Affirmed.

John F. Mail, of Denver, for appellant. Crane & Patrick, of Pueblo, for appellee.

MORGAN, J. This is an appeal by plaintiff from a judgment for defendant in an action for the possession of a quarter section of land. At the beginning of the trial in the lower court it was stipulated: That the United States conveyed the land to Samuel Menz September 8, 1888; that he conveyed to Clint C. Rush March 11, 1892; that he conveyed to Charles Zilly March 18, 1895; that he conveyed to Albert E. King October 4, 1907; that he conveyed to Charles E. Gibson, the plaintiff; that Charles Zilly was a defendant in a certain case, No. 135, in Kiowa county, entitled Foster v. Deleplane et al., and that judgment was rendered in that action, quieting the title of George S. Foster, September 7, 1906, prior to the time that Zilly conveyed to King. After this stipulation was made, the plaintiff rested, and defendant offered in evidence, without objection, the complaint and the decree in the said case No. 135, both of which show on the face thereof that the name of Charles Zilly does not appear therein. The plaintiff then offered in rebuttal the summons, the affidavit of publication, and the order of publication, in said case No. 135, all of which show that Charles Zilly's name does not appear; and said evidence discloses also that the summons was issued on May 1, and returned by the sheriff, not served, on May 11, 1906.

Appellant assigns for error that the court erred in rendering judgment for the defendant, and not for the plaintiff; that the court erred in holding that any jurisdiction of the person of the defendant was acquired by the plaintiff in said case No. 135, and that the court erred in holding that the summons in said case was held by the sheriff for the time required by law.

[1] It has been repeatedly held, as shown by the exhaustive discussion in the case of Stebbins v. Anthony, 5 Colo. 348, and it is

also provided in our Code (section 382), that fractions of days are not noticed in computing time in such instances as this, and that time in such instances is computed by excluding the first day and including the last. Consequently the sheriff held the summons for a sufficient length of time. The law does not require that 10 full days intervene between the first day, the day the summons is issued, and the day that it is returned.

[2] No contention seems directly based upon the disclosure by the decree and the judgment roll, including the publication of summons, that neither Zilly, who owned the land when the prior suit was begun, nor King, plaintiff's immediate grantor, were parties thereto. No error is directly assigned thereupon, and the lower court's attention was not directed to this apparent mistake in the stipulation. Under these circumstances, the appellant is bound by his stipulation. Thompson, in his work on Trials, vol. 1, § 194, says: "Such being the nature of the stipulations of counsel made in court touching the cause of the trial, it follows that they will not be set aside upon any lower grounds than those which would warrant the rescission of a contract, namely, fraud, collusion, accident, surprise, or some ground of the same nature. The court will not relieve parties from the effects of a stipulation made under a full understanding of the facts existing at the time. The mere fact that a party by such a stipulation has waived defenses which he might otherwise urge is no sufficient ground for setting it aside. But by analogy to the relief of parties from contracts entered into under a mutual mistake of fact it is clear that a court will relieve a party against a stipulation made under such a mistake." Judge Thompson cites Butler v. Chamberlain, 66 Neb. 174, 92 N. W. 154: "This principle does not, however, embrace a case of omission of those things which reasonable prudence should have included and provided against." And Conner v. Belden, 8 Daly (N. Y.) 257, to the effect that parties cannot be relieved from the effects of a stipulation made under a full understanding of the facts existing at the time, "unless it has been improvidently entered into, and stands in the way of substantial justice, when a wise discretion should relieve from its effects," and Wells v. American Express Co., 49 Wis. 224, 5 N. W. 333, wherein the mistake does not appear to have been mutual, and yet the stipulation was set aside.

In the light of these authorities, the lower court, within its discretion, might have relieved the plaintiff from the effect of this stipulation, if it had been so requested, and upon a proper showing that both parties to the stipulation were mistaken as to the facts, but no such request was made of the lower court, nor of this court. Appellant contents himself solely upon what the record dis-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 133 P.—10



closes; and, while frequently repeating in the abstract and in his brief that Zilly was not a defendant, he never refers to the stipulation, which admits that Zilly was a defendant, and that the decree was rendered against him. Counsel seems to be disposed to adhere strictly to the stipulation, and there may be reasons for it not appearing in the record.

In view of the premises, and the absence of anything except that Zilly's name does not appear in the decree or in the roll, and on account of our inclination to respect and encourage stipulations as to facts, and require a strict adherence thereto, in the trial of cases, where the proof would consist of the formal introduction of lengthy documentary evidence with which counsel can thoroughly familiarize themselves prior to the trial, the judgment will be affirmed.

Affirmed.

(24 Colo. App. 256)

#### KING v. FOSTER.

(Court of Appeals of Colorado. June 9, 1913.)

Appeal from District Court, Kiowa County; J. E. Rizer, Judge.

Action by Albert E. King against George S. Foster. From a judgment for defendant, plaintiff appeals. Affirmed.

John F. Mail, of Denver, for appellant. Crane & Patrick, of Pueblo, for appellee.

MORGAN, J. Appeal from a judgment against the plaintiff in the Kiowa district court in his action for possession of a quarter section of land. Defendant pleaded a decree of said court duly made against plaintiff's immediate grantor prior to his purchase. The enrolled record of the decree pleaded discloses that the sheriff's return was made "not found" on May 11th, on the summons which was issued May 1, 1906, service by publication. The assignments of error are upon the contention that the return was made too soon. This contention has been disposed of against the appellant in the case of Gibson v. Foster (No. 3,673) 133 Pac. 144, just decided by this court, controlling this appeal.

Judgment affirmed.

(24 Colo. App. 247)

#### FOSTER v. GRAY.

(Court of Appeals of Colorado. June 10, 1913.)

#### 1. TAXATION (§ 761\*)—TAX DEEDS—PROPERTY SOLD—NONCONTIGUOUS TRACTS.

A tax deed which showed on its face a sale for a gross sum of noncontiguous tracts described therein was void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1509, 1510-1513; Dec. Dig. § 761.\*]

#### 2. TAXATION (§ 761\*)—TAX DEEDS—DAY OF SALE.

A tax deed was void on its face which showed that the land was struck off to the county on the first day of the sale, without showing that it was offered from day to day until the last day of the sale as required by statute.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1509, 1510-1513; Dec. Dig. § 761.\*]

#### 3. TAXATION (§ 764\*)—TAX DEEDS—DESCRIPTION.

If the bid under a tax sale made in 1896 was for the whole of the property, the second description of the land required by the statutory form need not verbally repeat the first description but may use some phrase, such as "all said property" or "the whole of the property hereinbefore described," but, if the bid was for only a part of the land offered, the second description must specifically describe the part sold.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1519-1522; Dec. Dig. § 764.\*]

#### 4. QUIETING TITLE (§ 37\*)—ISSUANCE—TITLE.

An allegation of the answer, in an action to quiet title, that defendant "is the owner and entitled to the possession" of the land described under a patent duly executed by the federal government "conveying the same to the said defendant," raised an issue on plaintiff's claim of title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 78; Dec. Dig. § 37.\*]

#### 5. ADVERSE POSSESSION (§ 79\*)—QUESTION OF TITLE—VOID DEED.

The five-year statute of limitations is not set in motion by a tax deed void on its face.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 459-462; Dec. Dig. § 79.\*]

#### 6. QUIETING TITLE (§ 29\*)—DEFENSES—LIMITATION.

Where the sole purpose of an action to quiet title is to remove a cloud from plaintiff's title, a plea of the five-year limitation is not available.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 63; Dec. Dig. § 29.\*]

Appeal from District Court, Kiowa County; J. E. Rizer, Judge.

Action by George S. Foster against Alexander Gray, in which defendant filed a cross-complaint. From a decree for defendant, plaintiff appeals. Affirmed.

Crane & Patrick, of Pueblo, for appellant.

HURLBUT, J. Code action to quiet title commenced September 27, 1906, by appellant (plaintiff below) against appellee. The cross-complaint included in the answer asserts title in defendant to the disputed premises by virtue of a government patent, and further pleads that the title of plaintiff is based upon a tax deed recorded June 6, 1900, in the clerk's office of Kiowa county, but alleges the same to be absolutely void and a cloud on defendant's title. Replication denies defendant's title and possession; denies that the tax deed mentioned is void on its face or otherwise; and pleads the five-year statute of limitations. Decree was rendered in favor of defendant, quieting title in him, from which this appeal was taken.

At the trial defendant established title in himself by introducing in evidence without objection patent from the government of the United States, therein conveying to him the premises in issue. Plaintiff offered in evidence treasurer's deed for the premises, dated March 7, 1900, filed for record June 6, 1900, the grantee therein being S. R. Smith, from

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



whom plaintiff deraigned title. Defendant objected to the introduction of the deed in evidence, alleging as reasons: (a) That the deed shows the sale of noncontiguous tracts of land en masse for a gross sum; (b) that it shows the county bid off the premises on the first day of sale, and fails to show that the same were offered on the first day of sale and from day to day thereafter until the last day of sale, the last day being the only time the county was authorized to purchase the property; (c) that it does not show what portion of the lands was sold or that any lands were sold by the treasurer, in that no lands were described or referred to by apt words in the space provided for in the statutory form; and lastly, (d) the acknowledgment was fatally defective. The court sustained the objection and excluded the deed from evidence. There was no error in this ruling. The tax deed reads in part as follows: "Know all Men by these Presents, That, whereas the following described real property, viz.: [Noncontiguous tracts here described] situated in the county of Kiowa and state of Colorado, was subject to taxation; \* \* \* and, whereas, the treasurer of the said county did, on the 22d day of December, A. D. 1896, by virtue of the authority vested in him by law, at (an adjourned sale), the sale begun and publicly held on the 22d day of December, A. D. 1896, expose to public sale at the office of the Treasurer in the county aforesaid, in substantial conformity with the requirements of the statute in such case made and provided, the real property above described, for the payment of the taxes, interest and costs then due, and remaining unpaid on said property; and, whereas, at the time and place aforesaid Kiowa county, of the county of Kiowa, and state of Colorado, having offered to pay the sum of one hundred and twenty-five dollars and eighty-five cents, being the whole amount of taxes, interest and costs then due, and remaining unpaid on said property, for the year 1895, which was the least quantity bid for, and payment of said sum having been made by Kiowa county to the said treasurer, the said property was stricken off to Kiowa county at that price," etc.

[1] Under the first objection to the admission of the deed, it will be seen that the deed was void on its face for the reason that it shows a tax sale en masse of noncontiguous tracts for a gross sum. Page et al. v. Gillett, 47 Colo. 289, 107 Pac. 290; Empire R. & C. Co. v. Coleman, 129 Pac. 522. The second objection is also well taken.

[2] It will also be seen that the deed is void on its face, for the reason that it shows the land sold was struck off to the county on the first day of the sale, and fails to show it was offered from day to day until the last day of sale as required by statute. Bryant v. Miller, 48 Colo. 192, 109 Pac.

959; Church v. Nielsen, 128 Pac. 880; Empire R. & C. Co. v. Howell, 129 Pac. 521; Empire R. & C. Co. v. Coleman, 129 Pac. 522; Empire R. & C. Co. v. Howell, 129 Pac. 245; Empire R. & C. Co. v. Gibson, 129 Pac. 520. The third objection is equally good. The deed is void on its face because it does not appear in the proper place in the deed what lands were sold, either by description or apt words of reference. At the time this property was sold the sale of lands for delinquent taxes was different from a sale under execution, mortgage, trust deed, decree of court, etc., as in the latter cases the highest bidder was one who bid a certain amount for each tract or for all the premises offered, as the case might be, while in the former such bidder was the one who offered to pay the tax due for the smallest portion of the land offered.

[3] If the bid was for the whole of the property offered, then the second description of the land required by the statutory form need not have been a verbatim repetition of the former description, but some phrase such as "all said property," "the whole of the property hereinbefore described," etc., would have satisfied the statute, but, if the bid had been for only a portion of the land offered, then it was necessary in the second description that the deed specifically, or by apt words, describe such portion so struck off and sold under the bid. Lines v. Digges, 43 Colo. 166, 95 Pac. 341; Riley v. Lemieux (May, 1913, No. 3640) 132 Pac. 699.

[4] No brief is filed by appellee. Appellant contends that there is no denial in the answer of plaintiff's allegations of ownership set out in the complaint. It is true the answer does not deny in terms such allegations, but it contains this recital: "That the said defendant is the owner and entitled to the possession of the following described real property (describing lands), by virtue of a patent duly made and executed by the United States of America, conveying the same to the said defendant." While the answer is loosely drawn in this respect, the recital just quoted is inconsistent with an admission of title or ownership in plaintiff, and is sufficient to raise an issue on plaintiff's claim of title. Dodge v. Millett et al., 127 Pac. 247; McCroskey v. Mills, 32 Colo. 272, 75 Pac. 910; Bessemer Ir. D. Co. v. Woolley, 32 Colo. 437, 76 Pac. 1053, 105 Am. St. Rep. 91.

[5, 6] The five-year statute of limitations is not set in motion by a deed void on its face (Gomer v. Chaffee, 6 Colo. 314; Empire R. & C. Co. v. Irwin, 128 Pac. 867), and the plea is not available in an action to quiet title where the sole purpose of the action is to remove cloud on plaintiff's title (Munson v. Marks, 52 Colo. 553, 124 Pac. 187; Empire R. & C. Co. v. Mason, 126 Pac. 1129).

There are other errors discussed by appellant, which need not be noticed, as those



already disposed of show the tax deed to be void on its face and incompetent to fix any title to the disputed premises in plaintiff. Defendant showed fee title to the disputed land in himself, and was entitled to a decree quieting his title.

The record appearing to be free from error, the judgment will be affirmed.

(24 Colo. App. 217)

CARROLL et al. v. KIT CARSON LAND CO.  
(Court of Appeals of Colorado. June 9, 1913.)

1. DEEDS (§ 88\*)—VENDOR AND PURCHASER (§ 233\*)—RECORDING—FAILURE TO RECORD—EFFECT.

Under Rev. St. 1908, § 694, providing that all deeds affecting title to real estate may be recorded in the office of the recorder of the county, and that from and after the filing thereof for record, and not before, such deeds shall take effect as to subsequent bona fide purchasers and incumbrancers by mortgage, judgment, or otherwise not having notice thereof, an unrecorded deed is valid between the parties and conveys the title absolutely, except that it does not take effect as to subsequent bona fide purchasers and incumbrancers without notice until filed for record.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 228; Dec. Dig. § 88;\* Vendor and Purchaser, Cent. Dig. §§ 563-566; Dec. Dig. § 233.\*]

2. VENDOR AND PURCHASER (§ 233\*)—RECORDING—FAILURE TO RECORD—EFFECT.

Under Rev. St. 1908, § 694, providing that a deed shall not take effect as to subsequent bona fide purchasers and incumbrancers without notice until filed for record, and Code Civ. Proc. § 38, providing that only from the time of filing notice of lis pendens shall the pendency of the action be constructive notice thereof to purchasers or incumbrancers of the property described in the complaint, a judgment quieting the title of the holder of a tax deed as against a former owner was not binding on a purchaser from such owner, whose deed was executed before, but recorded after, the institution of the suit, since the holder of the tax title was not a bona fide purchaser or incumbrancer within the recording act, and, even though it was, it acquired its title from the county and not from the former owner, and the recording act only applies as between parties acquiring their titles from a common source.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 563-566; Dec. Dig. § 233.\*]

Appeal from District Court, Kit Carson County; John W. Sheafor, Judge.

Action by Thos. Carroll and another against the Kit Carson Land Company. Judgment for defendant, and plaintiffs appeal. Reversed and remanded, with directions.

C. H. Miller, of Alma, Neb., and Allen & Webster, of Denver, for appellants. Louis Vogt and P. B. Godsmen, both of Burlington, for appellee.

MORGAN, J. This appeal is from a judgment of the Kit Carson district court against the plaintiffs in an action to quiet title to a quarter section of land. The defendant relied upon two tax deeds and a decree obtain-

er thereupon in a prior action to quiet title against plaintiffs' grantor, instituted after plaintiffs received their deed from him for the land, but before they recorded it. They were not parties to the suit in which the said decree was obtained, and the default of their grantor was entered therein on service by publication.

[1, 2] The judgment should be reversed. The tax deeds were void, as held by the lower court, when offered in evidence by the defendant. The decree pleaded was of no effect as to the plaintiffs here, because they were not parties to that suit and were not bound by the decree therein made for any other reason. A deed, though not recorded, is valid between the parties to it and conveys the title absolutely, except that it shall not take effect, as required by our recording act, until filed for record, "as to subsequent bona fide purchasers and incumbrancers by mortgage, judgment or otherwise not having notice thereof" (Rev. St. 1908, § 694), and except as to the effect such recording act may have upon the statute concerning notice of a suit pending, commonly called "notice of lis pendens," which provides that: "Only from the time of filing such notice shall the pendency of the action, suit or proceeding be constructive notice of the action, suit or proceeding, to a purchaser or incumbrancer of the property described in the complaint, petition or answer." Code of Civ. Proc.; Rev. St. 1908, p. 80, § 38. The defendant does not come within the class of persons protected by these provisions. It was not a subsequent bona fide purchaser or incumbrancer under the recording act, nor was it in a position, under the prior suit in which the decree pleaded was made, to profit by plaintiffs' failure to record their deed. These statutes should not be strained nor extended beyond the legislative intent or the words used so as to include anything not therein specified. Even if the recording act (section 694, supra) were broad enough to include, or if it had contained, in addition to purchasers and incumbrancers, persons instituting actions and filing notice of suit pending, it would not, even then, avail the defendant, plaintiff in the prior suit, anything, because it did not obtain title from the same grantor, as distinctly pointed out in the following authorities.

The defendant here, as plaintiff in the prior suit, claimed title under a purchase from the county at a tax sale, and the decree pleaded was obtained by virtue of such purchase. Its interest was not derived from, nor connected with, the estate conveyed by the unrecorded deed, within the meaning of the exceptions in our recording act. Tinsley v. Atlantic Mines Co., 20 Colo. App. 61, at page 63, 77 Pac. 12, at page 13. In the case just cited the court, quoting, said: "A tax title, from its very nature, has nothing to do

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



with the previous chain of title; does not in any way connect itself with it. It is a breaking up of all previous titles. The party holding such title, in proving it, goes no further than his tax deed; the former title can be of no service to him, nor can it prejudice him."

And, defining the effect and purpose of our recording act, our Supreme Court has said: "A deed duly recorded is constructive notice of its existence and of its contents to all persons claiming what is thereby conveyed under the same grantor by subsequent purchase or mortgage, but not to other persons. 3 Wash. R. P. 319, § 53. In the case of Maul v. Rider, 59 Pa. 167, Sharswood, J., says: 'That the record of a deed is constructive notice to all the world is too broad an enunciation of the doctrine. Such record is constructive notice only to those who are bound to search for it as subsequent purchasers and mortgagee and all others who deal with it on the credit of the title in the line of which the recorded deed belongs.'" *Gillett et al. v. Gaffney et al.*, 3 Colo. 366, cited in *Smith v. Russell*, 20 Colo. App. 554, 558, 80 Pac. 474, and in *Judd v. Robinson*, 41 Colo. 222, 220, 92 Pac. 724, 124 Am. St. Rep. 128, 14 Ann. Cas. 1018.

In the case of *Hallett v. Alexander*, 50 Colo. 37, 45, 114 Pac. 490, 494 (34 L. R. A. [N. S.] 328, Ann. Cas. 1912B, 1277), our Supreme Court, through Justice White, discussing section 604, supra, said: "It is claimed the contest here is not between claimants from a common source of title, and that the statute operates, and is intended to operate, only in such cases. We are persuaded that the statute applies only as between claimants from a common source of title."

It was also said by Cooley, J., in *Smith v. Williams*, 44 Mich. 240, 242, 243, 244, 6 N. W. 662: "The defendants below, to show title in themselves, offered in evidence the enrolled record and proceedings in a cause, \* \* \* instituted by Sextus N. Wilcox as complainant against Byron F. Squires as defendant, \* \* \* in which Wilcox claimed title to the land under certain alleged conveyances on sales thereof for delinquent taxes, and prayed the court of chancery to quiet his title as against the claims of Squires. It appeared from the enrollment that Squires was proceeded against as a nonresident; that he was brought in by publication and did not enter an appearance or file any pleading; and that a decree that the title of Wilcox to the premises be quieted as against any claim of Squires was entered. \* \* \* It will be observed that Byron F. Squires alone was made defendant in the chancery suit, and that he had at the time no title to the land. The decree was that he be thereafter precluded from asserting title, and we are not informed that he does so. Obviously the claim of title which the complainant made was to Squires a matter of indiffer-

ence, since it could not in any manner affect his interests. The tax titles had accrued after he conveyed, and enforcing them neither took from him anything nor made him liable upon his covenant. Therefore, if knowledge of the suit had come to him, he would probably have given it no attention, because the result of it could not concern him. The decree as to him might as well have been left unmade. It is said, however, that this suit against a party who had no interest to be affected by it, and no occasion to defend it, has been effectual to cut off the right of the party actually concerned, and who probably never heard of it until the decree was presented which was to be conclusive against him. The only reason given for this position is that the plaintiff, by not recording her deed, and suffering Byron F. Squires to appear of record as apparent owner, 'has allowed him to appear to the world as the owner of the land now sought to be recovered by her,' so that 'Squires' day in court was her day, and she must accept the consequences of her own act.' It is, then, upon her failure to place the evidence of her title upon record that this effect of the decree upon her rights is to depend. The general rule that a judgment or decree binds those only who are parties to it is not disputed. There are a few well-understood exceptions of persons who, subsequent to the institution of the suit, have acquired interests or claims under the parties; but the plaintiff was not one of these, for her title had accrued before. If she loses her title, then it must be by force of the recording laws, for independent of these there is no principle of law that could bind her by the judgment against one whose interest she had acquired long before the suit was instituted. But the recording laws could not help the defendants. Those laws point out specifically the danger to which the party failing to record his title is exposed, and the courts cannot extend or add to it. *Columbia Bank v. Jacobs*, 10 Mich. 349 [81 Am. Dec. 792]; *Millar v. Babcock*, 29 Mich. 528. The danger is indicated by section 4231 of the Compiled Laws: 'Every conveyance of real estate within this state, hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded.' By 'subsequent purchaser' in this section is meant a subsequent purchaser from the same grantor. Mr. Wilcox was not such a purchaser. He does not claim under Squires, but by conveyances from the state which, if valid, should cut off the Squires title altogether." See, also, *Hammond v. Paxton*, 58 Mich. 393, 25 N. W. 321, a case decided after the statute was changed omitting the valuable consideration feature of the act. See, also, *Warnock v. Harlow*, 96 Cal.



298, 31 Pac. 166, 31 Am. St. Rep. 209; 25 Cyc. 1480; *Grant v. Bennett*, 96 Ill. 513.

It is unnecessary to the disposition of this appeal to consider the question raised as to whether the words, "subsequent bona fide purchasers and incumbrancers," under our recording act, refer only to those who become such for a valuable consideration. The only benefit that would have been derived in the prior suit in which said decree was made, if plaintiffs' deed had been of record, would have been the knowledge the plaintiffs therein might have obtained if they had seen the record, that these plaintiffs were proper parties defendant, but recording is not necessary or required for such purpose. Such record would not have been in any way beneficial to plaintiffs herein, nor would it have precluded the defendant in any way from obtaining any lawful relief. If such record had caused these plaintiffs to be made defendants in that suit, they could have defeated the cause and prevented any decree, because the tax deeds, upon which the decree was rendered, were void, as held by the court in the instant case, when offered in evidence by the defendant herein. Hence the defendant is complaining of the failure to do a thing, the doing of which would have been perilous to it.

There are opinions from other states having different recording acts and different provisions in acts requiring notice of suit pending, and rendered under different facts, as where the two contending titles were derived from and through the same grantor, but they are not opposed to the conclusions reached herein. If the decree relied upon by defendant herein had been entered upon a deed, duly executed and recorded, from, through, or under the same grantor named in the plaintiffs' unrecorded deed, it would have then become necessary to decide the question as to whether such a decree would have been a good defense herein and whether a person holding an unrecorded deed at the time a suit is brought, and notice of his pendens filed, to quiet title by a third party against the grantor in said unrecorded deed, is a purchaser pendente lite, or, as our statute says, *supra*, "from the time of filing such notice" of action pending, but such was not the case; a tax title is not derived from, through, or under the owner of the property taxed within the meaning and purview of our recording act. *Tinsley v. At. Min. Co.*, and cases cited, *supra*.

In the case of *Norton v. Birge*, 35 Conn. 250, and the dissenting opinion of Judge Dickey in the case of *Grant v. Bennett*, 96 Ill. 513, relied upon by appellee, the contending titles were derived from the same grantor. And in the cases of *Collingwood v.*

*Brown*, 106 N. C. 362, 10 S. E. 868, and *Hoyt v. Jones*, 31 Wis. 389, the contending titles were from the same grantor, and the statutes of North Carolina and of Wisconsin, as quoted in appellee's brief, concerning his pendens, provide that a person holding a conveyance, "subsequently executed or subsequently registered, shall be bound by the proceedings" the same as if made a party.

The Maine and Kansas cases and some others cited by appellee are not in point, because those states have statutes that provide that an unrecorded deed is void as to *all other persons* than the parties thereto and those with notice thereof, thus rendering the unrecorded deed under consideration void, under those statutes, as to this defendant, because the defendant comes within the class of *all other persons*, while under our statute an unrecorded deed is valid as to *all other persons* than subsequent purchasers, etc., without notice, thus rendering the unrecorded deed under consideration valid, under our statute, as to the defendant, because it comes within the class of *all other persons*, and does not come within the exception.

Bennett, in his treatise on the law of his pendens, says (section 294): "As we have seen, most of the recording acts declare what legal effect shall be given to recording or registration, but in some of the states it is left to the courts to declare what effect shall be given to the registration or record of recordable instruments. Most of the statutes declare that conveyances shall be valid between the parties thereto and those acquiring knowledge of their existence, whether recorded or not. Such would clearly be the law were the statute silent on the subject. Upon the question as to whether other classes than those who are bona fide purchasers without notice shall be protected against unrecorded instruments, the statutes themselves, as we have seen, vary, and the decisions of the courts in the various states, as we would naturally suppose, also vary."

The judgment of the lower court is therefore reversed, and the case remanded, with directions to enter judgment for the plaintiffs, quieting their title, setting aside the tax deeds relied upon by defendants, and letting the judgment say that the decree pleaded is of no effect as to plaintiffs' title, upon the payment by the plaintiffs to the defendant of such taxes, penalties, value of improvements, if any, etc., required by statute (section 5733, Rev. St. 1908) in reference to the recovery of land sold for taxes, the amount of which to be determined by further proof in this action, or by stipulation, as the court may be advised.

Reversed.



(90 Kan. 29)

**DELMORE v. KANSAS CITY HARDWOOD FLOORING CO.†**

(Supreme Court of Kansas. June 7, 1913.)

(Syllabus by the Court.)

**1. MASTER AND SERVANT (§ 221\*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.**

Where two employes in a factory are associated in operating a machine therein, and one complains to the master that he is afraid to work with the other, and the master replies that the one complained of is incompetent and careless, and that he will place him on some work where he cannot hurt the one complaining, the one complaining may thereafter continue in the employment for a reasonable time without assuming the risk of injury from the negligence of his fellow laborer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 638-640, 642-645; Dec. Dig. § 221.\*]

**2. MASTER AND SERVANT (§ 221\*)—INJURIES TO SERVANT—NEGLIGENCE OF FELLOW SERVANT—LIABILITY OF MASTER.**

In such case the master assumes liability for injuries received by the one who complained through the negligence of the other.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 638-640, 642-645; Dec. Dig. § 221.\*]

**3. TRIAL (§ 343\*)—VERDICT—CONSTRUCTION.**

The question whether the appellee was guilty of contributory negligence was under the instructions for the determination of the jury, and, there being no special question submitted thereon, the general verdict in favor of appellee inferentially acquits him of such negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 564, 565; Dec. Dig. § 343.\*]

**4. WORDS AND PHRASES—"CARELESS"—"NEG- LIGENT."**

The word "negligent" is given as one of the synonyms of "careless"; and, while negligent is probably the better word in pleadings, a petition alleging that defendant's fellow servant was "careless" is a charge that he was negligent.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, p. 973; vol. 5, p. 4765.]

Appeal from District Court, Wyandotte County.

Action by Al Delmore against the Kansas City Hardwood Flooring Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Miller & Miller, of Kansas City, Kan., and Sebree, Conrad & Wendorff, of Kansas City, Mo., for appellant. A. W. Little, of Armourdale, and E. C. Little, of Kansas City, Kan., for appellee.

SMITH, J. This action was brought by appellee for personal injuries under the factory act. A jury trial was had, and verdict and judgment were for plaintiff.

In the petition it was alleged that the appellee was injured while cleaning out with his hand shavings from the hopper of the planer which he was operating; that Appler, a fellow workman employed by the defendant, in handling lumber about the machine carelessly and negligently struck plaintiff's

arm and knocked his right hand against the knives in the machine, and cut off two fingers thereof to plaintiff's great injury. The petition also alleged that Appler was a careless, incompetent, and unsafe workman, and that appellee had some weeks before the accident complained to appellant's foreman of Appler's carelessness and negligence, and that the foreman had promised to give Appler employment where he could do appellee no harm, but had failed to do so. Several other grounds of negligence and failure to comply with the requirements of the factory act are set forth in the petition. A demurrer to the petition was filed by the appellant, and was properly overruled. The defendant answered by a general denial that the accident was due to the plaintiff's own carelessness and negligence, and that plaintiff was familiar with the machine and surrounding conditions, and assumed the risk of his employment.

[3, 4] The appellant points out several grounds of negligence upon which there was no evidence or upon which the evidence was insufficient, and one even where the plaintiff's own testimony seems to contradict an allegation of his petition. The appellant in several assignments of error calls attention to the allegations of the petition and also to the evidence, and says that there was no allegation or evidence that Appler was negligent. Words and Phrases Judicially Defined, Webster's International Dictionary, and Soule's Dictionary of English Synonyms give "negligent" as one of the synonyms of "careless." While "negligent" is probably the better word in legal pleadings and proceedings, it is evident that the word "careless" in this case was used in the sense of "negligent." There was evidence tending to show that Appler was a negligent, careless workman; that the appellant had been apprised of this fact, and knew it to be true, but that it had continued to employ him, and that Appler's negligence was the immediate cause of the injury. If the jury believed this evidence, as they apparently did, or believed the evidence in regard to one or more omissions of safeguards or precautions required by the factory act, it is sufficient to sustain the verdict in this case, and this is true even if the evidence was conflicting.

[1, 2] Where two employes in a factory are associated in operating a machine therein and one complains to the master that he is afraid to work with the other, and the master replies that the one complained of is incompetent and careless, and that he will place him on some work where he cannot hurt the one complaining, the one complaining may thereafter continue in the employment for a reasonable time without assuming the risk of injury from the negligence of his fellow laborer. Gray v. Red Falls Lumber Co., 85 Minn. 24, 88 N. W. 24. There was no

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied July 5, 1913.



evidence that the danger of injury from the incompetence or negligence of his fellow laborer was so obvious and imminent that a person of ordinary care and prudence would not incur the risk for the time reasonably necessary for the master to substitute another in the place. The question whether the appellee was guilty of contributory negligence was, under the instructions, for the determination of the jury; and, there being no special question submitted thereon, the general verdict in favor of appellee inferentially acquits him of such negligence. The appellant requested the giving of several instructions which the court refused. So far as they were proper statements of the law applicable to the case, they appear to have been covered by the instructions given by the court. In fact, the instructions given by the court seem to be very full and fair. There was evidence that a loose pulley and belt were supplied in connection with the planer, and that by the use thereof the appellee could have stopped the machine and cleaned out the hopper without danger; that the foreman had ordered appellee not to stop the machine but to clean out the shavings with his hand. In response to a question if appellee could not have stopped the machine and cleaned out the hopper without danger, the jury answered, "Yes; if allowed to stop the machine." Also, in response to a question, the jury answered that he could have cleaned out the hopper with a stick. The jury also answered other questions to the effect that cleaning out the hopper with his hand was more dangerous than either of the other methods. They also found that Appler was negligent, and the appellant knew he was negligent; that Appler, through carelessness and accident, hit appellee's arm while his hand was in the hopper cleaning it out.

It is often said that where an employé selects the more dangerous of two or more ways of doing an act in the line of his duty, and is injured thereby, he cannot recover damages for the injury from the employer, but this rule is subject to the qualification that he may adopt any one of the methods which a reasonably prudent man would adopt and not be negligent, although another way may be absolutely safe. *Brinkmeier v. Railway Co.*, 69 Kan. 738, 77 Pac. 586. In this case, however, there is evidence, which one of the answers indicates the jury believed, that the master had selected the method of cleaning out the hopper, and had directed the appellee not to stop the machine, but to clean out the hopper with his hand. It also appears by undisputed evidence that appellee had frequently and many times cleaned out the hopper in the way he was doing at the time of the accident without injury, and that the negligent act of Appler was the proximate, if not the sole cause of the injury.

In addition to the special findings, the jury returned a verdict in favor of appellee for \$825 damages, and the appellant filed a motion for judgment in its favor upon the special findings notwithstanding the verdict, which was overruled and judgment rendered on the verdict. Under the instructions we think the jury were justified in finding that Appler's negligence was the proximate cause of the injury; that Appler was negligent and careless; that appellant knew it, and, in effect, promised to remove him from work about the machine operated by appellee.

The judgment is affirmed. All the Justices concurring.

(30 Kan. 24)

KEATING v. MUTUAL LAUNDRY CO.†  
(Supreme Court of Kansas. June 7, 1913.)

(Syllabus by the Court.)

COMPROMISE AND SETTLEMENT (§ 16\*)—CONSTRUCTION.

The salary of an officer in a corporation was fixed at a stated sum, with an addition of a percentage of its gross receipts in excess of a certain amount; for several years the business of the company was such as to entitle him to this percentage, but he did not draw it, nor ascertain what it amounted to; in negotiation with other stockholders which led to the sale to one of them of his stock he was asked how much salary was owing him; he answered by giving the amount due on the basis of what he had been drawing; a memorandum was made stating that he was to receive what salary was due him, and pay back any excess if he was overdrawn, and that he was to have no claim against the assets of the company. *Held*, that he was not thereby precluded from claiming from the company the additional salary he had earned, the trial court having found upon sufficient evidence that his statement as to the salary owing him was intended to refer to the amount due on the basis of the fixed rate, and was so understood by the buyer, and that the stipulation regarding the assets of the company had reference to a controversy as to whether the buyer or seller should be entitled to dividends already earned, but not declared.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 54-65; Dec. Dig. § 16.\*]

Appeal from District Court, Shawnee County.

Action by A. C. Keating against the Mutual Laundry Company. From judgment for plaintiff, defendant appeals. Affirmed.

Waters & Waters, of Topeka, for appellant. Ferry, Doran & Dean, of Topeka, for appellee.

MASON, J. In 1905 A. C. Keating became the owner of 500 shares of the stock of the Mutual Laundry Company, a corporation. He was made vice president and treasurer, and an arrangement was entered into by which he was to devote all of his time to the service of the company, and to receive a salary then fixed by action of the directors. Prior to January 28, 1910, personal differences arose between Keating on the one hand

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
† Rehearing denied July 5, 1913.



and R. Matthews and C. H. Matthews on the other, they together owning 698 shares, being practically all the rest of the stock. As a result it became apparent that a change would have to be made in the management of the business, if not in its ownership. On that day the parties met, and Keating offered to buy the stock of the others at \$17.50 a share. This offer was refused, and a counter proposition was made to pay him \$10 a share for his stock, accompanied by an intimation that, if he did not accept, he would be removed from connection with the management of the company. He accepted, and a sale was made on that basis. A memorandum of the agreement was made. Shortly after the completion of the deal Keating demanded of the company several hundred dollars which he alleged to be owing to him as unpaid salary. Payment being refused, he brought action on the claim, and recovered a judgment, from which the company appeals.

The defendant maintains that the contract made between Keating and the Matthews included a settlement of all claims on his part against the company, and argues that such an agreement cannot be set aside merely because one of the parties overlooked something or made a mistake of fact against himself. This legal proposition is not controverted. The question involved is whether the evidence conclusively showed that a settlement was effected which covered the claim sued upon; the trial court having found to the contrary. The memorandum referred to did not upon its face indicate the adjustment of a demand for salary. In fact, it seemed expressly to negative such an adjustment. It read: "Cash payable at 1:30 p. m. this day. Keating to be given his salary including today. If it is overdrawn he to pay back. On sale he is to have no claim on anything, credits, supplies or other assets of co. & the differences are then considered adjusted." The concluding sentence, considered by itself, would be sufficient to cut off claims against the company of every character, but it yields to the more explicit statement that the plaintiff's salary was to be paid, and that, if overdrawn, the excess was to be refunded. The writing as a whole indicates that the amount due Keating as salary was not adjusted. By its terms, if he had been found to be overpaid to the extent of several hundred dollars, he would have been compelled to make restitution. The reference to a claim upon the assets of the company is explained by the fact that Keating had contended that, even if he accepted the offer of \$10 a share for his stock, he would still be entitled to a portion of the undivided profits then on hand, amounting to about \$1,500. The contention that the claim for salary was included in the settlement necessarily rests for its support upon oral evidence. During the negotiations the attorney of the Matthews stated in substance that, if

the sale of the stock was made, the transaction was to "clear the sky," and leave nothing for future adjustment or claim, and this was assented to by Keating. But the trial court specifically found that this was said with reference to the previous claim of Keating to a share in the accumulated profits, and was so understood by all the parties. It also appears from the defendant's answer that in the discussion it was agreed that, if time was given on the payment for the stock, "R. Matthews and C. H. Matthews should be entitled to all dividends accruing or that had accrued to the stock of the plaintiff." The evidence seems to justify the finding that the matters in controversy, to settle which the concluding sentence was added to the agreement, had relation to the disposal of dividends earned, but not declared prior to the time Keating sold his stock and received payment for it.

The motion, by the adoption of which Keating's salary was fixed, read: "C. H. Matthews, as manager and A. C. Keating as vice president and treasurer, in consideration of the fact that they devote their entire time to the service of the company, shall each receive as a salary for said services \$20 per week for the first \$300 gross receipts of this company per week, with an additional four per cent. for each and every dollar of business per week done by the company up to \$500 per week. No further increase of salary shall be allowed to said C. H. Matthews and A. C. Keating until the earnings of the company are sufficient to pay the stockholders seven per cent per annum upon the stock when said salaries shall be increased to five per cent instead of four per cent upon all amounts above said original \$300 per week." From April 1, 1907, up to the time the stock was sold, the earnings of the company were sufficient to pay 7 per cent. dividends, and such dividends were actually paid. Keating and C. H. Matthews had habitually drawn, in addition to the flat rate of \$20 a week, 4 per cent. of the receipts up to \$500, but at the time of the settlement neither had ever drawn any part of the additional 1 per cent. to which they had been entitled for nearly three years. In the discussion leading up to the sale of the stock Keating was asked by the attorney for the Matthews how much salary was due him, and answered that it would be about \$25 or \$30. The court found, however, that Keating meant, and was understood by the other parties to mean, that that would be the balance due him on the basis of what he had actually been drawing. The court also found that none of the parties thought anything about the additional 1 per cent. at the time; that the next day it occurred to Keating that he had never received it; that he did not know how much it would amount to without examining the books and making a computation; that in the afternoon he did this and demanded payment of



the company of the amount found to be due him.

We do not think these findings, or the evidence on which they are based, compel the conclusion that the claim for additional salary was barred. There was no room for any disagreement as to the total amount of salary Keating had earned, and there was no disagreement in fact as to how much he had received; there was no actual controversy on the subject and no actual settlement. The negotiation was not between the company and Keating as to how his account stood, but between the Matthews and Keating with reference to the purchase of stock in the company. The controversy as to a claim of Keating against the assets of the company did not relate to a demand against the company for services, or for anything else; it had to do merely with the question as to who, as between buyer and seller, would be entitled to dividends already earned, but not declared.

Of course, the question of how much the company owed Keating was material in agreeing upon a price to be paid for his stock. If he misrepresented the amount, a buyer who relied upon his statement would have the right to rescind the contract, or to have the price abated, not by the full amount of the understatement, but according to its effect upon the value of the stock purchased. If Keating had purposely misstated the sum due on his salary and the Matthews had been misled, he would doubtless be estopped from now claiming a larger amount. But the court found that there was no purpose to deceive, and no actual deceit. The parties all knew how the salary was fixed. There is no serious contention that Keating misled any one either as to the gross receipts of the business, or as to the total amount he had drawn. And, in any event, the Matthews did not deal with him on the basis that his statement of the amount due was necessarily correct, as conclusively appears from the insertion in the memorandum of the stipulation that, if he was overdrawn, he must account for the excess.

The judgment is affirmed. All the Justices concurring.

(89 Kan. 850)

**HARRISON v. BOARD OF COM'RS OF SUMNER COUNTY.**

(Supreme Court of Kansas. June 7, 1913.)

*(Syllabus by the Court.)*

**SCHOOLS AND SCHOOL DISTRICTS (§ 48\*) — COUNTY SUPERINTENDENT—COMPENSATION.**

Under the act fixing the salaries of county superintendents of public instruction (Laws 1911, c. 279), the superintendent in counties containing more than 1,500 persons of school age, exclusive of those in cities of the first and second classes, and exclusive of those containing a population of 70,000 or more, shall receive \$800, and \$20 per annum for each 100

persons of school age in excess of 1,500 until his salary reaches \$1,200, provided that in each county the county commissioners shall add to the salary otherwise provided the sum of \$1 per annum for each teacher employed in the county exclusive of those employed in cities of the first and second classes.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 100-111, 160; Dec. Dig. § 48.\*]

Appeal from District Court, Sumner County.

Action by Lee Harrison against the Board of County Commissioners of Sumner County. Judgment for defendant, and plaintiff appeals. Affirmed.

W. W. Schwinn, of Wellington, for appellant. Harold W. Herrick, of Wellington, for appellee.

BURCH, J. The action on the district court was one to recover a sum of money claimed to be due the plaintiff as salary for his services as county superintendent of public instruction. Judgment was rendered for the defendant, and the plaintiff appeals.

The decision of the controversy depends upon the interpretation to be given to chapter 279, Laws of 1911, fixing the salaries of county superintendents. Section 2 reads as follows: "In counties having a school population of less than 500, the county superintendent shall receive for each day actually employed in the discharge of his duties in his office the sum of three dollars per day for a number of days not to exceed 180 in any one year. In counties having a school population of from 500 to 1,000, he shall receive the sum of three dollars per day for a number of days not to exceed 200 in any one year. In counties having a school population of 1,000 to 1,500 he shall receive the sum of seven hundred and fifty dollars per annum; in counties containing more than 1,500 persons of school age, exclusive of those in cities of the first and second class, he shall receive eight hundred dollars and twenty dollars per annum for each 100 persons of school age in excess of said 1,500 up to the sum of one thousand two hundred dollars: Provided that in each county, the county commissioners shall add to the salary hereinbefore provided the sum of one dollar per annum for each teacher employed in the county, exclusive of those employed in cities of the first and second class: Provided that in counties of 70,000 or more population the salary of the county superintendent shall be one thousand eight hundred dollars per annum; Provided further, that if the county superintendent shall fail to spend at least one hour in each school during the year, so as to observe for at least one hour, the work of each teacher under his supervision, the county commissioners shall deduct from the last quarterly installment the sum of five dollars for each delinquency."

Sumner county has a school population of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



6,402, and 248 teachers are employed there. Therefore the plaintiff's salary is fixed by the portion of the section which has been italicized. He contends that, if the school population be sufficient, a county superintendent may receive in addition to the sum of \$800 per annum as much as \$1,200 more, computed at the rate of \$20 per annum for each 100 persons, besides the sum allowed for the number of teachers employed. He computes his salary as follows:

Fixed sum .....	\$ 800
\$20 per hundred for 4,900 persons.....	980
\$1 for 248 teachers.....	248
Total .....	\$2,028

The defendant contends that the words "up to the sum of one thousand two hundred dollars" fix a maximum salary limit, aside from the \$1 per annum for the number of teachers employed, and not a maximum limit to the sum which may be added to \$800. The defendant computes the plaintiff's salary as follows:

Fixed sum .....	\$ 800
\$20 per annum for each 100 persons sufficient to bring the total salary to \$1,200.....	400
	\$1,200
\$1 for 248 teachers.....	248
Total .....	\$1,448

The statute is quite ambiguous, but the language employed, read without special stress to emphasize either view, leaves the impression on the mind that he shall receive \$800, and \$20 per annum for each 100 persons of school age in excess of 1,500 until the salary reaches \$1,200. This interpretation is confirmed by considering other parts of the statute and previous legislation on the same subject.

Under the Salary Act of 1897 (Laws 1897, c. 131) § 6, county superintendents were to be paid as follows: In counties having a school population of less than 1,000 (cities of the first and second classes excluded), \$3 per day for not exceeding 150 days in any one year; from 1,000 to 1,200, \$500 per annum; from 1,200 to 1,500, \$600 per annum; more than 1,500, \$600 per annum and \$20 per annum for each additional 150, provided no county superintendent should receive to exceed \$1,000 per annum, but in counties having more than 120 school teachers employed the county commissioners might add to the salary of \$1,000 a sum not to exceed \$200, or as much thereof as they might deem necessary. The Salary Act of 1899 (Laws 1899, c. 141) § 6, made a slight increase in the compensation of county superintendents in all counties having a school population of 1,000 or more. Its provisions were as follows: Less than 1,000, \$3 per day for not exceeding 150 days in any one year; 1,000 to 1,200, \$600 per annum; 1,200 to 1,500, \$700 per annum; more than

1,500, \$700 per annum and \$20 per annum for each additional 100, provided that no county superintendent should receive to exceed \$1,000 per annum, and provided further that in counties having more than 100 teachers employed the county commissioners should add to the salary of \$1,000 per annum an amount not to exceed \$200. In 1905 (Laws 1905, c. 229) the salary in counties having a school population of less than 1,000 was increased by allowing the sum of \$3 per day for not exceeding 180 days in any one year, and it was provided that, in counties having a population of more than 1,500, the county commissioners should add to the maximum salary of \$1,000 per annum the sum of \$200 in case more than 100 teachers were employed.

The act of 1911 indicates a purpose to grant a further substantial increase in salaries to all county superintendents, except those in very small counties. In counties having a school population of from 500 to 1,000, \$3 per day are allowed for 200 instead of for 180 days. The classes of from 1,000 to 1,200, with a salary of \$600, and from 1,200 to 1,500, with a salary of \$700, are abolished, and a salary of \$750 per annum is given in all counties of from 1,000 to 1,500. In counties of more than 1,500 the minimum is raised from \$700 to \$800 and \$1 per annum is given for each teacher employed, whatever the number may be. The increases thus granted in counties of 1,500 or less are consistent with each other and with those given by former acts applying to the same classes of counties. If the statute, as applied to counties of more than 1,500, be interpreted as fixing a maximum salary of \$1,200, aside from the allowance for the number of teachers employed, it is consistent throughout and is in harmony with previous legislation on the subject. If it be interpreted as fixing a maximum of \$2,000, the parts of the act lose their proportion to each other and the particular part under consideration exhibits a radical departure from all previous salary schedules.

The plaintiff argues that the act of 1911 introduced a new principle by which the salary of county superintendents in counties of more than 1,500 is to be determined, and that is the amount of work done based on school population. The argument is unsound. The principle is not new, for it has been the custom in previous salary bills to base compensation in part on school population the same as this one does. School population is not a measure of a county superintendent's work, except indirectly. He does not deal with individual pupils but with school districts, schools, and teachers. So far as the principle can be applied, he is compensated according to services performed by the allowance of \$1 per year for each teacher employed and by an allowance under another statute (Gen. Stat. 1909, § 7386) of \$1 per



school per annum as traveling expenses in visiting schools.

It is said that the omission from this statute of the express words of limitation contained in preceding statutes, "no county superintendent shall receive to exceed," etc., indicates that it does not mean that no county superintendent shall receive more than \$1,200. The statute does contain a maximum salary limit expressed as positively as in former statutes. The question is whether that limit is \$1,200 or \$2,000. Some inequality results from the application of the statute as the district court interpreted it, but such consequences are quite unavoidable under any general salary law.

The judgment of the district court is affirmed. All the Justices concurring.

(89 Kan. 874)

**MONARCH PORTLAND CEMENT CO. v. WASHBURN.**

**SAME v. WASHBURN et al.**

(Supreme Court of Kansas. June 7, 1913.)

*(Syllabus by the Court.)*

**1. SPECIFIC PERFORMANCE (§ 92\*) — VENDOR AND PURCHASER (§ 134\*)—ACTION BY VENDOR — TENDER OF MERCHANTABLE TITLE — SUFFICIENCY.**

A petition by a vendor of real estate for specific performance of a contract of sale is examined, and held to state a cause of action.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 233-244; Dec. Dig. § 92;\* Vendor and Purchaser, Cent. Dig. §§ 238, 250-254, 258; Dec. Dig. § 134.\*]

**2. ESCROWS (§ 10\*)—"EARNEST MONEY."**

A contract for the sale of land recited that a check for \$500 as earnest money, payable to the vendor, was deposited in a bank with the contract, leaving a balance of \$9,500 to be paid, and the party of the second part agreed to pay cash on delivery of deed and abstract. The contract signed by an agent was to become effective only on approval of his principal. This approval was given a few days after the deposit, and thereupon a demand was made on the bank for the check, which was refused. The check, having been given as earnest money, was payable when the contract was approved, and a petition for damages against the bank for refusal to deliver it stated a cause of action (citing 3 Words and Phrases, 2302).

[Ed. Note.—For other cases, see Escrows, Cent. Dig. § 15; Dec. Dig. § 10.\*]

Appeal from District Court, Kingman County.

Two actions, both by the Monarch Portland Cement Company, one against Allen Washburn and the other against Allen Washburn and another. From judgments for defendants, plaintiff appeals. Remanded, with directions.

S. S. Alexander, of Kingman, and Wm. Keith, of Wichita, for appellant. Hay & Walter, of Kingman, for appellees.

BENSON, J. These appeals relate to the same transaction. The question for decision is whether demurrers to the petitions were erroneously sustained. The principal action is for specific performance of an agreement to purchase land. The other is for damages against the bank as custodian of a check given as an advance payment made upon the land. An action was first brought against the vendee and custodian jointly. Afterwards a separate action was instituted against the vendee, and he was dismissed from the first suit.

The petition in the last action sets out a written contract dated November 18, 1910, wherein the vendor, the cement company, party of the first part, does "hereby sell to party of the second part for the consideration of ten thousand dollars (\$10,000.00) lands described (then follows description containing 200 acres more or less). Party of the second part does herewith deposit a certified check for five hundred dollars (\$500.00) as earnest money payable to the Monarch Portland Cement Company, the receipt of which is hereby acknowledged to be placed with this contract in escrow in the Cunningham State Bank, leaving a balance of nine thousand and five hundred dollars (\$9,500.00). Party of the second part agrees to pay cash on delivery of deed and abstract showing good and merchantable title. \* \* \* The above sale is subject to the approval of the Monarch Portland Cement Company of Humboldt, Kansas. In event this contract is not approved by the Monarch Portland Cement Company the five hundred dollars (\$500.00) check above mentioned is to be delivered to the party of the second part and this contract to be null and void." The contract is signed by Washburn, the vendee, and by an agent for the vendor. The petition alleges that a certified check for \$500, payable to the plaintiff, was deposited in the bank with the contract, as earnest money, as provided in the agreement, and that on November 22d the plaintiff approved the contract and notified the defendants that he had done so; that pursuant to the contract the plaintiff on December 19th executed its deed of conveyance and placed it in the bank for delivery, and in due time performed all the conditions of the agreement; that on January 24, 1911, the plaintiff tendered the deed and an abstract showing a full merchantable title to the defendant, with a release of mortgages on the land, offered to pay any taxes which might be due and to cause the necessary entries to be made upon the abstract to show the land free of all incumbrances; but that the defendant refused to accept the deed, refused to perform the agreement, and stated that he would have nothing further to do with it.

In a letter written on November 22, 1910, attached to the petition, referring to a previous telegram of approval, the secretary of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the company said: "(1) Note that we are to receive \$50.00 per acre for this land, of which \$500.00 has already been paid into the Cunningham State Bank, as earnest money and the balance \$9,500.00 will be available on the delivery of the deed and abstract, showing good merchantable title. \* \* \* There are two mortgages involved in these transactions, both given by A. H. Nossaman to the Warren Mortgage Company of Emporia, Kansas; one is for \$4,000.00, \* \* \* and the other one is for \$3,000.00. \* \* \* Each of these mortgages is dated October 29, 1906, and will both be due on the 1st day of November, 1911, and each draws interest at 5 per cent. We have already taken up the commission mortgages, and I am writing the mortgage company to-day to ascertain whether or not we can arrange for the release of the land which we are now selling, and upon what terms, etc. The interest was made payable yearly in both instances, and we have just paid the interest for 1910 (November 1), which leaves the matter in bad shape in that respect, provided the mortgage company are not disposed to accommodate us."

[1] In support of the demurrer it is contended that the petition and abstract disclosed incumbrances on the land, and therefore the petition failed to state a cause of action upon the contract which required an abstract showing a good merchantable title. It is argued that a tender of the release and offer to pay any taxes that might be due and to cause the proper entries to be made upon the abstract were still insufficient to show compliance with the agreement. This is an extremely technical view of the situation. It is an insufficient excuse for failure to perform a plain agreement. In cases of specific performance, a tender even is not necessary if the party seeking relief is able and offers to perform the agreement on his part and the other party repudiates it. *Niquette v. Green*, 81 Kan. 569, 106 Pac. 270. While the abstract did not show the discharge of the mortgages, a release was presented and an offer made to have the entry made upon the abstract at the plaintiff's expense. If the defendant in the exercise of caution desired to have the release pass the scrutiny of the abstractor and be actually entered upon it, he should at least have so stated. It must be remembered that this is an action for specific performance, governed by equitable considerations, and the plaintiff could complete his abstract in any reasonable time before the decree; no special injury appearing from the delay. *Bell v. Sternberg*, 53 Kan. 571, 38 Pac. 1058; *Wiley v. Hellen*, 83 Kan. 544, 112 Pac. 158. The petition stated a cause of action.

[2] In the action against the bank it appears that the contract and check were placed in its custody. The check was so

deposited as earnest money payable to the cement company. It is alleged in the petition that, after the contract was approved by the company and became binding and effectual, the plaintiff demanded the check and that the demand was refused. The plaintiff claims that this amounted to a conversion.

The contract recites that the party of the second part agrees to pay cash on delivery of a deed and abstract. As the payment of \$500 was provided for by means of the check, the cash to be paid was the remaining \$9,500. Earnest money is money paid to bind the bargain. The idea is taken from the civil law, and the term is used in the English statute of frauds relating to contracts for the sales of personalty of over a certain value, which, to be enforceable, required the payment of something in earnest unless there was a written memorandum. 2 Bl. Com. 447, vol. 1; Chitty, bk. 2, p. 362; *Howe v. Hayward*, 108 Mass. 54, 11 Am. Rep. 306; *Words and Phrases* Jud. Defined, vol. 3, 2302.

As the contract, although signed by the agent, was to become operative only when approved by his principal, the check was not presently delivered but was deposited with the contract in the bank. But, having been given as earnest money, it became payable when the contract went into effect. Otherwise it would not be earnest money at all or an advance payment in any sense. The only way in which the plaintiff could obtain the advance payment or earnest money was through possession of the check and its presentment for payment. This possession was denied, and therefore a cause of action accrued. If facts exist constituting a defense in either case, they do not appear upon the petitions.

Both causes are remanded, with directions to overrule the demurrer in each case. All the Justices concurring.

(90 Kan. 40)

#### PLUMMER v. ASH et al.

(Supreme Court of Kansas. June 7, 1913.)

#### (Syllabus by the Court.)

#### 1. JUDGMENT (§ 273\*)—ENTRY NUNC PRO TUNC—MOTION BY GRANTEE.

A grantee of a party in whose favor the title to land has been adjudicated may maintain a motion in his own name to have the judgment entered nunc pro tunc if an entry of the judgment has not been made.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 525-541; Dec. Dig. § 273.\*]

#### 2. JUDGMENT (§ 273\*)—ENTRY NUNC PRO TUNC.

Where the court obtains jurisdiction by constructive service in an action to quiet title, and an answer is filed for a nonresident defendant, and the issue of title is tried without objection, and judgment rendered against the plaintiff, he cannot defeat a motion for an entry of the judgment nunc pro tunc, made five

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



years afterwards, by merely showing that the defendant did not authorize the appearance of the attorney.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 525-541; Dec. Dig. § 273.\*]

### 3. APPEARANCE (§ 15\*)—RATIFICATION.

The defendant, after learning that an appearance had been made for her without her knowledge or consent, might have ratified it and thereby would have been entitled to all its benefits although she had not authorized it. Her grantee may also ratify it so far as necessary to protect his interest in the land conveyed to him and affected by the judgment, in the absence of any previous repudiation by her of the unauthorized appearance.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 68, 69; Dec. Dig. § 15.\*]

Appeal from District Court, Stanton County.

Action by John Plummer against Charles Ash and others. From an order denying a motion of Charles E. Gibson for entry of judgment nunc pro tunc for defendant Anna F. R. Coffin, Gibson appeals. Reversed and remanded, with directions.

Scates & Watkins, of Dodge City, for appellant. George Getty, of Syracuse, for appellees.

**BENSON, J.** This is an appeal from an order denying a motion for judgment nunc pro tunc in an action to quiet the title to several tracts of land. Service was made by publication against Anna F. R. Coffin, a non-resident. An attorney appeared and filed an answer for her. The case was tried in regular course of practice, and upon the issues relating to the tract in question here a judgment was rendered on April 10, 1906, against the plaintiff in favor of the defendant Coffin, setting aside a tax deed under which the plaintiff claimed title, and giving to him a lien for taxes as provided by law, and awarding execution unless paid in thirty days. The judgment was never entered on the journal, but a memorandum of it was entered on the trial docket by the judge. Before the hearing upon this motion the plaintiff filed a motion to strike the motion just referred to from the files on the ground that the judgment was unauthorized and void because the attorney who had appeared for Mrs. Coffin had no authority to do so. The two motions were heard together. The motion for judgment was overruled, and the motion to strike it from the files was sustained.

[1] The following facts appeared from the evidence on the hearing of the motions: Service by publication was made on Mrs. Coffin. The answer filed for her alleged that she was the owner of the land in fee simple and entitled to the possession; that plaintiff had no title thereto except under a tax deed void and illegal because of various defects set out in the answer; alleging that the tax deed was a cloud upon her title; and praying that it be set aside, and the

plaintiff barred from any claim, interest, or title in the land. The attorney so appearing for Mrs. Coffin was not authorized to do so, and she had no actual knowledge of such appearance until after October 5, 1907. On that day she conveyed the land to Chas. E. Gibson, who on August 20, 1911, filed the motion for judgment nunc pro tunc. The former judge, who had presided at the trial in which the judgment was rendered and in whose handwriting the minutes appear, was examined as a witness and testified to their correctness, and that the judgment was rendered as stated above.

Various reasons are assigned in support of the ruling complained of. It is said that the failure to record the judgment was not because of any accident, mistake, neglect, or omission of the clerk. The evidence does not show the cause of the omission; but, having shown the rendition of the judgment, the failure to record it appears to have been through accident or mistake of the clerk, for it was his duty to make the record. Civil Code, §§ 412, 729, 731 (Gen. St. 1909, §§ 6007, 6325, 6326). It is suggested that it was the practice for an attorney who obtained a judgment to prepare a form of entry for the clerk, but this did not relieve that officer from the discharge of his public duty. Besides, in this case the judgment was in favor of both parties, for the plaintiff obtained a lien for his taxes, and his attorney could, under the practice referred to, prepare the form as well as the defendant's attorney.

Another reason suggested is that the entry of the judgment now would not be in furtherance of justice. This is not apparent. There was a regular trial and a judgment was duly rendered. By that judgment Mrs. Coffin's title was established and subject only to the tax lien adjudged in favor of the plaintiff. Afterwards she deeded the land to Gibson. This deed conveyed all her interest in the land, including whatever interest accrued to her by the judgment. It must be remembered that no questions concerning possible interests of third parties acquired from the plaintiff in the absence of a record of the judgment are presented. The controversy here is between the plaintiff who had his day in court and the grantee of the defendant who has succeeded to her rights. Another reason offered in support of the ruling is that such a motion could only be made by Mrs. Coffin. Perhaps it might have been made in her name, but that would have been a matter of form only. After the conveyance Gibson was the real party in interest, and had the right to move for the entry of judgment. The motion might be made by any party interested. Civil Code, § 556 (Gen. St. 1909, § 6151); 18 Encyc. of Pl. & Pr. 470; 1 Freeman on Judgments (4th Ed.) § 64; Reid v. Morton, 119 Ill. 118, 6 N. E.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



414; In re Cook, 77 Cal. 220, 17 Pac. 923, 19 Pac. 431, 1 L. R. A. 567, 11 Am. St. Rep. 267.

In *Rush v. Rush*, 97 Tenn. 279, 37 S. W. 13, it was held that the grantees of land in a deed made by a man who had obtained a divorce could maintain a petition for the entry nunc pro tunc of the decree of divorce as against the former wife, who claimed a homestead right in the land.

[2, 3] Another ground urged in support of the order, and the one upon which the court made it, as appears from recitals in the journal, is that the judgment pronounced, but not entered, is void because the attorney who appeared for Mrs. Coffin had no authority to appear in her behalf. The situation was this: The court had jurisdiction of the parties, including Mrs. Coffin, by regular constructive service. After due publication an answer was filed for her by an attorney of the court, an issue was joined upon the petition and this answer, and was tried without objection and without questioning the right of the attorney to appear for the defendant. The party for whom he appeared has never repudiated his acts. After notice of the appearance made in her behalf, she might have ratified it, and she could thereby have been entitled to all the benefits of the judgment. *Dresser v. Wood*, 15 Kan. 344. No reason is suggested why her grantee to whom she conveyed the subject of the action may not also ratify it so far as his interest in the land is concerned, in the absence of any previous repudiation by her. The plaintiff, after enjoying all the benefits of the trial of an issue tendered by himself, cannot question the right of an attorney appearing for the adverse party to meet and defend the issue. It is true that the plaintiff had that right before the trial. Gen. St. 1909, § 434. But he cannot after judgment have another trial of the issue on that ground alone where the adverse party has raised no such question.

It is argued that the judgment is wholly void for want of jurisdiction, but this is not true. The court had acquired jurisdiction by service before the answer was filed.

Authorities are cited to support the rule contended for by the appellant that it is the duty of the court to see that its journals speak the truth and contain a fair record of its proceedings, whether valid or not. It was held in *Aydelotte v. John S. Brittain & Co.*, 29 Kan. 98: "On the hearing of a motion for a nunc pro tunc entry, the question is: What order was in fact made at the time by the trial judge? And upon such question the minute on the judge's docket and the testimony of the trial judge are ordinarily controlling." Whether this rule should be applied in every case without exception need not now be decided. Upon the undisputed facts of this case it should be ap-

plied here, and the judgment should be entered as it was rendered.

It is suggested that the judgment is dormant for want of an execution. So far as it overthrew the plaintiff's tax title, and established the title of the defendant Coffin, an execution was unnecessary. The decree was the finality of procedure upon that issue. So far as it declared a lien in his favor, an execution is unnecessary, for a tender of the amount has been made. This objection is therefore unavailing even if it should be held that the plaintiff could take advantage of his own failure to take proceedings to protect his lien.

The order appealed from is reversed. The cause is remanded, with directions to sustain the appellant's motion and enter the judgment nunc pro tunc as it was rendered. All the Justices concurring.

(90 Kan. 34)

# FENN v. NORTHWESTERN NAT. LIFE INS. CO.

(Supreme Court of Kansas. June 7, 1913.)

(Syllabus by the Court.)

## INSURANCE (§ 392\*)—CONDITIONS OF POLICY—PAYMENT OF PREMIUM.

A life insurance policy provided for the payment of premiums on the 1st day of each month and forfeiture for nonpayment. It also provided for reinstatement during the life of the insured, at any time within 12 months of the date of lapse, by the payment of past-due premiums and a fine of 10 per cent. per annum on such overdue premiums. Premiums were paid on the policy for over six years on or about the 20th day of each month. The premiums so paid were accepted without objection or comment by the company, and its receipts were given therefor. The last payment was in November, 1909, and the insured died on the 6th day of December following. The receipts contained no allusion to reinstatement, and was in ordinary form. No fines were requested or paid, and no notice or intimation was given that the payments were not accepted as payments of monthly premiums, as they purported to be. It is held that the facts were sufficient to support a finding that the company had waived payment of premiums on the appointed day.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1041-1056, 1058-1070; Dec. Dig. § 392.\*]

Appeal from District Court, Sedgwick County.

Action by Nettie P. Fenn against the Northwestern National Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Vermillion & Evans, of Wichita, for appellant. Blake & Ayres, of Wichita, for appellee.

BENSON, J. This is an appeal from a judgment upon a life insurance policy. The defense was based upon an alleged lapse of the policy for failure to pay a premium at the time stipulated.

The policy was issued March 17, 1902, on the life of Edwin H. Fenn for \$600, payable

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



at his death to Nettle P. Fenn, his wife, in consideration of the payment of premiums as follows: \$60 for the first year, and a like amount in each year thereafter in 12 installments on or before the 1st day of each month until 10 annual premiums have been paid, or until the prior death of the insured. The policy contained the following clauses: "All premiums are due and payable at the home office of the company, but may be paid to agents producing receipts signed by the president or secretary, and countersigned by such agents; and the nonpayment of any premium, when due, shall forfeit all premiums paid on this policy and terminate the liability of the company thereunder, except as hereinafter provided. \* \* \* This policy may be reinstated during the life of the insured, at any time within twelve months of date of lapse, by the payment of all past-due premiums, and a fine of ten per cent. per annum on such overdue premiums."

The premiums were paid each month down to and including November, 1909. Fenn died December 6, 1909, and the company was duly notified of that fact by letter. The company answered on December 13th, stating "that said policy lapsed for nonpayment of premiums on December 1, 1909, and therefore no claim can be asserted under said policy." The plaintiff, on December 17th, sent a postal money order for \$5 in a letter to the company for the December premium, which was returned with the statement that the policy had lapsed on December 1, 1909.

From the date of the policy all the monthly premiums were paid on or about the 20th day of each month, and were accepted without objection or comment. The following receipt was mailed by the company to Mrs. Fenn for the premium for March, 1904:

Northwestern National Life Insurance Company,  
Minneapolis, Minn.

Received from  
N29395. Edwin  
H. Fenn, Ft.  
Scott, Kansas.

The holder of this company's  
policy, numbered as indicated  
in the address hereon, the sum  
of \$5.00, being the monthly premium  
thereon, due March 1,  
1904.

Fred J. Sacket, Secretary.

John MacVicar, Manager, Topeka, Kansas, Local  
Collector.

Paid 3-19-1904.

Receipts in the same form were given for all the other payments.

The plaintiff alleged in her petition that at the time the policy was issued the insuring company, by its agent and authorized officers, agreed to receive the monthly payments on the policy after the payment of her husband's salary on the 20th day of each month, and that the monthly premiums were paid and received about that date in accordance with that understanding. It was also alleged in the petition: "That defendant held out and gave said Edwin H. Fenn to understand and to believe, as herein set forth, that if he continued to make payment of said premium as provided for in said

agreement of insurance, as aforesaid, on or about the 20th to the 24th day of the month in which the same became due such payments would be as effectual as though said premium was paid promptly on the 1st day of such month, and waived the time of said payments as provided in said policy, and gave time for the payment thereof until the 24th day of each month or thereafter; that said payments were made, as aforesaid, with the knowledge and consent of the president and secretary of said defendant, and the payments made, as aforesaid, were received by said company and receipted for from the home office of said company; \* \* \* that no fines of any kind or character were ever requested or required to be paid by said insured by reason of the payment of said premium, as aforesaid, but it was the practice and custom of said defendant to so accept and receive such payments."

The custom of the company in receiving the payments after the 1st day of the month, and its reason for doing so, are stated in a letter relating to the plaintiff's claim under the policy, written by its vice president and attorney in charge of the settlement of claims to the commissioner of insurance of the state of Minnesota. We quote from the letter: "Premiums on this policy were due and payable on the first day of each month. It is true, as reported to you, that the insured usually paid his premiums on or about the 20th of each month, and that those premiums were also accepted by our company; but it is also true that we had no alternative, and were compelled, under the terms of the contract, to accept those premiums, *provided* that the insured was alive at the date of the payment. The clause of the policy governing the matter of reinstatement reads as follows: 'This policy may be reinstated *during the life of the insured*, at any time within twelve months of the date of lapse, by the payment of all past-due premiums, and a fine of 10% per annum on such overdue premiums.' Reinstatement was, therefore, not optional with the company. The insured had the absolute right of reinstatement at any time within twelve months, *provided he was alive*. We would have been compelled to accept payment of the December, 1909, premium if the insured had been alive at the date when it was received at this office, which was December 22d, 1909, but we had already received notice that the insured had died on December 6th, 1909."

This letter is referred to in the brief of the attorneys for the defendant as an exposition of their contention, and the defense in this action is based upon the theory outlined in the letter. The fact that the premiums were all accepted and receipted for without objection or condition about the 20th of each month appears to afford evidence from which a waiver of the exact terms of the contract may reasonably be inferred; but



it is contended that the clause giving a right to reinstatement by the payment of past-due premiums and a fine, if paid in 12 months after default, made the payment a matter of right and acceptance compulsory. If this construction of the contract is correct, the date for payment of premiums is extended 12 months, provided death does not occur sooner. If that were the meaning intended, it is reasonable to suppose that other terms would have been used in framing the policy.

The premiums were apparently received and receipted for, not as conditions of reinstatement, but as ordinary payments. No allusion was made at any time to any reinstatement; nor was any suggestion offered that the payments were so received. Neither was the payment of a fine, which was made a condition of reinstatement, required in any instance. As a reason for not exacting the fines, it is said that the amounts were trivial, only three cents for 25 days. But as a fine was due upon each reinstatement the amount, although still small, was of some moment. If a like practice has prevailed in respect to other policies, and the interpretation contended for is correct, a considerable loss of revenue has resulted. If the defendant's contention is well founded, this policy lapsed every month, and was in force less than half the time. Such a situation could not have been in the mind of the insured, and it is difficult to suppose that the company so understood it. An occasional lapse might not challenge attention, but lapses every month for six years should, in view of the consequences claimed, have elicited some word of disapproval. While it is true that by the terms of the policy a notice of default was not required, the silence of the officers of this company through the long period covering more than 75 alleged lapses, inducing reliance upon the acceptance of payments made after the appointed day, is a course of conduct calling for some note of warning before it is summarily abandoned and a forfeiture claimed. A forfeiture will not be permitted where, by the adoption of a custom or the course of its conduct, the insurer has led the insured member honestly to believe that the assessments may be paid and will be received at times other than those specified in the contract. *Foresters of America v. Hollis*, 70 Kan. 71, 78 Pac. 160, 3 Ann. Cas. 535; *Benefit Association v. Wood*, 78 Kan. 812, 98 Pac. 219; *Hartford Life Ins. Co. v. Unsell*, 144 U. S. 439, 12 Sup. Ct. 671, 36 L. Ed. 496; *Home Protection of North Alabama v. Avery*, 85 Ala. 348, 5 South. 143, 7 Am. St. Rep. 54; *Insurance Co. v. French*, 30 Ohio St. 240, 27 Am. Rep. 443.

It is concluded that the evidence was sufficient to warrant a finding that the company had waived the strict time of payment. The demurrer to the plaintiff's evidence fairly presented the question of waiver, conceded

by both parties to be the only question in the case. No other was argued. The defendant offered no evidence, and there was no dispute concerning essential facts.

The judgment is affirmed. All the Justices concurring.

(90 Kan. 140)

PATRICK v. JOHNSON et al<sup>†</sup>

(Supreme Court of Kansas. June 7, 1913.)

(Syllabus by the Court.)

COUNTIES (§ 35\*) — RELOCATION OF COUNTY SEAT—ELECTION.

To relocate and remove a county seat where buildings costing at least \$10,000 have been erected for county seat purposes, or when such county seat has been eight years or more continuously at any one place by a vote of the electors of the county, three-fifths of the legal electors voting on the question of relocation must vote in favor thereof, but it is not essential that three-fifths of those whose names appear on the registration list shall thus vote.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 38-45; Dec. Dig. § 35.\*]

Appeal from District Court, Haskell County.

Action by James S. Patrick against Henry W. Johnson and others. Judgment for plaintiff on demurrer, and defendants appeal. Affirmed.

W. E. Hutchison and C. E. Vance, both of Garden City, Edgar Foster, of Lakin, and C. G. Dennis, of Santa Fé, for appellants. T. W. Marshall, of New Ulysses, Herbert Rhoades, of Tekamah, Neb., and H. W. Stubbs, of Santanta, for appellee.

WEST, J. The plaintiff sued to enjoin removal of the county offices from Santa Fé to Sublette. A demurrer to the petition was overruled, and the defendants appeal.

It was alleged that at a recent election in Haskell county the registration list contained the names of 513 persons, 427 voting, 245 of whom were in favor of Sublette and 182 in favor of Santa Fé. The plaintiff contends that it was not only necessary that Sublette should receive a majority of the votes registered, but also that it should receive three-fifths of the number of votes shown by the registration list. The defendants insist that a majority only of the votes cast is sufficient, and that the provision requiring a three-fifths vote is void.

Chapter 26 of the General Statutes of 1888 provided that in a case like this the board of county commissioners, on petition of three-fourths of the legal electors of the county, should order an election for relocation of the county seat; the number of legal electors to be ascertained from the last assessment rolls. A majority of the votes cast was declared sufficient. In case no place received a majority of all the votes cast, a second election was required to be held on the second Tuesday thereafter; the balloting then to be con-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 133 P.—11

† Rehearing denied July 5, 1913.



fined to the two places which had received the highest number of votes at the preceding election. Chapter 94 of the Laws of 1879 amended section 2 of this act, making slight changes in the number of petitioners required, but none in the number of votes required. Chapter 89 of Laws of 1881 provides for the "registration of electors at elections for permanent location or relocation of county seats," and requires the preparation of a registration list before the holding of an election; such list to be used on election day and to constitute and be known as the register of election, the name of each voter thereon to be checked as his ballot is cast. No one whose name is not on the list can vote unless he furnishes proof to the election judges of his residence and right to vote. The list and poll books are to be returned together to the township and a duplicate to the county clerk. A significant feature is the requirement that the list be prepared "on Tuesday, three weeks preceding any election," and revised "on Tuesday of the week preceding the said election"—significant because the act of 1868 is still unchanged and still requires the election to be held within 50 days after presentation of the petition and the commissioners are still required to give 30 days' notice. Hence it cannot be plausibly contended that the registration list was meant for petition purposes, as it need not and cannot be prepared until after the 30 days' notice has begun, and still longer after the petition has been presented. In view of the language used in this act and what was said in County Seat of Linn County, 15 Kan. 500, there is ground for arguing that this registration list must have been intended for the purpose of ascertaining in an official way who the qualified electors are. It was said in the syllabus and repeatedly in the opinion, in substance, that, as the Legislature has made no provision for a registration, it might provide that the place receiving a majority of the votes cast should become the county seat. Now that it has so provided, there is force in the contention that this list is to be a roster of the legal electors who alone have the right to vote. Added evidence of such intent is found in the provision of section 1 of the act of 1883 that no proceeding or pretended election for the relocation of any county seat had or held since the taking effect of the act of 1881 "shall be deemed or held to have been an election within the meaning of this act unless registration was had, as required by the terms of said chapter eighty-nine." It must be conceded, however, that the Legislature has nowhere expressly declared, and we hold it unnecessary, that the majority of legal electors shall be determined by an examination of this list, as there are other abundant and sufficient reasons for requiring registration which may have actuated the law-makers.

Chapter 91, Laws of 1883: "An act to amend section 1 of chapter 94 of the Session laws of 1879 and sections 4 and 7 of chapter 26 of the General Statutes of 1868 relating to the location and removal of county seats"—so amended section 1 of the act of 1879 as to require "a vote of three-fifths of the legal electors of such county to relocate the county seat and remove it from such place." Section 4 of the act of 1868, providing that for the purposes of that act the number of legal electors should be ascertained from the last assessment rolls, was amended by reenactment and by adding the words: "And no petitioner shall be deemed a legal elector unless he be an elector and his name appears on said rolls." This language shows conclusively that, for the purpose of petitioning, the signers must be legal electors and their names must also be on the assessment rolls. Section 7 of the act of 1868, relating to a second or subsequent election, was amended in a way not material here.

The defendants' contention that the act of 1883 is void is based on the proposition that its title purports to amend only certain sections of former acts specifically designated, and that the section which was amended by inserting the three-fifths provision not only made no reference to the requisite number but was itself an act to amend a specific section of a former act referring entirely to petitioning for and calling elections and not to the determination of their results; that, in so far as the act purports to go outside of the question of calling an election, it goes beyond the limits of its title; that it does not purport to be a general act on the subject of location and removal but only to amend certain specified sections which never had any reference to the majority necessary for a relocation. The provision of section 6 of the original act that the place receiving the majority of all the votes cast should be proclaimed the county seat is left apparently unamended and unrepealed. In other words, we have an original act providing for the location and removal of county seats upon a majority of the votes cast at an election therefor. One of its sections relating only to the petition and call for election is amended, and this in turn by a subsequent act whose title gives no hint of adding the further subject of the requisite vote to insure a removal. To the writer there is much force in the suggestion that this subject is not expressed in the title of the act of 1883, which is not an act concerning the location and removal of county seats, but an act to amend certain specific sections relating to that subject, which sections have nothing whatever to do with the necessary number of votes. But the court is of the opinion that this is too literal and limited a construction, and that the manifest purpose of the Legislature was to avoid frequent county seat controversies by requiring in such cases as this a three-fifths vote, and that the



subject embraced in the act of 1883 is germane to the original statute amended and amounts to the latest expression of the legislative will. Another thing of significance is the fact that, by the express provision of this act, a three-fifths vote is required only in case buildings costing at least \$10,000 have been erected "or when such county seat has been eight years or more continuously at any one place by a vote of the electors of any county," a condition not found in any previous statute and evidently inserted for the purpose of meeting some particular situation contemplated by the draughtsman of the bill, and the situation arising here as shown by the allegations of the petition.

In *Stephens v. Ballou*, 27 Kan. 594, at page 601, holding that the amended section will not modify or repeal by implication any other sections of the former act unless it is clear beyond all reasonable doubt that such is the case, it was said that, if the provisions of the old and new acts can be reconciled by any possible mode of interpretation or construction so that each can be given effect under any circumstances, it should not be held that one overturns the other but both should be given effect. It would seem, therefore, that, in counties not coming within the provisions just mentioned, a majority will suffice while in others a three-fifths vote is indispensable, so that the different provisions of the two acts may be given force and meaning as different situations are presented.

In *State v. Thomas*, 74 Kan. 360, 86 Pac. 499, certain sections of an act giving a jury in contempt cases and restricting the power of judges therein were sought to be amended under a title referring to the former act as "one relating to contempt of court and proceedings therein," but correctly naming the chapter. It was held that this reference to the former act, while somewhat inaccurate, was good enough to keep the searcher for the law from going astray.

The argument is advanced that, as silence gives consent, the electors who did not vote presumably had no objection to the relocation of their county seat, and that the consent of a majority of the legal electors is sufficiently shown by a majority of those actually voting. This rule was suggested in the Linn County Case but not announced. A somewhat analogous proposition was favorably considered in *Com'rs of Marion County v. Winkley*, 29 Kan. 36.

In *State ex rel. v. Echols*, 41 Kan. 1, 20 Pac. 523, the statute required a majority of the votes cast, which was held to mean the votes cast on that particular proposition only.

In the Case of *Davis*, 62 Kan. 231, 61 Pac. 809, these decisions were referred to and not disturbed, but it was said: "The way for an elector to signify his favor for a candidate for office, or for a proposition to be voted on, is to cast a ballot for him or for it. \* \* \*

He may be bound in some cases by the action

of the majority by failing to dissent from it, but not where the law, in order to bind him, requires the expressed assent of a majority of the whole of an ascertainable number, which is the case under the law we are now considering." The act there considered provided that, "if a majority of the electors \* \* \* voting at such election shall favor the creation" of the court, it should be established.

In *Gardner v. State*, 77 Kan. 742, at page 749, 95 Pac. 588, at page 591, the act under consideration required a majority of the voters of each district to vote to unite in order to form a union school district, and it was held that a mere majority of those attending the meeting was not sufficient. It was said: "In district No. 7 just half the voters voted to unite with district No. 8. They could not bind their neighbors. It required a majority, and the proposition lost."

While there are many decisions of other courts in line with the argument suggested, including *Cass County v. Johnston*, 95 U. S. 360, 24 L. Ed. 416, *St. Joseph Township v. Rogers*, 16 Wall. 644, 21 L. Ed. 328, *Carroll County v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517, and *Taylor v. McFadden*, 84 Iowa, 262, this court has never expressly followed this rule, but in each case has endeavored to ascertain the real intent by the language used.

In *State ex rel. v. Sutterfield et al.*, 54 Mo. 391, it was decided that under a constitution prohibiting the removal of a county seat unless two-thirds of the qualified electors should vote in favor of such removal, and providing for the registering of voters, and a statute requiring a two-thirds vote of the legally registered voters, two-thirds of the votes cast would be insufficient unless they numbered two-thirds of all the qualified electors of the county. It was said in the opinion (54 Mo. 396) that the general view is that failure to vote indicates acquiescence, but many English and American decisions are unsafe guides in construing local constitutional and statutory provisions.

A novel situation was presented in *County Seat of Osage County*, 16 Kan. 296. An election was held to change the county seat from Burlingame, which received no votes. Three other towns were voted for, but none received a majority. A second election was ordered and the voting restricted to the two places which had received the highest votes. One received 1,131, the other 1,049, and a third 298, so that none received an actual majority of the votes cast. The commissioners ignored the vote for the third town and declared the higher of the other two the county seat. This was held correct on the theory that each election clearly showed the consent of a majority to change from the present county seat. No question seems to have arisen as to the majority of the legal electors.

The act of 1883 provides that: "It shall



require a vote of three-fifths of the legal electors of such county to relocate the county seat and remove it from such place." Whether or not this necessitates a favorable vote by three-fifths of all the legal electors of the county, it certainly does require a favorable vote by three-fifths of those actually voting on the question, and means the same as if it read: "It shall require a vote to relocate by three-fifths of the legal electors."

As Sublette failed to obtain the required vote, the county seat cannot be removed.

The order overruling the demurrer is sustained. All the Justices concurring.

(89 Kan. 638)

**HOLMES v. CULVER et al.**

(Supreme Court of Kansas. June 7, 1913.)

*(Syllabus by the Court.)*

**1. LIMITATION OF ACTIONS (§ 37\*)—FRAUD—WHAT CONSTITUTES.**

An action to establish the existence of a partnership between the plaintiff and the defendant, to establish the plaintiff's interest in property claimed to belong to the partnership, and for an accounting is not one for relief on the ground of fraud, and is not governed by the statute of limitations relating to actions of that character.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 182-186, 477; Dec. Dig. § 37.\*]

**2. ATTORNEY AND CLIENT (§ 123\*)—PURCHASE OF JUDGMENT.**

The rules of law stated in *Yeamans v. James*, 27 Kan. 195, relating to the purchase by an attorney from his client of the subject-matter of his employment, approved and applied.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 239-245, 243, 249; Dec. Dig. § 123.\*]

**3. TRIAL (§ 139\*)—DEMURRER TO EVIDENCE.**

The evidence for the plaintiff examined, and held to be sufficient as against a demurrer to it interposed by the defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.\*]

**4. TRIAL (§ 156\*)—RULING ON DEMURRER TO EVIDENCE.**

Although the Code does not so require, good practice requires that when a demurrer to the evidence is sustained, the court specify what the defect in the proof is, if an essential fact has been omitted, and what its view of the law is if the question be as to the law which governs.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 354-356; Dec. Dig. § 156.\*]

Appeal from District Court, Woodson County.

Action by S. C. Holmes against J. C. Culver and others. From judgment for defendants, plaintiff appeals. Reversed and remanded for new trial.

S. C. Holmes and G. R. Stephenson, both of Yates Center, for appellant. Lamb & Hogueland, of Yates Center, S. A. Gard, of Iola, and J. C. Culver, of Yates Center, for appellees.

BURCH, J. The action was commenced by the plaintiff to establish his interest in a tract of land as a partner of the defendant, for an accounting, and for other relief. The court sustained a demurrer to the plaintiff's evidence and rendered judgment against him, and he appeals.

The plaintiff is an attorney at law, and in the year 1901 brought a suit to recover judgment upon a promissory note and to foreclose a mortgage securing it for a client in Pennsylvania. After judgment had been rendered in favor of the client, the plaintiff procured an assignment of it to be made to the defendant, who furnished the consideration therefor. The arrangement between the plaintiff and the defendant was that the land involved in the suit should be purchased at the foreclosure sale, the title to be taken in the defendant's name and the plaintiff to perform the necessary legal services. Thereafter the land was to be partnership property, the plaintiff and the defendant to share revenues and expenses equally. When a satisfactory price could be secured, the land was to be sold. Net revenues from the land, including the proceeds of any sale which might be made, were to be applied, first, to reimburse the defendant for the sum advanced to buy the judgment, without interest. After that the profits were to be divided. This contract was carried out by both parties until the year 1906, when the defendant deeded the land to Hiram Waymire without the plaintiff's knowledge or consent. Afterwards Waymire died, and his heirs are parties to the suit, which was commenced in 1909.

[3] It is elementary that when considering the demurrer the court was not at liberty to weigh the evidence. If the various elements of the cause of action pleaded were supported by any evidence favorable to the plaintiff, or from which inferences favorable to the plaintiff could be drawn, the case should have been disposed of on its merits.

Without going into details it is sufficient to say that the evidence was ample to prove partnership. It was also sufficient to warrant the inference that Waymire took title with knowledge of the plaintiff's rights. The plaintiff's account of a conversation between himself and the defendant, occurring in Waymire's presence at his place of business before he received his deed, the terms of the deed itself, and the relations shown to have existed between Waymire and the defendant were sufficient to sustain a conclusion that Waymire was not an innocent purchaser.

[1] It is argued in support of the court's ruling that the action was one for relief on the ground of fraud, and consequently that it was barred by the two year statute of limitations applying to that subject. The Waymire heirs did not plead the statute of limitations. The defendant did plead the bare conclusion that the action was barred.



(89 Kan. 742)

## MOTTIN v. BOARD OF COM'RS OF LEAVENWORTH COUNTY.

(Supreme Court of Kansas. June 7, 1913.)

*(Syllabus by the Court.)*

## 1. BRIDGES (§ 21\*)—REPAIRS—COUNTIES.

Necessary repairs upon a county bridge, requiring an expenditure not exceeding \$100, may be made under a contract with a committee of the board of county commissioners, or any suitable person authorized by the board to make such repairs.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 48-55; Dec. Dig. § 21.\*]

## 2. BRIDGES (§ 21\*)—REPAIRS—ESTIMATE OF COSTS.

Estimates made by a deputy county surveyor, who is authorized by the board to make them, or by a committee of the board having the matter in charge, or, which having been made, are approved by the board, are a sufficient compliance with the statutory provisions requiring that estimates for such work shall be made.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 48-55; Dec. Dig. § 21.\*]

## 3. BRIDGES (§ 21\*)—REPAIRS—CLAIM—RECORDS OF REPORTS.

The careful conduct of public business by a county board requires that a record shall be kept of the reports of its committee, surveyor, or other person delegated to make repairs upon bridges, and the action of the board thereon; but an otherwise valid claim is not defeated by the absence of a record of such proceedings.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 48-55; Dec. Dig. § 21.\*]

## 4. BRIDGES (§ 21\*)—CLAIM FOR REPAIRS—APPROVAL—PROOF.

The approval of such work by the board of county commissioners may be shown as a fact, although no formal motion is made, whether recorded or unrecorded.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 48-55; Dec. Dig. § 21.\*]

## 5. MUNICIPAL CORPORATIONS (§ 167\*)—OFFICERS—AUTHORITY.

"It is a general rule that persons dealing with the officers of a municipal corporation must ascertain the nature and extent of their authority; but, in matters which are the proper subjects of municipal action, where there is no provision of law requiring that such authority shall be given by formal action of the governing body, it may be shown by a course of conduct which induces others honestly to assume and rely upon its existence." *Roberts v. St. Marys*, 78 Kan. 707, 93 Pac. 211.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 375, 379; Dec. Dig. § 167.\*]

*(Additional Syllabus by Editorial Staff.)*

## 6. TRIAL (§ 156\*)—DEMURRER—EVIDENCE—HEARING.

On a demurrer to the evidence, the court can consider only whether there is any competent evidence to prove essential facts, and cannot determine the weight or reconcile conflicting testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 354-356; Dec. Dig. § 156.\*]

Appeal from District Court, Leavenworth County.

Action by J. F. Mottin against the Board of County Commissioners of Leavenworth County, Kansas. From a judgment for de-

Treating the conveyance to Waymire as a fraud upon the plaintiff, there was no evidence to show that he delayed action more than two years after discovering it. But beyond this, the action was not one for relief on the ground of fraud. It was one to establish the partnership, to establish the plaintiff's interest in the land, and for an accounting, and the right to maintain such an action was not qualified by either the presence or absence of fraud.

It is further argued that no right to relief was established because the value of the land was not proved. Since there was evidence to show that Waymire was not an innocent purchaser, the plaintiff was entitled to recover one-half the land, whatever its value, and to have rents and profits accounted for which the proof tended to show the defendant had received.

[2] Finally, it is argued that the plaintiff violated his professional duty to his client in buying the judgment, and consequently that the law will leave him where it finds him. The rules applicable to transactions of this character are well stated in the first three paragraphs of the syllabus of the case of *Yeamans v. James*, 27 Kan. 195. The proof was sufficient to show that the sale of the judgment was beneficial to the owner, and that a judgment and adequate price was paid. The plaintiff's account of his correspondence with his client was not very satisfactory, but the fair inference to be derived from the testimony is that no advantage was taken of her, and that her interests and desires were both promoted.

No other deficiencies in the plaintiff's evidence having been pointed out, the judgment of the district court is reversed, and the cause is remanded for a new trial.

[4] It is quite possible that the particular matter which led the trial court to sustain the demurrer to the evidence has not been touched upon, because there is nothing in the record to indicate the basis of that ruling. When a demurrer to the evidence is sustained, the court ought to specify what the defect in the proof is, if an essential fact has been omitted, and what its view of the law is if the question be as to the law which governs. It would be much fairer to the parties and to this court if the practice suggested were adopted. In some cases the necessary proof might be supplied. In others an appeal might be forestalled. Should an appeal be taken, the expense might be greatly reduced, and, besides, the parties and this court would not be left in the dark. It is true that the Code does not impose this requirement upon district judges, but all those who have the opportunity ought to do whatever they can, in a legitimate way, to improve the administration of justice without waiting for tardy acts of legislation. All the Justices concurring.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



pendant, plaintiff appeals. Reversed, with directions.

A. E. Dempsey and F. P. Fitzwilliam, both of Leavenworth, for appellant. Lee Bond and M. N. McNaughton, both of Leavenworth, for appellee.

**BENSON, J.** The question to be decided arises upon a demurrer to evidence. The plaintiff sued upon claims for repairing bridges. The plaintiff's evidence tended to prove the following facts: The board of county commissioners had appointed M. C. Kennedy, one of its members, a committee on roads, bridges, and poor for the first commissioner district, and J. Bleakley, another member, a like committee for the third district. These committee appointments were entered on the journal of the board. A deputy county surveyor, who is a civil engineer of 25 years' experience, was directed by the board to make estimates on bridge work when repairs were contemplated, inspect the work after it was done, and report to the board. He is referred to in the testimony of members of the board as the engineer. In general he performed the duties just referred to. When there was a complaint or report that repairs were needed upon a bridge, the deputy surveyor, who for brevity will be referred to as the surveyor, was directed, either by the board, or the commissioner, acting as a committee in the district where the bridge was located, to make an estimate of the cost. In some cases members of the board accompanied the surveyor. Estimates were made accordingly, and when the repairs could be made for less than \$100, a contract was let. Upon proceedings of this character repairs were made by the plaintiff upon many bridges in the year 1908, for which over 50 bills were presented to the board, ranging from \$12 to \$99 in amount. About one-half of the bills were presented in November, 1908, and the others about two years later. One of the bills was in the following form:

August 27th, 1908.

The County of Leavenworth, to J. F. Mottin, Dr.  
Repair to Bridge No. 260 per estimate..... \$99.00  
O. K. H. A. Perkins, Deputy Surveyor.

A proper verification was added, and the following estimate was attached:

Leavenworth, Kansas, June 18, 1908.

To the Honorable Board of County Commissioners  
of Leavenworth Co., Kansas—Gentlemen:

I hand you herewith estimate of repairs on Bridge  
No. 260, over Mud Creek, Reno Township.

12 pcs. 2x12x14.

8 pcs. 3x12x16.

2 pcs. 8x8x16.

6 piles 16 in.

Repair to Hand Rail..... \$99.00.

H. A. Perkins, Dep. Co. Sur.

The other bills were in the same form, with like verification, and estimates were attached with similar specifications. These estimates were attached to the bills filed in

the year 1908 by order of the board after they had been filed. Estimates upon the bills filed in 1910 were attached before filing. The plaintiff testified that all the work was done in the year 1908, and that the bills withheld until the later date were not filed earlier because the board requested him to delay presentation. All were presented within the statutory period of limitation. The estimates made by the surveyor were entered in a book kept for that purpose, kept in his office, which was destroyed in a fire which burned the courthouse.

The usual procedure in making repairs appears from the following quotations from testimony:

"If a bridge was reported to me to be dangerous and needed repair, I reported it to the board. Before doing that, I would take a ride over in the neighborhood where the bridges were, and I reported them to the board then, and would be instructed to go to work and have them fixed, notifying the engineer to make an estimate under the limit. The limit was \$100. We advertised for the lowest bidder. Q. I will ask you to state if you ever took these matters before the board as a board. A. I think on three occasions. Q. State what you said to the board at that time. A. I believed that the bills were due, and knew they were never paid, and I asked that the bills be paid, and I made a motion twice to that effect. Q. Did the board as a board have knowledge of this work? A. The major portion of it did. Mr. Bleakley used to be absent on account of sickness. Mr. Short and myself discussed these matters at these meetings. We made it a rule that on amounts over \$100 must be advertised and let to the lowest bidder. So our contract price was always under \$99 for any work that was done that was not advertised and let to the lowest bidder. We would have the engineer go out and make an estimate. It would be impossible to tell how much grading and material was needed. Then we would instruct him to see some bridge men, or see them ourselves, and tell them to do the work and not to exceed that amount. If at times he didn't use all the material that was on the list, there was a deduction, and the engineer had authority to allow more material up to \$100, but not more. \* \* \* Q. Was there any objection made that these bills were not itemized sufficiently? A. I believe on one or two occasions there was something wrong, perhaps they were not signed up properly, and he would draw our attention to it, and we would have them rectified. \* \* \* We referred to the deputy surveyor as the engineer—we would give him instructions after the work was brought before us—we would quite often give him instructions to have this work done. The parties that were interested in the bridges notified us that the bridges needed repairing; they would come in and notify



us regarding bridges being dangerous and out of repair, and we would instruct the deputy surveyor or county surveyor to go out and make an estimate of the work and report to us. I will not say that this was done in each instance. At times we would tell him to have the work done, and at other times we would instruct somebody else after looking at the estimate. One of those courses was pursued in all bridge work. Q. I will ask you to state whether or not the work that is indicated in these bills was authorized by the board in the manner above indicated? A. Yes, sir."

Bleakley: "I would learn of a bridge out of repair, maybe it would be on a rural route. Usually when we met as a board I made known to the board what I had heard, and the matter was referred back to me, being chairman of the committee, unless there was some objection. I don't recall any time when objection was made. That course was pursued in relation to those bills in controversy. I was advised of and knew of the work represented by these claims in my district. That work was formally discussed by the board at regular meetings in my presence. The first steps that were taken were taken at a meeting. The full board was present. I suppose these specific bridges in controversy here were among the bridges discussed. \* \* \* The matter was up before us on several occasions because I didn't know whether to go ahead or stop, but they were clamoring for bridges—some bridges had been down the year previous, which was very annoying to the farmers, and they wanted the board to repair them. There was a great necessity for work in my district for a year or two previously. I don't remember any particular instructions I gave to Mottin, but on more than one occasion I instructed the county engineer to keep track of these bridges and repair the principal ones first, and if he found a bridge with a couple of planks broken, to have these placed in the bridge, and hand in the bill. We also instructed the trustee of each township that when they found a bridge with a plank, or more than a plank, out—a county bridge—to renew it, and at the end of the month to bring in their bill to the county. That was done to save the expense of sending the engineer out every time to look after a bridge that only amounted to a few dollars. The county surveyor reported a great many times to me, and made estimates a great many times. Sometimes the chairman of the board would take the estimates when he was going to look at them himself, other times they were placed on record. Sometimes the engineer may have kept them until the work was done. The bridge situation in my district in 1908 was very bad, and the same condition existed in the first district. I think there was scarcely a time when we met as a full board but what we discussed these principal bridge

matters, because they gave us more annoyance than any other matter that was brought before us. We took the matter up informally almost every time we met. Q. Did you give any directions to Mottin regarding this bridge work, or did the board in your presence? A. No, sir; we gave them to the engineer."

Perkins: "Q. What did you do when you made these estimates; how did you make them, and what did you do with them after they were made? A. I went to the bridge and listed the material that was necessary, and what work I thought was necessary to do the work, and I made an estimate of it, and up until a year or so ago these estimates were usually, unless it was where they had advertised, the estimates I handed to the commissioner in whose district the work was done. Q. In your direct examination you said these estimates attached to these bills you took from your field books? A. Yes, sir. These were copied by me off the record in the field books and attached to these bills and handed to the county commissioners. Q. Were the estimates called to the attention of the county commissioners? A. Certainly; I hand them either to the commissioners or to the county clerk. Q. You first made your estimate from your field books? A. Yes, sir; after that I attached them to the bills, took them to the county clerk or the county commissioner, and left them there. Q. I will ask you to state if there was any of this work done without previous estimate being made? A. No, sir."

[1, 2] The statute provides that: "When a bridge built by the county is out of repair, the board shall estimate the cost of repairing it, and make an appropriation therefor; and may require the township trustee of the township, or the overseer of the road district in which the bridge is located, or some other suitable person, to proceed immediately to repair the same, as the board may direct: Provided, that if the costs of repairing the same exceed one hundred dollars, then like preliminary steps shall be taken as in building a bridge." Gen. Stat. 1909, § 667. It appears that the commissioner for the particular district, as a committee, directed the surveyor to make the estimates and to let the contract when the expenditure would not exceed \$100. The surveyor, and possibly the committee in some instances, contracted with the plaintiff for the repairs referred to in the bills under consideration. On completion of each job the surveyor examined and approved it. The committee in charge, and in some cases other members of the board, knew of the work as it progressed and informally reported it to the board in session, which was thus kept generally informed. Such work, both before and after it was done, was considered at frequent meetings of the board, and no objection appears to have been made to the contracts, course of busi-



ness, or the work done. No record, however, was kept of these matters. It appears that the board, without particular directions as to each bridge, authorized the committee and the surveyor to proceed in the manner testified to by them, and it is at least a reasonable inference that it was intended that the necessary expense so incurred should be paid. Similar bills for repairs, made in previous years by authority of like proceedings, had been allowed to the plaintiff. The repairs specified in the bills in controversy were made, and were of the reasonable value charged therefor.

It is insisted by the defendant that the evidence is insufficient to sustain the claim that a commissioner, acting as a committee, authorized the repairs, or knew that they were being made, and, further, conceding in a general way that he knew the facts, it is insisted that the county is still not liable, because there was no authority from the board itself acting as a tribunal. It is also contended that the surveyor had no authority to bind the board by his contracts. It is doubtless true that such expenditure to be legal must either be authorized or ratified by the board. It is not, however, practicable for the commissioners to visit the locality of every bridge out of repair and make specific contracts as a board. It is sufficient if such contracts are made by its authority in the first instance, or ratified by the board afterwards. A failure to take prompt action might lead to disastrous results through resulting accidents. The act done pursuant to the delegation ought, however, to be reported to the board.

[3, 4] The careful conduct of public business requires that a record shall be kept of such authorizations and reports, but the holder of an otherwise valid claim should not be defeated by the absence of a record over which he has no control. Neither is it necessary that the delegation of authority to make repairs, or the approval of work done, should be by a formal motion, recorded or unrecorded. Where repairs are so made and reported to the board, approval is a question of fact. In this connection a like course of business pursued for a long time, and the regular payment of similar bills may also be considered. However, the safeguards of the law should not be broken down, nor claims allowed against a county, merely because the board has failed to express disapproval, but ratification or approval may be found from evidence which fairly proves the fact. This responsibility, as in other cases, rests upon the court or jury trying the issue.

[5] It was held in *Roberts v. St. Marys*, 78 Kan. 707, 98 Pac. 211: "It is a general rule that persons dealing with the officers of

a municipal corporation must ascertain the nature and extent of their authority, but in matters which are the proper subjects of municipal action, where there is no provision of law requiring that such authority shall be given by formal action of the governing body, it may be shown by a course of conduct which induces others honestly to assume and rely upon its existence." Syl. This principle is applicable to the proceedings of county commissioners as well as city councilmen.

Analogous questions are considered in *Sullivan v. School District*, 39 Kan. 347, 18 Pac. 287, *Meistrell v. Ellis County*, 76 Kan. 319, 91 Pac. 65, and *Watkins v. School District*, 85 Kan. 760, 118 Pac. 1069.

These views are in harmony with those expressed in syllabus No. 2 of *State v. Kennedy*, 82 Kan. 373, 108 Pac. 837, although the issue there was different, and the defense made here might prevail and yet no member of the board be subject to removal.

It will be observed that under the statute the board had authority to authorize any suitable person to repair the bridges where the cost did not exceed \$100. This duty could be delegated to a member or to the surveyor. If they did so authorize the committees, and directed that estimates should be made by the surveyor, or if in pursuance of a recognized course of business the committee gave such directions, or if the estimates having been made, by direction of the committee, were approved by the board, then the statutory provision for an estimate was sufficiently complied with.

[8] It is argued that the cross-examination of the witnesses showed that the contracts, estimates, and inspection were really not made as testified to in chief, and that the contractor had no specific knowledge of the work upon particular bridges, and that the evidence generally was insufficient to prove the claims. Other considerations are urged which appear to relate to the weight of the testimony, and are not pertinent to a demurrer to evidence, where the court can only consider whether there is any competent evidence to prove essential facts. The court cannot determine the weight or reconcile conflicting testimony upon a demurrer. *Holmes v. Culver*, 133 Pac. 164.

It is concluded that the demurrer was erroneously sustained. The district court should find from all the evidence whether the facts essential to a recovery within the principles herein stated are established as to these claims, or any of them, and award judgment accordingly.

The judgment is reversed, with directions to overrule the demurrer and proceed with the cause. All the Justices concurring.



(38 Kan. 700)

MURPHY v. FAIRMOUNT TP. et al.<sup>†</sup>  
(Supreme Court of Kansas. June 7, 1913.)

(Syllabus by the Court.)

**INJUNCTION (§ 79\*)—HIGHWAY OFFICERS—INJURY TO ABUTTING LAND.**

The commissioners of highways are vested with power to exercise their judgment and discretion in planning and constructing a culvert. But when such culvert has been constructed with an opening so insufficient that surface water is thrown back upon the land of an abutting owner to his repeated damage, rendering the structure a continuing nuisance, it is the duty of such commissioners, upon proper notice and demand, to abate the same by remedying the defect; and upon failure they will be required so to do by judicial action.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 149; Dec. Dig. § 79.\*]

Appeal from District Court, Leavenworth County.

Action by John Murphy against Fairmount Township and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

A. M. Jackson, of Leavenworth, for appellant. Lee Bond, of Leavenworth, and M. N. McNaughton, of Tonganoxie, for appellees.

WEST, J. Plaintiff sued the township and township officers to recover damages alleged to have been caused by overflow on account of a culvert constructed with an insufficient passageway for water, and also prayed that the defendants be permanently enjoined from maintaining such culvert in its present defective condition. A demurrer to the plaintiff's evidence was sustained, and, the defendants electing not to introduce any testimony, the injunction was denied, and the plaintiff appeals.

The question of damages is ruled by *Fisher v. Township*, 87 Kan. 674, 125 Pac. 94, 41 L. R. A. (N. S.) 1074, and cases there cited, holding that subordinate agents of the state are not, under the circumstances here shown, liable for injuries caused by their negligence.

The plaintiff insists, however, that he is entitled to an injunction on the theory that the township and its officers should not be allowed to maintain a culvert with an opening so small that damages from overflow are likely to occur from time to time. The defendant insists that there was no testimony proving the danger of such injury, and that the plaintiff, without protest, permitted the work to go ahead and the money for the culvert to be expended, and should not now be heard to demand destruction and rebuilding.

The plaintiff testified that the water backed up above the culvert and extended about 20 rods north thereof, ran over the road and down across his land, and had cut a channel 30 or 40 feet from the main channel, which started in 1909 after the building of the cul-

vert; that in May, 1909, when it was raining, half of the water was not going under the culvert or into the main channel until after it backed up and flowed over the road north of the culvert; that to his knowledge the water had come across nine times since the culvert had been built, the rains at these times being ordinary ones; that he had no trouble with the water before the culvert was put in, except once in 1907, when trouble arose from an obstruction in a ditch; that when there was a wooden bridge at the place before the culvert was constructed it had about three times the capacity; that he never lost any crops before the culvert was built; that since its construction about a foot of the surface had been washed off over about four acres. A civil engineer, who had been county surveyor, testified that the area in the opening of the culvert was 39 square feet, while the ditch on the lower side was 200 square feet, in area; that the drainage area above the culvert is about 400 acres; and that to drain 640 acres the opening should be 100 square feet. Other witnesses testified as to the overflow and damage.

As to the right of plaintiff to maintain injunction, one theory is that the highway commissioners act only as a local branch of the state government, and not being convicted of fraud they are not liable for having exercised their judgment in reference to the size of the opening in the culvert. The other theory is that the landowner rightfully presumed that the township officers would not only do their duty free from fraud, but free from patent blunders and mistakes in engineering, so that the culvert would not amount to a continuing nuisance to him; that, having a right thus to assume, he naturally and properly refrained from interfering with the progress of the work, and made no complaint until it was ascertained that the opening was so small that the culvert necessarily brought upon him serious damage, which damage must continue to occur so long as the structure remains in its present inadequate condition; that, although he may not, under the settled rules of law, be entitled to recover damages for the injuries already sustained, there is no reason why he may not enjoin the continuance of such nuisance.

In *Oliphant v. Com'rs of Atchison County*, 18 Kan. 386, a purchaser of land over which a road was used and traveled, but which he claimed had never been legally appropriated to public use, attempted to fence up such road, when the authorities resisted his attempt, and it was held that injunction was a proper remedy to restrain their further interference. In *Township of Quincy v. Sheehan*, 48 Kan. 620, page 623, 29 Pac. 1084, page 1085, holding that a township is not liable under the statute for loss arising from failure to erect and maintain water marks at fords,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied July 5, 1913.



on the ground that such liability could only be created by the city, it was said: "The neglect of the overseer to perform these duties may create a liability against him for injuries resulting from his failure; but we do not think that it was intended to impute such negligence to the township, nor impose a liability upon the township. \* \* \*" It will be noticed that in this case the township is the party defendant, and also the board of trustees and board of commissioners of highways. In *Shanks v. Pearson*, 66 Kan. 168, page 170, 71 Pac. 252, it was decided that road overseers, while acting within the scope of their duty, have a very broad discretion, with which the courts will not interfere, except in cases of fraud "or some manifest or gross injustice which would constitute an abuse of discretion." It was also held that in an action to enjoin certain repairs to be made on a public road it was competent to show that they would operate as a special injury to another, and were being made to subserve private and personal ends, as tending to show bad faith. In the opinion it was said: "If there are several methods of repairing a road, the overseer may select any one of them that is within reason, although another may be preferable. The general rule is that when such officers act within the scope of the power conferred on them there will be no judicial interference with their discretion and judgment, in the absence of fraud or some manifest or gross injustice which would constitute an abuse of discretion." 66 Kan. 170, 71 Pac. 252. In *Silver v. Clay County*, 76 Kan. 228, page 229, 91 Pac. 55, an action for damages for the removal of a bridge by the county commissioners, while denying the relief sought, it was said: "According to the allegations of the petition, the removal of the bridge by the county commissioners was illegal, and imposed great hardship upon the plaintiff, and he would, perhaps, under the authority of *Greeley Township v. Com'rs of Saline County*, 26 Kan. 510, 514, have been entitled to enjoin the act, or may even yet not be without a remedy." In *Shawnee County v. Jacobs*, 79 Kan. 76, 99 Pac. 817, 21 L. R. A. (N. S.) 209, it was alleged that the county board had so constructed a bridge as to cast water upon the plaintiff's land, and it was held that he could not recover damages under the statute. Gen. Stat. 1901, § 579; Gen. Stat. 1909, § 658. On rehearing it was expressly said that the pleadings were in such condition that it was impossible to determine whether or not the plaintiff was entitled to an injunction, and it was suggested that the remedy, if any, was in the district court. In *State v. Railway Co.*, 81 Kan. 430, 105 Pac. 704, 28 L. R. A. (N. S.) 1082, it was held that an abutting owner could not enjoin the construction of a subway in a city which would injure him, for

the reason that his proper remedy was an action for consequential damages.

Section 9633 of General Statutes of 1909 provides concerning the highway commissioners, that "the work on roads shall be done timely, and in accordance with the best-known methods of road-making—by proper grading, and thorough drainage by tile or otherwise, as may be expedient, or by the application of gravel, rock, or other material." Section 9634 provides: "In order to insure efficiency, they may employ a general superintendent outside their own body to work and execute their orders, or they may let contracts, appoint overseers, employ laborers, or such other agencies as they may deem expedient and most to the interest of the township." If any inference is to be derived from this language, it is that the commissioners are not to build culverts with utter disregard of the effect they will have on inhabitants of the township owning adjoining lands.

The testimony clearly tended to show that already a foot of soil covering considerable ground has been taken from the plaintiff; that his crops have been injured; and that such injuries have been occasioned by the character of the culvert in question. In *Young v. Com'rs of Highways*, 134 Ill. 569, 25 N. E. 689, it was held that the discretion of the commissioners could not be interfered with, unless they invade some private right of a citizen; that when they undertake to drain a public highway they are governed by the same rules as adjoining landowners who seek to drain their own lands, and they have no right to divert the water from its natural course and turn it upon the land of another, and if they attempt to do so they may be enjoined at the suit of the owner. In *Bills v. Belknap*, 36 Iowa, 583, page 586, it was held that a road supervisor may be enjoined from removing trees standing in the highway in front of the owner's premises, unless such removal is demanded by public necessity, and that his determination is not so far judicial that it cannot be reviewed and controlled. In the opinion the court said: "He may certainly be so controlled in his acts, as an officer, that the property of the citizen may not be taken or destroyed when the public interest does not demand it, and he may be restrained from inflicting injury, wantonly or unnecessarily, to any one, when attempted under color of his office." In *Bolton v. McChane*, 67 Iowa, 207, 25 N. W. 135, it was decided that equity will enjoin road supervisors from removing or interfering with fences, hedges, water courses, and the like in discharge of their official duties. In *Frances v. Town of Sharon*, 143 Iowa, 730, page 732, 121 N. W. 523, page 524, it was ruled that the construction of culverts in streets of a city, so as to carry the water and filth from private drains upon the land of an abutting owner, is a nuisance for which the



city is liable in damages. In the opinion it was said: "The creation and maintenance of a nuisance is very clearly not a governmental function, and the authorities are practically of one voice on the subject." This court has gone only to the extent of holding that counties and townships, in instances like this, are not required to respond in damages for injuries already caused; not that they may be permitted to continue a nuisance, or that they may not be enjoined from so doing.

In *Dennis v. Osborn*, 75 Kan. 557, 89 Pac. 925, it was held that an error of judgment by the road overseer as to the plan of improving a highway, adopted in good faith, would not of itself be a ground for enjoining the improvements, but it was ruled in the syllabus that "the officers must act with reason and prudence in making such improvements, and cannot collect a considerable quantity of water and unnecessarily and unreasonably throw it in a body upon the land of a private owner to his injury." Syl. 3. One reason given in the opinion for refusing the injunction was that, under the law as it then stood, the owner could protect himself against surface water. But this reason no longer exists. *Laws 1911, c. 175*; *State ex rel. v. Zerbe*, 87 Kan. 300, 124 Pac. 160. It was also said in the opinion that the proposed improvement would not increase the flow or impose a greater burden upon plaintiff's land than it bore before the highway was established. Here the very opposite is true, according to the testimony already referred to. The plaintiff also testified: "If there was no obstruction in this ditch, it would carry the water. I was born and raised right there on the creek when there was no bridge there at all, and it has carried everything that has come down it to my knowledge for the last 35 years. I never lost any crops before the culvert was built. We have had no unusual rains during the last 2 or 3 years, but just ordinary rains. When my land has been overflowed, the rains were just ordinary heavy rains. The land that is damaged is some of my best farming land. That land would produce 30 or 40 bushels of wheat to the acre, and from 70 to 80 bushels of corn to the acre, in ordinary crop years. It is

where I produced my best corn and wheat. Since this land has been flooded, it is practically worthless as farm land."

The action was begun February 8, 1911. The record shows that November 12, 1910, the township trustee was notified in writing that the culvert was too small, and was causing overflow and damage, and that, unless removed or made of sufficient capacity, suit would be brought. It cannot be that the Legislature intended, under such circumstances, that the highway commissioners should continue a nuisance of this character. While it has been determined in this state that a mere consequential damage does not amount to a taking, within the meaning of section 4, art. 12, of our Constitution, or the fifth amendment to the federal Constitution, we can find no warrant in the statutes or in the common law for permitting a quasi municipal corporation or its officers so to use their own official rights as thus to injure the property of another.

Having the question now squarely presented, we hold that, while the courts may not control the judgment and discretion of the highway commissioners in planning and constructing a culvert, nevertheless, when time demonstrates its utter insufficiency and its certainty of causing continuous or repeated damage to the abutting landowner, and notice of such condition is brought home to such officers, it then becomes their duty to abate such nuisance, and upon failure they will be required so to do by judicial action; that for such officers knowingly to permit such nuisance to continue is not an exercise of official duty, but a disregard thereof amounting to bad faith. They have control of the highway situation, and are therefore and thereby charged with the duty to treat it upon principles of fairness, and not of oppression. The ancient and eminently just maxim applies that one shall not so use his own as to injure another's. The evidence quoted was sufficient to take the injunction branch of the case past the demurrer which the trial court erred in sustaining.

The ruling is therefore reversed, and the cause remanded for such disposition as all the evidence shall upon a full hearing warrant. All the Justices concurring.



(89 Kan. 719)

**DOTY v. GARFIELD TP.**

(Supreme Court of Kansas. June 7, 1913.)

*(Syllabus by the Court.)***TOWNS (§ 52\*)—BONDS—ESTOPPEL—NOTICE OF DISHONOR—QUESTION FOR JURY.**

The testimony tended to show that when the plaintiff purchased the refunding bonds and coupons attached he was assured by the seller that the bonds were valid; that he ascertained that after their issuance a tax had been levied by the township for two successive years to pay the interest, that judgments had been recovered on others of the same issue, and he was advised by counsel that the bonds were valid; that when he purchased the interest had been in default for 17 years, but he had no knowledge of any infirmity in the principal obligations, which contained all the necessary recitals, and which the auditor of state had certified were regularly and legally issued; that, owing to a question as to who was required to make the levy, and in view of the fact that the county and township had been compromising their bonded indebtedness, he understood that he might be compelled to put in judgment or compromise the paper, for which he paid about 25 per cent. of the total principal and interest. *Held*, that the question of his bona fides should have been submitted to the jury.

[Ed. Note.—For other cases, see *Towns*, Cent. Dig. §§ 90-94; Dec. Dig. § 52.\*]

**Appeal from District Court, Finney County.**

Action by Dennis D. Doty against the Township of Garfield, Finney County From judgment for defendant, plaintiff appeals. Reversed and remanded.

Hopkins & Hopkins, of Garden City, for appellant. Hoskinson & Hoskinson, of Garden City, and Frank Doster, of Topeka, for appellee.

**WEST, J.** In April, 1909, the plaintiff, Doty, purchased eight Garfield township bonds. These were part of a series of refunding bonds, dated November 12, 1890; the obligations thereby taken up having consisted of bonds issued in aid of a sugar company, and \$1,000 of township warrants. This action was on certain coupons. Doty testified that he bought in good faith, after being advised by some of the counsel now representing both parties here that the bonds were valid, and after learning that a tax to pay interest had been levied for two successive years, and also that two judgments had been procured on other refunding bonds of the same issue. These instruments were duly registered, and contained all the necessary recitals. The auditor of state had also certified that they were regularly and legally issued, and that the signatures thereto were genuine. The county attorney had placed on file in the auditor's office a letter, dated November 19, 1890, stating that the former objections to their issuance had been overcome by the "building in said township," to which letter was appended a certificate of its truthfulness by the clerk of Garfield township. It was shown by the defendant that the

plaintiff bought the bonds for about 25 per cent. of their face value and accrued interest; that the seller understood the purpose for which the bonds were issued; and that Doty bought with knowledge that the interest had been in default for 17 years. At the close of the testimony the court directed a verdict for the defendant, and the plaintiff appeals.

Assuming that the township had no authority to issue bonds to aid a private enterprise, still it could so estop itself as to innocent purchasers by refunding, by recitals and payment of interest, or other acts of recognition that it could no longer deny liability. *Rathbone v. Hopper*, 57 Kan. 240, 45 Pac. 610, 34 L. R. A. 674. It is claimed by the defendant that the default in interest shown by the past-due coupons was in itself, as a matter of law, sufficient to charge the purchaser with notice of the defense to the bonds, as the trial court instructed. Certain state decisions are cited in support of this contention, but the state courts are not in accord, and authorities both ways may readily be found. *Parsons v. Jackson*, 99 U. S. 434, 25 L. Ed. 457, referred to by counsel, involved instruments which had been seized and carried away before delivery, and apparently before being entirely filled out, and it was held that their uncertainty as to amount and as to place of payment were sufficient to cause their integrity to be questioned, and it was said that "the presence of the past-due unpaid coupons was itself an evidence of dishonor, sufficient to put the purchasers on inquiry." The price paid was also mentioned in connection with all the other matters which, taken together, were held to be prima facie inconsistent with a valid title; and hence the report of the master on all the evidence was confirmed.

In *Cromwell v. County of Sac*, 96 U. S. 51, at pages 57, 58, 59 (24 L. Ed. 681), involving an action upon four bonds for \$1,000 each and four \$100 interest coupons attached to them, which coupons were past due and unpaid when purchased by the plaintiff, it was argued that negotiable paper is dishonored by any breach of the engagement which it imports, and that past-due coupons attached to the bonds in question were notice to the purchaser that the paper was dishonored. On this question the circuit court had divided, and the Supreme Court, speaking through Mr. Justice Field, said: "The nonpayment of an installment of interest, when due, could not affect the negotiability of the bonds or of the subsequent coupons. Until their maturity a purchaser for value, without notice of their invalidity as between antecedent parties, would take them discharged from all infirmities. The nonpayment of the installment of interest represented by the coupons, due at the commencement of the month in which the purchase was made by Clark, was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



a slight circumstance, and, taken in connection with the fact that previous coupons had been paid, was entirely insufficient to excite suspicion even of any illegality or irregularity in the issue of the bonds. \* \* \*

As with other negotiable paper, mere suspicion that there may be a defect of title in its holder, or knowledge of circumstances which would excite suspicion as to his title in the mind of a prudent man, is not sufficient to impair the title of the purchaser. That result will only follow where there has been bad faith on his part. \* \* \*

The interest stipulated was a mere incident of the debt. The holder of the bond had his option to insist upon its payment when due, or to allow it to run until the maturity of the bond; that is, until the principal was payable. Many causes may have existed for a failure to meet the interest as it matured, entirely independent of the question of the validity of the bonds in their inception. The payment of previous installments of interest would seem to suggest that only causes of a temporary nature had prevented their continued payment. If no installment had been paid, and several were past due, there might have been greater reason for hesitation on the part of the purchaser to take the paper, and suspicions might have been excited that something was wrong in issuing it. All that we now decide is, that the simple fact that an installment of interest is overdue and unpaid, disconnected from other facts, is not sufficient to affect the position of one taking the bonds and subsequent coupons before their maturity, for value, as a bona fide purchaser. *National Bank of North America v. Kirby*, 108 Mass. 497. To hold otherwise would throw discredit upon a large class of securities issued by municipal and private corporations, having years to run, with interest payable annually or semi-annually. Temporary financial pressure, the falling off of expected revenues or income, and many other causes having no connection with the original validity of such instruments, have heretofore, in many instances, prevented a punctual payment of every installment of interest on them as it matured; and similar causes may be expected to prevent a punctual payment of interest in many instances hereafter. To hold that a failure to meet the interest as it matures renders them, though they may have years to run, and all subsequent coupons, dishonored paper, subject to all defenses good against the original holders, would greatly impair the currency and credit of such securities and correspondingly diminish their value. We are of opinion, therefore, that Clark took the two bonds in suit and the subsequently maturing coupons as a bona fide purchaser, and as such was entitled to recover upon them, whatever may have been their original infirmity."

This rule has been referred to and fol-

lowed in *Railway Co. v. Sprague*, 103 U. S. 762, 26 L. Ed. 554, in *Thompson v. Perrine*, 106 U. S. 592, 1 Sup. Ct. 504, 568, 27 L. Ed. 298, and in *Morgan v. U. S.*, 113 U. S. 502, 5 Sup. Ct. 588, 28 L. Ed. 1044. In the *Thompson Case* it was contended that the coupons in suit, being detached from the bonds and overdue when purchased, were dishonored, and therefore not negotiable. In response to this it was said: "This position cannot be sustained. It is an immaterial circumstance that the coupons, when purchased by Perrine, were detached from the bonds. And the bonds not having then matured the coupons, though overdue, had not lost the quality of negotiability by the law merchant. This result must follow from the principles announced in *Cromwell v. County of Sac*, 96 U. S. 51 [24 L. Ed. 681]."

*Trask v. Jacksonville, etc., Railroad Company*, 124 U. S. 515, 8 Sup. Ct. 574, 31 L. Ed. 521, is also cited, which involved a purchase at auction of bonds which had been running 10 years or more, and no interest had ever been paid. The instruments were state bonds, and it was said that the mere fact that no interest had ever been paid furnished the strongest presumptive evidence that they were dishonored. The plaintiff, who took under this purchaser, was held to be the agent of those who were engaged in perpetrating a fraud between the railroad company, and employed by them to get the bonds to London, so that a large part of the proceeds could be applied to a payment of the personal debts of one of the guilty parties. It was said in the opinion, however, that the only question disputed was whether the purchaser, in law and in fact, occupied the position of a bona fide holder, and "that is substantially a question of fact only, and it presents itself in a double aspect." It was also said that when the contract was made fraud and illegality in the original issue of bonds had become notorious, and that it was impossible that the purchaser, situated as he was, could have been ignorant of the facts.

Doty testified that he had no notice or knowledge of any defect, or any information whatever that any defense would be made to the bonds; that his vendor assured him that there was no question but that they would be paid, and that they were all good; that he understood that, on account of conditions being such that taxes had not been levied, because there was a question as to who should make the levy, it might become necessary to put the bonds and coupons in judgment; and that there possibly would be a necessity for a compromise, as he had heard that the county and township had been compromising their bonded indebtedness. This, together with the fact that interest on the refunded issue had been levied for two years, that other bonds of the same issue had been recovered upon in court, and the advice of counsel, already referred to, that these bonds



were valid, does not leave the matter resting solely on the question of past-due coupons, but presents a situation which, within the principle of the federal decisions referred to, was one for the jury to pass upon.

Sections 59 and 60 of the negotiable instruments act (Gen. St. 1909, §§ 5305, 5306) are invoked. These sections, so far as applicable here, provide that a holder in due course is one who became the holder before the instrument was overdue, and that when such instrument, payable on demand, is negotiated an unreasonable length of time after its issue the holder is not deemed a holder in due course. Neither the bonds nor the coupons were payable on demand, and the bonds, when purchased, were not yet due, and would not be for nine years. True the coupons were overdue, and if they are thereby to be considered demand obligations under section 14 (Gen. St. 1909, § 5260) then ordinarily the question of reasonable or unreasonable length of time they can remain due without imparting notice of dishonor would be one of fact for the jury.

A decision of the Supreme Court of New York was introduced in evidence for the purpose, as then stated, of showing that, as the bonds were made payable at the fiscal agency in New York, they thereby became New York contracts, so far as the law of bona fide ownership is concerned, and, as stated in the brief, for the purpose of showing that the common law of that state is the same as that of Kansas, and it is now suggested that this was hardly necessary, as in the absence of proof it would be presumed to be the same. It would seem, therefore, that the controversy is submitted for determination under the law of this state, our views of which have already been indicated. It is therefore not necessary to notice the objection of the plaintiff that the New York law was not pleaded, and that the decision introduced was not rendered by a court of last resort.

The action of the trial court in directing a verdict was erroneous, and the judgment is reversed and the cause remanded for further proceedings in accordance herewith. All the Justices concurring.

(90 Kan. 153)

JAGGER v. GREEN, Mayor, et al.

(Supreme Court of Kansas. June 7, 1913.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 217\*) — "FIELDMAN" OF HEALTH DEPARTMENT — TERM OF OFFICE.

A fieldman of the department of health of the city of Kansas City is not an officer of the city but merely the holder of a subordinate position, and consequently his employment does not terminate with the term of office of the board of commissioners appointing him under section 88 of chapter 114 of the laws of 1907.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 576, 577, 579, 580; Dec. Dig. § 217.\*]

2. MUNICIPAL CORPORATIONS (§ 218\*) — DEPARTMENT OF HEALTH — FIELDMAN — CIVIL SERVICE APPOINTEE.

The civil service act (Laws 1909, c. 74, § 4) governs appointments to the position of fieldman in the department of health of the city of Kansas City, and that act withdraws civil service appointees from the operation of section 90, c. 114, Laws 1907, which permits the board of commissioners of the city to remove the incumbent of any office or employment, at discretion, with or without cause.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 589-598; Dec. Dig. § 218.\*]

3. MUNICIPAL CORPORATIONS (§ 217\*) — HEALTH DEPARTMENT — FIELDMAN — TENURE OF OFFICE.

Since the position of fieldman in the health department is not an office, section 2 of article 15 of the Constitution, which forbids the creation of any office the term of which is longer than four years, does not govern its tenure.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 576, 577, 579, 580; Dec. Dig. § 217.\*]

Application by John F. Jagger for a writ of mandamus to Charles W. Green, mayor of the city of Kansas City, and others. Motion to quash overruled.

James F. Getty, of Kansas City, for plaintiff. R. J. Higgins, of Kansas City, for defendants.

BURCH, J. The plaintiff asks for a writ of mandamus to compel the defendants, who constitute the board of commissioners of the city of Kansas City, to recognize him as a "fieldman" of the department of health, to which position he was appointed under civil service rules and from which he was removed by the defendants without cause. The defendants move to quash the alternative writ on the ground that it does not state facts sufficient to constitute a cause of action. The decision turns primarily upon the force to be given to the civil service law applying to cities of the first class adopting a commission form of government. Since this law, so far as it relates to the city of Kansas City, will be superseded on June 1, 1913, by a new one (Laws 1913, c. 88), and since the action involves the tenure of a particular position created by an ordinance of the city, the opinion will be extended only so far as may be necessary to indicate the court's views.

The law providing for a commission form of government in cities of the first class (Laws 1907, c. 114) authorized the board of commissioners to appoint a city attorney, a city clerk, a city treasurer, a city auditor, a city engineer, a superintendent of streets, a superintendent of waterworks, a secretary of waterworks, a fire marshal, a chief of police, a city physician, a judge of the police court, a superintendent of public parks, and a city assessor. The board was further authorized to appoint "such assistants and other officers and servants as they may deem necessary for the best interests of the city; but no such



officer shall be appointed until his term and salary shall have been fixed by ordinance." Section 88. This law provided that the terms of all appointive officers should expire with the term of office of the board appointing them, but that the board might at its discretion by a majority vote of all the members remove, with or without cause, the incumbent of any city office or employment whatever, except city attorney, city clerk, city treasurer, and city auditor, for whose removal special provision was made. Laws 1907, c. 114, §§ 88, 90.

The commission form of government act was amended and supplemented by chapter 74, Laws 1909. Certain sections not now material were repealed, and the amendatory act concluded with the useless declaration that all acts and parts of acts in conflict with it were repealed. Section 4 of the act of 1909 was in effect a complete civil service law for cities to which it applied. It created a board of civil service commissioners, whose duties were to endeavor to secure and maintain an honest and efficient force of city employes free from partisan influence or control. It contained the following provisions:

"Said commission shall on the first Monday of April and October of each year, or oftener if it shall be deemed necessary, under such rules and regulations as may be prescribed by the commissioners, hold examinations for the purpose of determining the qualifications of applicants for positions, which examination shall be practical and shall fairly test the fitness of the persons examined to discharge the duties of the position to which they seek to be appointed. Said commission shall, as soon as possible after such examination, certify to the city commission double the number of persons necessary to fill vacancies who, according to its records, have the highest standing for the position they seek to fill as a result of such examination, and all vacancies which occur that come under the civil service, prior to the date of the next regular examination, shall be filled from said list so certified: Provided, however, that should the list for any cause be reduced to less than three for any division, then the city commissioners or the head of the proper department may temporarily fill the vacancy, but not to exceed thirty days." Subdivision "b."

"All persons subject to such civil service examinations shall be subject to removal from office or employment by the city commission for misconduct or failure to perform their duties under such rules and regulations as it may adopt, and the chief of police, chief of the fire department, or any superintendent or foreman in charge of municipal work, may peremptorily suspend or discharge any subordinate then under his direction for neglect of duty or disobedience of his orders, but shall within twenty-four hours thereafter report such suspension or discharge and the

reason therefor to the superintendent of his department, who shall thereupon affirm or revoke such discharge or suspension, according to the facts. Such employé (or officer discharging or suspending him) may, within five days of such ruling, appeal therefrom to the commission which shall fully hear and determine the matter." Subdivision "c."

"The provisions of this section shall apply to all appointive officers and employes of said city, except city attorney, the members of the fire department where they have already adopted the civil service plan, city clerk, city treasurer, city auditor, city engineer, superintendent of streets, superintendent of waterworks, secretary of waterworks, chief of police, city physician, judge of police court, superintendent of public parks, city assessor, commissioners of any kind (laborers whose occupation requires no special skill or fitness), election officials, and mayor's secretary and assistant attorney, where such officers are appointed." Subdivision "f."

In 1910, pursuant to power duly conferred, the city created by ordinance an executive department, to be known as the health department, which was given the right to make regulations to secure the general health of the city and was charged with the performance of certain specified duties in the interest of the public health. The ordinance provided for the appointment of a health commissioner who was given general supervision over the department. The qualifications for appointment were that he should be a reputable physician well known for his skill and efficiency in hygienic matters and in matters of analysis and chemistry, and he was given an annual salary as compensation for his services. Many of his duties were specifically prescribed. Besides these, he was given direct charge of and made responsible for all other work of the department, and was authorized to formulate rules and regulations for its government and conduct, in the interest of the public health. Section 3 of the ordinance provided as follows:

"Sec. 3. There shall be appointed in addition to the health commissioner, not more than three fieldmen and one clerk, at least one of said fieldmen to be a veterinarian. All of said officers to be appointed in the manner provided by law, and to receive as their compensation the following sums, respectively: The veterinarian, eighty dollars per month, one fieldman, \$70.00 per month, and the second fieldman, who shall also be a laboratory assistant, \$80.00 per month, and the clerk, fifty dollars per month, payable monthly."

The principal work assigned to the fieldmen was the making of inspections and the making of daily reports to the health commissioner. Besides this, they were to collect samples of milk and food products for examination as often as the department deemed necessary, execute quarantine regulations, do



fumigating, and perform whatever other services the health commissioner might require of them in the interest of the public health. They were further empowered to condemn and confiscate unwholesome foodstuffs. An ordinance of the city provided that civil service appointments should, after a probationary period of three months, be deemed to be permanent, and that such appointees should not be removed, except in the manner provided by law.

[1] The plaintiff was appointed a fieldman under civil service regulations in March, 1912. On April 10, 1913, he was removed. The term of office of the board appointing him had expired. The plaintiff was not one of the officers specifically named in the act of 1907 whom the commissioners were authorized to appoint. He was appointed by virtue of the power given to appoint "such assistants and other officers and servants" as the public interest may require. If he was not an appointive officer but was merely a subordinate position holder, his term did not expire with the term of office of the board appointing him.

The health commissioner is the only person connected with the department of public health who holds a position analogous to an office. The fieldmen are merely subordinate employes who work under his direction and supervision and for whose conduct he is responsible. The power to condemn and confiscate unwholesome foodstuffs is exercisable only under the commissioner's supervision and under such rules and regulations as he may formulate, and the fieldmen possess no other authority which rises to the dignity of corporate power officially vested. It is not important that the ordinance uses the term "officers" in one place in speaking of the appointees in the health department. Considering the nature of the service, its relative importance, its essentially subservient character, and the placing of responsibility for results upon a superior who is given full power of direction, supervision, and control, it must be held that the plaintiff was not a city officer within the meaning of the statute just referred to.

[2] Since the plaintiff is not one of the appointive officers or employes excepted from the operation of the civil service act, he is entitled to claim the benefit of its provisions. The purpose of civil service laws is well understood. They are designed to break up the spoils system of filling public offices and employments and to promote efficiency in the

administration of public business. To accomplish this it is not enough that provision be made for testing qualifications and for impartial selections. There must be permanence of tenure so long as good behavior and efficient discharge of duty continue. The civil service act in question has dealt with the subject of removals. The whole subject of appointments is covered by subdivision "b," quoted above. Terms of employment are not mentioned, and the act applies only to those employments which ought not to be confined to fixed terms. The last clause of the subdivision allows vacancies to be filled temporarily under certain contingencies. There is no limit to the time for which other appointments are made, and they would be permanent, except for the provision relating to removals which immediately follows in subdivision "c." The two subdivisions contain exclusive requirements, the one relating to appointments and the other relating to removals, and the result is that civil service appointees are withdrawn from the operation of the act of 1907, which permits the board of commissioners of the city to make removals at discretion with or without cause.

If it be true, as the defendants argue, that it is compatible with sound civil service theory to allow them to make removals at will and hold them responsible for the arbitrary exercise of the power, the Legislature did not adopt that view in framing the act of 1909. The law of 1913 provides that "all persons subject to civil service examination may be removed from office or employment only upon charges preferred," etc. It is not believed that the Legislature has changed its policy or that the word "only" was inserted to mark an irreconcilable difference between the old law and the new, but that the purpose was to silence quibble by greater clarity of expression.

[3] Since the position of fieldman of the health department is not an office, section 2 of article 15 of the Constitution, which forbids the creation of any office the term of which is longer than four years, does not apply.

The case is finally submitted upon the alternative writ and the motion to quash. The motion to quash is overruled, and a peremptory writ will be allowed unless within five days the defendants answer that they have reinstated the plaintiff to the possession and enjoyment of the position of fieldman of the health department of the city. All the Justices concurring.



(38 Okl. 486)

**SMITH v. BOARD OF COM'RS OF WASHITA COUNTY.**(Supreme Court of Oklahoma. May 13, 1913.  
Rehearing Denied July 8, 1913.)*(Syllabus by the Court.)***CLERKS OF COURTS (§ 12\*)—COMPENSATION—MODIFICATION.**

It was the purpose of the Legislature by the enactment of section 15a, c. 69, Sess. Laws 1910, to fix the maximum amount which may be allowed the clerk of the county court as full compensation for his services and to authorize the board of county commissioners in the exercise of their discretion to allow a less amount whenever in their judgment it is proper to do so.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. § 34; Dec. Dig. § 12.\*]

Appeal from District Court, Washita County; James R. Tolbert, Judge.

Action by Ralph D. Smith against the Board of County Commissioners of Washita County. Judgment for defendant, and plaintiff appeals. Affirmed.

T. A. Edwards and A. M. Beets, both of Cordell, for plaintiff in error. Massingale & Duff, of Cordell, for defendant in error.

**KANE, J.** This was an action commenced by the plaintiff in error, plaintiff below, against the defendant in error, defendant below, to recover a balance alleged to be due him upon his salary as clerk of the county court of the county of Washita. Upon a trial to the court, there was judgment for the defendant, to reverse which this proceeding in error was commenced.

It is conceded that Washita is a county having a population of over 25,000, and that the plaintiff was duly appointed clerk of the county court thereof by the county judge, in pursuance of section 15, c. 69, Session Laws 1910, and that the board of county commissioners, upon the theory that by virtue of section 15a, c. 69, Session Laws 1910, it was authorized to do so, fixed the salary of the clerk of the county court at a sum less than \$100 per month, to wit, the sum of \$80 a month, and allowed his claims for that sum from month to month which were duly paid.

The plaintiff contends that by virtue of section 15a the salary of the clerk of the county court is fixed by the Legislature at \$100 per month, and that the board of county commissioners have no power or authority to fix it at any less amount, and therefore he is entitled to recover the difference between \$80 per month and \$100 per month for the time he has served as clerk. Section 15a reads as follows: "The clerk of the county court shall receive as full compensation the following amount to be allowed by the board of county commissioners, payable monthly: In counties having a population of 10,000 and not over 25,000, a salary not to exceed \$75.00 per month; in counties having a population over

25,000, not to exceed \$100.00 per month, and in counties having over 50,000 population not to exceed \$125.00 per month."

We think the construction placed upon the statute by the board of county commissioners is correct. Obviously, it was the purpose of the Legislature to fix the maximum salary of such officers and leave it to the discretion of the board of county commissioners to allow a less amount whenever in their judgment it was proper to do so. In 11 Cyc. 428, it is said: "The compensation of a county officer is dependent either directly upon the statutory provision, or is fixed by the county board in pursuance of statutory authority or constitutional provision. Where, however, the duty of fixing the salaries of county officers is by the Constitution devolved upon the Legislature, it has been held that such body cannot delegate the regulation of compensation to the county board. This power of county boards to regulate the compensation of county officers and make allowances for services, since it exists only by virtue of Constitutional or statutory provision, can be exercised only in the manner and in direct accordance with the language used therein. Hence if the salary of a certain official is definitely fixed or the maximum determined by statute, the board have no power to increase it although they conceive it to be inadequate or believe that extra compensation should be allowed; but where the maximum is fixed by statute, the board may, in its discretion, fix a less amount."

A Texas statute declared that the county treasurer's commission shall be fixed by the commissioners' court at not to exceed 2½ per cent. In *Staples v. Llano County*, 9 Tex. Civ. App. 205, 28 S. W. 571, it was held that: "The purpose of this law was to fix a maximum amount that may be allowed such officers and to authorize the commissioners' court, in the exercise of its judgment, to fix an amount less, whenever it was proper to do so."

It is true that the Texas statute provides that the commission shall be "fixed" by the board of commissioners, whilst our statute provides that the compensation of the clerk shall be "allowed" by the board of county commissioners; but that is not significant, as the authorities show the two words to be used interchangeably in a great many instances.

In *Polk v. Minnehaha County*, 5 Dak. 129, 37 N. W. 93, it was held that, "allow," as used in Sess. Laws 1885, p. 83, providing that the district attorneys shall receive such salaries for their services as the board of county commissioners of the proper county shall 'allow,' is synonymous with the word 'fix' as used in a resolution of the board stating that they 'fix' the salary of the district attorney at a certain sum." 1 Words and Phrases, 345.

In the national banking act authorizing the national banks to charge and receive inter-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
133 P.—12



est at the rate "allowed" by the laws of the state or territory where the bank is located, and declaring that when no rate is "fixed" by the laws of the state or territory they are "allowed" a rate not exceeding 7 per cent., the word "fixed" is used in the same sense as the word "allowed." *Hinds v. Marmolejo*, 60 Cal. 229, 231; *Daggs v. Phoenix Nat. Bank*, 5 Ariz. 409, 53 Pac. 201, 204; *Wolverton v. Exchange Nat. Bank*, 11 Wash. 94, 39 Pac. 247.

In *Guild v. First Nat. Bank*, 4 S. D. 566, 57 N. W. 499, it was held that "'allowed,' as used in Rev. St. U. S. § 5197 (U. S. Comp. St. 1901, p. 3493), providing that any national bank may charge the interest 'allowed' by the laws of the state where it is located, means fixed or established by the law of such state." 1 Words and Phrases, 345.

A Kansas statute (Gen. St. 1889, par. 1799) which seems to be identical in meaning with section 15a provides that: "The county attorneys of the several counties of this state shall be allowed by the board of county commissioners, as compensation for their services, as salary per year, as follows: In counties of from 1,000 to 5,000 inhabitants, not more than \$400.00. \* \* \*." In *Naylor v. Board of County Commissioners*, 8 Kan. App. 761, 61 Pac. 763, it was contended, as it is in this case, that the statute fixed the salary of the county attorney and left the board of county commissioners no discretion in the matter. The court said: "Counsel would read the statute as follows: 'The county attorneys of this state shall be allowed by the board of county commissioners as compensation for their services, as salary per year, in counties of from 1,000 to 5,000 inhabitants \$400.' It is argued that the statute does not confer a discretion on the board of county commissioners to fix the salary of the county attorney at less than \$400 per year, but it forbids their allowing more than that sum. We are unable to adopt this view."

We have examined the authorities cited by counsel for plaintiff in error, but do not find any of them in conflict with the foregoing cases or with the conclusion reached herein.

The judgment of the court below is therefore affirmed. All the Justices concur, except DUNN, J., absent.

(37 Okl. 649)

#### CHURCHMAN v. PAYTE.

(Supreme Court of Oklahoma. June 19, 1913.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE (§ 159\*) — APPEAL BOND—DEFECTS—AMENDMENT.

Where the bond given on appeal from justice court to county court is in proper form in all respects, and contains all the statutory conditions, except the condition to "prosecute the appeal to effect and without unnecessary delay," it is error to refuse leave to correct the

error by filing a new bond containing the omitted condition.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 544, 550-578; Dec. Dig. § 159.\*]

Commissioners' Opinion, Division No. 2. Error from County Court, Coal County; R. H. Wells, Judge.

Action by S. G. Payte against Tom Churchman. From a judgment of the county court, dismissing an appeal from a justice of the peace, plaintiff brings error. Reversed and remanded.

C. M. Threadgill, of Coalgate, for plaintiff in error. Trice & Moore, of Coalgate, for defendant in error.

ROSSER, C. This appeal is from an order of the county court dismissing an appeal on account of a defect in the appeal bond.

The facts in this case are substantially the same as the facts in the case of *Spaulding Mfg. Co. v. Roff*, 34 Okl. 309, 125 Pac. 727. It was there held that it was the duty of the court to permit an appeal bond to be corrected or amended as provided in section 5394, Comp. L. 1909. That case has been followed in *C. R. I. & P. R. R. Co. v. Moore*, 34 Okl. 199, 124 Pac. 989, *Spaulding Mfg. Co. v. Witter*, 34 Okl. 313, 125 Pac. 729, and *Roberts v. Converse*, 131 Pac. 539.

This case must be reversed and remanded, with instructions to the county court of Coal county to permit the plaintiff in error to file an amended appeal bond, and to proceed with the trial of the case in regular course.

PER CURIAM. Adopted in whole.

(38 Okl. 420)

#### PATTERSON v. FOREMAN.

(Supreme Court of Oklahoma. March 12, 1912. Rehearing Denied July 8, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 568\*)—SETTLEMENT OF CASE—MADE—DISMISSAL FOR DEFECTS.

Where, in a proceeding in error brought to this court on a case-made, it does not appear, from the record or otherwise, that the defendant was present, either personally or by counsel, at the settlement, nor that notice of the time thereof was served or waived, nor that any amendments were suggested, allowed, or disallowed, the same will be dismissed on motion of the defendant in error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2523-2529; Dec. Dig. § 568.\*]

Error from District Court, Pottawatomie County; Roy Hoffman, Judge.

Action between C. J. Patterson and S. C. Foreman. From a judgment for the latter, the former brings error. Dismissed.

W. S. Pendleton, of Shawnee, for plaintiff in error. A. M. Fowler, of Wewoka, and B. B. Blakaney, of Muskogee, for defendant in error.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



DUNN, J. This case presents error from the district court of Pottawatomie county. A motion has been lodged in this court by counsel for defendant in error, seeking to secure a dismissal of the same for the reason, among others, that no notice of the time and place of the signing and settlement of the case-made was given or waived, and there was no appearance of the opposite party either in person or by counsel at the time of the settlement of the same.

It appears from the record that the case was served on counsel for defendant in error on the 21st day of February, 1911, but it is not made to appear, either by the case-made or by any extraneous showing, that the essential prerequisites relied on by movant took place, nor that any amendments to the case-made were suggested. The case-made was signed and settled by the trial judge on the 6th day of March, 1911. The question presented is no longer an open one in this court, having been settled by a number of cases, among which may be noted *Ft. Smith & Western Ry. Co. v. State Nat. Bank of Shawnee*, 25 Okl. 128, 105 Pac. 647, and *Harrison et al. v. Penney*, 28 Okl. 523, 114 Pac. 734; the rule being that where, in a proceeding in error brought to this court on a case-made it does not appear, from the record or otherwise, that the defendant was present, either personally or by counsel, at the settlement, nor that notice of the time thereof was served or waived, nor that any amendments were suggested, allowed, or disallowed, the same will be dismissed on motion of the defendant in error.

It therefore follows that the case must be dismissed.

TURNER, C. J., and WILLIAMS, and HAYES, JJ., concur. KANE, J., absent.

#### LINDLEY v. HILL et al.

(Supreme Court of Oklahoma. June 10, 1913.  
Rehearing Denied July 8, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 323\*) — NECESSARY PARTIES—JOINT JUDGMENT.

The absence of a party to a joint judgment, who will necessarily be affected by a reversal thereof, defeats the jurisdiction of the appellate court, and prevents a review of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1796, 1798-1805; Dec. Dig. § 323.\*]

Error from County Court, Tillman County; T. E. Campbell, Judge.

Action by E. C. Hill against T. H. Lindley and another. Judgment for plaintiff, and the defendant named brings error. Dismissed.

Wilson & Tomerlin, of Oklahoma City, and Ahern & Searcy, of Frederick, for plaintiff in error. Mounts & Davis, of Frederick, and Gray & McVay, of Oklahoma City, for defendants in error.

TURNER, J. On July 9, 1909, E. C. Hill, one of the defendants in error, recovered a judgment for \$112.25 against Lindley-Kirk Construction Company before a justice of the peace in Tillman county, whereupon the company appealed to the county court and executed a bond, with T. H. Lindley, plaintiff in error, and Sam Kelley, as sureties. There, on trial anew, judgment was rendered and entered in favor of plaintiff and against the defendant on February 1, 1910. On May 17, 1910, a joint judgment was rendered and entered in favor of the plaintiff in that suit against said sureties on said appeal bond, and after three separate motions to set said judgment aside, which were overruled, Lindley brings the case here, assigning as error the action of the court on his last motion, without making his cosurety a party to this proceeding.

In support of their motion to dismiss, it is urged by defendants in error, among other things, that the matter set forth in the last motion to vacate was twice res adjudicata, and that Kelley is a necessary party to this appeal. On the other hand, it is insisted that, as the county court was not by Comp. Laws 1909, § 6399, vested with jurisdiction to enter judgment against the sureties on the appeal bond, the same is void, and by section 6101 "may be vacated at any time, on motion of the party, or any person affected thereby."

But whether the court erred in refusing to set aside the judgment complained of cannot be inquired into by us, and the motion to dismiss must be sustained; this for the reason that the judgment is joint against the movant and Kelley, and he is not made a party to this proceeding. *Hughes v. Rhodes*, 25 Okl. 172, 105 Pac. 650. All the Justices concur, except WILLIAMS, J., not participating.

(33 Okl. 267)

#### CARROLL v. DURANT NAT. BANK.

(Supreme Court of Oklahoma. June 10, 1913.)

(Syllabus by the Court.)

INFANTS (§ 57\*)—CONTRACTS (§ 2\*)—STATUTES (§ 279\*) — RATIFICATION — LAW GOVERNING—PLEADING STATUTE.

Syllabus same as in *Barnes v. American Soda Fountain Co.*, 32 Okl. 81, 121 Pac. 250.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 136-148, 151; Dec. Dig. § 57;\* Contracts, Cent. Dig. §§ 2, 41, 145; Dec. Dig. § 2;\* Statutes, Cent. Dig. § 378; Dec. Dig. § 279.\*]

Error from County Court, Marshall County; J. W. Falkner, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Action by the Durant National Bank against J. H. Carroll. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

F. E. Kennamer and Chas. A. Coakley, both of Madill, for plaintiff in error. Slough & Minter, of Madill, for defendant in error.

KANE, J. This is an appeal from a judgment rendered by the county court of Marshall county. The action was commenced by the Durant National Bank, defendant in error, plaintiff below, against J. H. Carroll, plaintiff in error, defendant below, to recover upon a certain written instrument. The answer of the defendant was to the effect that the instrument sued upon was executed on the 31st day of May, 1907, in the Indian Territory, and that it fell due upon the 1st day of October, 1907; that at the time of its execution the defendant was a minor, but that he reached his majority on the ——— day of August, 1907; that after attaining full age he did not promise in writing to pay said note, or any part thereof, nor did he in writing ratify his former action: Wherefore he prays that the plaintiff take nothing by its action and that he have judgment for his costs and all proper relief. To this answer the defendant filed a general demurrer which was sustained by the court, and, the defendant electing to stand upon his answer, judgment was rendered against him. To reverse this judgment this proceeding in error was commenced.

Counsel for plaintiff in error contended that by virtue of the schedule to the Constitution the liability of their client must be determined by section 3384, c. 68, Mansf. Dig. Ark., in force in the Indian Territory prior to statehood, of which act the courts of the state must take judicial notice.

The same questions arose in *Barnes v. American Soda Fountain Co.*, 32 Okl. 81, 121 Pac. 250, and *Guthrie v. Susie Mitchell*, 132 Pac. 138, not yet officially reported. *Barnes v. Soda Fountain Co.*, supra, was an action upon a promissory note, executed by a minor in the Indian Territory prior to statehood. As stated by Robertson, C., who delivered the opinion of the court: "The only question in this case, as contended by plaintiff in error, requiring consideration, is whether or not an infant's contract, under the facts of the case and the law applicable, is binding, after he reaches his majority, without being ratified or affirmed. But we think the real question is whether or not plaintiff in error ratified, in writing, the contract sued on, after he arrived at full age. If he did, then the judgment must be affirmed; if not, then it cannot stand. Plaintiff in error relies upon the provisions of section 3384, c. 68, Mansf. Dig. Ark., which was in force in that part of the state where the notes were executed in March, 1904, which reads as follows: 'No

action shall be maintained whereby to charge any person upon any promise made after full age, to pay any debt contracted during infancy, unless such promise or ratification shall be made by some writing and signed by the party charged therewith.'" Discussing the questions arising out of this situation, the opinion continues: "The contract sued on was made prior to statehood at Francis, in the Indian Territory; but defendant became of age prior to statehood, and the rights of the parties thereto were fixed by the law in force at that place, at the time of the execution of the contract, which, as has been seen, was chapter 68, Mansf. Dig. of Arkansas. Section 1 of the schedule of the Constitution of the state of Oklahoma provides that: 'No existing rights, actions, suits, proceedings, contracts, or claims shall be affected by the change in the form of government, but all shall continue as if no change in the form of government had taken place,' etc. Hence it was unnecessary for plaintiff in error to plead the statute in the court below in order to obtain its benefits. The question of pleading foreign statutes has no place in the trial of this cause for the reason that the statutes of Arkansas, prior to the adoption of the Constitution, were applicable to the contract sued on, and by virtue of section 1 of the schedule of the Constitution, supra, remained in full force so far as said contract was concerned, and controls the case now." *Guthrie v. Susie Mitchell*, supra, is to the same effect, and, in the opinion prepared by Mr. Justice Williams, the authorities sustaining this view are fully collected.

Upon the authority of that case, the judgment of the court below must be reversed, and the cause remanded, with directions to proceed accordingly. All the Justices concur, except WILLIAMS, J., disqualified and not participating.

(38 Okl. 426)

#### KINNEY v. ST. LOUIS & S. F. R. CO.

(Supreme Court of Oklahoma. May 27, 1913.  
Rehearing Denied July 8, 1913.)

#### (Syllabus by the Court.)

NEGLIGENCE (§ 83\*)—CONTRIBUTORY NEGLIGENCE—REFUSAL OF INSTRUCTIONS.

In an action for damages on account of an alleged negligent act of the defendant, it is not error for the court to refuse to charge the jury that the plaintiff may recover, notwithstanding his contributory negligence, if the defendant, by the use of ordinary care, ought to have known that plaintiff was about to put himself into the dangerous position wherein he was injured.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115; Dec. Dig. § 83.\*]

Error from District Court, Bryan County; James R. Armstrong, Judge.

Action by P. B. Kinney against the St. Louis & San Francisco Railroad Company.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Judgment for defendant, and plaintiff brings error. Affirmed.

J. M. Crook, of Durant, for plaintiff in error. W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and Fred E. Sults, both of Oklahoma City, for defendant in error.

DUNN, J. This case presents error from the district court of Bryan county. There is but one question presented, which arises on the plaintiff's assignment of error, the basis for which was the refusal of the court to give the following instruction: "You are instructed that if you believe from the evidence that going under the tie in question was a negligent act of the plaintiff, as the term 'negligence' is herein defined, but that before plaintiff did go under the tie he cautioned defendant's servant and advised him that he was going under the tie, and that defendant's servant then and there knew that plaintiff was going under the tie, or by the use of ordinary care ought to have known that plaintiff was going under said tie, in the condition and position that said tie was then in, and that at the time plaintiff was under the tie the defendant's servant carelessly and negligently moved said tie, and caused said tie to fall upon plaintiff and injure him, and but for this negligence, if negligence it was, in so moving said tie, the plaintiff would not have been injured, then you will find for the plaintiff."

This question was passed upon by this court in the case of Oklahoma City Ry. Co. v. Barkett, 30 Okl. 28, 118 Pac. 350, where in the syllabus it is said: "In an action for damages on account of the alleged negligent act of defendant, it is error for the court to charge the jury that the plaintiff may recover, notwithstanding his contributory negligence, if the defendant failed to exercise reasonable care to avoid the injury after it discovered, or by the exercise of reasonable care might have discovered, that an accident was imminent." The cases cited and relied upon by plaintiff are noted and discussed in that case, and it will be unnecessary to repeat what is there said. See, also, St. Louis & S. F. R. Co. v. Kral, 31 Okl. 624, 122 Pac. 177, and cases therein cited.

The judgment of the trial court is therefore affirmed.

HAYES, C. J., and TURNER, WILLIAMS, and KANE, JJ., concur.

(38 Okl. 428)

LONDON et al. v. DAY.

(Supreme Court of Oklahoma. Feb. 11, 1913.  
Rehearing Denied July 8, 1913.)

Error from Superior Court, Pottawatomie County; George C. Abernathy, Judge.

Action by Thomas J. Day against R. H.

London and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded, with instructions to dismiss.

C. P. Holt, Co. Atty., Chas. W. Friend, and R. P. Wyatt, all of Shawnee, for plaintiffs in error. Roscoe C. Arrington and John L. Arrington, both of Tecumseh, for defendant in error.

PER CURIAM. This cause presents error from the superior court of Pottawatomie county, and grows out of the action of the State Board of Equalization in raising the assessed value of real estate in said county 50 per cent. over and above the amount fixed by the county board of equalization for the year 1911. The defendant in error, plaintiff below, filed his action to enjoin the plaintiffs in error, being the board of county commissioners, treasurer, and sheriff, from collecting so much of the taxes on the real property of the defendant in error as was caused by the said raise. So far as the merits of the case and the remedy are concerned, they have been settled in this court directly and in principle in a number of decisions wherein the same and kindred questions were involved, and it would be a useless labor to review what we have there said. See Williams v. Garfield Exchange Bank, 134 Pac. 863, an opinion filed May 14, 1912, and not yet officially reported; Rumph, Treasurer, v. Joines, 131 Pac. 1095, an opinion filed May 14, 1912, and not yet officially reported; In re McNeal, 128 Pac. 285; In re Western Union Telegraph Co., 29 Okl. 483, 118 Pac. 376; Board of Com'rs of Kingfisher County v. Guarantee State Bank et al., 27 Okl. 736, 117 Pac. 216; Asher State Bank v. Board of Com'rs of Pottawatomie County, 31 Okl. 145, 120 Pac. 634.

In addition, however, plaintiff assails the constitutionality of the act of the Legislature under which the foregoing opinions have been rendered. Chapter 87, Sess. Laws 1910. We have examined the contentions made in this regard, but deem them to be without merit.

The judgment of the trial court is therefore reversed, and the cause is remanded, with instructions to dismiss it.

TURNER and WILLIAMS, JJ., dissent.

(38 Okl. 440)

CARRICO et al. v. CROCKER et al.

(Supreme Court of Oklahoma. Feb. 11, 1913.  
Rehearing Denied July 8, 1913.)

(Syllabus by the Court.)

1. TAXATION (§ 450\*) — EQUALIZATION BY STATE BOARD—DUTIES OF COUNTY CLERKS.

On the return to the county clerk of a county of the statement by the State Board of Equalization showing its action in raising or lowering the assessment of the county, it is

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the duty of the said official to extend the same upon the tax rolls.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 800-804; Dec. Dig. § 450.\*]

**2. TAXATION (§ 450\*)—EQUALIZATION—CERTIFICATION TO COUNTY—NOTICE TO TAXPAYERS.**

No notice is provided by the statute nor required to be given to the taxpayers of a county at the time the county clerk, on receipt of the statement from the State Board of Equalization showing the raising or lowering of the assessment of such county, extends the same upon the tax rolls thereof.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 800-804; Dec. Dig. § 450.\*]

Williams and Turner, JJ., dissenting.

Error from District Court, Oklahoma County; John J. Carney, Judge.

Action by Samuel Crocker and others against G. W. Carrico and others, constituting the Board of County Commissioners and the County Treasurer of Oklahoma County. From a judgment for plaintiffs, defendants bring error. Reversed and remanded.

C. W. Stringer, I. R. McQueen, and Sam Hooker, all of Oklahoma City, for plaintiffs in error. John H. Wright and C. J. Blinn, both of Oklahoma City, for defendants in error.

DUNN, J. On March 27, 1912, Samuel Crocker and a number of other taxpayers of Oklahoma county began their action against the board of county commissioners and county treasurer of said county in the district court thereof. The purpose of the action was to restrain the collection of the taxes of the said parties for the year 1911, as the same were equalized by the State Board of Equalization. Since the filing of the case this court has in effect decided every question presented therein in the following cases: In re McNeal, 128 Pac. 285; In re Western Union Telegraph Co., 29 Okl. 483, 118 Pac. 376; Board of Com'rs of Kingfisher County v. Guarantee State Bank et al., 27 Okl. 736, 117 Pac. 216; Asher State Bank v. Board of Com'rs of Pottawatomie County, 31 Okl. 145, 120 Pac. 634; Williams v. Garfield Exchange Bank, 134 Pac. 563, and Rumph v. Joines, 131 Pac. 1095, opinions filed May 14, 1912, and not yet officially reported; London et al. v. Day, 133 Pac. 181, delivered at this term of court.

The case at bar might well be disposed of on the authority of the foregoing cases without discussion, except the defendants in error present here the propositions: First, that there was no order made by the State Board of Equalization requiring the county clerk to extend the raise upon the property of the taxpayers, and hence the said official was without authority to do so; and, second, that the said taxpayers were entitled to notice and a hearing before the said raise was extended.

[1] On the first proposition the statute

(section 7620, Comp. Laws 1900) provides in reference to the State Board of Equalization: "It shall be the duty of said board to examine the various county assessments and to equalize, correct and adjust the same as between the counties by increasing or decreasing the aggregate assessed value of the property or any class thereof, in any or all of them, to conform to the fair cash value thereof as herein defined and to order and direct the assessment rolls of any county in this state to be so corrected as to adjust and equalize the valuation of the real and personal property of the several counties in this state." Under the system of taxation provided by law in Oklahoma, it is provided in section 7616, Id., for equalization between individuals by the township board of equalization, which is authorized to correct, equalize, and adjust assessments therein between the individual taxpayers. On the completion of these duties it is provided in section 7617, Id., that the county board of equalization shall hold a session for the purpose of equalizing, correcting, and adjusting the assessment rolls in its county between the different townships thereof. Thereafter it is provided in section 7619, Id., that the county clerk shall forward to the state auditor the equalized and corrected assessment rolls of the county, the purpose thereof being to enable the State Board of Equalization to equalize as between the counties of the state, so that a fair cash value of assessment between the different counties may be secured. Under the provisions of section 7620, supra, after the State Board of Equalization has acted and equalized between the counties, it is then its duty to order and direct the assessment rolls in the counties in the state to be so corrected as to conform to its action. The county clerk is the clerk of the board of equalization for the county. The assessment rolls are in his hands and custody, and on the return of the statement from the State Board of Equalization, showing its action and without any specific order thereof, it was his duty to so equalize the tax rolls as to make them conform to the valuation fixed by the said board. All of the county and other levies are based upon the equalization as finally fixed by this board, and section 7624, Id., provides for the adjournment of the board of county commissioners to await the statement of the state board, if it has not been received by the third Friday in July of each year. All of which shows that it is clearly the contemplation of the law that the county clerk should, on receipt of the statement from the State Board of Equalization, extend the same upon the tax rolls. The receipt by such official statement from the said board was tantamount to an order directing the assessment rolls of his county to be corrected to conform thereto.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



[2] On the question of the right to notice and an opportunity to be heard, by a taxpayer, before the action of the state board should be applied to his individual assessment, thereby placing his property on the rolls at a higher valuation than was placed upon it by the township and county boards, conceded by both counsel to be the real question involved in this appeal, we will say that the statute makes no provision for such a hearing. The system for assessment and levy of taxes in the state prior to the county assessors law in 1911, provided that, after the individual's property had been assessed by the township assessor, it should be equalized as between individuals by the township board. Every taxpayer had the most ample opportunity to be heard before this board. Its day of meeting was fixed by statute, and any inequality or injustice done any individual could there be remedied. Not only was there an opportunity for a hearing before the said board afforded, but an appeal was provided to the board of county commissioners, and from thence to the county court. But it is not this assessment of which complaint is made, nor of the equalization made by the county board of equalization. Plaintiffs are apparently satisfied with both of these, but their complaint is that the equalization of the county as made by the state board assessed their property beyond its fair cash value, and hence that they were entitled to the remedy which they here seek. In this contention we are unable to agree. At the conclusion of the labors of the township board of equalization the presumption obtains that every taxpayer owning property in the township and who did not appeal was satisfied with the action of such board. In contemplation of law he was before the board and acquiesced in his assessment. The same rule obtains in reference to the county board of equalization. In the absence of any protest or appeal, every township, at the conclusion of the labors of that board, was presumed, with all of its taxpayers, to be satisfied with its action and to consent that its conclusion was correct. So that when the property of the county was submitted for the action of the State Board of Equalization the presumption conclusively obtained that it had all been assessed on a uniform basis and that, according to the judgment of the officials who were called upon to act, the assessment conformed to the fair cash value thereof. Upon this judgment it was the duty of the State Board of Equalization to act, and when it had acted, in the absence of evidence of fraud or gross error in the system on which the valuations were made, its judgment was final, except by appeal, and plaintiffs could not in this manner put against and nullify it, either the judgment of themselves, the county clerk, the board of county commissioners, or of any court. The hearing which they seek is not

provided for by statute, but is specifically legislated against. See chapter 87, p. 173, Sess. L. 1910; also, 1 Cooley on Taxation, p. 786; Foster v. Rowe, 128 Wis. 326, 107 N. W. 635, 8 Ann. Cas. 599; Taylor v. Secor, 92 U. S. 575, 23 L. Ed. 672; Gilbert v. Lyon County, 30 Kan. 166, 1 Pac. 577.

The judgment of the trial court is reversed, and the case remanded, with instructions to dismiss the petition.

HAYES, C. J., and KANE, J., concur.  
WILLIAMS and TURNER, JJ., dissent.

(37 Okl. 684)

MILLER BROS. v. McCALL CO.

(Supreme Court of Oklahoma. June 19, 1913.)

(Syllabus by the Court.)

1. EVIDENCE (§ 397\*)—PAROL EVIDENCE—CONTRACTS.

When persons meet and negotiate concerning a contract and discuss its proposed terms and conditions, and finally end the matter by executing a written contract fully covering the subject, it represents the final agreement of the parties, and oral evidence tending to vary, contradict, enlarge, or narrow the terms of the writing is not admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1756-1765; Dec. Dig. § 397.\*]

2. TRIAL (§ 252\*)—REFUSAL OF INSTRUCTIONS—EVIDENCE.

It is not error to refuse to give to the jury a requested instruction, although it may be applicable to some issue raised by the pleading, when there is no evidence in support of the issue upon which the instruction is based.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Oklahoma County; J. J. Carney, Judge.

Action by the McCall Company, a corporation, against Miller Bros. Judgment for plaintiff, and defendant brings error. Affirmed.

Robt. A. Rogers, of Oklahoma City, for plaintiff in error. Burwell, Crockett & Johnson, of Oklahoma City, for defendant in error.

BREWER, C. The McCall Company, a corporation, sued Miller Bros., a partnership, in the district court of Oklahoma county for a balance due for goods sold and delivered, in the sum of \$909.10, under a written contract between the parties, and for damages on account of a breach of the contract by Miller Bros. The contract is lengthy, and goes into great detail; under it the defendants ordered and agreed to handle a line of patterns for various garments worn by women. Defendants also agreed to take and pay for, periodically, certain advertising sheets and other matter to be furnished by plaintiff. It is alleged, and not denied, that plaintiff furnished goods to defendants under the terms of the contract in the sum of \$1,-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



\$909.91, and that defendants had paid thereon \$100.83. The damages claimed were for loss of profits. The defendants in their answer set up first, the defense of fraud in the procurement of the execution of the contract; second, a plea that part of plaintiff's claim was for penalty and not for liquidated damages; third, that defendants had made settlement in accordance with a plan proposed by plaintiff; fourth, that plaintiff is a trust. The cause was tried to a jury and a verdict was rendered in favor of the plaintiff for \$909.10, which was the amount of balance due for goods received by defendants, less payments made. The jury disallowed the plaintiff's claim for damages entirely, therefore the defense as to the question of damages having prevailed, that branch of the case will need no further attention.

The defendants below appealed the case under 27 separate assignments of error. Their brief filed in scarcely a particular conforms to the rules of the court. For instance: Assignments 3 to 12, inclusive, deal with the refusal of the court to admit certain evidence, and yet this evidence is not brought forward in the brief, but its purported substance is merely stated in a general way with reference made to the case-made; and the refusal to give a number of requested instructions is casually mentioned in the brief, but, with one exception, they are not set out therein in totidem verbis, as required by rule 25 of this court. Yet from a careful examination of plaintiff in error's brief we think that it may be fairly said that errors urged here have been reduced to two general propositions: (1) The refusal of the court to permit them to prove by oral testimony that they were exclusive agents in handling the McCall patterns. (2) The refusal to give their requested instruction number two.

Before taking up the two allegations of error mentioned above, we consider it proper to say that the defense of fraud in procuring the execution of the contract failed for want of any proof to support it. The agent for plaintiff and both defendants testified as to what took place at the time of, and leading up to, the execution of the contract. We have read the evidence and fully agree with the trial court that there was no evidence produced in any wise tending to show fraud as charged. Also on the defense that the McCall Company was in a trust, or unlawful combination in restraint of trade, the trial court held that: "There has been no testimony admitted in the trial of this case in support of that allegation of the defendant's answer." We fully agree with the trial court. This defense failed through a total failure of proof.

[1] 1. On the first point sufficiently presented in the brief, i. e., that the court erred in refusing to permit them to prove that contemporaneously with the execution of the

written contract a verbal one was made that defendants should have the exclusive sale of plaintiff's goods in Oklahoma City, it is not suggested in what way this evidence would have been of value to them if admitted. They did not claim that any one else did have the sale of the goods, thus depriving defendants of expected profits; in fact it is admitted that such was not the case. The trial court held that the written contract which detailed its terms and conditions fully and with minute particularity could not be changed or varied in its terms by oral proof, and that to admit the proof offered would have that effect. The court was right. When persons meet and negotiate concerning a contract and discuss its proposed terms and conditions, and finally end the matter by executing a written contract fully covering the subject, it represents the final agreement of the parties, and oral evidence tending to vary, contradict, enlarge, or narrow the terms of the writing is not admissible.

The instrument involved here is admittedly a contract, is free from fraud, accident, or mistake, and covers fully the details of its subject-matter. Under similar circumstances this court in *Southard v. Arkansas Valley & W. Ry. Co.*, 24 Okl. 420, 103 Pac. 755, has ruled: "For the instrument here involved is admittedly a contract, and under the authorities cited by the plaintiff in error it is not permissible to prove a parol contemporaneous contract to add to, vary, or contradict a written contract, unless under proper allegations as to fraud, accident, or mistake. This rule is supported by practically an unbroken line of authority where the common law controls. *Engelhorn v. Reittlinger et al.*, 122 N. Y. 79, 25 N. E. 297, 9 L. R. A. 548; *Wilson v. Deen*, 74 N. Y. 531; *Hubbard v. Marshall*, 50 Wis. 327, 6 N. W. 497; *Underwood v. Simonds*, 12 Metc. (Mass.) 277; *Fawcner v. Smith Wall Paper Co.*, 88 Iowa, 169, 55 N. W. 200, 45 Am. St. Rep. 230; *Sandage v. Studabaker Bros. Mfg. Co.*, 142 Ind. 157, 41 N. E. 380, 34 L. R. A. 363, 51 Am. St. Rep. 165; *Baum v. Lynn*, 72 Miss. 932, 18 South. 428, 80 L. R. A. 441; *Ferguson v. Rafferty*, 128 Pa. 337, 18 Atl. 484, 6 L. R. A. 33; *Parker v. Morrill*, 98 N. C. 232, 3 S. E. 511; *Elghmie v. Taylor*, 98 N. Y. 288; *Wigmore on Evidence*, § 2433." The statute (Harris-Day Code 1910, § 942) fully covers the point in issue. This statute was construed in *Garrison v. Kress*, 19 Okl. 433, 91 Pac. 1130, which cites *L. L. & G. Ins. Co. v. Richardson*, 11 Okl. 585, 69 Pac. 938; *Deming Inv. Co. v. S. F. Ins. Co.*, 16 Okl. 1, 83 Pac. 918, 4 L. R. A. (N. S.) 607.

[2] 2. The instruction requested and refused is as follows: "The jury are further instructed that if they believe from the evidence that before the filing of this suit of plaintiffs, plaintiffs offered in writing a mode of settlement to defendant, which defendant accepted within a reasonable time thereafter,



you will find for the defendant, unless you find that they are further indebted to them for any sum for balance due." The mode of settlement referred to is based on the following postscript to a letter from the McCall Company replying to one from defendants asking to be relieved of the contract: "You are doubtless aware of the fact that our contract is not subject to cancellation now, but should conditions arise whereby it would be impossible for you to carry it out, we would consent to your transferring it to some other reputable merchant." The defendants claim to have interpreted this postscript as giving them authority to immediately terminate the contract and return plaintiffs all the goods they had on hand in settlement of their indebtedness. Upon just what species of reasoning such an interpretation was arrived at is not easily perceived, and we feel that the mere statement of the contention and the language upon which it is based is all the argument the matter needs. There was no evidence upon which to base the instruction offered and its refusal was proper.

The defendants testified, and their testimony is marked with every evidence of candor and truthfulness, and it, taken with the numerous letters they wrote, merely shows that after making the contract they found that it was an unwise and unprofitable one. That the line of goods they bought and agreed to handle was not adapted to the business they were in. They asked to be relieved of the contract solely upon those grounds. Upon refusal they breached it. They had the sympathy of the trial court and the jury, which refused damages and gave judgment solely for the balance due for goods bought. This much plaintiff was unquestionably entitled to, and the cause should be affirmed.

PER CURIAM. Adopted in whole.

(37 Okl. 784)

ST. LOUIS & S. F. R. CO. v. WALKER.†  
(Supreme Court of Oklahoma. July 8, 1913.)

(Syllabus by the Court.)

**1. CARRIERS (§ 207\*)—CONTRACT TO FURNISH CARS—ESTOPPEL.**

Where a shipper ordered cars from the agent of a railroad company to be used for shipping cattle on a day named by him, and the agent promised to order the cars and did not suggest to the shipper that the cars might not be obtained, the company is estopped to deny that there was a contract to furnish the cars on the day named.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 129-239; Dec. Dig. § 207.\*]

**2. CARRIERS (§ 218\*)—CONTRACT WITH SHIPPER—RELEASE OF LIABILITY—VALIDITY.**

Where a shipper made a written offer of shipment at the time a written contract of shipment was entered into, in which cattle offered for shipment were valued and which stated, among other things, the "valuation is named by me for the purpose of securing a reduced rate of freight on the shipment," and which offer was accepted in writing as fol-

lows: "The \* \* \* company accepts this shipment and the above valuation as a basis for fixing the rate of freight thereon"—a paragraph in the contract as follows: "For the consideration aforesaid the shipper agrees to waive and release, and does hereby release the company from any and all liability for or on account of delay in shipping said stock after the delivery thereof to its agent, and from any delay in receiving the same after tender of delivery, and for breach of any alleged contract to furnish cars at any particular time, and the shipper hereby releases and does waive and bar any and all causes of action for any damages whatsoever that have accrued to the shipper by any written or verbal contract prior to the execution hereof concerning said stock or any of them"—and was without consideration and is invalid where there is no evidence that the shipper obtained a lower rate than he would have received on the same valuation had no damage accrued prior to the execution of the written contract.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-940; Dec. Dig. § 218.\*]

**3. CARRIERS (§ 228\*)—SHIPMENT OF LIVE STOCK—CLAIM FOR DAMAGES—EVIDENCE.**

Where the evidence showed that plaintiff instructed a commission company to make claim for damages for injury to live stock occasioned by delay in shipment, and a letter from the claim agent of the railroad company to the commission company, written some weeks after the shipment was made, showed that the claim was made and that he had investigated it, and said nothing about the claim having been filed too late, and no proof was offered by the company showing or tending to show that it was not filed in time, the presumption that it was filed within the time prescribed by the contract is a condition precedent to recovery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 957-960; Dec. Dig. § 228.\*]

**4. CARRIERS (§ 213\*)—SHIPMENT OF LIVE STOCK—LIABILITY FOR DELAY.**

A common carrier is not responsible for delay in the shipment of live stock where the delay is occasioned by the act of God and there has been no negligence by the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 920-922; Dec. Dig. § 213.\*]

Commissioners' Opinion, Division No. 2. Error from County Court, Garfield County; James B. Cullison, Judge.

Action by W. H. Walker against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed upon condition.

W. F. Evans, of St. Louis, and R. A. Kleinschmitt and J. H. Grant, both of Oklahoma City, for plaintiff in error.

ROSSER, C. W. H. Walker, hereinafter called plaintiff, brought this action against the St. Louis & San Francisco Railroad Company, hereinafter called defendant, to recover damages for injuries to certain cattle shipped by the plaintiff over the defendant's road. The petition contained four different counts stating four different causes of action.

As to the first cause of action it is alleged that the plaintiff entered into an oral contract with the defendant on the 16th day of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied.



October, 1906, to furnish cars for the shipment of 62 head of cattle from Covington to Kansas City, to be furnished on the 21st day of October, 1906; that the plaintiff delivered his cattle at the stock yards at Covington on the 21st; that the defendant failed and neglected to furnish cars until the 24th day of October, 1906; and that the plaintiff was unable to get the cattle on the market at Kansas City until the 25th day of October. It also alleged a certain loss in market, shrinkage in the cattle, and other expenses.

For the second cause of action plaintiff alleged that on the 20th day of October, 1907, he shipped two cars of cattle, containing 70 head, from Covington to Kansas City; that the stock was loaded in time to have reached the Kansas City stock yards for the market on the 21st day of October, but on account of the delay and failure to transport promptly the cattle did not arrive at the stock yards until October 22d. He also alleges a shrinkage in the weight of the cattle and a decline in the market from the 21st to the 22d.

For the third cause of action plaintiff alleged that on the 25th day of October, 1908, he delivered to the defendant at its station at Covington two cars of cattle, 59 in number, for shipment to Kansas City; that they were loaded at 7:30 a. m. on the 25th of October; that they reached Avard Junction at 5:50 p. m. of that date, and were held there and later backed to the station at Sapulpa, arriving there at 3 o'clock on the morning of October 26th; that they were not unloaded until 7 o'clock on the morning of the 26th; that they were held in the yards at Sapulpa until 8 o'clock p. m. on the 28th of October; and that they reached the stock yards at Kansas City at 7 o'clock on the morning of October 30th.

The fourth cause of action was for a later shipment, but the court instructed the jury that the plaintiff was not entitled to recover on the fourth cause of action, and that portion of the case is not before this court.

The defendant denied the principal allegations as to the first alleged cause of action and answered that it furnished the cars to plaintiff within a reasonable time after demand was made, and as soon as it was possible to secure the car, and that after the car was secured the cattle were promptly transported.

For its answer to the second cause of action it denied that it agreed or undertook to transport the cattle within a specified time. It further pleaded that it transported the cattle under the terms of a written contract, the eleventh paragraph of which provided that, as a condition precedent to the recovery of damages for the delay, loss, or injury to the live stock, the plaintiff should give notice in writing of its claim to some gen-

eral officer or agent of the defendant at destination within one day after the delivery of such stock at destination.

To the third cause of action defendant answered that it received two cars of cattle on the 25th day of October, consigned to Kansas City, and transported them by virtue of a written contract, the fourth paragraph of which provided that the live stock was not to be transported within any specified time, and that neither the company nor any connecting line should be responsible for delay caused by storm, failure of machinery or cars, or from obstructions on the track, and that the defendant should not be liable for any delay in the carriage of the live stock. It further alleged that on the 25th day of October, and about the time the shipment was received and started on its way, by reason of an unusual and extraordinary flood, the Verdigris river bridge on its line was washed out, rendering its tracks impassable, and that said delay was caused by the flood and was an act of God, for which it could not be held responsible.

[1] Defendant urges that the first cause of action cannot be maintained for two reasons: First. It contends that the evidence does not show that it entered into a contract with the plaintiff to furnish cars on the 21st of October, 1906. It is true that the plaintiff states that he received no assurance from the agent that the cars would be there on the 20th. His statement was that he went to the agent and asked him to get the cars for the 20th, and that the agent told him that he would order them for the 20th. The agent did not express any doubt as to whether or not they would be there at that time, but merely told him that he would order the cars. The natural presumption would be that he would get the cars when he ordered them. He knew that the plaintiff expected to ship at that time, and when he, in response to a request to furnish them, stated he would order them for that time, without making any suggestion that they might not be there, it amounted to an agreement that the cars would be there at that time. It is estopped by the conduct of its agent from denying that it made a contract. Knowing that the plaintiff was relying upon its having the cars at the time they were ordered, it was defendant's duty to inform him that they were not to be had; it is liable for the damages for failure to transport promptly. *Pittsburg Railroad Co. v. Racer*, 5 Ind. App. 209, 31 N. E. 853; *Ayers v. Chicago & N. W. R. Co.*, 71 Wis. 372, 37 N. W. 432, 5 Am. St. Rep. 226.

[2] Defendant's second contention is that by the seventh paragraph of the bill of lading the plaintiff released whatever cause of action it may have had against the defendant for failure to furnish cars at the time agreed upon. The seventh paragraph is as follows: "For the consideration afore-



said the shipper agrees to waive and release, and does hereby release, the company from any and all liability for or on account of delay in shipping said stock after the delivery thereof to its agent, and from any delay in receiving the same after tender of delivery, and for breach of any alleged contract to furnish cars at any particular time, and the shipper hereby releases and does waive and bar any and all causes of action for any damage whatsoever that has accrued to the shipper by any written or verbal contract prior to the execution hereof concerning said stock, or any of them." The terms of the paragraph are broad enough to cover the damage claimed by the plaintiff in this case, but the release is ineffective because it was made without consideration. The contract was on a printed form of contract, exactly the same as was used by the company upon any other shipments referred to in the other causes of action. This is not evidence that the plaintiff obtained a lower rate by reason of the release of accrued damages than he would have obtained by the same valuation if no damages had already accrued. So far as the evidence shows, the company would have charged the same rate exactly whether there had been any previous damages or not. The only consideration for the reduced rates was an agreement to release the company from a risk upon the cattle above a certain valuation. This clearly appears from the application or offer of shipment made by the plaintiff at the time the contract and bill of lading was issued. This application is as follows:

"To the St. Louis & San Francisco Railroad Company: The undersigned offers for shipment over your road 62 head of cattle from Covington, O. T., to Kansas City, Mo., each head of the estimated weight of 1,000 pounds, and valued at thirty dollars per head, \* \* \* which valuation is named by me for the purpose of securing a reduced rate of freight on the shipment; and I agree that in case of loss or damage to same said valuation so named shall be conclusive, should I name any claim for such loss or damage against any carrier over whose line the same may pass. This application is an election on my part to avail myself of a reduced rate by making this shipment under the following contract, limiting the liability of such carrier, instead of shipping the same at a higher rate without such limitations. W. H. Walker, Owner or Shipper. Witness O. G. Sage.

"The St. Louis & San Francisco Railroad Company accepts this shipment and the above valuation as a basis for fixing the rate of freight thereon. St. Louis & San Francisco Railroad Company, by J. E. Bernard, Agent."

The exact point is decided in *Clark v. Ulster & Delaware R. Co.*, 189 N. Y. 93, 81 N. E. 766, 13 L. R. A. (N. S.) 164, 121 Am.

St. Rep. 848, 12 Ann. Cas. 883. The first paragraph of the syllabus is as follows: "An oral contract whereby a railroad company undertakes, through a station agent, to furnish cars for a shipment of live stock at a specified station and at a specified time is not void by written contract, signed by the shipper, for the transportation of live stock, subsequent to a breach of the oral contract, unless there is some consideration moving to the shipper as compensation for damages incurred by him in consequence of the breach of the oral contract." It is true that the court in that case said that a written contract signed related only to matters in futuro; but while that was referred to the decision was not rested upon that ground, but was rested upon the fact that there was no consideration for the release of the damages already accrued. The same question is decided in *Gulf, etc., R. Co. v. House*, 40 Tex. Civ. App. 105, 88 S. W. 1110.

As grounds of reversal as to the second cause of action, the defendant contends that the eleventh paragraph of the contract of shipment, which provided that, as a condition precedent to recovery for any damage for delay, loss, or injury, plaintiff must give notice in writing of the claim to some general officer or the nearest station agent of the defendant before the stock was removed from the point of shipment or from the place of destination, and before it was mingled with other stock, and that the written notice must be served within one day after delivery of the stock at destination, and which provided that the failure to comply with that provision of the contract should be a bar to a recovery of such damages.

[3] This cause of action arose prior to statehood, and at that time it was necessary, in order to entitle plaintiff to recover, that he should have given notice. The plaintiff offered no direct proof that notice was served. He testified, however, that his commission company was instructed to file a claim, and he offered in evidence a letter signed by the freight claim agent of the defendant, dated February 12, 1908, addressed to his commission company, from which it appears that the claim had been made by the commission company, and in which nothing was said about a failure to file the claim within time. On the other hand, the letter admitted that the defendant was responsible for missing one market, and stated that five cents a hundred would cover any actual difference in the market. From this letter, written a few weeks after the shipment, and which showed that it had been preceded by an investigation upon the part of the freight claim agent, and in which nothing was said about the failure to file the claim within time, the presumption is that the claim had been made at the proper time and in the proper way, especially as the defendant offered no proof as to when the claim was filed.

[4] Defendant contends that plaintiff is not



entitled to recover upon the third cause of action, because the delay was occasioned by the act of God and through no fault of the defendant. This contention must be sustained. The evidence shows that the shipment upon which the third cause of action is based was made at a time when there had been a great deal of rain and when the plaintiff himself knew that the tracks were in bad condition. About the time the stock was shipped, bridges across the defendant's road were washed away, one across Caney creek and another across Verdigris river, and it was on account of this condition that the defendant was unable to transport the cattle within a reasonable time and with the usual dispatch. There is no evidence of negligence on the part of the company which, concurring with the freshets, caused the injury. The company is not responsible for damages caused by an act of God. *Armstrong, etc., Co. v. Illinois Central R. Co.*, 26 Okl. 352, 109 Pac. 216, 29 L. R. A. (N. S.) 671, and cases there cited; *O. R. I. & P. R. Co. v. Logan, Snow & Co.*, 23 Okl. 707, 105 Pac. 343, 29 L. R. A. (N. S.) 663.

It follows that plaintiff was not entitled to recover upon the third cause of action, and that so much of the judgment as allows a recovery upon that cause is erroneous. The verdict of the jury was for separate amounts upon each cause of action, but the judgment was for the entire amount. The verdict for the third cause was \$200.

If the plaintiff will within 40 days enter a remittitur for that amount, the judgment should be affirmed; otherwise it should be reversed and remanded.

PER CURIAM. Adopted in whole.

(37 Okl. 645)

BELL v. BEARMAN et al.

(Supreme Court of Oklahoma. June 19, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 338\*) — TIME FOR TAKING APPEAL.

Act Feb. 14, 1911 (Sess. Laws 1910-11, c. 18), limiting the time within which appeals can be taken to six months, is not retroactive, and does not apply to cases tried before it was passed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1879-1882, 3057; Dec. Dig. § 338.\*]

2. APPEAL AND ERROR (§ 748\*)—ASSIGNMENTS OF ERROR—AMENDMENT.

When the assignment of errors fails to allege as error the overruling of the motion for new trial, the plaintiff in error will be permitted to amend his assignment of errors within the time allowed by law for appealing the case, so as to assign as error the action of the court in overruling the motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3058-3064; Dec. Dig. § 748.\*]

3. EVIDENCE (§ 476\*)—OPINION—AGE.

It is not error to permit witnesses acquainted with a person whose age at a certain

time is in controversy to testify that she appeared to be more than 18 years old at that time.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2236; Dec. Dig. § 476.\*]

4. EVIDENCE (§ 291\*)—DECLARATION OF DECEDENT—AGE.

Evidence is admissible that a person, dead at the time of trial, stated that she was more than 18 years of age on a certain date.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1150; Dec. Dig. § 291.\*]

5. APPEAL AND ERROR (§ 1050\*)—EVIDENCE (§ 297\*)—AGE—HARMLESS ERROR.

Where the issue is as to whether a person had attained majority at the time she executed a certain deed, it is not error to admit evidence that she executed a note and mortgage prior to the execution of the deed in controversy, and the case will not be reversed because the contents of the note and mortgage were received in evidence, when it does not appear that their contents could have influenced the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\* Evidence, Cent. Dig. § 1154; Dec. Dig. § 297.\*]

6. EVIDENCE (§ 297\*)—AGE—AFFIDAVITS.

Where the grantor's mother and sister were dead at the time of trial, it was not error to admit in evidence their affidavits as to the age of the grantor, made long before the execution of the deed whose validity is disputed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1154; Dec. Dig. § 297.\*]

7. EJECTMENT (§ 86\*) — BURDEN OF PROOF — EVIDENCE—INDIANS.

Where the defendant in an action of ejectment is in possession deraining title through a deed from a Creek allottee, and the plaintiff claiming title through a subsequent deed from the same allottee relies for recovery on the fact that the first deed is invalid because of the minority of the allottee at the time of its execution, the burden is upon him to show such minority.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 238-245; Dec. Dig. § 86.\*]

8. APPEAL AND ERROR (§ 1001\*)—VERDICT—EVIDENCE.

A verdict reasonably supported by the evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3923-3934; Dec. Dig. § 1001.\*]

Error from District Court, Wagoner County; Chas. Bagg, Judge.

Action by L. A. Bell against Jacob A. Bearman and another. Judgment for defendants, and plaintiff brings error. Affirmed.

Robert F. Blair, of Wagoner, and Peter Deichman, of Tulsa, for plaintiff in error. F. B. Righter, of Broken Arrow, and Preston C. West, of Muskogee, for defendants in error.

ROSSER, C. This was an action by L. A. Bell against Jacob A. Bearman and John S. Bilby to recover certain land. There was a judgment for the defendants, and plaintiff appealed. He filed a brief containing a number of assignments of error, all of which related to matters occurring at the trial, but did not assign as error the overruling of the motion for a new trial. The defendants

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



in error have filed a motion to dismiss the petition in error for the reason of the overruling of the motion for new trial is not assigned as error. Plaintiff in error has filed a response to the motion to dismiss the petition in error, in which he admits that the overruling of the motion for a new trial must be assigned before this court can review the questions raised by the brief, but he asks to be allowed to amend the petition in error by adding the assignment that the court erred in overruling the motion for a new trial.

[1, 2] The order overruling the motion for new trial was entered on the 6th day of January, 1911. The application to amend the assignment of error was filed November 15, 1911. At the time the action was tried, the law permitted appeals to be taken at any time within a year, and the law then in force governed as to the time within which an appeal could be taken. Act Feb. 14, 1911 (Sess. Laws Okl. 1910-11, p. 85), limiting the time within which appeals can be taken to six months, is not retroactive in its effect, and does not apply to cases tried before it was passed. *Rotater v. Strain*, 31 Okl. 58, 119 Pac. 902; *Buchanan v. Loving*, 128 Pac. 499. The plaintiff in error filed his application to amend his assignment of error by adding one with reference to the action of the court in overruling the motion for a new trial before the expiration of a year from the time of overruling of the motion. The assignment presents no new question of law, and the appellees cannot be injured in any way by permitting the amendment, except that they will lose their technical right to have the appeal dismissed. Therefore the assignment of error with reference to overruling the motion will be considered, and the motion to dismiss will be overruled. The land in controversy in this action is in the Greek Nation. Both parties claim under a deed from Beatrice Davis (née Bean), who was the original allottee. The defendants, who are also defendants in error, claim through a deed executed by her to the Western Investment Company March 1, 1905. The plaintiff claims through a deed executed by her June 7, 1907. It is his contention that the allottee was a minor less than 18 years of age at the time she executed the deed to the Western Investment Company March 1, 1905. The question upon which issue was joined is whether or not she was of lawful age at the time she executed the deed to the Western Investment Company.

[3-5] Plaintiff's brief contains 16 assignments of error. The first 9 relate to the admission of testimony. Evidence was received that she appeared to be of age, and that she stated that she was of age. A certain note and mortgage given by her to a third party was also received in evidence. No material error was committed by this action of the court. It is competent to prove

by witnesses that a person has the appearance of being of a certain age. *State v. Grubb*, 55 Kan. 678, 41 Pac. 951; *State v. Bernstein*, 99 Iowa, 5, 68 N. W. 442; *Garner v. State*, 28 Tex. App. 561, 13 S. W. 1004; *Jones v. State*, 32 Tex. Cr. R. 108, 22 S. W. 149; *Bice v. State*, 37 Tex. Cr. R. 38, 38 S. W. 805. The admission in evidence of the note and mortgage executed a short time prior to the deed to the Western Investment Company was not material error. By executing them she asserted her capacity to do so, and the fact that their contents were placed before the jury is not such error as requires a reversal of the case; it not appearing that their contents had anything to do with the issues here.

[6] The court admitted in evidence certain affidavits of the mother and sister of the allottee of her age at a certain date. The affiants were dead. The affidavits were made long before plaintiff's deed was made. This was competent. It amounted to a declaration by the affiants as to the age of a member of their family. *David v. Sittig*, 1 Mart. N. S. (La.) 147, 14 Am. Dec. 179; 1 Greenl. on Ev. (16th Ed.) 114b; *Wigmore*, § 1481 et seq.

[7] It is urged that the court erred in instructing the jury that the burden was on the plaintiff to show by a preponderance of the evidence that the allottee was a minor at the time she executed to the Western Investment Company the deed under which the defendants claim. This instruction was correct. The defendants were in possession under a deed. The burden was on the plaintiff to show that they had no right to the possession. The exact question was decided in *Moore v. Sawyer* (C. C.) 167 Fed. 826. It was there held that a person was presumed competent to make contracts, and that the person pleading infancy as a ground for avoiding a contract or instrument must prove it by clear evidence. 22 Cyc. 690, and cases cited in note 58. The case of *Libby v. Clark*, 118 U. S. 250, 6 Sup. Ct. 1045, 30 L. Ed. 133, relied on by plaintiff in error, is not opposed to this view. In that case the statute provided that the allottee could not sell lands before becoming a citizen of the United States; that members not under disabilities could sell to each other with the consent of the Secretary of the Interior. It was held that a deed made by the allottee without the consent of the Secretary before he became a citizen of the United States was not admissible in evidence in that case, though the plaintiff was offering the deed. The restriction applied to all the lands of all the allottees unless the Secretary consented to the sale. In the present case the restriction had been removed from the surplus allotments, except as to minors. The defendants were in possession, and the presumption was that their possession was lawful. This presumption could only be over-



come by showing that the deed through which they claimed, and which was regular on its face, was invalid because executed by a minor. Other objections to the instructions are urged, but none of them seem to require consideration.

[8] The plaintiff devotes most of his brief to the proposition that the evidence does not support the verdict. The evidence is very conflicting. The preponderance in the number of witnesses is strongly in favor of the plaintiff, but there was a good deal of testimony in favor of the defendant. They had the statement of the allottee's mother, as well as of the girl herself, and they had other witnesses who knew the allottee.

The evidence supports the verdict, and the case should be affirmed.

(37 Okl. 655)

#### HOGAN et al. v. LEEPER.

(Supreme Court of Oklahoma. June 19, 1913.)

##### *(Syllabus by the Court.)*

#### 1. JURY (§ 14\*)—RIGHT TO JURY TRIAL—DEED OF TRUST—CANCELLATION.

The defendant in a suit to cancel a deed of trust, alleged to have been executed under duress, is not entitled to a jury trial, though the effect of the cancellation will be to restore the maker of the instrument to the control of land described in said instrument.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 40-60, 66-83; Dec. Dig. § 14.\*]

#### 2. TRIAL (§ 374\*)—NATURE OF ACTION—VERDICT OF JURY.

A suit to cancel an instrument conveying land in trust is an equitable suit, and the verdict of a jury is merely advisory to the court, and the court may make different findings if satisfied that different findings are required by the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 884; Dec. Dig. § 374.\*]

#### 3. TRUSTS (§ 50\*)—DEED OF TRUST—VALIDITY—DURESS.

The evidence showed that a son came to the city of his father's residence, employed a lawyer, and had the lawyer to prepare a deed of trust conveying all of his father's real estate to a trustee for the life of his father, with directions to apply \$40 per month of the income to the support of the father and the balance to the expenses of the trust and payment of certain mortgages on some of the property. The father was then requested to go to the lawyer's office and was there requested to sign the deed of trust and was told that if he did not proceedings would be commenced to appoint a guardian for him. He then signed the instrument without having had time or opportunity to reflect or consult friends or counsel of his own choosing, saying at the time that he was signing his life away. *Held*, that the instrument should be canceled.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 50.\*]

#### 4. INSANE PERSONS (§ 30\*)—APPOINTMENT OF GUARDIAN—GROUNDS.

The fact that a man 76 years of age desires to marry is not sufficient ground for the appointment of a guardian of his property.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 43, 45, 61; Dec. Dig. § 30.\*]

#### 5. TRUSTS (§ 46\*)—TRUST DEED—EXECUTION—PRESUMPTION.

When circumstances, such as are related in paragraph 3 above, are shown conclusively or admitted by the party procuring the execution of the instrument, the presumption arises that the instrument was obtained through duress and undue influence, and the burden is then upon the party procuring the execution of the instrument to show that the execution was not so procured.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 69; Dec. Dig. § 46.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Oklahoma County; George W. Clark, Judge.

Action by J. G. Leeper, as executor of Thomas J. Bailey, deceased, against Daniel W. Hogan and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Fred S. Caldwell and Chas. H. Garnett, both of Oklahoma City, for plaintiffs in error. Vaught & Ready, of Oklahoma City, for defendant in error.

ROSSER, C. This was an action by Thomas J. Bailey, now deceased, against Daniel W. Hogan, Samuel E. Bailey, Dora L. Adams, Mamie L. Huntley, John A. Bailey, Thomas A. Bailey, and Leigh M. Bailey. There was a judgment for plaintiff, and defendants appeal.

The plaintiff has died since the trial, and the case has been revived by making J. G. Leeper, executor of his will, the defendant in error here. The plaintiff, Thomas J. Bailey, had been married a number of years ago, and the defendants named, except Hogan, are his children by the wife of his youth. These children grew up and his first wife died and he married a second time. At the opening of the territory of Oklahoma he came to Oklahoma City with his second wife and one or two of his younger children and established a home here. He lived in a tent for a time and endured other hardships to acquire and hold property until at the time of the transaction involved in this case he had accumulated property valued by different persons at from \$25,000 to \$75,000. His second wife died. His children established homes for themselves and he began boarding. For three or four years he boarded or made his home with a woman named Scantlin, who was a married woman living apart from her husband. She lived in one of his houses, and their relations were very friendly, but from the testimony not more than friendly. Some of his daughters visited him and it seems that they became apprehensive that this woman would induce him to give her some of his property. At any rate, after some correspondence among the children, the defendant Leigh M. Bailey came to Oklahoma City and employed a lawyer to draw a deed of trust. He remained in the city two or three days consulting with his lawyer and with some of plaintiff's neighbors, who



were busying themselves in the matter. He had the records examined, found out what property his father had and its condition, and had his lawyer to prepare the deed of trust involved here. His lawyer telephoned the plaintiff to come to his office and see him on a matter of interest to the plaintiff. The plaintiff started to his office to see him and was met by his son, Leigh M. Bailey, who until then had not permitted him to know that he (the son) was in the city, and who accompanied him back to the lawyer's office. When he reached there the lawyer informed him that he (the lawyer) had been retained by Leigh M. Bailey to look up the condition of his property; that they believed Mrs. Scantlin was trying to get his property; and that if he continued to live with her and did not put his property where she could not get it in time she would get it. Bailey replied that she had not yet gotten any considerable part of his property and that he did not intend for her to have it, and thought he could protect himself. He was then asked what disposition he wanted to make of his property, when he died, and he stated that he wanted his six children to have it and also stated that he had a will. He was then told that a will was uncertain, and that the woman might get another will. The lawyer then showed him the deed and explained it to him. The plaintiff testified that the lawyer and his son threatened to have him and the Scantlin woman arrested unless he signed the deed of trust. The testimony of his son and the lawyer, however, is that they told him that if he did not sign the deed of trust they would have a guardian appointed for him, and their statement is accepted as correct. After some discussion, at the request of the plaintiff, the lawyer withdrew from the room and the plaintiff talked the matter over with his son. The lawyer returned to the room and told his son to make him sign the deed of trust just as it was. After further conversation he signed the deed of trust. When he did so, according to his and his son's statement, he began crying and stated that he had signed his life away. He went with the trustee, however, and pointed out the property and introduced him to the tenants in the property with the instruction that they pay the trustee the rent from that time on. A short time after he signed the deed of trust he became dissatisfied and began writing to his children and asked them to release him from its provisions and threatened suit if they did not. There is absolutely no evidence that Mrs. Scantlin was trying to get his property, except that one witness, who had interested herself a good deal in the matter, testified that Bailey told her upon one occasion that the woman had obtained \$15 from him. She testified that he was very much dissatisfied on that account and stated to the witness that he was going to move. The evidence shows that the woman

waited upon him during his sickness and was kind to him in every way, and that his children expressed themselves as being satisfied with her treatment of him at the time they visited him when he was boarding with her. The case was tried to a jury, and there was a verdict for the defendants. The court set aside the verdict upon motion and rendered judgment for the plaintiff.

[1] The defendants contend that as the trustee was in possession of the plaintiff's property he was entitled to a jury trial, and that the court erred in disregarding the verdict of the jury and rendering judgment in accordance with his views of the law and the evidence. They based their contention upon the provisions of the Code with reference to trial by jury in ejectment cases and the further provision of section 6122, Comp. L. 1909, in substance, that an equitable title will support the action of ejectment. The contention is not well founded. This was not an action in ejectment. Plaintiff was not suing to recover possession. He was suing to cancel a deed of trust. The possession of the property was only incidentally involved. The purpose of the suit was to cancel the deed and remove the trustee. It was not a suit to recover specific real property.

[2] The suit to cancel the deed was an equitable one, and defendants were not entitled to a jury trial. *Mosler v. Walter*, 17 Okl. 305, 87 Pac. 877; *Watson v. Borah*, 132 Pac. 347, not yet officially reported; *Barnes v. Lynch*, 9 Okl. 158, 59 Pac. 995; *Richardson Dry Goods Co. v. Hockaday*, 12 Okl. 546, 73 Pac. 957; *Murray v. Snowden*, 25 Okl. 421, 106 Pac. 645; *Apache State Bank v. Daniels*, 32 Okl. 121, 121 Pac. 237, 40 L. R. A. (N. S.) 901; *Wat-Tah-Noh-Zhe v. Moore*, 129 Pac. 877. See, also, *Evans v. McConnell*, 99 Iowa, 326, 63 N. W. 570, 68 N. W. 790; *Martin v. Martin*, 44 Kan. 295, 24 Pac. 418; *Hospital Co. v. Philippi*, 82 Kan. 64, 107 Pac. 530, 30 L. R. A. (N. S.) 194; *Mesenburg v. Dunn*, 125 Cal. 222, 57 Pac. 887. The foregoing decisions of this court also hold that in an equity case a verdict of a jury is advisory only, and that the court may disregard the verdict if he is of a different opinion. This does not mean that the court should ignore the verdict in an equity case. When a jury has been impaneled and a verdict rendered in such cases, the court should give the verdict consideration; but if after due consideration he is unable to agree with the jury, and is of the opinion that a different finding is the correct one, it is his duty, notwithstanding the verdict of the jury, to enter what in his opinion is a correct judgment.

[3] The question is then whether the evidence supports the judgment. It does. In the first place there was no consideration for the deed of trust. Thomas J. Bailey was giving up the control of property which he had accumulated by his own exertions and paying another person a consideration to



look after the property when he was himself entirely competent to superintend it. It is true the compensation paid the trustee was not more than he earned, but the trusteeship was not necessary. There was no proof offered or attempted to be offered that Bailey was not managing his property well enough. It is true there were some small mortgages on some of it, but there is no proof at all that he had squandered or was squandering any money. One of the mortgages was for part of the purchase price of the property which he had bought a short time before the transaction involved here. If the mere giving of a mortgage subjected the giver to having a trustee appointed over his property, many people of the highest standing socially, professionally, and in a business way, and even some in official life, would be required to surrender the control of their possession to the hands of trustees. A little bad management or an occasional unprofitable business transaction, or even an occasional useless expenditure of money, is not sufficient ground upon which to take from a man the control of his property. If the deed was not procured by technical duress at least, it was not the voluntary act of Thomas J. Bailey.

Leigh M. Bailey, the son, came to Oklahoma City, but instead of going to his father he counseled with some people named Yeager and acting under their advice employed a lawyer. Evidently he did not believe there was immediate danger that the woman would obtain the property for he remained in the city three days without speaking to his father. During that time he saw his father, but his filial affection was of such a lukewarm nature that he got away to prevent his father from seeing him. When the deed of trust was ready, he had his lawyer telephone to his father to come to the office and then went out and met the old man and guided him to the office. When the old man reached the office, his son and his counsel unfolded the purpose for which he had been requested to come. That he demurred to surrendering, without reason and without consideration, the control of his property appears from the proof. There is a conflict in the testimony as to what was said. He says that his son and his counsel told him that he would be arrested, charged with improper relations with the woman, unless he signed the instrument. They deny this and say that they told him that if he did not sign application would be made to the court to have a guardian appointed for him. The effect from either threat would be about the same. If they did believe he was so incompetent as to need a guardian or committee, it seems inconsistent that they should have been willing for him to sign a deed of trust, surrendering the control of the results of a lifetime of labor, a transaction which certainly required the complete use of his faculties. Their attitude apparently was that

if the old man would sign the deed he was competent, but if he did not he needed a guardian. When he was confronted with the alternative of delivering his property to the care of a stranger or being arrested or having his child the moving party in an effort to show him incapable of attending to his affairs, he asked for an opportunity to talk privately with his son. "And he called his son Joseph, and said unto him: If now I have found grace in thy sight, put, I pray thee, thy hand under my thigh, and deal kindly and truly with me."

When the attorney retired Bailey asked his son why he had not come to him instead of going to a lawyer. His son did not answer; he made no appeal on the ground of affection. He offered no time for advice or reflection but, though dealing with his father, stood coldly on the advice of his lawyer. The lawyer returned to the room and the plaintiff signed the deed, saying, with emotion, that he had signed his life away. The whole transaction only took a short time. He had no opportunity to reflect and had no opportunity to consult a lawyer of his own choosing. The fact that he had no opportunity for reflection and advice is a strong circumstance in the case. *Miller v. Simonds*, 72 Mo. 669; *Davis v. Strange*, 86 Va. 793, 11 S. E. 406, 8 L. R. A. 261; *Story's Eq. Juris.* 251. The father undoubtedly had confidence in his son.

"Whenever there exists between parties confidence on the one hand and influence on the other, from whatever cause they may spring, equity requires in all dealings between them the highest degree of good faith on the part of him in whom the confidence is reposed. If a conveyance is executed by the other in his favor, the burden rests upon him to prove that it was not procured by means of such confidence and influence. It is his duty, before accepting the conveyance, to see that the grantor has disinterested advice and full information." *McClure v. Lewis*, 72 Mo. 314. See, also, *Parker v. Parker*, 45 N. J. Eq. 224, 16 Atl. 537; *Snyder v. Snyder*, 131 Mich. 658, 92 N. W. 353.

In the case of *Bowe v. Bowe*, 42 Mich. 195, 3 N. W. 843, which was a transaction between a father and son, in which the son was the beneficiary, the court said: "It is not necessary, under such circumstances, that the court should be satisfied the case was one of fraud, or even of undue influence; it is enough if the defendant has dealt oppressively with his parents, and that the consideration for the mortgage was either wanting or was inadequate."

"Influence obtained by flattery, importunity, superiority of will, mind, or character, or by what art soever that human thought, ingenuity, or cunning may employ, which would give dominion over the will of the testator to such an extent as to destroy the free agency, or constrain him to do against



his will what he is unable to refuse, is such an influence as the law condemns as undue, when exercised by any one immediately over the testamentary act, whether by direction or indirection." In re Disbrow's Estate, 58 Mich. 96, 24 N. W. 624.

This statement of the law as applied to wills is not only the law with reference to wills but with reference to conveyance contract which a party might enter into.

The evidence upon the part of the defendants in this case scarcely attempts to controvert the allegation that the plaintiff executed the deed of trust under a species of coercion. A considerable portion of the evidence is directed to the proposition that Thomas J. Bailey was infatuated with a woman, and it was necessary to protect him, but the evidence does not show that any improper relations existed between them or that she was making any effort to secure his property. They had been together for a considerable length of time and there is no proof that she ever sought to have him convey any part of his property to her. It does appear that he advanced her a few hundred dollars to engage in a small business. But the evidence tends to show that she was using the money in the business, and there is nothing in the evidence to show that the business was not successful. She, or the husband she later married, bought out his interest in the business and paid him for it. The proof does show that he complained to a neighbor once that she had gotten \$15 from him, and that she was costing him too much. This circumstance strengthens his case. If he complained of giving her \$15 while pressing his suit, it is likely he would have become very penurious later.

[4] The evidence does tend to show that he wanted to marry the woman. His son probably objected to that. He probably believed it was right to prevent the marriage. There is no doubt though that he was actuated largely by a desire to secure the old man's property to himself and his brothers and sisters. Old men try to control the marriages of their children. Children sometimes think that their surviving parent must get their consent before embarking for another voyage on the sea of matrimony. Usually the efforts of both parents and children are futile when directed toward preventing the other from marriage. Children have no right to act as guardians for a parent if the parent is in possession of his faculties and possessed of means sufficient for his support.

It is claimed the old man was infatuated with the woman. The writer of this opinion knows no reason why an old man has not the same right to be infatuated with a woman as a 16-year old boy or a 30-year old man. Men of all ages and conditions are continually becoming infatuated with all sorts of women, and unless the infatuation goes to

the extent of destroying the freedom of will and reason, it furnishes absolutely no ground for the appointment of a guardian. This old man had raised a family which had scattered out over the world and left him alone. If he could find solace with a woman who would give him good treatment in his declining years, there is absolutely no reason in law, equity, or morals why he should not do so and even bestow upon her his property if, acting in full exercise of his reason, he desired to do so. This deed of trust was obtained for the purpose of preventing him from disposing of his own property, and undue influence and coercion was brought to bear to induce him to sign it.

[5] It is claimed the court erred in holding that the burden of proof was on the defendants to show that the deed of trust was not obtained by force or undue influence or duress. The burden is always on the party alleging one or all of these grounds of cancellation to prove them or some of them, and some of the *language* of the court was not an accurate statement of the law, but a fair interpretation of his decision is that when it was shown that Bailey was called to the office of a stranger to him, suddenly presented with the deed of trust, and by his son and his son's lawyer given the alternative of signing the instrument or having guardianship proceedings begun, and that he signed it with the statement with tears in his eyes that he was signing his life away, the plaintiff had made a prima facie case that must be met by proof on the part of the defendant. That this was the correct view is supported by natural reason as well as by several authorities cited above.

The judgment should be affirmed.

PER CURIAM. Adopted in whole.

(37 Okl. 616)

SWOFFORD BROS. DRY GOODS CO. v.  
OWEN et al.

(Supreme Court of Oklahoma. June 11, 1913.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 28\*)—ORGANIZATION—"DE FACTO CORPORATION."

Under Act Cong. Feb. 18, 1901, c. 379, 31 Stat. 794, putting in force in the Indian Territory certain provisions of the laws of Arkansas, relating to corporations (section 960, and succeeding sections down to and including section 1035 of Mansfield's Digest), where the president and directors of a corporation in course of organization filed a true copy of their articles of incorporation, at full length, and also a certificate setting forth the purpose for which such corporation is formed, the amount of its capital stock, the amount actually paid in, and the names of its stockholders, and the number of shares by each respectively owned, with the clerk of the United States Court of Appeals for the Indian Territory, but fail to file a duplicate thereof with the clerk of the judicial district in which such organization is to transact business, where the attempt to organize is for a lawful purpose and within the statute,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
133 P.—13



made in good faith, and there has been an actual user of the corporate franchise for a term of years, without objection on the part of the sovereignty, a de facto corporation is thereby created.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 26, 70; Dec. Dig. § 23.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1841-1843.]

**2. CORPORATIONS (§ 29\*)—LEGALITY OF INCORPORATION—RIGHT TO ATTACK.**

The legal existence of such a corporation cannot be inquired into by those with whom as a corporation it has contracted, though the legality of its corporate existence may be inquired into by the state in an action brought by it in the manner prescribed by statute.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 77-79, 2504; Dec. Dig. § 29.\*]

**3. PARTNERSHIP (§ 41\*)—LEGALITY OF INCORPORATION—STOCKHOLDERS.**

A creditor who has dealt with a corporation de facto in its corporate name and capacity, and given credit to it and not to its stockholders, cannot, in the absence of fraud, charge them as partners with the debts of the corporation.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 56, 58, 59, 74; Dec. Dig. § 41.\*]

**4. BANKRUPTCY (§ 363\*)—EFFECT OF FILING CLAIM—PARTNERSHIP—ESTOPPEL.**

By filing proof of its claim against a bankrupt corporation, and receiving and accepting dividends on account thereof, a creditor is estopped from asserting its claim, in an action subsequently brought on the same indebtedness, against certain of the stockholders, with whom it claims it contracted as a partnership.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 550-554; Dec. Dig. § 363.\*]

**5. BANKRUPTCY (§ 363\*)—ALLOWANCE OF CLAIM—ADJUDICATION OF LIABILITY OF CORPORATION.**

The presentation and allowance of the account as a debt of the corporation was an adjudication by a court of competent jurisdiction, done at the instance and procurement of the creditor, fixing the corporation's liability.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 550-554; Dec. Dig. § 363.\*]

**6. BANKRUPTCY (§ 363\*)—EFFECT OF FILING CLAIM—ESTOPPEL.**

Even though the creditor, before filing its claim, was entitled to proceed against certain of the stockholders as partners, it having elected to file its claim against the bankrupt corporation, and participated in the corporate dividends declared, with knowledge of the facts, cannot subsequently be heard to say that the indebtedness was not in fact a debt of the corporation, but of the partners instead.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 550-554; Dec. Dig. § 363.\*]

**7. CORPORATIONS (§ 349\*)—LIABILITY TO DIRECTORS—ACCRUAL.**

Under section 1297, Comp. Laws 1909, no right of action accrues to the creditor of a corporation against the directors for creating debts beyond the subscribed capital stock until after a dissolution of the corporation shall have been duly adjudged.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1459, 1462; Dec. Dig. § 349.\*]

(Additional Syllabus by Editorial Staff.)

**8. ESTOPPEL (§ 1\*)—"ESTOPPEL BY RECORD."**

An "estoppel by record" is the preclusion to deny the truth of a matter set forth in a record, whether judicial or legislative, also to

deny the facts adjudicated by a court of competent jurisdiction.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 11-13; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 3, p. 2497.]

Commissioners' Opinion, Division No. 1. Error from Carter County Court; M. F. Winfrey, Judge.

Action by the Swofford Bros. Dry Goods Company against R. A. Owen and others. Judgment for defendants, and plaintiff brings error. Affirmed.

J. F. Bledsoe, of Oklahoma City, and Thos. Norman, of Ardmore, for plaintiff in error. D. A. Richardson, of Oklahoma City, and W. F. Tyree, of Durant, for defendants in error.

SHARP, C. On the 22d day of April, 1903, articles of agreement and incorporation were filed by the Owen-Willis-Wheeler Mercantile Company in the office of the clerk of the United States Court of Appeals for the Indian Territory, at McAlester. The corporation so organized thereafter engaged in the general mercantile business in the Indian Territory, and afterwards in Oklahoma, until July 2, 1908, when it was adjudged a bankrupt by the United States District Court for the Eastern District of Oklahoma. The corporation was organized pursuant to an act of Congress of February 18, 1901, putting in force in the Indian Territory certain provisions of the laws of Arkansas relating to corporations. Among the statutes so put in force was section 960, and the succeeding sections down to and including section 1035, as published in 1884, in the volume known as Mansfield's Digest. Section 968 of the adopted statutes provides that, before any corporation formed and established by virtue of the provisions of said act shall commence business, the president and directors thereof shall file a true copy of their articles of association at full length, and also a certificate setting forth the purpose for which such corporation is formed, the amount of its capital stock, the amount actually paid in, and the names of its stockholders, and the numbers of shares by each respectively owned, with the Secretary of State, and a duplicate thereof with the clerk of the county in which said corporation is to transact business. Under section 2 of the act of Congress, it was provided that wherever the words "Secretary of State" occur there should be substituted therefor the words "clerk of the United States Court of Appeals for the Indian Territory," and wherever the words "clerk of the county" occur there should be substituted therefor "clerk of the judicial district." So that, to comply fully with the law thus put in force, it was necessary to file a true copy of the articles of association with the clerk of the United States Court of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Appeals for the Indian Territory, and a duplicate thereof with the clerk of the judicial district in which such corporation was to transact business. The former, as we have seen, was done; it does not appear from the record that the latter was. Save in this respect, the organization of the corporation appears in every way to have been regular, and that the corporation so formed continued the exercise of its corporate powers until adjudicated a bankrupt. June 11, 1909, plaintiff sued the defendants, R. A. Owen, A. G. Noble, J. Hamp Willis, and John McDuffee, former stockholders of said corporation, to recover an alleged balance due it amounting to \$996.24. The petition charged that the defendants on or about the 18th day of December, 1907, and subsequently thereto, were engaged in the mercantile business at Woodville and Kingston, Okl., under the firm name and style of the Owen-Willis-Wheeler Mercantile Company, and that said concern was indebted to plaintiff on account for goods, wares, and merchandise purchased between December 18, 1907, and March 25, 1908, on which there was a balance due, after allowing all proper credits, of \$883.05. A second count in the petition sought to recover the additional sum of \$116.19 and attorney fee, being the balance due on a promissory note, dated March 31, 1908. The answer of the defendants Willis, Owen, and McDuffee contained (1) a general denial; and further charged (2) that the indebtedness sued on was that of the corporation; (3) estoppel by a course of dealing; (4) estoppel arising out of the fact that plaintiff had asserted its claim against the bankrupt corporation, had participated in said bankruptcy proceedings, and received therefrom and accepted dividends on account of its said indebtedness. After a paragraph containing a general denial, plaintiff in its amended reply, filed February 17, 1911, charged as follows: "Further replying to said answers, plaintiff denies that the Owen-Willis-Wheeler Mercantile Company is a corporation, and denies that it is still in existence, but admits that it was adjudged a bankrupt as alleged in said answer." Plaintiff's testimony consisted of the deposition of its former adjuster, who testified that the plaintiff had been selling goods to the Owen-Willis-Wheeler Mercantile Company of Kingston and Woodville for several years, and up to and including the transactions of 1908 the plaintiff company dealt with said Owen-Willis-Wheeler Mercantile Company as a corporation. The witness further testified that the bill of goods included in the first paragraph of the petition was sold, not to the corporation, but to a copartnership composed of Owen, Willis, and McDuffee, upon the representation of these parties and one Murphy that the corporation had been dissolved, and a copartnership organized in its stead. At the close of the trial, the court peremptorily instructed

the jury to return a verdict for the defendants. This is urged as error for the following reasons: (1) That it does not appear that the Owen-Willis-Wheeler Mercantile Company was duly incorporated, and, if not, the defendants, being stockholders, were liable as partners; (2) that the defendants, having represented that the goods were purchased for the copartnership, were therefore individually liable, regardless of the fact that the corporation was or was not regularly incorporated. A payment of \$242.47 was collected and remitted by their attorneys, in addition to which \$92.97 was paid it by the trustee, J. P. Haven. These payments, so made and credited, consisted of dividends realized out of the bankrupt corporation. The plaintiff had full knowledge of the bankruptcy proceedings, and at one time made an offer to purchase the bankrupt stock.

[1] Assuming, without deciding, that it was incumbent upon the defendants to prove under the issues joined that a duplicate of the articles of incorporation was filed with the clerk of the judicial district in which the corporation was to transact its business, what, then, would be the legal effect of a failure to comply with this provision of the statute? The adopted statute authorized the organization of a corporation for the purpose of engaging in or carrying on any kind of manufacturing, mechanical, mining, or other lawful business. There was a bona fide attempt to organize a corporation for the purpose of engaging in the general mercantile business, a class of business within the statute. As we have seen, articles of incorporation had been filed with the clerk of the Court of Appeals; of the capital stock, \$20,000 had been subscribed and paid in, and stock certificates issued therefor; also that directors and officers had been elected, and for a term of years had proceeded in the discharge of their respective duties. In fact, all of the steps necessary to the formation of a de jure corporation had been effected, except proof is lacking in the one particular above mentioned. There had been an actual user of the corporate franchise for the period of five years, and during all of which time the corporation had been actively engaged in performing its corporate functions. The honest belief and good faith of the incorporators that they had in fact effected a corporation stands unchallenged. The rule applicable to such cases is announced in *Tulare Irrigation District et al. v. Shepard*, 185 U. S. 1, 22 Sup. Ct. 531, 48 L. Ed. 773, after the citation of numerous cases, in the following language: "From the authorities, some of which are above cited, it appears that the requisites to constitute a corporation de facto are three: (1) A charter or general law under which such a corporation as it purports to be might lawfully be organized; (2) an attempt to organize thereunder; and (3) actual user of the corporate



franchise." In *Whipple v. Tuxworth*, 81 Ark. 391, 99 S. W. 86, the above case is cited with approval, and the rule there announced, pertaining to the liability of stockholders in a de facto corporation, is followed; numerous additional authorities being cited in support of the court's conclusions. Speaking with reference to the liability of stockholders in a de facto corporation, it is said in *Cook on Corporations* (4th Ed.) § 234: "During the past few years, however, the great weight of authority has clearly established the rule that, where a supposed corporation is doing business as a de facto corporation, the stockholders cannot be held liable as partners, although there have been irregularities, omissions, or mistakes in incorporating or organizing the company. The corporation is a de facto corporation where there is a law authorizing such a corporation and where the company has made an effort to organize under that law and is transacting business in a corporate name. \* \* \* It must be admitted that this conclusion of the law is reasonable and just. There is no reason why parties who have dealt with a corporation as a corporation should afterwards be allowed to claim more than they originally bargained for, and to hold the stockholders personally liable. Such a rule would be disastrous in the extreme. Under the rule subjecting stockholders to this unknown peril, the dangers to business were so great, the hardship to innocent parties so intolerable, and the risk of investing in corporate enterprises so increased, the courts gradually departed from the old decisions on this subject and wisely refused to hold the stockholders liable. The equities are against such liability, and recent cases have so settled the law beyond reasonable doubt." See, also, section 637. Other authorities are *Newcomb-Endicott Co. v. Fee*, 167 Mich. 574, 133 N. W. 540; *Stevens v. Episcopal History Co.*, 140 App. Div. 570, 125 N. Y. Supp. 573, 579; *Card v. Moore*, 68 App. Div. 327, 74 N. Y. Supp. 18, affirmed in 173 N. Y. 598, 66 N. E. 1105; *Brookville & G. Turnpike Co. v. McCarty*, 8 Ind. 392, 65 Am. Dec. 768. Both from principle and by the great weight of authority, but few of which we have attempted to cite, the corporation was a de facto organization. Had a duplicate of the articles of incorporation been filed with the clerk of the judicial district, it would have been a de jure corporation. The duplicate not being filed, the right of the de facto corporation to act within the scope of its corporate authority and to bind and be bound by its acts is none the less effective. There existed the three necessary elements to constitute a de facto corporation; i. e., a general law authorizing the incorporation, a bona fide attempt to organize, and a user for a term of years of the corporate franchise.

[3] Not only was the company a de facto organization, but it was so recognized by the plaintiff during a long course of dealing. A

person who has entered into a contract with a de facto corporation in its proper name and capacity cannot, in the absence of an averment of fraud, afterwards disregard the existence of the corporation and sue the stockholders individually as partners. Corporations may exist either de jure or de facto. If of the latter class, they are under the protection of the same law, and governed by the same legal principles as those of the former, so long as the sovereignty acquiesces in their existence and exercise of corporate functions.

[2] A private citizen, whose rights are not invaded and who has no cause of complaint, has no right to inquire collaterally into the legality of its existence. This can only be done in a direct proceeding on the part of the state, from whom it derived the right to exist as a corporation, and whose authority is usurped. It was said in *Western Union Telegraph Co. v. Mexican Agr. Land Co.*, 31 Okl. 528, 122 Pac. 505, in this regard: "It is true that the legality of the organization of a corporation cannot be collaterally questioned, but must be tested by an information; and that where there has been a good-faith effort to organize a corporation under the law, and corporate functions have been assumed and exercised, the organization becomes a corporation de facto, and as a general rule its existence cannot be inquired into collaterally. But the distinction must be kept in view between an attempted incorporation under a statute authorizing the creation of such corporation and an attempted incorporation where no statute authorizes the creation of such a corporation. If there is a law authorizing incorporation, and a good-faith effort has been made to organize under such law, and the company has exercised corporate rights, it becomes a de facto corporation, and its de jure existence can only be questioned by the state." *Comp. Laws 1909*, § 1256. In *Swartwout v. Railroad Co.*, 24 Mich. 390, the court, speaking through Cooley, J., on this subject, expressed itself in the following language: "Where there is thus a corporation de facto, with no want of legislative power to its due and legal existence, when it is proceeding in the performance of corporate functions, and the public are dealing with it on the supposition that it is what it professes to be, and the questions suggested are only whether there has been exact regularity and strict compliance with the provisions of the law relating to incorporation, it is plainly a dictate alike of justice and of public policy that in controversies between the de facto corporation and those who have entered into contract relations with it, as corporators or otherwise such questions should not be suffered to be raised." The Supreme Court of Alabama in *Cahall v. Association*, 61 Ala. 232, speaking through Brickell, C. J., on this subject, said: "Whoever contracts with a corporation, in the use of corporate powers and fran-



chises, and within the scope of such powers, is estopped from denying the existence of the corporation, or inquiring into the regularity of the corporate organization, when an enforcement of the contract, or of rights arising under it, is sought." Taylor, in his work on Corporations, par. 148, having stated the general rule that a corporation when sued on its contract, and the person who contracted with it, when sued on his contract, is estopped to deny its legal corporation, adds: "Furthermore, persons who have contracted with a corporation as such, and have acquired claims against it, are estopped from denying its corporate existence for the purpose of holding its shareholders liable as partners." While there are authorities announcing a different rule, we believe as a matter of exact justice and correct principle that those dealing with a corporation which has failed in some particular to comply with the statute under which it is organized, in the absence of fraud on the part of the de facto corporation, are by their conduct estopped from questioning the validity of the corporate organization. Having dealt with the corporation upon the strength of its financial worth and liability, it would be most inequitable to make responsible for the corporate debts the innocent stockholders whose personal liability in no wise entered into the relations between the creditor and the corporation at the time of the transaction in question. As was said in *Whitney v. Wyman et al.*, 101 U. S. 392, 25 L. Ed. 1050: "It seems to us entirely clear that both parties understood and meant that the contract was to be and in fact was with the corporation, and not with the defendants individually. The agreement thus made could not be afterwards changed by either of the parties without the consent of the other. *Utley v. Donaldson*, 94 U. S. 29, 24 L. Ed. 54." Additional authorities supporting our conclusions are *Doty et al. v. Patterson et al.*, 155 Ind. 60, 56 N. E. 668, and authorities cited; *Imperial Building Co. v. Chicago Open Board of Trade*, 238 Ill. 100, 87 N. E. 167; *Snider's Sons' Co. v. Troy*, 91 Ala. 224, 8 South. 658, 11 L. R. A. 515, 24 Am. St. Rep. 887; *Richards v. Minnesota Savings Bank*, 75 Minn. 196, 77 N. W. 822; *Planters' & M. Bank v. Padgett*, 69 Ga. 150; *American Salt Co. v. Heidenheimer*, 80 Tex. 344, 15 S. W. 1038, 26 Am. St. Rep. 743; *Stout v. Zulick*, 48 N. J. Law, 599, 7 Atl. 362; *Merriman v. Magiveny*, 12 Heisk. (Tenn.) 494; *Gartside Coal Co. v. Maxwell (C. C.)* 22 Fed. 197; *West Winsted Savings Bank v. Ford*, 27 Conn. 282, 71 Am. Dec. 66; *Town of Searcy v. Yarnell*, 47 Ark. 269, 1 S. W. 319; *Humphreys v. Mooney*, 5 Colo. 282; *Andrews v. National F. & P. Wks.*, 77 Fed. 774, 23 C. C. A. 454, 36 L. R. A. 153. This court recognized the principle here announced in *Lynch v. Perryman*, 29 Okl. 615, 119 Pac. 229, Ann. Cas. 1913A, 1065, where it was

said: "The rule, generally, is, as announced in the case of *Estey Mfg. Co. v. Runnels*, 55 Mich. 180 [20 N. W. 823], that: 'Where a body assumes to be a corporation and acts under a particular name, a third party dealing with it under such assumed name is estopped to deny its corporate existence. Such is the general rule, founded upon equitable principles,' and, if any exceptions exist, it is only where 'there are no facts which make it legally unjust to forbid its denial.'" No such exceptions appear in the case at bar. Section 46, art. 9, *Williams' Ann. Const.*, impliedly, at least, recognizes the rights of de facto corporations where a bona fide organization has been effected, and business commenced in good faith, by declaring that all existing charters or grants of special or exclusive privileges, under which a bona fide organization shall not have taken place and business commenced in good faith at the time of the adoption of the Constitution, are ineffective and shall thereafter have no validity.

(4, 6) Passing to the next question, that of the individual liability of the defendants arising out of their representations to the plaintiff that the corporation had been dissolved, and a partnership formed in its stead, it is insisted by defendant in error that again plaintiff is estopped by reason of its participation as a creditor in the bankruptcy proceedings of the corporation. From the statement of the account it appears that the credit extended to the alleged partnership was during the month of March, 1908, and that the representations made were either prior thereto or not later than the 1st day of July of said year. The adjudication in bankruptcy was had July 2, 1908. The dividends were received and accepted by plaintiff during the months of October and December immediately following. The insolvency and subsequent bankruptcy of the corporation did not enlarge the liability of the stockholders, neither did it work a dissolution of the corporation. *Clark & Marshall on Private Corporations*, p. 863; *Topeka Paper Co. v. Oklahoma Pub. Co.*, 7 Okl. 220, 54 Pac. 455. Even though plaintiff may have had the right, based upon the alleged representations made by the alleged partners, to proceed against them individually, yet having elected, with full knowledge of the facts, to proceed against the corporation by filing its claim with the trustee, and participating in and accepting the dividends of the corporation, it thereby waived its right to hold the defendants as individuals. Having made an election between two courses, with knowledge of the facts, it waived the one not chosen. The positions assumed by it are inconsistent. If the alleged partnership was liable both for the account incurred during March, and on the alleged agreement of the partners to assume the then existing corporate debt evidenced by the note of the corporation, the latter was not. While, on



the other hand, if the de facto corporation was liable, clearly no individual liability would attach to the shareholders, unless by virtue of some statute.

[8] An estoppel by record is the preclusion to deny the truth of matters set forth in a record, whether judicial or legislative, also to deny the facts adjudicated by a court of competent jurisdiction. 16 Cyc. 684; Herman on Estoppel and Res Judicata, §§ 27, 28, 29. In *Clark & Marshall on Private Corporations*, pp. 274, 275, it is said that an estoppel to deny the existence of a pretended corporation may also arise from a matter of record, as from a recognizance purporting to be in favor of a corporation, or a judgment either for or against a corporation. It is further said: "A person who sues a corporation as such thereby admits the legality of its incorporation, and is estopped from denying it in that suit. And the same is true where a person files a cross bill or petition, or a counterclaim, against a corporation. \* \* \* In an action by a corporation, the defendant cannot deny the plaintiff's existence as a corporation after admitting it by his plea or answer, and he admits its corporate existence by going to trial on the merits or pleading to the merits, instead of pleading want of incorporation."

[5] By the filing of proof of its claim in the bankruptcy proceedings, it was of necessity adjudicated that the de facto corporation was indebted to the plaintiff on the account, for the balance of which it is sought to hold the individuals liable as partners. The position of the plaintiff in the present case is utterly inconsistent with its position before the bankruptcy court, as it now contends that, regardless of the question of incorporation, the defendants were liable under an express agreement entered into by them as partners. This we hold it cannot do. In legal effect the presentation and allowance of its claim against the bankrupt estate was a determination against it of the liability of the corporation, and is as binding as if plaintiff had prior to the bankruptcy adjudication brought suit against the corporation to recover its indebtedness. In *Clausen v. Head et al.*, 110 Wis. 405, 85 N. W. 1028, 84 Am. St. Rep. 933, a somewhat similar state of facts is found. The law of the case is alike applicable to both questions here considered. The syllabus of the opinion follows: "Where a person deals with an association of individuals as a corporation, such dealing, by estoppel, as to such transaction, fixes the status of the company to be what it was represented and recognized to be therein. Where certain persons associated together assumed to be a corporation, and as such executed an assignment for the benefit of creditors, and a creditor filed his claim in such assignment proceedings, the claim, if in existence against the association in any capacity, became a claim against the company as a corporation and the assignee in

his representative capacity. Even though the creditor, before filing his claim, was not bound by estoppel to recognize the association as a corporation as his debtor, and could have proceeded against the association as a corporation outside of or within the assignment proceedings, or against the members thereof as partners, yet having made an election between the two courses, with knowledge of the facts, by filing his claim with the assignee of the corporation as such, he thereby waived the one not chosen." Other authorities in support of the rule are *Cresswell et al. v. Oberly*, 17 Ill. App. 281; *Lombard v. Chicago Sinai Congregation*, 64 Ill. 477; *Ward v. Minnesota & N. W. Co.*, 119 Ill. 287, 10 N. E. 365; *Pochelu v. Kemper*, 14 La. Ann. 307, 74 Am. Dec. 43; *Shields v. Clifton Hill Land Co.*, 94 Tenn. 123, 28 S. W. 668, 26 L. R. A. 509, 45 Am. St. Rep. 700; *Estey Mfg. v. Runnels*, 55 Mich. 130, 20 N. W. 823; *Shoun v. Armstrong et al.*, 59 S. W. (Tenn. Ch. App.) 790; *McClinch v. Sturgis*, 72 Me. 288, 297; *Stoutimore v. Clark*, 70 Mo. 471; *First Nat. Bank v. Dovetail, etc., Co.*, 143 Ind. 534, 42 N. E. 924; *Hinsdale v. Larned*, 16 Mass. 65; *Kuypers v. Reformed Dutch Church*, 6 Paige (N. Y.) 570; *Buellesbach v. Sulka et al.*, 94 N. Y. Supp. 1; *Black River Imp. Co. v. Holway*, 85 Wis. 344, 55 S. W. 424; *National Mutual Building Ass'n v. Ashworth*, 91 Va. 706, 22 S. E. 521; *Lillard v. Porter*, 2 Head (Tenn.) 177; *Etowah Milling Co. v. Crenshaw*, 116 Ga. 406, 42 S. E. 709; *Montgomery v. Seaboard Air Line Ry.*, 73 S. C. 503, 53 S. E. 987. Counsel for plaintiff in error place much stress upon the decision of the Circuit Court of Appeals in *Harrill v. Davis*, 168 Fed. 187, 94 C. C. A. 47, 22 L. R. A. (N. S.) 1153, but a discriminating examination of that case will show a very different question was before the court. All but \$400 of the debt sued for was contracted before the alleged corporation made any effort to file its articles of incorporation with any one, and it was said by the court: "Under the general law of Arkansas in force in the Indian Territory, the filing of articles of incorporation with the clerk of the Court of Appeals was a sine qua non of any color of a legal corporation. Without that there was not, and there could not be, an apparent corporation or the color of a corporation. \* \* \* The defendants cannot escape individual liability for the \$4,700 on the ground that the Coweta Cotton & Milling Company was a corporation de facto when that portion of the plaintiff's claim was incurred, because it then had no color of incorporation, and they knew it, and yet actively used its name to incur the obligation." Again, in the course of the opinion: "One who deals with parties who masquerade under a name which represents no corporation de facto is no more estopped from denying that it is a corporation than he would be from denying that they constituted or acted for the Union Pacific



Railroad Company, or any other well-known corporation, when they did not. The fact that the plaintiff dealt with and treated the Coweta Cotton & Milling Company as a corporation did not estop it from denying that it was such before the defendants filed their articles of incorporation, because it was not a corporation de facto before that time.

\* \* \* Further it was said: "They represented themselves to be a corporation when they knew they were not; under the name of a corporation which did not exist they purchased these goods and services." Obviously the case does not support the position of the plaintiff in error, the facts being altogether dissimilar. The true rule in such cases is recognized by Judge Sanborn in said case, wherein he says: "The general rule is that parties who associate themselves together and actively engage in business for profit under any name are liable as partners for the debts they incur under that name. It is an exception to this rule that such associates may escape individual liability for such debts by a compliance with incorporation laws or by a real attempt to comply with them which gives the color of a legal corporation, and by the user of the franchise of such a corporation in the honest belief that it is duly incorporated." An able differentiation of the facts in this case from the rule applicable to the liability of de facto corporations is found in *Magnolia Shingle Co. v. J. Zimmern's Co.* (Ala.) 58 South. 90.

[7] Finally, it is insisted that the court erred in sustaining a demurrer to paragraphs 3 and 4 of the plaintiff's amended reply. That part of the reply to which the demurrer was sustained sought to hold the defendants individually liable by reason of the fact that, while there was but \$20,000 of the capital stock of the corporation subscribed, yet the defendants as directors and officers in said corporation had permitted it to become indebted in a sum in excess of \$60,000. While numerous objections are made to the legal sufficiency of these paragraphs of the reply, all of which present serious questions, but one is necessary for our determination. Section 1297, Comp. Laws 1909, under which it was sought to fix the individual liability of the defendants, provides in part: "The directors of corporations must not \* \* \* create debts beyond their subscribed capital stock. \* \* \* For a violation of the provisions of this section the directors under whose administration the same may have happened \* \* \* are, in their individual and private capacity, jointly and severally liable to the corporation, and to the creditors thereof, in the event of its dissolution, to the full amount of the \* \* \* debt contracted." It will be noted that the cause of action in the first instance is given to the corporation, and in the event of dissolution to the creditors thereof. We have already seen

that the mere fact of the corporation having been declared a bankrupt did not work its dissolution. Hence, there being no dissolution, no cause of action accrued, except to the corporation or its trustee in bankruptcy. In *Topeka Paper Co. v. Oklahoma Publishing Co.*, supra, it was sought to hold directors individually liable under the same statute. A recovery was denied, and it was said in the opinion: "The act by which the defendant corporation undertook to associate itself with the Press-Gazette corporation, and to form a new corporation, and receive stock therein in fixed proportions, is not, in our view, a 'division, withdrawal or payment' to the stockholders of the defendant corporation of any part of its capital stock. And, if it were, the liability would not accrue until, in the terms of the statute, 'in the event of its dissolution.' Therefore, before any liability could be claimed or set up, or could have accrued, so that an action could be brought against the defendants for the debts of the corporation, \* \* \* which, as is expressly provided in section 968, Statutes 1893, could only have taken place upon the 'expiration of the time' limited by its articles of incorporation, or by the judgment of a competent court." The demurrer was properly sustained.

From a careful examination of the record, we are of the opinion that no error was committed in the trial court, and its judgment should in all things be affirmed.

PER CURIAM. Adopted in whole.

(37 Okl. 631.)

ST. LOUIS & S. F. R. CO. v. RINKLE.

(Supreme Court of Oklahoma. June 19, 1913.)

(Syllabus by the Court.)

CARRIERS (§ 218\*)—SHIPMENT CONTRACT—CONSTRUCTION—EXEMPTION FROM LIABILITY—VALIDITY.

A special contract executed between a carrier and a shipper, in consideration of a reduced freight rate, providing that, in case of total loss of any of the live stock covered by the contract, the liability of the carrier shall not exceed a maximum valuation of the live stock stipulated in the contract, is not a contract attempting to exempt the carrier from liability arising from its own negligence; and where the contract is reasonable and just, and has been fairly entered into by the shipper, the same will be upheld by the court as a proper and lawful manner of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.\*]

Commissioners' Opinion, Division No. 2. Error from County Court, Tillman County; T. E. Campbell, Judge.

Action by J. B. Rinkle against the St. Louis & San Francisco Railroad Company, a corporation. Judgment for plaintiff, and de-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



fendant brings error. Reversed and remanded for new trial.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and J. H. Grant, both of Oklahoma City, for plaintiff in error. Mounts & Davis, of Frederick, for defendant in error.

BREWER, C. The defendant in error shipped a car load of hogs from Davidson, Okl., to Ft. Worth, Tex., by way of Vernon, Tex. Five head of the hogs died in the pen at Vernon into which they had been unloaded. The shipper, as plaintiff, sued the railroad in the justice of the peace court in Tillman county for \$100, the alleged value of the five dead hogs, and for \$82, alleged as the damage, by reason of shrinkage in weight, to the remainder of the hogs. The justice of the peace having removed from the county, the parties by agreement transferred the case to the county court, where it was tried, resulting in a verdict of \$119.28.

In the petition, or bill of particulars, the plaintiff declares on his written contract of shipment, alleges its execution between himself and the railroad, makes no charge of unfairness, mistake, or fraud in its execution, and attaches a copy to and makes it part of his petition. This is followed by charges of negligence upon the part of the railroad in handling the shipment, which it is alleged caused the death of the five hogs, and the shrinkage in weight of the others.

The contract of shipment contained the following provisions:

"Notice.—This company has two rates on live stock. Shippers of live stock will take notice that rates of freight and the extent of liability of the company are governed by the valuations which they place thereon. Rates of freight are on file and will be shown by agent on application.

"To the St. Louis & San Francisco Railroad Company: The undersigned offers for shipment over your road 87 head of hogs from Davidson, Okl., to Ft. Worth, each head of the estimated weight of 190 pounds, and valued at ten (\$10.00) dollars per head, from Davidson to Ft. Worth, etc. \* \* \* This application is an election on my part to avail myself of a reduced rate, by making this shipment under the following contract, limiting the liability of such carrier, instead of shipping the same at a higher rate without such limitations. [Signed] J. B. Rinkle, Owner or Shipper. \* \* \* (10) It is further agreed that neither the company nor any carrier over whose line this stock may be transported shall be liable for any injury to said stock in any amount above the actual damage thereto, nor in any amount in excess of the value thereof as stated in the application of the shipper, which is hereto attached and made a part hereof, and in case of total loss of said stock, or any portion thereof, and claim therefor is made by

the shipper against the company, or any connecting carrier, wherein the value of said stock may be material, the valuation named in said application shall be conclusive upon all parties hereto."

The court instructed the jury, over the objections of the railroad, as follows:

"You are instructed that if you believe from the evidence in this case that the plaintiff turned over to defendant as a common carrier 87 head of hogs, to be shipped from Davidson, Okl., to Ft. Worth, Tex., and if you further find from the evidence that the defendant carelessly and negligently permitted any of said hogs to die from heat or want of water while in the defendant's hands at Vernon, Tex., then you are instructed that defendant would be liable for any such hogs thus permitted to die, if any, and you will find for the plaintiff for the value of such hogs thus permitted to die, to not exceed \$20 each, or a total value of \$100."

The giving of this instruction was reversible error. In *Chicago, R. I. & Pac. Ry. Co. v. Wehrman*, 25 Okl. 147, 105 Pac. 328, it is said: "A special contract, executed between a carrier and a shipper in consideration of a reduced freight rate, providing that, in case of total loss of any of the live stock covered by the contract, the liability of the carrier shall not exceed a maximum valuation of the live stock stipulated in the contract, is not a contract attempting to exempt the carrier from liability arising from its own negligence; and where the contract is reasonable and just, and has been fairly entered into by the shipper, the same will be upheld by the court as a proper and lawful manner of securing a due proportion, between the amount for which the carrier may be responsible and the freight he receives." *M., K. & T. Ry. Co. v. Hancock*, 26 Okl. 257-259, 109 Pac. 220; *M., K. & T. Ry. Co. v. McLaughlin*, 29 Okl. 346, 116 Pac. 811; *A., T. & S. F. Ry. Co. v. Johnson*, 29 Okl. 348, 116 Pac. 812.

Counsel urge with great earnestness that, inasmuch as the verdict was for only \$119.28, and as it would have been possible for the jury under the evidence to properly award their client \$82 for shrinkage, that notwithstanding he was only entitled to recover \$50 for the value of the five dead hogs, and the instruction permitted the jury to allow him \$100, yet that this error should be held harmless, because the aggregate of the verdict did not exceed what the jury could have properly allowed him under correct instructions. We cannot agree with this suggestion. From a reading of the evidence, it is most probable that the jury allowed him the full amount claimed for the dead hogs, and that extra odd number of dollars added was an allowance for shrinkage. Under the utmost limits of the evidence, on the question of shrinkage, the damage on this item could not have exceeded \$41, thus leaving in the



verdict more for the value of the hogs that died than could be awarded under proper instructions.

The cause should be reversed and remanded for a new trial.

PER CURIAM. Adopted in whole.

(37 Okl. 571)

**JONES LEATHER CO. v. WOODY.**

(Supreme Court of Oklahoma. June 19, 1913.)

(*Syllabus by the Court.*)

**APPEAL AND ERROR (§§ 695, 1001\*)—DISSOLUTION OF ATTACHMENT—EVIDENCE.**

Where plaintiff attaches certain chattels of defendant on the ground that defendant had sold or was about to sell all or a portion of his property for the purpose of defrauding his creditors, and on the further ground that he had violated the bulk sale statutes, and defendant moves to dissolve the attachment on the ground that the allegations in the attachment affidavit are false, and the court upon conflicting testimony decides that such allegations are false, and dissolves the attachment, such order will not be disturbed on appeal, where it is fairly supported by the evidence, or where the record fails to contain all the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2914, 3922, 3928-3934; Dec. Dig. §§ 695, 1001.\*]

Commissioners' Opinion, Division No. 2. Error from County Court, Oklahoma County; John W. Hayson, Judge.

Action by the Jones Leather Company against J. L. Woody on an account. Judgment sustaining defendant's motion to dissolve attachment, and plaintiff brings error. Affirmed.

R. N. McConnell, of Oklahoma City, for plaintiff in error. Munden & Horton, of Oklahoma City, for defendant in error.

**HARRISON, C.** This action was begun May 26, 1911, by Jones Leather Company against J. L. Woody for the sum of \$337.28 alleged to be due on an account. Simultaneously with the filing of the suit plaintiff procured an order of attachment and attached defendant's property upon the grounds that defendant was about to convert his property into money for the purpose of placing it beyond the reach of his creditors and that he had disposed of a portion of his property with the intent to hinder, delay, and defraud his creditors. Defendant moved to dissolve the attachment, alleging that the alleged grounds for attachment did not exist and that the statements made in the affidavit for attachment were false. On June 1st, a hearing was had on the motion to dissolve the attachment, at which testimony was submitted by defendant in support of the motion to dissolve, and by the plaintiff in support of the attachment. At the conclusion of the testimony the court took the question under

consideration and on June 8d sustained the motion and discharged the attachment. Whereupon plaintiff appealed to this court upon three assignments of error, to wit: First, that the order of the court discharging the attachment is contrary to the law under the evidence; second, the court erred in discharging the attachment, because the evidence conclusively shows that the defendant had assigned, removed, and disposed of a part of his property with intent to injure, delay, and defraud his creditors; third, because the evidence shows that the defendant had disposed of a portion of his stock of merchandise without complying with the laws of Oklahoma relating to the sale of merchandise in bulk, and such sale and disposition presumes the intention to hinder, delay, and defraud creditors.

The record discloses that the question of violation of the bulk sale law and the truth of the statements made in the attachment affidavit were issues tried and determined by the court below upon testimony decidedly conflicting in its tendencies, and from an examination of same we cannot say as a matter of law the court erred. The record does not contain all the evidence. It contains the following recital: "The foregoing was all the evidence offered," which defendant in error contends is insufficient. However, it is not necessary to decide whether such recital is sufficient or not, as the record shows upon its face either that it does not contain all the evidence or that the record itself does not speak the truth. It shows that certain checks and vouchers and a certain written contract of sale were introduced in evidence, none of which are in the record. It also shows that this contract became lost or misplaced, and that there was a conflict in the testimony as to whether such written contract was the result of the conspiracy on the part of plaintiff to procure a purported contract of sale in order to base attachment proceedings thereon. It further shows a conflict in the testimony on the question whether the goods alleged to have been contracted for sale were any part of the mercantile business in which defendant was engaged and against which he had contracted the debt sued on, or whether it was other property separate and distinct from the mercantile business. It also shows a conflict in the testimony as to whether defendant was contracting a sale for a portion of his property in order to obtain money with which to pay off all his indebtedness, and shows that within a few months next prior to the attachment proceedings he had diminished his indebtedness from about \$1,700 to \$700.

The court heard all this conflicting testimony and adjudged its weight, and if there were no other evidence than is contained in the record we should not feel justified in disturbing the judgment, and we feel less justifi-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



fed in doing so when the record shows on its face that it does not contain all the evidence, and as we find no error of law, and that the judgment of the court was based upon conflicting testimony, following the well-established rule of this court, the judgment is affirmed.

PER CURIAM. Adopted in whole.

(37 Okl. 678)

**GEORGIA HOME INS. CO. v. HALSEY.**

(Supreme Court of Oklahoma. June 19, 1913.)

*(Syllabus by the Court.)*

**1. STIPULATIONS (§ 12\*) — WITHDRAWAL — DISCRETION OF COURT.**

It is within the sound judicial discretion of the court as to whether a party will be permitted to withdraw from a stipulation concerning a case pending before the court.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 66; Dec. Dig. § 12.\*]

**2. STIPULATIONS (§ 12\*) — WITHDRAWAL — DISCRETION.**

Where parties entered into a stipulation as to what question should be submitted to the court, it was not an abuse of discretion for the court to refuse to permit one of the parties to withdraw from the stipulation after the question had been argued to the court.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 66; Dec. Dig. § 12.\*]

**3. PLEADING (§ 180\*) — DEPARTURE — REPLY — INSURANCE.**

The petition in an action on a policy of fire insurance alleged that plaintiff had complied with all the conditions of the policy except as had been waived. The answer alleged a failure to comply with the conditions of the policy with reference to taking an inventory and keeping books showing a complete record of the business, etc. The reply denied all the affirmative allegations of the answer and alleged further that the insured kept a set of books which at all times substantially disclosed the exact status of his business, and that from them could be ascertained to a substantial and reasonable certainty the exact condition of his business. *Held*, that the matters alleged in the reply could have been proven under the allegations of the petition and general denial contained in the reply, and that the reply was not a departure from the petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 358-384; Dec. Dig. § 180.\*]

**4. JUDGMENT (§§ 341, 394\*) — RIGHT TO SET ASIDE — RENDITION.**

The court has the right, on its own motion, to set aside an erroneous judgment during the term at which it was rendered. And where the question submitted is one of law, upon which argument had been heard, to render the proper judgment without rehearing the case.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 667, 756; Dec. Dig. §§ 341, 394.\*]

Commissioners' Opinion, Division No. 2. Error from County Court, Grady County; N. M. Williams, Judge.

Action by Walter Halsey against the Georgia Home Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Seothorn, Caldwell & McRill, of Oklahoma City, for plaintiff in error. F. E. Riddle, of Chickasha, for defendant in error.

ROSSER, C. This is an appeal from a judgment of the county court of Grady county in favor of Walter Halsey against the Georgia Home Insurance Company, upon a policy of fire insurance. The petition was an ordinary petition, alleging the making of the contract, and alleging further that the plaintiff had performed all the conditions required of him to be performed by the provisions of the policy, except such as had been waived by the company and by consent changed. It made a copy of the policy an exhibit. The defendant answered and denied all the material allegations contained in the petition, except such as were specifically admitted. The answer further alleged that the policy of insurance contained a provision which required the insured to take an itemized inventory at least once in each calendar year, and one which required the insured to keep a set of books showing a complete record of the business transacted, including all purchases, sales, and shipments of stock, both for cash and credit, and, third, which required the insured to keep the books and inventory, and also the last preceding inventory, securely locked in a fireproof safe at night, and at all times when the building mentioned was not actually opened for business, or "failing in this the insured will keep such books and inventories at night, and at all such times, in some place not exposed to fire which would ignite or destroy the aforesaid building; and, in case of loss, the assured specifically warrants, agrees and covenants to produce such books and inventories for the inspection of said company." The answer further alleged that the plaintiff had failed to comply with this provision of the policy, had failed to make an itemized inventory of the stock in each calendar year, had not taken an inventory of the stock within 12 calendar months prior to the date of the policy; that he had failed to keep a set of books which showed a complete record of the business transacted, etc., and failed to keep such books as he did have and as he kept in the transaction of his business and the inventories referred to in said policy of insurance, or either of them, locked in a fireproof safe, and did not keep such books and inventories, at times when the room occupied by the stock of goods was not open for business, in some place not exposed to fire; and that he had failed to produce the books and inventories provided for in the policy.

The plaintiff filed a reply to this answer, which is as follows: "Comes now the plaintiff in the above-entitled cause and files this reply to the answer of plaintiff filed herein, and for such reply denies each and singular every affirmative allegation of new matter

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.



in said answer alleged. Second. For further reply, this defendant especially denies that said policy contained absolute warranties, as alleged, but avers the truth to be that said provisions, as quoted in said answer, are in the nature of promissory warranties. Third. Plaintiff denies that he did not take an inventory of said stock of goods, as alleged in said answer, denies that he did not comply with the terms and provisions of said policy as alleged in said answer, and denies that he did not keep a set of books showing substantially the status and condition of his business, as alleged in said answer; but avers the truth to be that he was engaged in what is known as a cash grocery business in a suburb of the city of Chickasha, and was doing no credit business, and that he kept a set of books which at all times substantially disclosed the exact status of his said business, and that on the date of said fire it could be ascertained to a substantial and reasonable certainty the exact condition of his said business, the amount of stock on hand and cash received, and such other matters as were necessary for the disclosure and information of the adjuster of the insurance company in adjusting said policy. Fourth. Plaintiff further avers that he was not experienced in bookkeeping, was unable and it was impossible for him to have kept a scientific, technical, and correct set of books, and that his business did not justify him in employing a bookkeeper for said purpose, but that the books he did keep were sufficient to show to a reasonable certainty the condition of his said business, and while he admits that he did not have an iron safe in said place of business at said time, he avers the truth to be that at all times when said business was not open he had his books and other papers kept in connection with said business in a reasonably safe place and that he did not keep them in said store during the time said store was not open for regular transaction of business. He further avers the truth to be that none of said books and papers that were kept in connection with said business and which were material and necessary in the way of furnishing information as to the status of said business were burned in said fire."

When the case came on for trial the plaintiff started to read his reply to the jury. The defendant objected to the reading of the reply for the reason that it was a departure from the petition, and that the plaintiff could not make the defenses contained in it, even if they were true.

[1, 2] It appears that there was some controversy between them, and that the court did not rule upon the question immediately, and the counsel then entered into the following agreement: "It is hereby agreed by and between plaintiff and defendant in open court that this cause may be submitted to the court upon an issue of law, as follows:

Whereas, the defendant heretofore filed a motion to strike portions of plaintiff's reply and now objects in open court to the reading of said reply by plaintiff and the consideration of the same by the court in this case, whereupon the plaintiff proposed in open court to submit said issue to the court and in the event the court holds in this cause said motion to strike said reply and said objection as now made is good and well taken, that judgment shall be rendered for the defendant dismissing plaintiff's cause of action and a final judgment on the merits. In the event that the court should hold that said motion to strike and said objection made to said reply is not well taken under the law in this cause, then judgment shall be rendered for the plaintiff for the count sued for in his petition. It is understood either party shall have the right to prosecute an appeal from said decision, and in the appellate court the cause shall be finally submitted and decided upon this one issue, and final judgment rendered thereon." This agreement seems to have been dictated to the stenographer, though the record is not clear upon this point. At any rate, it appears from the record that before the agreement was written the questions agreed to be submitted in the agreement were argued to the court, and he announced his judgment, which was in favor of the insurance company, at that time. But counsel for the company, for some reason, after the agreement was written and after he had signed it, and after the matter had been argued to the court and he had announced his decision, erased his signature from the agreement and requested the court to release him from the agreement. There were some other cases pending against other insurance companies in which the same counsel appeared for plaintiff and defendant respectively, and another agreement had been drawn and signed with reference to the other cases. When defendant's counsel asked to be relieved from the stipulations the court consented to relieve him from the stipulations in all the cases except the one in which the argument had already been heard, but refused to permit him to withdraw from the stipulation in this case.

This was not error. Such matters are within the discretion of the court, which discretion cannot be interfered with unless abused. *Moffitt v. Jordan*, 127 Cal. 628, 60 Pac. 175; *State Ins. Co. v. Farmers' Mut. Ins. Co.*, 65 Neb. 34, 90 N. W. 997; *Meldrum v. Kenefick*, 15 S. D. 370, 89 N. W. 863. The court did not abuse his discretion in refusing to permit counsel to withdraw from the stipulation, after the time of the court had been taken up in hearing the argument.

[3] It is contended that the stipulation gave the court no issue to decide; that it was in effect a wager. This position is not tenable. The effect of the stipulation was that



the defendant admitted that the allegations of the reply were true, and that he had no defense unless the reply constituted a departure; while plaintiff agreed in effect that if it did constitute a departure judgment should be rendered against him, and that he would not ask to cure the defect in his petition by amending it so as to allege in it the same matters that were set up in the reply; a course which he might well have taken had the reply constituted a departure, subject, of course, to suffering the case to be continued unless the defendant was ready for trial.

The reply did not constitute a departure. It amounted simply to a general denial of the allegations of the answer. It is true that it stated that the plaintiff had substantially complied with the provisions of the policy alleged by the defendant to have been breached, but this was surplusage. He could have proved a substantial compliance under the allegations of his petition, and the general denial in the reply, of the breach of conditions as alleged in the answer. See *Liverpool & London & Globe Ins. Co. v. Kearney*, 180 U. S. 132, 21 Sup. Ct. 326, 45 L. Ed. 400; *s. c.*, 2 Ind. T. 67, 46 S. W. 414; *Western Assurance Co. v. McGlathery*, 115 Ala. 213, 22 South. 104, 67 Am. St. Rep. 26; *Western Assur. Co. v. Redding*, 68 Fed. 708, 15 C. C. A. 619. Besides, the answer pleaded a breach of a promissory warranty, and the reply would not have been a departure even if it had gone much further than it did. *Western Reciprocal Underwriters' Exchange v. Coon*, 134 Pac. 22, not yet officially reported; *Great Western Life Ins. Co. v. Sparks*, 132 Pac. 1092, not yet officially reported.

[4] It is contended that the court erred in setting aside the judgment rendered in favor of the defendant and rendering judgment for the plaintiff. The argument is that as the case was tried on the stipulation no motion for new trial was necessary, and the court had no jurisdiction to entertain a motion or to set aside its first judgment. It is not necessary to decide the question whether a motion for new trial was proper under the circumstances. A court has control of its judgments during the term at which they are rendered and may set them aside of its own motion, if they are erroneous. *Shallenberger v. Brady*, 131 Pac. 1096, not yet officially reported. Of course, the court should not act arbitrarily in so doing, and it might act so unfairly and oppressively as to make its action error, regardless of whether or not the judgment set aside was correct or not. But in the present case all parties knew the court had under consideration the matter of setting aside its judgment, and no circumstances of fraud or oppression exist.

The question presented was one of law, and it is not claimed that the defendant did not fully present its argument thereon.

Therefore the court had the right, when it set aside its erroneous judgment, to render one in accordance with law and without a formal rehearing of the case.

The judgment is affirmed.

PER CURIAM. Adopted in whole.

(37 Okl. 674)

CLEVELAND NAT. BANK v. AMOS.

(Supreme Court of Oklahoma. June 19, 1913.)

(Syllabus by the Court.)

1. PAYMENT (§ 38\*)—APPLICATION—RIGHT TO DIRECT.

Where a party is indebted to a bank on two separate promissory notes, and remits draft to be applied on his indebtedness, he has the right to direct on which note the payment shall be applied.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 99-103; Dec. Dig. § 38.\*]

2. PAYMENT (§ 38\*)—APPLICATION—RATIFICATION.

Where a party indebted to a bank on two separate promissory notes remits draft, with instructions to apply same in payment of one note, and the bank disregards such instructions and applies same to the payment of the other note, and the subsequent acts of the debtor tend to show an acquiescence on his part in the application of the payment, and such fact is in issue at the trial, it is error for the court to refuse an instruction on such issue.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 99-103; Dec. Dig. § 38.\*]

Commissioners' Opinion, Division No. 2. Error from County Court, Pawnee County; Fred S. Liscon, Judge.

Action by the Cleveland National Bank against James Amos. Judgment for defendant, and plaintiff brings error. Reversed.

Wm. Blake, of Tulsa, and A. C. Hazlett, of Oklahoma City, for plaintiff in error. Orton & McNeill, of Pawnee, for defendant in error.

HARRISON, C. The question herein presented grew out of an action in replevin by the plaintiff in error against James Amos to replevy a certain mule, possession of which plaintiff claimed by virtue of a chattel mortgage, and defendant claimed by virtue of purchase at public sale. The facts out of which the questions here presented grew were: That one L. R. Crumpton was indebted to the plaintiff bank on two certain promissory notes, one for \$49.25, secured by a chattel mortgage on the mule in question; the other for \$50.75, secured by mortgage on a buggy and harness. The payment of each note had been extended, but the \$50.75 note became due first. At a public sale, designated in the record as "Baker's sale," Crumpton, the mortgagor, had the mule sold. James Amos, the defendant below, purchased the mule at said sale. At the time of the sale the mortgage from Crumpton to the Cleveland National Bank was in force and was of record. James

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Amos, the purchaser of the mule, gave his promissory note to L. R. Crumpton for the purchase price, and at maturity thereof paid the amount due to Crumpton. Whereupon Crumpton with the proceeds purchased a draft for \$50 from the Terlton State Bank and instructed said bank to send the draft to the Cleveland National Bank, with instructions to apply same in payment of the mule note. The Cleveland National Bank applied said payment on the \$50.75 note, and wrote the Terlton Bank what had been done, and notified the Terlton Bank that there was 75 cents yet due on the note, which 75 cents was afterwards sent to the Cleveland National Bank by the Terlton State Bank, was credited on the note, and the note canceled and sent to the Terlton State Bank to be delivered to the maker, L. R. Crumpton. Crumpton accepted the note without making any objections at that time to the application of the payment. Some time thereafter, when the mule note for \$49.25 became due, Crumpton had the time of payment extended. The record does not show clearly whether or not the note had become due under the last extension at the time this action was brought; but, the mortgaged mule being in possession of the defendant, Amos, the plaintiff bank brought suit for the possession of the mule under its mortgage. The defendant, Amos, claimed the mule by virtue of his purchase at the sale aforesaid, and claimed that the bank, having misapplied the payment intended for the mule note, and having violated the instructions as to which note to apply such payment on, had no right to the mule. The cause was tried, and a verdict and judgment rendered in favor of defendant, Amos, because of the aforesaid misapplication of the payment.

It is contended by defendant in error that the only issue to be tried was whether Crumpton had directed what note the payment should be applied on, and whether the bank had violated its instructions and misapplied the payment, and that the only question presented here is whether there was sufficient evidence to sustain the verdict of the jury. On the other hand, it is contended by plaintiff in error that the decisive question presented here is, conceding that the bank had misapplied the payment, whether the mortgagor, Crumpton, by accepting the canceled note, had, by subsequently extending the mule note, acquiesced in the application of the payment. This contention we think under the record is sustained.

It is conceded by plaintiff in error in its supplemental brief that the debtor, Crumpton, had the right to direct which note the payment should be applied on, that he instructed the plaintiff bank to apply the payment on the mule note, and that the bank had violated such instruction by applying such payments on the other note; but it contends that by accepting the canceled note without

objection, and by afterwards going to the bank and procuring an extension of time for the payment of the mule note, he acquiesced in the application of the payment and could not now be heard to complain. At the trial of the cause plaintiff asked for a peremptory instruction in its favor, on the ground that the debtor had acquiesced in the application of the payment, which instruction the court refused to give. Plaintiff then offered an instruction to the effect that if the jury found from the evidence that the money received by the Cleveland National Bank from Mr. Crumpton was applied to the payment of the \$50.75 note as against the instruction of Mr. Crumpton, but that if Mr. Crumpton received the note paid and canceled, and retained same without objection, and afterwards extended the note in question, that such acts constituted an acquiescence and ratification on the part of Mr. Crumpton to the application of the money, and that in such case the jury should find for the plaintiff. This instruction was also refused by the court, and the refusal to give same is assigned as error. There was some conflict in the testimony as to whether the plaintiff bank was instructed as to which note to apply the payment on; but since the jury found from the evidence that such instruction was given, and that the payment was applied on a certain note, it is conceded by plaintiff in error, for the purpose of this case, that the instructions were given, and that the bank misapplied the payment.

[1, 2] That the debtor has a right to direct the application of payments is a well-settled principle of law. This was held by this court in *Carson et al. v. Cook County Liquor Co.*, 130 Pac. 303, and supported by an exhaustive list of authorities therein cited. It is needless, therefore, to discuss this phase of the question. It is also held in *Cardinell v. O'Dowd*, 43 Cal. 586, *Bird v. Benton & Bros.*, 127 Ga. 371, 58 S. E. 450, *Citizens' Bank v. Carey et al.*, 2 Ind. T. 84, 48 S. W. 1012, *Dorsey v. Wayman*, 6 Gill (Md.) 59, *Hubbell v. Flint*, 81 Mass. (15 Gray) 550, *Flarsheim v. Brestrup*, 43 Minn. 298, 45 N. W. 438, and *Spencer Optical Mfg. Co. v. Jump*, 10 N. Y. St. Rep. 130, that although a payment may have been misapplied, if the debtor receives the canceled note or account without objection, or, as in the case at bar, accepts the canceled note and subsequently renews the note on which he had directed payment to be made, he is held to have ratified the application of payment, and that in such cases it is reversible error to refuse an instruction on such theory. In the case at bar there was evidence undenied that Mr. Crumpton accepted the canceled note without objection to the application of payment, and that he afterwards, still without objection or protest, renewed the note secured by the mortgage on the mule. Under this state of facts, in the absence of some other paragraph of the court's charge covering this phase of the



case, it was error to refuse the instruction offered by plaintiff.

Therefore the judgment is reversed, and the cause remanded.

PER CURIAM. Adopted in whole.

(38 Okl. 391)

**COLBERT v. FIRST NAT. BANK OF ARDMORE.**

(Supreme Court of Oklahoma. June 24, 1913.)

*(Syllabus by the Court.)*

**EVIDENCE (§ 441\*)—PAROL EVIDENCE—WRITTEN CONTRACT—CONSTRUCTION.**

In an action by a bank upon a promissory note against joint and several makers, one of the makers cannot show for the purpose of escaping liability a contemporaneous parol agreement that he signed the note upon the representations of the bank's cashier that security taken upon real estate at the time of the execution of the note would be sufficient to pay the note, and that such maker would not be personally bound by the note, and would not be called upon to pay it, because such statement contradicts the written promise of the note and violates the rule that parol testimony is inadmissible to vary or contradict the terms of a written contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.\*]

Error from District Court, Carter County; S. H. Russell, Judge.

Action by the First National Bank of Ardmore against Walter Colbert. Judgment for plaintiff, and defendant brings error. Affirmed.

W. F. Bowman, of Ardmore, for plaintiff in error. Cruce & Cruce and W. D. Potter, all of Ardmore, for defendant in error.

**HAYES, C. J.** This suit was instituted originally by defendant in error in the court below against plaintiff in error, Walter Colbert, and one B. M. Colbert, on three promissory notes of \$2,000 each, dated October 7, 1905, upon which there was a credit of \$1,765.12. The suit in the lower court resulted in a judgment against defendant for the balance due on the notes, from which this appeal is prosecuted by plaintiff in error. The notes are all similar and are of the usual form of promissory notes, complete and unambiguous in their terms, by which they bind the makers, unconditionally, to pay to defendant in error at a specified time the amounts stipulated in the notes, with interest from maturity.

Plaintiff in error, as a defense to the action, admitted in his answer that he, on the 7th day of October, 1905, executed the notes named in plaintiff's petition, but denied that he became liable to plaintiff in any amount by signing said notes, and alleges that it was expressly agreed and understood by and between defendant in error and himself that he would not be personally

liable for any amount by reason of his having signed said notes. He further alleges that his codefendant, on the date of the execution of the notes, was indebted to defendant in error in certain amounts, aggregating \$7,000, which was secured by a mortgage on certain lands; that plaintiff in error was not then indebted to defendant in error in any amount; that on said date, his codefendant, B. H. Colbert, was involved financially; and that defendant in error's cashier requested plaintiff in error to accept a conveyance from his codefendant for the lands upon which defendant in error had then a mortgage, and to execute to defendant in error the notes sued upon and a mortgage upon the lands to secure same, with the agreement on the part of the said cashier, acting for and on behalf of defendant in error, guaranteeing to plaintiff in error that he should not be personally liable by reason of his signing said notes and the deed of trust. At the trial plaintiff in error undertook to introduce evidence to establish a parol agreement with the cashier of the defendant bank, by which it guaranteed that he should not be personally liable on the notes. The rejection of this testimony constitutes the only assignment of error presented for reversal of the cause.

There is no contention that the notes are ambiguous or incomplete, and that parol testimony is necessary to aid in the interpretation of same; nor is there any contention that they were executed and delivered without consideration, or through fraud or mistake of fact. The contention made by plaintiff in error has never been determined by this court in any case upon exactly the same state of facts; but we think it is completely answered by the statute and by many decisions of this court upon facts so similar as to be decisive of his contention against him.

Section 942, Rev. Laws of Okl., provides: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations \* \* \* concerning its matter, which preceded or accompanied the execution of the instrument." This statute does nothing more than affirm an elementary principle of the common law; and in all the following cases, it has been held that parol agreements made prior to or contemporaneous with the execution of a written contract upon the same subject-matter is inadmissible to contradict or vary the terms of the written contract. *Guthrie & Western Railroad Co. v. Rhodes*, 19 Okl. 21, 91 Pac. 1119, 21 L. R. A. (N. S.) 490; *McNinch v. Northwest Thresher Co.*, 23 Okl. 386, 100 Pac. 524, 138 Am. St. Rep. 803; *Holmes v. Evans*, 29 Okl. 373, 118 Pac. 144; *Hercules Buggy Co. v. Hinde*, 33 Okl. 85, 124 Pac. 27.

In *Guthrie & Western Railroad Co. v.*

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.



Rhodes, *supra*, the maker of a promissory note which bound him to pay a stipulated sum upon specified conditions offered to show, in an action upon the note, that the payment was to be made upon other conditions not mentioned in the note. It was held that such evidence was not competent. The testimony offered by plaintiff in error does not tend to prove want of or failure of consideration, or that the note was secured by fraud. Its purpose is only to prove that contemporaneous with the written agreement an oral agreement was made, which defendant in error now seeks to violate. Cases from other jurisdictions involving promissory notes and in point are numerous, of which only the following will be cited: Remington v. Wright, 43 N. J. Law, 451; San Jose Savings Bank v. Stone, 59 Cal. 183; Charles v. Denis, 42 Wis. 56, 24 Am. Rep. 383; Martin's Ex'r v. Lewis' Ex'r, 30 Grat. (71 Va.) 672, 32 Am. Rep. 682; Simpson v. Currier, 60 N. H. 19; Thompson v. McKee, 5 Dak. 172, 37 N. W. 387; Moore v. Beem et al., 83 Ind. 219; Bank of the United States v. Dunn, 6 Pet. 51, 8 L. Ed. 316; Kulenkamp v. Groff, 71 Mich. 675, 40 N. W. 57, 1 L. R. A. 594, 15 Am. St. Rep. 283.

The notes upon their face absolutely and unequivocally bind plaintiff in error to pay same upon maturity. Their execution and delivery is not controverted. If he may show a parol agreement to establish that the contract, instead of being what it is expressed to be upon the face of the notes, is that plaintiff in error shall not be bound to pay, then the very purpose of a written contract is destroyed, for its primary purpose is to create evidence incapable of dispute to establish what the final agreement of the parties thereto is. Although every person is presumed to know the law, a person may sometimes be ill advised relative thereto, and execute a written contract, relying upon parol assurances that it will not be enforced. It is unfortunate, if such a person is deceived and is called upon to perform his contract; but it is better that he lose than that a principle so essential to the certainty and stability of contracts should be destroyed in order to relieve him from the consequences of his indiscretion.

As the record presents no error requiring a reversal of the cause, the judgment of the trial court is affirmed. All the Justices concur.

#### PENN v. PENN.

(Supreme Court of Oklahoma. June 19, 1913.)

(Syllabus by the Court.)

#### 1. DIVORCE (§ 104\*)—AMENDMENT OF PETITION—DISCRETION.

A petition in a suit for divorce alleged cruelty and gross neglect of duty. After the answer was filed, but several days before trial,

the court permitted plaintiff to file an amended petition alleging adultery. *Held*, that the court did not abuse its discretion by permitting the amendment.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 27, 28, 328-339; Dec. Dig. § 104.\*]

#### 2. DIVORCE (§ 184\*)—FINDINGS—REVIEW.

Where the evidence reasonably supports a finding of the court that the defendant in a divorce case was guilty of adultery, the finding will not be disturbed on appeal.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 570-573; Dec. Dig. § 184.\*]

#### 3. DIVORCE (§ 51\*)—GROUNDS—CONDONED OFFENSE—REVIVAL.

Where, after a breach of marital duty has been condoned, the same misconduct is repeated, the condoned offense is revived.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 185-187; Dec. Dig. § 51.\*]

#### 4. DIVORCE (§ 298\*)—CUSTODY OF CHILDREN.

Where the evidence shows that a mother's treatment of her children was such as to endanger their health and permanently injure their disposition, she is not entitled to their custody as against their father, if he is a suitable person capable of giving them the proper care, even though they are of tender years.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 781-787; Dec. Dig. § 298.\*]

Commissioners' Opinion, Division No. 2. Appeal from District Court, Lincoln County; Chas. B. Wilson, Jr., Judge.

Action by A. M. Penn against Ola J. Penn. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. B. Rittenhouse and F. A. Rittenhouse, both of Chandler, for plaintiff in error. Jackson & Eagleton, of Norman, and Hoffman & Foster, of Chandler, for defendant in error.

ROSSER, C. This was a suit for divorce brought by J. M. Penn against Ola Penn. Plaintiff's original petition charged the defendant with extreme cruelty toward the plaintiff and toward their children after children were born to them. It further charged that she was guilty of profane and vulgar language, which amounted to extreme cruelty, and that she was guilty of gross neglect of duty in that she would not keep house properly and neglected the care of her children. Defendant filed answer on the 24th of March, 1911. On the 18th of April, 1911, the plaintiff filed an amended petition in which the same allegations were made as in the original petition, and an additional allegation was made that the defendant had been guilty of adultery with one D. L. Ramsey.

[1] The first assignment of error is that the court erred in permitting the plaintiff to file the amended petition setting up the additional ground of adultery. The case was not tried until the 1st day of May following the filing of the amended petition. The record shows that both parties announced ready for trial. The court did not abuse its discretion in permitting the amendment to be

(37 Okl. 650)



filed. The cause of action was for divorce, and the amendment only added another to the list of the breaches of duty. In passing on the right to amend a petition in the case of *Deyo v. Morss*, 144 N. Y. 216, 39 N. E. 81, the Supreme Court of New York said: "The causes of action were legally distinct, but the purpose of both complaints was to compel the application of the decedent's property to the payment of his debts; and whether the result was reached by treating the conveyance by the defendants as fraudulent, or by compelling them to account for the proceeds of the property, as provided under the statute, does not affect the substantial purpose of the action."

It was held in *Clayburgh v. Clayburgh*, 15 Wkly. Notes Cas. (Pa.) 385, that a divorce petition could be amended by adding an additional cause of action.

In *Appeal of Powers*, 120 Pa. 320, 14 Atl. 60, it was held that a divorce petition could not be amended on appeal so as to state another ground of divorce, but it was said that it might have been so amended in the trial court where the defendant would have had an opportunity to meet the new allegation with proof.

Section 5679, Comp. L. 1909, provides that: "The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any party, or correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or conform the pleading or proceeding to the facts proved, when such amendment does not change substantially the claim or defense; and when any proceeding fails to conform, in any respect, to the provisions of this Code, the court may permit the same to be made conformable thereto by amendment." This section gives the court a very wide discretion in the matter of amendments, and unless this discretion is abused the case will not be reversed because an amendment has been permitted. See *Trower v. Roberts*, 30 Okl. 215, 120 Pac. 617; *Fort Produce Co. v. Southwestern Grain & Produce Co.*, 26 Okl. 13, 108 Pac. 386; *Lookabaugh v. Bowmaker*, 21 Okl. 489, 96 Pac. 651; *Lookabaugh v. La Vance*, 6 Okl. 358, 49 Pac. 65; *Swope v. Burnham, Hanna, Munger & Co.*, 6 Okl. 736, 52 Pac. 924.

If the amendment in this case had not been permitted, the plaintiff would have been put to the necessity of dismissing his action and filing a new suit. The defendant had ample time to prepare her defense. She announced ready for trial, had her witnesses present, and the case appears to have been fairly tried upon the issues presented, including the question of whether or not she had been guilty of adultery.

[2] The next ground relied upon for a

reversal of the case is that the evidence was not sufficient to warrant a finding that the defendant was guilty of adultery. It would serve no good purpose to set forth the evidence. The evidence was conclusive that she permitted Ramsey, the person alleged to have committed adultery with her, to take liberties with her such as respectable married women do not permit. The adulterous disposition was shown. In addition opportunity to commit the act was shown, and many suspicious circumstances were shown. In cases of this sort the judgment of the trial court is entitled to special weight. He heard and saw the witnesses. What is of most importance he saw the defendant and her alleged paramour and heard them testify. It is impossible to put on paper the characteristic demeanor of such persons, which to a great extent, outside of the spoken evidence, convinces the judge of experience with such cases either that they are the victims of unreasonable jealousy or that they are guilty. It is not necessary to review the cases cited by defendant to show what circumstances have been held sufficient to establish the charge of adultery. Some of the cases cited do not, in the opinion of the writer, arrive at the proper conclusion from the evidence, especially the case of *Aitchison v. Aitchison*, 99 Iowa, 93, 68 N. W. 573.

[3] It is next contended that the plaintiff condoned the offense, even if it was committed. The plaintiff saw the defendant in a compromising position with the correspondent on the evening or night of March 10th, but made no complaint, and occupied the same bed with her that night and the next night. The defendant testifies that he had sexual intercourse with her on the night of the 11th. He denies this. At any rate, the evidence shows that she kept up the same conduct with regard to the correspondent for a few days after the 11th of March that she had before. When she continued her intimacy, she revived the condoned offenses. *Estee v. Estee*, 34 Okl. 305, 125 Pac. 455.

[4] The last assignment is that the court erred in giving the plaintiff the custody of the children. It is not necessary to go into a general discussion of the right of one parent to the custody of a child as against the other. The children in this case were a boy aged four years and a girl aged two years. Ordinarily at that age the mother would be entitled to the custody. The fact that she had stepped aside from the path of virtue on a few occasions would not necessarily forfeit her right to the custody of the children of such tender years. But a reading of the record in this case shows that, aside from the question of her chastity or lack of it, it was not for the best interests of the children for them to remain with her. It was shown that she was negligent and slovenly in taking care of them; that she was of ungovernable temper; and that when in a rage



she punished them almost brutally. It is shown and admitted by her that she struck the little boy with a buckle on the end of a strap across the face, causing a permanent scar above his eye. And many other instances of cruel and unusual punishments inflicted on her children are detailed in the record. It was such as was likely to endanger their health and injure their disposition permanently. It was shown that the plaintiff is a man of good character, a suitable person to have their custody, and capable of giving them the proper care.

There is no material error in the record, and the judgment should be affirmed.

PER CURIAM. Adopted in whole.

(37 Okl. 536)

ST. LOUIS & S. F. R. CO. v. STEELE.

(Supreme Court of Oklahoma. June 11, 1913.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 174\*)—APPEAL—PLEADING—DISCRETION.

The right to file new pleadings in the county court, on appeal from a justice of the peace court, depends upon whether it is in furtherance of justice to permit such pleadings to be filed, which is to be determined by the county court in the exercise of a sound judicial discretion.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 665-693; Dec. Dig. § 174.\*]

2. RAILROADS (§ 421\*)—FAILURE TO FENCE—INJURY TO ANIMALS—DEFENSES.

In an action under the fence statute (sections 7499, 7500, Comp. Laws 1909), negligence of the plaintiff in the care of his stock, contributing to the injury, is no defense, unless such negligence be shown to be willful.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1501-1508, 1510; Dec. Dig. § 421.\*]

3. RAILROADS (§ 411\*)—FAILURE TO FENCE—RIGHTS OF LANDOWNER.

A railroad company, by its failure or neglect to erect a fence, as required in the foregoing paragraph, cannot deprive the owner of adjoining land of the rightful use thereof.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1409-1450; Dec. Dig. § 411.\*]

4. RAILROADS (§ 104\*) — DUTY TO FENCE — "PENAL STATUTES."

The foregoing sections of the statute, providing that an owner or occupant of land abutting on a railroad, who is desirous of having a hog-proof fence constructed along its right of way, shall give written notice to the agent of the company at the station nearest his land, are not penal statutes (quoting Words and Phrases, pp. 5269-5271).

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 320-332, 767, 769, 772; Dec. Dig. § 104.\*]

5. RAILROADS (§ 103\*) — DUTY TO FENCE — HERD LAW.

The herd law, requiring domestic animals to be restrained, does not alter the obligation imposed upon railroads to fence their rights of ways.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 315-319, 762, 763, 767, 769, 772; Dec. Dig. § 103.\*]

6. RAILROADS (§ 411\*)—NOTICE TO FENCE—SUFFICIENCY.

Under section 7500, Comp. Laws 1909, a notice to the superintendent of the railroad company, instead of to the agent at the station nearest the land desired to be fenced, while not in strict compliance therewith, is sufficient to fix a liability upon the railroad for all damages occurring by reason of its failure or neglect to erect a fence in accordance with said statute, where it appears that the railroad actually received the notice and had a full statutory opportunity to comply therewith.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1409-1450; Dec. Dig. § 411.\*]

7. RAILROADS (§ 411\*)—FAILURE TO FENCE—LIABILITY.

Where a railroad is required by statute to fence its right of way, and neglects so to do, it is liable for all injuries to stock resulting from such failure, though the statute does not in terms impose such liability.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1409-1450; Dec. Dig. § 411.\*]

8. RAILROADS (§ 443\*)—FAILURE TO FENCE—NEGLIGENCE—EVIDENCE.

A prima facie case of negligence is established by showing that the hogs were in a field improperly fenced by the railroad company and strayed therefrom onto the tracks and were killed by defendant's train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1608-1620; Dec. Dig. § 443.\*]

9. DAMAGES (§ 18\*)—PROXIMATE CAUSE.

Damages suffered on account of extra care and attention required in rearing sucking pigs, the increase of the sows killed, may be recovered; the killing of the sows being the proximate cause of such damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 37; Dec. Dig. § 18.\*]

Commissioners' Opinion, Division No. 1. Error from County Court, Jackson County: W. T. McConnell, Judge.

Action by P. P. Steele against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed on condition of remittitur.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and J. H. Grant, both of Oklahoma City, for plaintiff in error. Guy P. Horton, of Altus, for defendant in error.

SHARP, C. This action, filed in the justice of peace court for Altus township, Jackson county, August 18, 1910, was to recover damages for the killing of two sows belonging to plaintiff by one of defendant's trains and for the resultant injury to 12 sucking pigs. In his petition plaintiff alleged that he had constructed a hog-proof fence around his hog pasture, except on the side bordering on the defendant's right of way, and served notice on the defendant, as required by law, to construct a hog-proof fence along that portion of its right of way contiguous to plaintiff's hog pasture; that defendant failed and refused to construct said hog-proof fence, and as a result thereof the hogs of plaintiff wandered onto defendant's tracks, and two sows were killed by defendant's train; that at the time of the killing said sows had 12

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 133 P.—14



sucking pigs, five of which soon died, the seven that lived being stunted in growth, entailing additional care and expense. Plaintiff alleged that the value of the sows was \$40 each and of the five pigs killed, and the services and care required for the other seven pigs, \$2 each, or \$104 in all. On August 22, 1910, judgment was rendered in the justice court in favor of plaintiff for this amount. Defendant appealed to the county court and on October 7th thereafter filed its answer therein, setting up two defenses, namely: (1) General denial; (2) contributory negligence of plaintiff in permitting his hogs to run in the field which had not been fenced hog proof on the side adjacent to the railroad right of way. Plaintiff filed a motion to strike the second defense. Defendant then filed a motion, with its said answer attached, asking that it be allowed to file the same, which motion, as to the second defense of the answer, was overruled. The case was tried to the court and judgment rendered for plaintiff, from which judgment defendant appeals to this court.

[1] The first assignment of error urged is that the trial court erred in overruling defendant's application to file an answer, setting up the defense of contributory negligence. Section 6388, Comp. Laws 1909, provides: " \* \* \* And the case shall be tried de novo in the district (county) court upon the original papers on which the cause was tried before the justice, unless the appellate court, in furtherance of justice, allow amended pleadings to be made, or new pleadings to be filed." The question, then, is whether it would have been in furtherance of justice to have permitted the defendant to file the answer in toto and if the court abused its discretion in striking out the second defense thereof. A similar question was before the Supreme Court of Kansas in *Robbins et al. v. Sackett*, 23 Kan. 301, where the district court, on an appeal from a justice court, refused to allow the defendants to file an answer. It was said by the court: "They claim that the court below erred in refusing to permit them to file an answer, setting up a counterclaim for rent for said house. Such refusal, however, we think not erroneous; nor was it material, if erroneous. It is for the court to determine whether new pleadings should be filed on an appeal. Justices' Code, § 122; Comp. Laws 1879, p. 720." See, also, *Stanley et al. v. Farmers' Bank*, 17 Kan. 592; *Ziegler v. Osborn*, 23 Kan. 464; *Baughman v. Hale*, 45 Kan. 453, 25 Pac. 856; *Ward v. Chicago, R. I. & P. Ry. Co.*, 87 Kan. 825, 126 Pac. 1083. As it will appear later, the defense of contributory negligence would have availed defendant nothing, and we do not see how defendant was prejudicially affected by the court's refusal to permit it to be set up.

[2] By the next assignment of error the defendant submits that it was entitled to ask and have answered the following ques-

tion, to which an objection of plaintiff was sustained: "Q. At the time you turned these sows and pigs loose in the field, you knew that there was no fence along the St. Louis & San Francisco Railroad Company's track, didn't you?" The only purpose defendant could have had in asking this question was to show that plaintiff was negligent in turning his sows and pigs into the field adjoining defendant's track. It is well settled that even though plaintiff turned his hogs into a field, knowing the railroad company had not fenced its track, such fact is no defense to an action for damages for the killing of the hogs. *Chicago & Alton R. Co. v. Nevitt*, 122 Ill. App. 505; *Toledo, Wabash & Western Ry. Co. v. Cory*, 39 Ind. 218; *Claus v. Chicago Great Western Ry. Co.*, 136 Iowa, 7, 111 N. W. 15; *Missouri Pacific Ry. Co. v. Bradshaw*, 33 Kan. 533, 6 Pac. 917; *Wilder v. Maine Central R. Co.*, 65 Me. 332, 20 Am. Rep. 608; *Flint & Pere Marquette Ry. Co. v. Lull*, 28 Mich. 510; *Cressey v. Northern Railroad*, 59 N. H. 504, 47 Am. Rep. 227; *Congdon v. Central Vermont R. Co.*, 56 Vt. 390, 48 Am. Rep. 793. If plaintiff had willfully driven his hogs onto the track of defendant company, then, of course, by reason of his conduct he could not claim any damages, but no such claim is made. If defendant was right in contending that plaintiff was negligent in turning his hogs into the field adjacent to the railroad, knowing that it had not been fenced by the railroad company with hog-proof fence, the plaintiff would have been prevented from using his field as he had a right to do, and the company could protect itself absolutely by refusing to construct the fence, whereas the purpose of the statute is to enforce upon railroad companies the duty of so fencing their right of way that the owners of adjoining fields may safely pasture their hogs or other stock there.

[3] A railroad company, by its failure or neglect to erect a fence, cannot deprive the owner of adjoining land or of the rightful use thereof. The risk in such cases is that of the railroad company and not the owner of the stock. *McCoy v. California Pacific R. Co.*, 40 Cal. 532, 6 Am. Rep. 623; *Chicago & Alton Ry. Co. v. Nevitt*, supra; *Rehler v. Western New York & P. R. Co.*, 8 N. Y. Supp. 286; *Congdon v. Central Vermont R. Co.*, supra.

[5] And the fact that a herd law, requiring domestic animals to be restrained, was in force at the time of the accident does not, under the facts here presented, alter the obligation imposed on railroads to fence their rights of ways. *Missouri Pacific Ry. Co. v. Bradshaw*, 33 Kan. 533, 6 Pac. 917; *Missouri Pacific Ry. Co. v. Roads*, 33 Kan. 640, 7 Pac. 213; *Iola Electric R. Co. v. Jackson*, 70 Kan. 791, 79 Pac. 662.

[4] Under the third assignment of error

<sup>1</sup> Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 55 Hun, 604.



plaintiff in error contends that the demurrer to plaintiff's evidence should have been sustained, basing its argument upon the hypothesis that the statute under which the action was brought was penal, requiring strict construction, and that, since plaintiff did not strictly comply with the provisions thereof, he did not have a cause of action against the defendant.

[6] Sections 7499, 7500, Comp. Laws 1909, are the governing statutes. It is therein provided that the owner or occupant of land abutting on a railroad, who is desirous of having a hog-proof fence constructed along its right of way, shall give written notice of his intention to the agent of the company at the station nearest his land. The statute simply imposes a duty that before its passage did not exist. Penal statutes are defined in *Smith v. Colson*, 31 Okl. 703, 123 Pac. 149, as follows: "In Words and Phrases, p. 5269, it is said: 'Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American Constitutions, the executive of the state has the power to pardon. Statutes giving a private action against a wrongdoer are sometimes spoken of as penal in their nature; but in such cases neither the liability imposed nor the remedy given is strictly penal.'" Guiding ourselves by this definition, it is evident that the statutes under consideration are not penal. Here the plaintiff, after having completed his part of the fence, gave written notice to Mr. Clark, superintendent of defendant company, at Sapulpa, Okl. But he did not give written notice to the agent at Altus, the station nearest his farm. The evidence shows, however, that plaintiff was told to send his notice to Clark, the superintendent, by the section foreman of defendant company having control of the right of way at the place plaintiff desired to have fenced. Such being the case, and since an officer of the defendant company of superior rank actually received notice to construct the fence, but took no action towards its erection for a period of five months, or at any time before the accident, we do not think it in a position to insist on strict compliance with the statute. It is plain that the purpose of the statute, to secure to railroad companies a reasonable notice in such cases, was accomplished. *Choctaw, O. & G. R. Co. v. Deperade*, 12 Okl. 367, 71 Pac. 629.

[7] Although defendant says the fence statute is penal, yet it argues that, since no penalty is provided therein for a failure to fence against hogs, none can be recovered, and plaintiff is not entitled to a judgment. Counsel have cited no authorities in support of their contention, and we know of none. In *Parish v. Louisville & N. R. Co.*, 78 S. W. 186, 25 Ky. Law Rep. 1524, affirmed in 126 Ky. 638, 104 S. W. 690, 31 Ky. Law Rep. 1020, the contrary rule is so aptly expressed that we quote at length. There it was held

that, where a railroad company was required by statute to fence its right of way and neglected to do so, it was liable for injury to cattle resulting from such failure, though the statute did not in terms impose a liability. The opinion reads: "In that case the court said: 'There can be no doubt of the proposition that if the company is in default of the performance of a legal obligation, as by neglect to maintain a fence or cattle guard where stock may stray on the track, proof of such default and of the cattle coming on at such places and being killed will suffice to render it liable for damages.' *Pierce on Railroads*, p. 428. The case of *City of Henderson v. Clayton* (Ky.) 57 S. W. 1 [22 Ky. Law Rep. 283] 53 L. R. A. 145, was where the city was sued for a violation of its duty imposed by a statute. The court said: 'From time immemorial, where a statutory duty for the protection of individuals has been violated, an action at common law might be maintained.' The common-law rule referred to is thus stated in *Comyn's Digest*, Action upon Statutes: 'In every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.' Another common-law authority thus states the rule: 'Whenever an act of Parliament doth prohibit anything, the party grieved shall have an action and the offender shall be punished at the King's suit. It is written in the hornbook of the law that the public and a party particularly aggrieved may each have a distinct but concurrent remedy for an act which happens to be both a public and a private wrong.' *Endlich on Statutes*, § 463. The same common-law rule is laid down in *Bishop on Noncontract Law*, § 133, and in *Cooley on Torts*, p. 658." The fact, therefore, that the statute failed to impose in terms a liability does not detract from the responsibility of the railroad company for all damages proximately caused thereby.

[8] Plaintiff's evidence showed that he was the owner of land abutting on the railroad; that he had built a fence around his land as provided by statute, and given the defendant notice to construct their portion thereof; that he was the owner of the hogs injured; that defendant company had failed and neglected to construct the fence; and that as a result of such failure and neglect the plaintiff's hogs wandered on the track of defendant company and there were killed. This was sufficient to fix the liability of defendant, under the great weight of authorities, which hold that a railroad, not having fenced its line as provided by statute, is liable for all damages resulting therefrom. *McCoy v. California Pacific R. Co.*, 40 Cal. 532, 6 Am. Rep. 623; *Johnson v. Oregon Short Line R. Co.*, 7 Idaho, 355, 63 Pac. 112, 53 L. R. A. 744; *Patrie v. Oregon Short-Line R. Co.*, 6 Idaho,



448, 56 Pac. 82; *Bernardi v. Northern Pacific R. Co.*, 18 Idaho, 76, 108 Pac. 542, 27 L. R. A. (N. S.) 796; *Monical v. Northern Pacific Ry. Co.*, 19 Idaho, 150, 112 Pac. 764; *Toledo, P. & W. Ry. Co. v. Wickery*, 44 Ill. 76; *Rabberman v. Hunt, Receiver*, 88 Ill. App. 625; *Jarvis v. Bradford*, 88 Ill. App. 685; *Chicago & Alton Ry. Co. v. Nevitt*, 122 Ill. App. 505; *Atlantic Coast Line R. Co. v. Peeples*, 56 Fla. 145, 47 South. 392; *Toledo, Wabash & Western Ry. Co. v. Cory*, 39 Ind. 218; *Craig v. Wabash R. Co.*, 121 Iowa, 471, 96 N. W. 965; *Claus v. Chicago Great Western Ry. Co.*, 136 Iowa, 7, 111 N. W. 15; *Missouri Pacific Ry. Co. v. Bradshaw*, 33 Kan. 533, 6 Pac. 917; *Missouri Pacific Ry. Co. v. Baxter*, 45 Kan. 520, 26 Pac. 49; *Iola Electric R. Co. v. Jackson*, 70 Kan. 791, 79 Pac. 662; *Stanley v. Atchison, T. & S. F. Ry. Co.*, 88 Kan. 84, 127 Pac. 620; *Wilder v. Maine Central R. R. Co.*, 65 Me. 332, 20 Am. Rep. 698; *Flint & Pere Marquette Ry. Co. v. Lull*, 28 Mich. 510; *Blankenship v. St. Louis & S. F. Ry. Co.*, 135 Mo. App. 338, 115 S. W. 1027; *Kirn v. Cape Girardeau & C. Ry. Co.*, 149 Mo. App. 708, 129 S. W. 475; *Cressey v. Northern R. Co.*, 59 N. H. 564, 47 Am. Rep. 227; *Lee v. Brooklyn Heights R. Co.*, 97 App. Div. 111, 89 N. Y. Supp. 652; *Congdon v. Central Vermont R. Co.*, 56 Vt. 390, 48 Am. Rep. 793; *San Antonio & A. P. Ry. Co. v. Harrison* (Tex. Civ. App.) 146 S. W. 596; *Rio Grande & E. P. Ry. Co. v. Garcia* (Tex. Civ. App.) 117 S. W. 204; *Galveston, H. & S. A. Ry. Co. v. Kropp* (Tex. Civ. App.) 91 S. W. 819; 3 *Elliott on Railroads* (2d Ed.) § 1181; note to 9 L. R. A. (N. S.) 347. Whether or not the operatives of the train causing the injury were negligent in the running of the train is immaterial; it appearing that the hogs came upon the track by reason of there being no proper fence. The negligence consisted of a failure to discharge the duty imposed upon the company by law, viz., the failure to construct a proper fence. *McCoy v. California Pacific R. Co.*, supra; *Craig v. Wabash R. Co.*, supra; *Claus v. Chicago Great Western Ry. Co.*, supra; *Missouri Pacific Ry. Co. v. Baxter*, supra; *Missouri Pacific Ry. Co. v. Bradshaw*, supra; *Rinehart v. Kansas City Southern Ry. Co.*, 204 Mo. 269, 102 S. W. 958; *Elliott on Railroads* (2d Ed.) § 1181.

[8] The last ground of error urged is that the judgment of the court is not sustained by the evidence. The prayer of the petition was for \$40 each for the sows and \$2 each for the five pigs killed and the seven pigs which required extra care and attention, a total of \$104. As the judgment was for this amount, presumptively it was found in accordance therewith. No objection is made as to the value of the two sows. As to the seven pigs that lived, plaintiff testified that it was worth the value of the pigs to raise them by hand. Their value, according to the evidence, was between \$2.50 and \$5 each. Damages suffer-

ed on account of extra care and attention required in rearing the increase of animals wrongfully killed may be recovered where it appears that the killing of the animal was the proximate cause of such damages. *McDonnell v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 17 N. D. 606, 118 N. W. 819. There is no evidence whatever that the five pigs that died did so as the result of the killing of the sows, and we cannot say such was the fact in the absence of proof.

Finding no error in the record, except in the particular above noted, the judgment of the trial court will be affirmed, if the plaintiff within 15 days from the filing of this opinion files a remittitur in this court of \$10; otherwise the judgment of the lower court should be reversed and the cause remanded for a new trial.

PER CURIAM. Adopted in whole.

(38 Okl. 410)

ROONEY v. McPHERSON.

(Supreme Court of Oklahoma. June 30, 1913.)

(Syllabus by the Court.)

CHATTEL MORTGAGES (§ 242\*)—DISCHARGE OF LIEN—ATTACHMENT.

Where the owner of a note secured by chattel mortgage sues on the note, attaches the mortgaged property, brings replevin, and then dismisses the prior suit, *held*, that the mortgage lien was ipso facto discharged by the levy of the attachment, after which plaintiff was without special interest in the property sufficient to maintain replevin.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 496; Dec. Dig. § 242.\*]

Error from District Court, Pottawatomie County; J. H. Woods, Special Judge.

Action by M. A. Rooney against W. A. McPherson. Judgment for defendant, and plaintiff brings error. Affirmed.

Pendleton, Abernathy & Howell, of Shawnee, for plaintiff in error. H. H. Smith and W. T. Williams, both of Shawnee, for defendant in error.

TURNER, J. This case presents error from the probate court of Pottawatomie county. The record discloses that M. A. Rooney, plaintiff in error, plaintiff below, sold W. A. McPherson certain personal property taking in payment his note in the sum of \$450 secured by a chattel mortgage on the property; that upon the maturity of said note \$338 remained unpaid, and suit was commenced thereon; that at the same time said Rooney filed his affidavit for an attachment "on the same property embraced in the mortgage" to secure any judgment obtained; that thereupon attachment issued, and the property seized, whereupon said McPherson pleaded the exemption laws of the territory of Oklahoma, and moved to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



discharge the attachment; that while said suit was pending and the writ of attachment still in effect said Rooney commenced this action in replevin for the purpose of gaining possession of the personal property covered by said chattel mortgage, and during the trial of the action the attachment suit was formally dismissed. The case was tried to the court upon an agreed statement of facts and judgment was rendered and entered for defendant, and plaintiff brings the case here. He contends that, although he brought suit on the note and attached the mortgaged property, still he had a right to also institute an action in replevin for the same property after dismissing the attachment proceedings. Not so. The lien of his mortgage was ipso facto discharged by the levy of the attachment. Thenceforth he had no special interest in the property sufficient to maintain replevin. This was the holding in *Dix v. Smith*, 9 Okl. 124, 60 Pac. 303, 50 L. R. A. 714, followed in *Crismon, Sheriff, v. Barse Live Stock Co.*, 17 Okl. 117, 87 Pac. 876, and cited with approval in *Bailey v. Willoughby et al.*, 33 Okl. 194, 124 Pac. 955.

In *Dix v. Smith*, supra, the syllabus reads: "Where a creditor brings suit against his debtor and sues out a writ of attachment, but before levying the same learns that the debtor's property is covered by a chattel mortgage, and upon receiving such information buys the chattel mortgage debt and has the mortgage assigned to himself, and thereafter causes said property to be seized under such attachment, he thereby waives his lien under the chattel mortgage; and in case the attachment is discharged, either by the court on the trial, or by appealing from the judgment of the trial court and executing an appeal bond, the creditor cannot maintain an action in replevin to secure the possession of the mortgaged property, so that he may foreclose his mortgage, for the reason that the mortgage lien is waived by the attachment of the property covered thereby." In a note to said case (50 L. R. A. 714) it is said: "To render applicable the theory of the case, that the lien of a chattel mortgage and the lien of an attachment are inconsistent and cannot coexist, since the first imports legal title in the mortgagee, and the second legal title in the mortgagor, not only the common-law doctrine that a chattel mortgage operates to transfer the legal title to the mortgagee, but also the common-law rule that a mere equitable right, such as the equity of redemption remaining in the mortgagor, is not subject to levy, must have been left undisturbed, both by statute and judicial decision."

As both said common-law doctrine and common-law rule obtain in this jurisdiction, the judgment of the trial court is affirmed. All the Justices concur, except WILLIAMS and DUNN, JJ., absent and not participating.

(37 Okl. 684)

## MUSKOGEE ELECTRIC TRACTION CO. v. McINTIRE.

(Supreme Court of Oklahoma. April 5, 1913.  
Rehearing Denied June 20, 1913.)

(Syllabus by the Court.)

## 1. WITNESSES (§ 56\*)—COMPETENCY—HUSBAND AND WIFE.

Comp. Laws 1909, § 5842, provides that husband and wife are incompetent to testify for or against each other, except concerning transactions in which one has acted as agent of the other. *Held* that, where plaintiff, a married woman, on being injured in a street car accident, directed her husband to search for a negro passenger who was also on the derailed car, the fact that the husband was plaintiff's agent for that purpose did not render him competent to testify, in his wife's behalf, to a conversation between himself and the negro for the purpose of impeaching the latter.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 153-156; Dec. Dig. § 56.\*]

## 2. WITNESSES (§ 75\*)—COMPETENCY—OBJECTION.

The incompetency of a husband to testify as a witness for his wife in an action to which she is a party, under section 5842, Comp. Laws 1909, must be raised in the trial court by an objection to the competency of the witness, and not merely an objection to the competency, relevancy, or materiality of the evidence offered by the witness.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 189, 193, 194; Dec. Dig. § 75.\*]

## 3. APPEAL AND ERROR (§§ 181, 203\*)—OBJECTION BELOW—NECESSITY—WAIVER.

It is the objection made, and not that which might have been urged, that called for the ruling of the court. Had proper objection been made, it must be presumed that the objection would have been sustained, hence no error committed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1064, 1141-1151, 1157, 1158, 1160; Dec. Dig. §§ 181, 203.\*]

## 4. CARRIERS (§ 316\*)—INJURY TO PASSENGER—BURDEN OF PROOF.

Proof of an accident resulting in injury to a passenger, caused by the derailment of a street car, is sufficient to charge the company with negligence, and to cast upon it the burden of proof to show that the injury was caused without its fault.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1261, 1262, 1283, 1285-1294; Dec. Dig. § 316.\*]

## 5. NEGLIGENCE (§ 121\*)—"RES IPSA LOQUITUR."

The principle expressed by the Latin formula "res ipsa loquitur," "the thing itself speaks," is that, where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from lack of proper care.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 217-220, 224-228, 271; Dec. Dig. § 121.\*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6136-6139; vol. 8, p. 7787.]

## 6. EVIDENCE (§ 376\*)—BOOK ENTRIES—PRELIMINARY PROOF.

Entries in books of account, admissible as evidence under section 5907, Comp. Laws 1909,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



are inadmissible, when it does not appear, by the oath of the person who made such entries, that they are correct, and were made at or near the time of the transaction to which they relate, or where proof of the handwriting of the person who made the entries, in case of his death or absence from the county, is not made.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1628-1646; Dec. Dig. § 376.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Muskogee County; John H. King, Judge.

Action by Etta McIntire against the Muskogee Electric Traction Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Gibson & Thurman, of Muskogee, for plaintiff in error. A. E. Patterson and J. H. Lilley, both of Muskogee, for defendant in error.

SHARP, C. Plaintiff sued defendant for injuries sustained while a passenger on one of its electric street railway cars, being operated in the city of Muskogee. The allegations of negligence contained in the petition were general. It was charged that the car on which plaintiff was a passenger, while being operated at a high rate of speed, suddenly left the track by reason of the negligence, mismanagement, and want of care of the servants, agents, and employes of defendant, in the negligent management and control of the car; and in the negligence of defendant in failing to furnish a safe and substantial railway upon and along its Fondulac Avenue line; and in failing to have and keep said car in good condition and repair. That upon the derailment of said car it came to a sudden and violent stop, thereby permanently injuring the plaintiff as set forth in her petition, to her damage in the sum of \$5,300. Defendant's answer, in addition to containing a general denial, denied specially that plaintiff was a passenger on one of its cars on the day of the alleged injury.

Among the witnesses who testified for plaintiff was her husband, Perry McIntire. His testimony was objected to on the ground that he was an incompetent witness, being the husband of plaintiff. The court's action in permitting the witness to testify is assigned as ground for reversal. It was first shown upon examination of the plaintiff that she authorized her husband, about three weeks after the accident had occurred, to ascertain the name and whereabouts of a certain negro who was on the car at the time she was injured. Among other witnesses who testified for defendant was one Roger Wright, a negro, who testified that he was a passenger on a street car of defendant company on October 24, 1908, the date of plaintiff's injury, and that said car jumped the rail at Ninth street. Upon cross-examination, the time and place being fixed, Wright was asked concerning a

certain conversation alleged to have taken place between him and Perry McIntire, in which he was said to have stated that at the time of the accident there was a negro woman on the car, who was injured by the accident, but that he did not know who she was. This conversation the witness denied, and it was then Perry McIntire was offered as a witness and testified that at the time charged he saw and had a conversation with Roger Wright, who told him that at the time the car was wrecked there was a negro woman on board.

[1] It is insisted by counsel for plaintiff in error that McIntire had authority only to ascertain the name and whereabouts of Roger Wright, and when he had found Wright was the man that was on the Fondulac car that ran off the track at Ninth street, and his place of residence, he had done all that he was authorized to do, as his wife's agent, and that the witness was incompetent to testify as to any conversation concerning any other fact. Section 5842, Comp. Laws 1909, provides that husband and wife shall be incompetent to testify for or against each other, except concerning transactions in which one acted as the agent of the other. The question therefore presented is: Was the conversation given in evidence one concerning a transaction in which he acted as the agent of his wife? The question, on principle, has recently been decided by this court in the negative, in the case of Fish v. Bloodworth, 129 Pac. 32, where it was held that a husband could not testify to a conversation between his wife and a third person, particularly when the conversation was not had with the adverse party, and did not concern the vital issue of the case, though it was shown that the husband was acting for his wife, and went with her to the bank to talk about the matter with the cashier, who afterwards was a witness in the case. The husband's agency to gather testimony for his wife did not render him a competent witness to testify to a conversation had with one found by him to have been a passenger at the time of the accident.

[2, 3] But is the defendant company in a position to urge a reversal on account of the admission of McIntire's testimony? When it was shown that Perry was the husband of the plaintiff on the date of the accident, objection was made to his giving any testimony, which objection was by the court properly overruled, as the witness, his agency having already been established, was competent to testify to facts arising within the scope of his agency. No objection to the following question, touching the conversation, was offered, but after the witness had answered the question, objection was made, not to the competency of the witness to answer the particular question, but to the competency, relevancy, and materiality of the question, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



that the question was not a proper impeaching question. The question presented was before the court in *Williams et al. v. Joins*, 126 Pac. 1013, where it was held that, in order for one to avail himself of the incompetency of a witness, he must object to the witness' competency, and not merely to the competency of the testimony offered by the witness. While, had the original objection to the competency of the witness been properly urged, it would probably not have been necessary to renew the objection of the witness' competency to the following question, yet where the witness was competent to answer the first, but not the second, question, a proper objection should have been laid; otherwise the witness' competency to answer the question will be deemed to have been waived. Had proper objection been made it must be presumed that the objection would have been sustained, and no error committed. It is the objection made, and not that which might have been urged, that called for the ruling of the trial court. The question was competent, relevant, and material, and a proper impeaching question, hence the court did not err in overruling the objection as made.

[4] It is insisted by plaintiff that there was not a scintilla of evidence showing any negligence or carelessness in the operation of the car, or evidence of the bad condition or any defect in the car. An examination of the record will not justify this statement. The conductor testified that an east-bound car on the Fondulac line got off the track at Ninth street on the date in question; that at that point the track was curved; and that the track there was generally covered up with mud, washed down around the rails, the street having been but partly graded. Another conductor named Beam, who relieved Conductor Blackwell, testified that when he went back on duty after dinner he found his car off the track at Ninth street; that Conductor Blackwell was in charge; that it took an hour to get the car back on after his arrival. In fact, the general manager of defendant company testified that on the date of the accident but one car was operated on the Fondulac line, and that it was off the track on three separate occasions. The fact, therefore, of the derailment of the car stands admitted. It was not incumbent upon the plaintiff to offer further testimony to show the particular defect in construction or operation that caused the accident. Proof that she was a passenger, and that there was an accident from which an injury resulted, no question of contributory negligence being involved, was all that was necessary for plaintiff to establish.

[5] The rule of demonstrative evidence of negligence applies in such cases. This rule is one now widely recognized by the authorities, and is referred to in *Thompson's Commentaries on the Law of Negligence* (volume 1, § 15) as follows: "The principle is gener-

ally expressed in the Latin formula '*res ipsa loquitur*,' 'the thing itself speaks.' The meaning was thus expressed by Erle, J., in giving his judgment in a noted case: 'Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.' This definition has met with such approval at the hands of judges in subsequent cases that it has become, so to speak, a legal classic. The meaning is not that the mere happening of an accidental injury is, of itself and in the abstract, presumptive evidence of negligence; it is that, in the numerous cases which fall within the above definition of the principle, the fact of the accident, when viewed in connection with the circumstances under which it took place, tends to demonstrate negligence, subject to explanation."

Section 429, Comp. Laws 1909, provides that a carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill. *Lane v. Choctaw, Oklahoma & Gulf Ry. Co.*, 19 Okl. 324, 91 Pac. 883. Where a duty such as that imposed by our statute exists, there are certain cases where the facts and circumstances, connected with the injury itself, furnish such evidence of the breach of duty on the defendant's part as to constitute *prima facie* negligence, and, unless explained by the defendant in a manner consistent with right conduct on its part, to be held a sufficient discharge of the burden of establishing an affirmative case, on the plaintiff's part. *White, Personal Injuries on Railroads*, § 110, and authorities cited.

The rule is considered in *Elliott on Evidence*, § 1902, where it is said: "It is very generally said, however, that proof of the happening of an accident which appears to have been due to defective roadbed, track, machinery, or appliances, or fault of the operation of the conveyance, makes out a *prima facie* case in an action by the passenger to recover for injuries resulting therefrom; and throws on the carrier the burden of proof to show his freedom from negligence, that is, from any want of the exercise of the high degree of care, skill, and foresight required of carriers of passengers in the prosecution of their business without respect to the defect or default which caused the accident." The following section reads: "It has been held that proof of injuries caused in the following ways is sufficient to raise a presumption of negligence under the *res ipsa loquitur* doctrine: \* \* \* by derailment." In his later work (*Elliott on Railroads*, § 1644), the author, after criticizing



the rule as defined in some of the courts, says: "The true rule would seem to be that when the injury and circumstances attending it are so unusual and of such a nature that it could not well have happened without the company being negligent, or when it is caused by something connected with the equipment or operation of the road, over which the company has entire control, without contributory negligence on the part of the passenger, a presumption of negligence on the part of the company usually arises from proof of such facts, in the absence of anything to the contrary, and the burden of going forward and producing evidence in order to escape liability is then cast upon the company to show that its negligence did not cause the injury." Many cases supporting the rule announced are cited in the footnote.

In the ordinary operation of the defendant's railroad its cars would not have left the rails. It is a matter of common knowledge that a street railway is so built, and the cars and roadbed so constructed, that when there is no defect in either, and the cars are run with due care, the latter will remain upon the track; and consequently, proof of the derailment of a car, in the absence of evidence to the contrary, justifies the conclusion that it resulted either from improper construction, failure to keep in proper repair, or negligence in operation. The following, and perhaps other, states hold that a presumption of negligence arises when an injury to a passenger results from a derailment: Alabama, Arkansas, California, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Maine, Massachusetts, Missouri, Nebraska, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, Tennessee, Texas, and Wisconsin. The same rule has been followed by the Circuit Courts of Appeal in the Sixth and Ninth Circuits. Many authorities sustaining this view of the law will be found in extended footnotes to *Barnowski, Adm'r, v. Helson*, 15 L. R. A. 33; *McGinn v. New Orleans Railway & Lighting Co.*, 13 L. R. A. (N. S.) 601; *Philadelphia, Wilmington & Baltimore R. Co. v. Anderson*, 20 Am. St. Rep. 483. While in the majority of reported cases the rule was invoked where the accident occurred on steam railways, there is no principle upon which an exception to the rule can be made in cases of street railways, especially where operated by electricity or steam power. The reason of the rule is equally applicable to electric cars operated in a city. *Bergen County Traction Co. v. Demarest*, 62 N. J. Law, 755, 42 Atl. 729, 72 Am. St. Rep. 685; *Electric Ry. Co. v. Carson*, 98 Ga. 652, 27 S. E. 156; *Bosqui v. Sutro Railroad Co.*, 131 Cal. 390, 63 Pac. 682.

[8] It is next insisted that the court erred in not admitting as evidence the car record book identified by its general manager, showing the record of runs, and containing a daily

record of car numbers, number of runs, number of both motorman's and conductor's badge, motorman's and conductor's name, with number of hours that each worked, giving the time that each went on and off duty, and that these entries in the book offered were kept by the motorman and conductor on duty. The court properly excluded this testimony. Section 5907, Comp. Laws 1909, is as follows: "Entries in books of account may be admitted in evidence, when it is made to appear by the oath of the person who made the entries that such entries are correct, and were made at or near the time of the transaction to which they relate, or upon proof of the handwriting of the person who made the entries, in case of his death or absence from the county."

Assuming, without deciding, that the book so kept is such as is contemplated by the statute, no effort was made to show by the oaths of the persons making the entries, that such entries were correct, or that they were made at or near the time of the transaction to which they relate. Conductor Blackwell, who was in charge of the car at the time of its derailment, was present in court as a witness, but was not asked with reference to the record. The whereabouts of the motorman who was in charge of the car at the time of its derailment was not shown. Neither was any effort made to prove the handwriting of those not present, and who made the entries in the record; or that such person was dead or absent from the county. In short, there was no effort made to comply with the provisions of the statute. *First Nat. Bank of Enid v. Yeoman*, 14 Okl. 626, 78 Pac. 388; *Missouri, K. & T. Ry. Co. v. Davis*, 24 Okl. 677, 104 Pac. 34, 24 L. R. A. (N. S.) 806; *Missouri, K. & T. Ry. Co. v. Walker*, 27 Okl. 849, 113 Pac. 907; *Kasenberg et ux. v. Hartshorn*, 30 Okl. 417, 120 Pac. 956.

The opinion of the trial court should, therefore, be affirmed.

PER CURIAM. Adopted in whole.

(37 Okl. 754)

KREPS et al. v. BRADY.

(Supreme Court of Oklahoma. June 18, 1912.  
Rehearing Denied June 24, 1913.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW (§ 238\*) — EQUAL PROTECTION—FELLOW SERVANTS.

Section 36, art. 9, of the state Constitution, abrogating the common law doctrine of fellow servant in the cases of employees of railroad, street railway, interurban railway, and mining companies, is not repugnant to the "equal protection" clause of the fourteenth amendment to the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688-690, 695, 706-708; Dec. Dig. § 238\*.]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**2. MASTER AND SERVANT (§ 179\*)—FELLOW-SERVANT DOCTRINE—"MINING."**

Drilling a well in search of oil or gas is not mining within the meaning of section 36, art. 9, of the state Constitution.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 354-358; Dec. Dig. § 179.\*]

For other definitions, see Words and Phrases, vol. 5, p. 4517.]

**3. CONSTITUTIONAL LAW (§ 238\*) — MASTER AND SERVANT (§ 179\*) — ABOGATION OF FELLOW-SERVANT DOCTRINE.**

For the purpose of abrogating or modifying the common-law rule of fellow servants, it is competent for the lawmaking power of a state, without offending against the "equal protection" clause of the federal Constitution (fourteenth amendment), to classify railroad, street railway, and mine employes because of the hazard attached to those employments; and a constitutional provision doing this, in language broad enough to include all such employes, is not to be restricted to those employes only who are engaged in the specially hazardous work of such vocations, but extends to all employes doing work essential to be done in the carrying on of the business of railroad-ing, mining, etc.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688-690, 695, 706-708; Dec. Dig. § 238;\* Master and Servant, Cent. Dig. §§ 354-358; Dec. Dig. § 179.\*]

**4. MASTER AND SERVANT (§ 185\*)—FELLOW-SERVANT DOCTRINE—LIABILITY OF MASTER.**

Where the common-law doctrine of "fellow servant" has not been abrogated or modified by constitutional or statutory provisions, the master is not liable to a servant for an injury occasioned by such servant's collaborators in the performance of some mere detail of the common employment, where the performance of the thing done in no sense involved a non-delegable duty of the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.\*]

Commissioners' Opinion, Division No. 2. Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action by James A. Brady against A. T. Kreps, Jr., and another. Judgment for plaintiff, and defendants bring error. Reversed, with directions.

N. B. Maxey, Thos. W. Leahy, and J. B. Campbell, all of Muskogee, for plaintiffs in error. John R. Thomas and Grant Foreman, both of Muskogee, and Luther James, of Tulsa, for defendant in error.

BREWER, C. The defendant in error, Brady, as plaintiff, sued in the district court of Muskogee county for personal injuries and obtained a verdict and judgment. The facts out of which the suit arose are substantially as follows: The plaintiffs in error, defendants below, were partners engaged in drilling oil wells under contracts with the owners of oil leases. While so engaged in drilling a well Brady was injured. It takes two men to operate a drill; in the oil fields four are assigned to each well and they work in two shifts (called towers) of two men each. These two men are known, one

as a driller, the other as a tool dresser. Brady was a tool dresser. The drill is run by an engine. The driller operates the levers near the mouth of the well, except when steam is being raised, when he attends to the brake. He has charge of the hole being made and is responsible for its going down straight. The tool dresser fires and oils the engine, heats the bits, and helps to sharpen them, empties the baler, and in other ways assists the driller. When taking down the stem to which the bit is attached, he ascends into the derrick and pulls the lower end of the stem outside the girder, or girt, so that it may be lowered to the ground. The stem is a piece of steel 35 feet long to which the bit is attached. The derrick or rig is 20 feet square at the bottom; four corner posts extending upward and inward 72 feet to where the derrick is 3 or 4 feet square. A girder of heavy timber encircles these posts 10 feet from the ground; other girders 8 feet apart continue up to the top. Other timbers are used as braces to make the structure substantial. The stem works up and down in this derrick; it is taken down or out whenever the bit needs sharpening, or the machinery is to be moved. The driller and the tool dresser must each be experienced men. They receive high wages; the driller commanding a slightly higher wage than the dresser. To take down the stem the tool dresser operates the engine and hoists the stem up into the derrick so high that the lower end may be swung clear of the lowest girder. The driller stands at the brake, and when the stem is so raised he holds the brake and the tool dresser goes up into the derrick and, by means of a rope previously tied loosely around the stem, pulls or swings the stem outward over the girder, and the driller, using the brake, lowers the stem into a wagon on the ground.

On the day of the injury, Brady, operating the engine, raised the stem into the derrick preparatory to taking it down. The rope had been tied around it by the driller, before it was raised. Brady went up into the derrick and found he had not raised the stem high enough to clear the girder. The driller hollowed up at him to take it out under the girder. In doing this he walked out on a walking beam where he could not support himself against the timbers of the derrick. He pulled down and outward on the rope; it came untied; and he lost his balance and fell to the ground and was injured. It was alleged as the gravamen of the action that the driller was negligent in tying the rope so that it could come untied.

It is contended by plaintiffs in error that Brady was the fellow servant of the driller and that therefore they are not liable. The defendant in error answers this by saying: First. That the work in which the injury occurred was mining, and that section 36 of article 9 of the Constitution, having abro-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



gated the common-law doctrine in mining cases, whether they were fellow servants is immaterial. Second. That, if it should be held that drilling an oil well is not mining within the meaning of the Constitution, then the case falls within what has been termed the "superior servant" or vice principal rule. The plaintiff in error replies: First, that the drilling of oil wells is not mining. Second, that if the production of oil and gas should be held to be embraced within the term mining used in the constitutional provision, then that the work being done in this case was not inherently dangerous and involved none of the risks and hazards usually incident to mining operations, and therefore the provision could not apply to this class of servants, even though engaged in mining. These contentions cover all the points in the case.

[1, 3] The portion of the Constitution necessary to be studied follows: "Art. 9, Sec. 36. The common law doctrine of the fellow servant, so far as it affects the liability of the master for injuries to his servant, resulting from the acts or omissions of any other servant or servants of the common master, is abrogated as to every employé of every railroad company and every street railway company or interurban railway company, and of every person, firm, or corporation engaged in mining in this state; and every such employé shall have the same right to recover for every injury suffered by him for the acts or omissions of any other employé or employes of the common master that a servant would have if such acts or omissions were those of the master himself in the performance of a non-assignable duty. \* \* \* And every railroad company and every street railway company or interurban railway company, and every person, firm, or corporation engaged in *underground mining* in this state shall be liable under this section, for the acts of his or its receivers. Nothing contained in this section shall restrict the power of the Legislature to extend to the employes of any person, firm, or corporation, the rights and remedies herein provided for." This clause (section 36, art. 9, Const.) is not repugnant to the federal Constitution. *Coalgate Co. v. Bross*, 25 Okl. 244, 107 Pac. 425, 138 Am. St. Rep. 915; *M. & T. Ry. Co. v. Richardson*, 220 U. S. 601, 31 Sup. Ct. 715, 55 L. Ed. 603; *Id.* (Tex. Civ. App.) 125 S. W. 623; *St. L. & S. F. Ry. Co. v. Arms* (Tex. Civ. App.) 136 S. W. 1164.

In passing, however, it is necessary to briefly notice the contention made here and supported by considerable authority that this provision is only constitutional in so far as it is sought to affect employes actually engaged in the inherently dangerous employment of operating trains, street cars, mines, etc. In other words, that the inherent danger of the employment justifies the law and keeps it from being obnoxious to the "equal protection of the law" clause of the fourteenth amendment. And that, as to em-

ployés not so engaged in the hazardous employment, it would be obnoxious to said clause. This contention has been sustained by a number of states in construing statutes abrogating the common law of fellow servants, notably in Mississippi in the case of *Bradford Const. Co. v. Heflin*, 88 Miss. 314, 42 South. 174, 12 L. R. A. (N. S.) 1040, 8 Ann. Cas. 1077. Minnesota, in the case of *Blomquist v. Great Northern Ry. Co.*, 65 Minn. 69, 67 N. W. 804, by construction of the law abrogating the fellow-servant doctrine, limited its operation to "those employes who are exposed to the peculiar dangers attending the operation of railroads, or what are, for brevity, called 'railroad dangers.'" Indiana likewise by a line of decisions (*Indianapolis Traction Co. v. Kinney*, 171 Ind. 612, 85 N. E. 954, 23 L. R. A. [N. S.] 711) so limited the effect of a similar provision. These decisions were all based on what was supposed to be the views of the Supreme Court of the United States in various decisions, notably that of *Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107. In a late case in the Supreme Court of the United States, however (*Louisville & N. R. Co. v. Melton*, 218 U. S. 36, 30 Sup. Ct. 676, 54 L. Ed. 921), this same contention was held to be unsound. That case was taken to the Supreme Court on writ of error to the Court of Appeals of Kentucky (127 Ky. 276, 105 S. W. 366, 110 S. W. 233, 112 S. W. 618), which had affirmed a judgment for personal injuries sustained by a carpenter engaged with others in erecting a coal tippie for the railroad. The injury occurring in Indiana, the law of Indiana abrogating the fellow-servant doctrine as to railroad employes was invoked. The contention of the railroad was that this carpenter, although in the employment of the railroad, was not engaged in work that involved the perils and hazards of railroad-ing, and that, under the facts of that case, the Indiana statute would be unconstitutional, although admittedly constitutional in cases where the employé was engaged in train service. The Court of Appeals of Kentucky held that: "\* \* \* For the purpose of abrogating or modifying the common-law doctrine of fellow servant, it was competent for the lawmaking power of a state, without offending against the equal protection clause, to classify railroad employes because of the hazard attached to their vocation, and that a statute doing this need not be confined to employes who were engaged in and about the mere movement of trains, but could also validly include other employes doing work essential to be done to enable the carrying on of railroad operations."

The Supreme Court of the United States, after stating the holding of the Kentucky court and reviewing its own various decisions, affirms the case, and in the course of the opinion says: "And coming to consider the concrete application made of these gen-



eral principles in the decisions of this court which have construed the statute here in question, and statutes of the same general character enacted in states other than Indiana, we think, when rightly analyzed, it will appear that they are decisive against the contention now made. It is true that in the Tullis Case, which came here on certificate, the nature and character of the work of the railroad employé who was injured was not stated, and that reference in the course of the opinion was made to some stated cases, limiting the right to classify to employés engaged in the movement of trains. But that it was not the intention of the court to thereby intimate that a classification, if not so restricted, would be repugnant to the equal protection clause of the fourteenth amendment will be made clear by observing that the previous case of Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675, was cited approvingly, in which, under a statute of Kansas classifying railroad employés, recovery was allowed to a bridge carpenter employed by the railroad company, who was injured while attempting to load timber on a car. And in the opinion in the Pontius Case there was approvingly cited a decision of the Court of Appeals of the Eighth Circuit (Chicago, R. I. & P. R. Co. v. Stahley, 11 C. C. A. 88, 62 Fed. 363), wherein it was held that under the same statute an employé injured in a roundhouse while engaged in lifting a driving rod for attachment to a new engine could recover by virtue of the statute. All this is made plainer by the ruling in *St. Louis Merchants' Bridge Terminal R. Co. v. Callahan*, 194 U. S. 628, 24 Sup. Ct. 857, 48 L. Ed. 1157, where, upon the authority of the Tullis Case, the court affirmed a judgment of the Supreme Court of Missouri, which held that recovery might be had by a section hand upon a railroad, who, while engaged in warning passersby in a street beneath an overhead bridge, was struck by a tie thrown from the structure. While, as we have previously said, it is true there are state decisions dealing with statutes classifying railroad employés sustaining the restricted power to classify which is here insisted upon, we do not think it is necessary to review them or to notice those tending to the contrary. They are referred to in the opinions rendered in the court below. Nor do we think our duty in this respect is enlarged because, since the judgment below was rendered, the court of last resort in Indiana (*Indianapolis Traction Co. v. Kinney*, 171 Ind. 612, 85 N. E. 954, 23 L. R. A. [N. S.] 711, and *Cleveland, C., C. & St. L. R. Co. v. Foland* [174 Ind. 411], 91 N. E. 504 [92 N. E. 165], decided April 20, 1910) has, upon the theory that it was necessary to save the statute in question from being declared repugnant to the equality clause of the state Constitution and the fourteenth amendment, unequivocally

held that the statute must be construed as restricted to employés engaged in train service." See, also, *Mobile, Jackson & K. C. R. Co. v. Turnipseed*, 219 U. S. 39, 31 Sup. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463.

This case, however, does not depend for its solution upon the nature of the work being done at the time of the injury. If prospecting for oil or gas, or the production of same, comes within the classification of the Constitution under the term "mining" as used therein, then the common-law doctrine of fellow servants cannot avail the defendants in this case. If not so embraced, then such doctrine must be applied to this case.

[2] Does drilling a well in quest of oil and gas by a contractor with the owner of the lease constitute mining within the meaning of the Constitution? If so, this case must be affirmed; if not, then the inquiry must proceed to the application of the common law of fellow servant to the facts of the case as presented.

"It is a cardinal rule in the interpretation of constitutions that the instrument must be construed as to give effect to the intention of the people, who adopted it. This intention is to be sought in the constitution itself, and the apparent meaning of the words employed is to be taken as expressing it, except in cases where that assumption would lead to absurdity, ambiguity or contradiction." Section 8, *Black on Interpretation of Laws*.

"A constitution should be construed with reference to, but not overruled by, the doctrine of the common law and the legislation previously existing in the state." Section 11, *Black on Interpretation of Laws*.

"The words employed in a constitution are to be taken in their natural and popular sense, unless they are technical, legal terms, in which case they are to be taken in their technical signification." Section 16, *Black on Interpretation of Laws*.

"The object of construction as applied to written constitutions is to give it the intent of the people in adopting it. In the case of all written laws, it is the intent of the law giver that is in force." *Cooley, Const. Limitations*, 69.

Does operating a well drill on the surface, even though for the discovery of oil, meet the popular idea or generally accepted definition of mining? It is true that oil is, technically speaking, a mineral; but would any person, upon approaching an oil well six or eight inches in circumference, think of calling it a mine, or the act of boring it mining? We think not.

Webster's Dictionary is probably more often consulted by the people generally than any other. It defines a mine thus: "A subterranean cavity or passage, especially a pit or excavation in the earth, from which metallic ores or other mineral substances are tak-



en by digging; distinguished from the pits from which stones only are taken, and which are called quarries."

In *Marvel v. Merritt*, 116 U. S. 11, 6 Sup. Ct. 207, 29 L. Ed. 550, the court, referring to mines and minerals, say: "The words used are not technical, either as having a special sense by commercial usage or as having a scientific meaning different from their popular meaning. They are the words of common speech, and as such their interpretation is within the judicial knowledge, and therefore matter of law."

In defining the word "mine," Cyc. vol. 27, 532, says: "The primary meaning of the word 'mine,' standing alone, is an underground excavation made for the purpose of getting minerals; a pit or excavation in the earth from which metallic ores or other mineral substances are taken by digging. It is also extended to a quarry or other place where anything is dug."

"A 'mine' is a work for the excavation of minerals, by means of pits, shafts, levels, tunnels," etc. *Murray v. Allred*, 100 Tenn. 100, 43 S. W. 355, 39 L. R. A. 249, 66 Am. St. Rep. 740.

"Mines," according to Jacob's Law Dictionary, "are quarries where anything is digged."

"To 'mine' is defined to dig a pit or mine, to dig in the earth for minerals, etc., and appears to apply more especially to underground work." *Commonwealth v. Brookwood Coal Co.*, 25 Pa. Co. Ct. R. 55.

"Whether any excavation be a mine or not depends on the mode in which it is worked, and not on the substance obtained from it." *Rex v. Dunsford*, 2 Adol. & Ell. 568.

"A peculiar shaft sunk from the surface of the land for the purpose of raising clay out of the strata, which was done by a steam engine and other mining apparatus, the excavation being similar to those made for working coal and metallic mines, and the mode of raising clay the same as used in a coal mine, is a clay mine." *Rex v. Bretell*, 3 Barn. & Ad. 424.

In testing the intention of the framers of this section, we find that, in the provision extending the benefits of the act to receivers of companies coming within the classification, the word "underground" is used in connection with mining. This appears to be significant of the intention pervading the whole section. If other than mining which requires underground work was intended in the first part of the section, what reason could be given for not extending the benefits thereof, where such other mines are in the hands of receivers? None can be perceived. There is another reason why drilling for oil or gas was probably not intended to be embraced in the terms used. To prevent a conflict with the fourteenth amendment to the Constitution of the United States, a classification of this kind must include all coming fairly within the class referred to. Drilling a well

for water would be performed in the same manner as if drilling for oil or gas. By no stretch of the imagination could such an operation be held to be mining; therefore the act, if intended to embrace oil well drilling, and not to embrace drilling for water, would probably be objectionable to the federal Constitution in not affording "equal protection of the law."

In ascertaining intent, we may also look to the laws of the two territories at the time and prior to the making of the Constitution. Mansfield's Digest of the Laws of Arkansas in force in the eastern part of the state contained no mining law. Oklahoma territory had merely some criminal laws regarding acts done about a mine. It had, however, passed in 1905, just prior to the assembling of the constitutional convention, a well-defined code of law relating to the production of "oil and gas." These laws use the terms "wells," and the work of securing either is called "operating." Nowhere is the term "mine" or "mining" used in the law in force when the convention was considering this provision. Section —.

The first Legislature, of which many members of the constitutional convention participated, passed a most comprehensive law relating to mines and mining and without once using the term "oil" or "gas." Other legislation, complete in itself, dealt with "oil" and "gas" and nowhere in it used the term "mine" or "mining." These laws, practically contemporaneous with the making of the Constitution, may be considered in determining the intention of that body. From all of which we conclude that this case does not come under the provisions of the Constitution relied upon.

[4] The remaining question is: Was Brady, according to this record, injured in consequence of the negligence of a fellow servant, within the meaning of that term as it is used in the rule which exempts the master from liability for injuries resulting from the negligence of a fellow servant? In this case but two persons were present when the injury occurred—the plaintiff and the driller. At the time of trial the driller could not be found, and the facts of the injury rest solely on the plaintiff's testimony. It is not claimed but that the machinery, tools, appliances, apparatus, and instrumentalities used were all of a proper and suitable kind and were in good condition and free from defects. That the two men were both engaged in hard manual labor under the same employer, working in conjunction, in a common undertaking to a common end, and that the thing done was not ordinarily dangerous, is shown by all the proof. That while prosecuting the work each did certain particular things, but that many of the varying acts and details necessarily needed to be done in each day's work, as the occasion arose, were done by whichever of the men



happened to be best situated at the time to attend to it. Such was the detail of tying the rope on the stem. This was not the special duty of either. It was done by whichever of the two could do it most conveniently. It was a mere detail of the day's work. Under no decision that has been cited, or that we have found, would this be held to be a part of the master's work or fall within the master's duty.

In illustrating what would be the act of a fellow servant, even in the presence of the master, the court in *Blackman v. Thomson-Houston Co.*, 102 Ga. 71, 29 S. E. 123, say: "There are some appliances so simple in their nature as even the most unskilled workman may be safely intrusted with their erection and use. Two pieces of timber used as a fulcrum and lever, in a broad sense, constitute an appliance. Their use involves the application of scientific principles of a high order; and yet these principles are so simple and so well understood that the negligence of a fellow servant in placing these two pieces of timber in position for use by other fellow servants could not be imputable to the master." This proposition has perhaps had the attention of as many courts and the application of the learning of as many wise men as any question in the law; and, while it is admitted in practically all courts that the master is not liable to his servant for an injury resulting from the negligence of a fellow servant in the same common service, yet the difficulty has been found in the application of the rule to the facts of a given case and in the development of exceptions to the general rule. The question always arises: Did the servants bear that relation toward each other? The courts seem to have been unable to announce any definite principles formulated into a general rule sufficiently comprehensive to govern in all the multitude of cases in which it is involved. We agree with the Supreme Court of Missouri in the case of *Parker v. Hannibal & St. Joe Ry. Co.*, 109 Mo. 379, 19 S. W. 1123, 18 L. R. A. 802, in the statement: "The main and only difficulty has been to satisfactorily determine at all times whether the employment was a common service and the employes fellow servants within the meaning of the rule. And after due consideration we are of the opinion that, unsatisfactory as it may seem, the rule itself must remain general, its application specific, as the cases arise." However, in this jurisdiction the rule as to fellow servants and vice principals, in so far as it is involved in this case, seems to be settled. Indeed, the rule of vice principal, as stated in the opinions of this court noted below, could be extended much farther than it has been and yet not change the conclusion that in this case, as made in the record, the driller and tool dresser were fellow servants in the act that caused the injury. Indeed, upon a careful examination

of the evidence and every authority cited by the defendant in error, we conclude that the decisions are extremely rare under which a doctrine of vice principal is announced so broad as to take this case out of the rule invoked.

In the case of *Van Winkle v. Brooks*, 29 Okl. 351, 116 Pac. 908, it is said in the syllabus: "In order to constitute a foreman or boss of a gang of laborers employed by a corporation in the construction of a water tank in connection with an oil mill a 'vice principal', for whose negligence in the management of that part of the work the corporation will be liable for personal injuries to any of those employed under him and who were subject to his discretion and control, the master must confer upon such boss or foreman the entire and absolute management of the entire department, retaining no oversight and exercising no discretion of its own as to the conduct of such department, except that it is the positive duty of the master to use reasonable care in providing safe tools, machinery, and appliances to work with, a safe place to work in, safe materials to work on, and safe fellow servants and coemployes, and, if the work is such as to require it, to require safe and proper rules and regulations for conducting the same. Negligence in the performance of any of these positive duties will render the master liable without regard to the standing or authority of the employe through whose fault the injury is occasioned. If the injury is not the result of an omission to perform one of these positive duties of the master, but is occasioned by the negligence of such foreman, such foreman will be deemed a 'fellow servant' with the person injured, even though he has power to oversee the men and direct the work directly under his charge, unless his authority in his department is entire and absolute. If he is subject to the control of one or more over him in the management of his department, he is a fellow servant with those under him."

This case follows the cases of *Ruemmell-Braun Co. v. Cahill*, 14 Okl. 422, 79 Pac. 260, and *Mollhoff v. C. & P. Ry. Co.*, 15 Okl. 540, 82 Pac. 733, decided by the Oklahoma territorial Supreme Court, and while the injury in the *Van Winkle* Case occurred prior to statehood, as has been suggested, even a most liberal expansion of the rule therein announced would not avail to save this case, if we are to remain within the current of judicial decisions. See, also, *Erickson v. Victoria Copper Mining Co.*, 130 Mich. 476, 90 N. W. 291.

It follows that under the views herein expressed the plaintiff below failed in the proof to establish any liability against the defendants. And as there was but one witness to the facts of the injury, and he the plaintiff, that a new trial would be a useless



thing, and that the case should be reversed and judgment entered for defendants below.

PER CURIAM. Adopted in whole.

(39 Okl. 1)

FT. SMITH & W. RY. CO. v. HARRISON.  
(Supreme Court of Oklahoma. Dec. 7, 1912.  
Rehearing Denied July 8, 1913.)

(Syllabus by the Court.)

CARRIERS (§ 69\*) — NEGLIGENT BILLING OF FREIGHT—QUESTION FOR JURY.

In an action against a railroad company for negligently billing a shipment to a wrong destination, where the decisive issue is whether the agent of the company was negligent in billing the shipment contrary to instructions from the shipper, or whether the shipper was negligent in failing to examine the bill of lading after it was handed to him by the agent, and such issue is properly submitted to the jury, the finding of the jury will not be disturbed, if it is reasonably supported by the evidence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 217-219, 222, 228, 230, 232-239; Dec. Dig. § 69.\*]

Commissioners' Opinion, Division No. 2. Error from County Court, Okfuskee County; T. T. Doyle, Judge.

Action by B. F. Harrison against the Ft. Smith & Western Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

C. E. & H. P. Warner, of Ft. Smith, Ark., and J. B. Patterson, of Okemah, for plaintiff in error. Tom Hazlewood, of Okemah, for defendant in error.

HARRISON, C. This action was originally begun in the justice court of Okfuskee county, Hon. J. N. Jones, J. P., by B. F. Harrison, against the Ft. Smith & Western Railway Company, for the sum of \$128.92, because of alleged negligence on the part of defendant railroad company in billing a car load of staves to a wrong destination, thereby causing plaintiff to pay said sum over and above what would have been required had the shipment been rightly billed. Plaintiff obtained judgment in the justice court, and the railroad company appealed to the county court, wherein a jury trial was had in January, 1910, again resulting in a verdict and judgment in favor of plaintiff. From this judgment the railroad company brings the case here.

The plaintiff's right of recovery depended wholly upon proof of negligence on the part of the railway company in billing out the shipment. Plaintiff testified that he instructed the agent of the railway company, at Kinta, Okl., to bill the car to A. Weinman, Atchison, Kan. The agent billed the car to Hutchinson, Kan., thereby necessitating the shipment to be rebilled from Hutchinson to Atchison, and causing the extra charge.

There was evident negligence on the part of some one in the billing of this car. It is not disputed that the proper destination was Atchison, nor that the car was wrongfully billed to Hutchinson. The question, then, is whether the agent was negligent in making out the bill of lading contrary to the instructions of the shipper, or whether the shipper was negligent in giving proper instructions to the agent, and whether, after the bill of lading was made out and handed to him, the shipper was negligent, under the circumstances, in failing to look over the bill of lading, to see for himself whether or not it was billed to the proper place. The question as to which of the two was negligent was fairly submitted to the jury by the trial court under the following instructions:

"To entitle the plaintiff to recover in this action he must prove by a fair preponderance of the evidence every material allegation in his petition; that is, that the plaintiff directed the agent of the defendant railroad company to ship the staves in question in the manner and way that is alleged in his petition.

"The court instructs the jury that if you believe from the evidence in this case that the plaintiff delivered the staves in question to the defendant railroad company, with instructions to bill the same to A. Weinman at Atchison, Kan., and if you further find from the evidence that the agent of the defendant railroad company received the staves in question and through carelessness and negligence and contrary to the order received from plaintiff, billed the staves to Hutchinson, Kan., then the plaintiff will be entitled to recover as his damages such sum as you may find from the evidence, not to exceed the sum claimed in the petition.

"The court instructs the jury that by the term 'ordinary care and prudence,' as used in these instructions, is meant that degree of care that would be used by a person of ordinary prudence under the same similar circumstances. A failure to exercise ordinary care is a question for the jury to determine from all the evidence in the case, in connection with all the facts and circumstances in the case.

"Where a shipper is offered and accepts a bill of lading covering his shipment, he is bound by the contents thereof; and should you find from the evidence that plaintiff received a bill of lading in which the destination of his car was written, and that by the use of due diligence he could have ascertained the error in the destination of the car before the car left Kinta, Okl., and he did not do so, then you will find for the defendant."

Guided by these instructions the jury heard and weighed the testimony of the witnesses. There was testimony introduced tending to show that plaintiff instructed the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



agent where to bill the car, that the agent asked plaintiff whether he meant Hutchinson or Atchison, that plaintiff replied that the car was to go to Atchison, and spelled the word "Atchison" out plainly to the agent. There was also testimony tending to show that, when the bill of lading was handed to plaintiff, it was getting dark and the light was poor, but that he looked over the bill, and thought it said Atchison, and thereupon mailed it to consignee at Atchison. On the other hand, there was testimony tending to show that the agent was not plainly instructed as to which of the two towns the shipment was intended for, and that the plaintiff had ample opportunity to examine the bill of lading, and ascertain whether or not they were billed to the proper place. The jury heard this testimony and passed upon the credibility of the witness, concluding therefrom that the agent was the party guilty of negligence. This being the only question in the case, and depending solely upon the testimony submitted, we are unable to say which of the two lines of witnesses was the more credible, and, under the oft-announced rule of this court "that a verdict which is reasonably supported by the evidence will not be disturbed," we see no reason for disturbing the verdict herein.

The judgment is therefore affirmed.

PER CURIAM. Adopted in whole.

(41 Okl. 50)

WHITE et al. v. STARBUCK et al.

(Supreme Court of Oklahoma. June 19, 1913.)

(Syllabus by the Court.)

1. INDIANS (§ 27\*)—TRUSTS—ACTION TO ESTABLISH.

A petition which alleged that plaintiff, a member of the Cherokee Tribe of Indians, filed upon certain land in March, 1903; that she has been in possession of the land ever since that date; that on the 13th of May, 1904, a Delaware Indian filed a contest on a portion of the land filed on by plaintiff in March, 1903; that plaintiff and the contestant compromised in November, 1904, and plaintiff confessed judgment in favor of the contestant for the portion claimed in the contest, and paid the contestant \$200, and the contestant agreed to release her claim to the land in controversy and other land; that plaintiff leased the land in controversy for oil and gas purposes in August, 1904; that the lessee went into possession of the land and bored two wells thereon and paid plaintiff royalties thereon; that the Commissioner to the Five Civilized Tribes on the 28th of June, 1906, arbitrarily, on his own motion and without notice to plaintiff, canceled her filing; that on said 28th day of June, 1906, Amos White, one of the defendants, presented to the Land Office a bill of sale from the Delaware, who formerly claimed some rights in the property, executed in consideration of the sum of \$12, and that the land was allotted to him, and that plaintiff exhausted its remedies before the Interior Department in endeavoring to have the order canceling her filing revoked, states a cause of action, which, if true, entitles her to have a judg-

ment decreeing that White holds the land as her trustee.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 19, 20; Dec. Dig. § 27.\*]

2. INDIANS (§ 13\*)—ALLOTMENT—CANCELLATION.

The lands in the Cherokee Nation, not segregated from allotment as provided by section 25 of the Curtis Bill (Act June 28, 1898, c. 517, 30 Stat. 504), were subject to allotment prior to the final decision of the case of Delaware Indians v. Cherokee Indians, 193 U. S. 127, 24 Sup. Ct. 342, 48 L. Ed. 646, and a filing on such land could not be canceled after the expiration of nine months from the date of the filing in the absence of fraud.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 30; Dec. Dig. § 13.\*]

3. INDIANS (§ 13\*)—ALLOTMENT—SALE OF IMPROVEMENTS.

Act April 21, 1904, c. 1402, 33 Stat. 189, and Act March 3, 1905, c. 1479, 33 Stat. 1048, giving Delaware Indians the right to sell improvements on lands of which they were in rightful possession April 21, 1904, in excess of the amounts which they could take as their allotments, did not give them the right to sell improvements on lands which had been allotted to members of the Cherokee Tribe and in possession of such members more than a year prior to the 21st of April, 1904.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 30; Dec. Dig. § 13.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Washington County; John J. Shea, Judge.

Action by Goldie Starbuck against Amos White, W. G. Sawyer, and others. Judgment for plaintiff, and defendants named bring error. Affirmed.

Geo. S. Ramsey and C. L. Thomas, both of Muskogee, for plaintiffs in error. Allen & Nichols, of Muskogee, for defendant in error.

ROSSER, C. This is an action by Goldie Starbuck, as plaintiff, against Amos White et al., as defendants, to have the defendant Amos White decreed to be the trustee for the plaintiff of certain lands in the Cherokee Nation. The petition alleges, in substance, that plaintiff is a member of the Cherokee Tribe of Indians; that the land in controversy was allotted to her by the Commissioner to the Five Civilized Tribes on the 2d day of March, 1903, and that she received certificates of allotment therefor upon that date; that afterwards, on the 13th of May, 1904, Ida M. Swannock instituted a contest against plaintiff for certain land filed upon by plaintiff, but afterwards, on the 1st day of November, 1904, a compromise was entered into between said Ida M. Swannock and the plaintiff by which the plaintiff agreed to confess judgment for the portion claimed by Ida M. Swannock in her contest, and Ida M. Swannock agreed to relinquish all her claims, if she had any, to the improvements upon any other part of the land selected as the allotment of the plaintiff, and that in pursuance of the agreement Ida



M. Swannock went before the Commissioner and relinquished all of her claims, and that the plaintiff also paid Ida M. Swannock \$200 in cash in further consideration of the claim; that the plaintiff is now and has been ever since the 2d of March, 1903, in the actual, open, notorious, peaceable, and undisputed possession of all her allotment, and all the improvements; that on or about the 5th of August, 1904, plaintiff executed to one Benjamin F. Holmes an oil and gas mining lease upon the land selected by her, and that he began drilling on the lands, and up until the month of June, 1906, he drilled seven wells upon the land leased to him by the plaintiff, two of which were upon the particular portion of the land now in controversy; that on or about the 28th of June, 1906, the Commissioner to the Five Civilized Tribes arbitrarily, on his own motion and without notice to the plaintiff, pretended to cancel her allotment certificate and to cancel her filing on the real estate in controversy, and that said pretended cancellation was procured to be made by the defendants Amos White and W. G. Sawyer, pretending to act for the said Ida M. Swannock, by wrongfully and unlawfully and without the knowledge or consent of the said Ida M. Swannock, making application to the Commissioner to the Five Civilized Tribes to have the lands in controversy certified by said Commissioner as improved Delaware surplus holdings of the said Ida M. Swannock under Acts April 21, 1904, and March 3, 1905, in violation of the agreement made between the plaintiff and Ida M. Swannock; that the plaintiff had no notice, either actual or constructive, that the Commissioner intended to consider the question of canceling her filing on the 28th of June, or any other time, and that the first notice she received of his intention was by a letter of date of July 5, 1906, mailed by the said Commissioner to her at Chanute, Kan., which notified her of the pretended cancellation; that on the 28th of June, 1906, Amos White, one of the defendants, presented to the Cherokee Land Office a pretended approved bill of sale, executed by Ida M. Swannock, dated June 21, 1906, for certain pretended improvements on the land in controversy in this action, and which purported to convey them to the defendant Amos White for the sum of \$12, and that the land was allotted to him. The petition also alleges that, if Ida M. Swannock ever had any rights to the improvements, she had relinquished them long prior to the 21st of June, 1906, and that Amos White obtained no right to the improvements by virtue of said pretended bill of sale; that on the 17th of July, 1906, plaintiff filed a motion for rehearing with the Commissioner, who overruled same without allowing her to appear and introduce any evidence; that she took an appeal from his decision, and that on or about the 2d of February, 1907, the Commissioner of

Indian Affairs affirmed his decision; that she took an appeal from the decision of the Commissioner of Indian Affairs to the Secretary of the Interior, and that on April 13, 1907, he affirmed the decision of the Commissioner of Indian Affairs; that afterwards, on the 4th of May, 1907, she filed her complaint with the Commissioner to the Five Civilized Tribes, alleging the facts with reference to the cancellation of her allotment certificate, and that the relief sought was also denied; that each of the officers have committed serious and gross errors of law in pretending to cancel the filings and certificate of allotment of plaintiff, and in awarding the land to Amos White, and refusing to permit the plaintiff to show by evidence her right to hold the real estate in controversy as a portion of her allotment; that the defendants Amos White and W. G. Sawyer have at all times mentioned known that plaintiff was in the actual, open, notorious, and peaceable possession of the real estate in controversy, together with the improvements thereon, and knew that she had leased the land to Holmes for oil and gas purposes, and knew that he had expended a large sum of money in developing it. She attached copies of the decision of the Secretary of the Interior affirming the decision of the Commissioner of Indian Affairs affirming the action of the Commissioner to the Five Civilized Tribes dismissing the complaint which plaintiff filed May 4, 1907, asking that the allotment of Amos White upon the land in controversy be canceled.

The evidence shows that the plaintiff filed on the land in controversy, together with other land, March 2, 1903. On the 13th of May, 1904, Ida M. Swannock filed with the Commissioner to the Five Civilized Tribes a statement of the lands held by her April 21, 1904, in excess of the land allotable by her. This statement did not include the land in controversy. The fact that it did not tends to support plaintiff's theory that Miss Swannock intended to release all the land she had claimed, except that for which plaintiff confessed judgment in her favor. Plaintiff asserts that it did not, but a man named Goodykoontz appeared before the Commissioner later and made claim for her, and the department seems to have regarded the claim by him as sufficient. Miss Swannock also instituted a contest as to certain land which had been filed upon by plaintiff. On the 5th of August, 1904, plaintiff executed an oil and gas mining lease on the lands to Benjamin F. Holmes, and that lease was approved by the Secretary of the Interior January 6, 1905. On the 14th of November, 1904, the plaintiff confessed judgment in favor of Miss Swannock to the land upon which the contest had been filed. It would seem from the record that there was a settlement of all differences between these women on that day, though the land in controversy was not



described. Goodykoontz testified with reference to the excess land of Miss Swannock. Miss Swannock, in her testimony given later, stated that Goodykoontz's statement was correct, but it does not appear that it was read to her or that she understood what the statement was, and the land in controversy was not described in her examination, either in question or answer. Another hearing was had in 1906, but the notice to plaintiff to appear was addressed to Coffeyville, Kan., instead of Chanute, Kan., her post office, and she did not receive it. It is a matter for remark that the record of the Commissioner showed her post office was Chanute, and other notices were mailed to her there, both before and after the one giving notice of the hearing which she failed to receive. Following this hearing, the filing was canceled. The first notice that she had of the cancellation was on the 9th of July, 1906, and from that time on she has been making all reasonable efforts to get a hearing, but has never been permitted to appear and offer evidence. On the 21st of June, 1906, Miss Swannock sold the improvements on the land in controversy to Amos White for the consideration of \$12, and on the 28th of June White presented the bill of sale to the Land Office, at which time the filing of Goldie Starbuck was canceled, and White was permitted to file upon the land. The evidence also shows that certain lands in the same township with the land in controversy were segregated from allotment in accordance with the provisions of section 25, Act June 28, 1898, 30 Stat. L. 495, c. 517, and of section 23, Act July 1, 1902, 32 Stat. L. 716, c. 1375, but the land in controversy was not segregated. The testimony is not clear as to how much of the land in controversy was improved prior to the time it was filed.

The defendants claim title through Ida M. Swannock, and they base her right upon the following provisions of the statutes and treaties between the United States and the Indians:

(1) The Treaty of 1866 of the Delaware Indians (Kapler's Indian Treaties, 937; 14 Stat. 793), by which it was agreed that the Delaware Indians should move to the Indian Territory.

(2) An agreement between the Delaware Indians and the Cherokee Indians entered into April 8, 1867, by which it was agreed that the Cherokee Nation should sell to the Delawares land amounting altogether to 160 acres for each individual Delaware removing to the Cherokee Nation, and which further provided: "And in case the Cherokee lands shall hereafter be allotted among the members of said nation, it is agreed that the aggregate amount of land herein provided for the Delawares to include their improvements according to the legal subdivision when surveys are made (that is to say, 160 acres for each individual) shall be guaranteed to each

Delaware incorporated by these articles into the Cherokee Nation. \* \* \* On the fulfillment by the Delawares of the foregoing stipulations, all the members of the tribe registered as above provided shall become members of the Cherokee Nation, with the same rights and immunities and the same participation (and no other) in the national funds, as native Cherokees, save as hereinabove provided. And the children hereafter born of such Delawares so incorporated into the Creek Nation shall, in all respects, be regarded as native Cherokees." See *Delaware Indians v. Cherokee Nation*, 193 U. S. 127, 24 Sup. Ct. 342, 48 L. Ed. 646, for the material portion of the text of this agreement.

(3) Section 25 of the act of June 28, 1898 (30 Stat. L. 495), entitled "An act for the protection of the people of the Indian Territory, and for other purposes," commonly known as the Curtis Bill, as follows: "That before any allotment shall be made of lands in the Cherokee Nation, there shall be segregated therefrom by the Commission heretofore mentioned, in separate allotments or otherwise, the one hundred and fifty-seven thousand six hundred acres purchased by the Delaware Tribe of Indians from the Cherokee Nation under agreement of April eighth, eighteen hundred and sixty-seven, subject to the judicial determination of the rights of said descendants and the Cherokee Nation under said agreement. That the Delaware Indians residing in the Cherokee Nation are hereby authorized and empowered to bring suit in the Court of Claims of the United States, within sixty days after the passage of this act, against the Cherokee Nation, for the purpose of determining the rights of said Delaware Indians in and to the lands and funds of said nation under their contract and agreement with the Cherokee Nation dated April eighth, eighteen hundred and sixty-seven; or the Cherokee Nation may bring a like suit against said Delaware Indians; and jurisdiction is conferred on said court to adjudicate and fully determine the same, with right of appeal to either party to the Supreme Court of the United States."

(4) Section 23, Act July 21, 1902 (32 Stat. L. 716, c. 1375), as follows: "All Delaware Indians who are members of the Cherokee Nation shall take lands and share in the funds of the tribe, as their rights may be determined by the judgment of the Court of Claims, or by the Supreme Court if appealed, in the suit instituted therein by the Delawares against the Cherokee Nation, and now pending; but if said suit be not determined before said Commission is ready to begin the allotment of lands of the tribe as herein provided, the Commission shall cause to be segregated one hundred and fifty-seven thousand six hundred acres of land, including lands which have been selected and occupied



by Delawares in conformity to the provisions of their agreement with the Cherokees dated April eighth, eighteen hundred and sixty-seven, such lands so as to remain, subject to disposition according to such judgment as may be rendered in said cause; and said Commission shall thereupon proceed to the allotment of the remaining lands of the tribe as aforesaid. Said Commission shall, when final judgment is rendered, allot lands to such Delawares in conformity to the terms of the judgment and their individual rights thereunder. Nothing in this act shall in any manner impair the rights of either party to said contract as the same may be finally determined by the court, or shall interfere with the holdings of the Delawares under their contract with the Cherokees of April eighth, eighteen hundred and sixty-seven, until their rights under said contract are determined by the courts in their suit now pending against the Cherokees, and said suit shall be advanced on the dockets of said courts and determined at the earliest time practicable."

(5) A portion of Act April 21, 1904 (33 Stat. L. 189-205, c. 1402), as follows: "That the Delaware-Cherokee citizens who have made improvements, or are in rightful possession of such improvements, in the Cherokee Nation at the time of the passage of this act shall have the right to first select from said improved lands their allotments, and thereafter, for a period of six months shall have the right to sell the improvements upon their surplus holdings of lands to other citizens of the Cherokee Nation entitled to select allotments at a valuation to be approved by an official to be designated by the President for that purpose; and the vendor shall have a lien upon the rents and profits of the land on which the improvements are located for the purchase money remaining unpaid; and the vendor shall have the right to enforce such lien in any court of competent jurisdiction. The vendor may, however, elect to take and retain the possession of the land at a fair cash rental, to be approved by the official so as aforesaid designated, until such rental shall be sufficient to satisfy the unpaid purchase price, and when the purchase price is fully paid he shall forthwith deliver possession of the land to the purchaser: Provided, however, that any crops then growing on the land shall be and remain the property of the vendor, and he may have access to the land so long as may be necessary to cultivate and gather such growing crops. Any such purchaser shall, without unreasonable delay, apply to select as an allotment the land upon which the improvements purchased by him are located, and shall submit with his application satisfactory proof that he has in good faith purchased such improvements."

(6) A portion of Act March 3, 1905 (33 Stat. L. 1071, c. 1479), as follows: "That

Delaware-Cherokee citizens who have made improvements or were in rightful possession of such improvements upon lands in the Cherokee Nation on April twenty-first, nineteen hundred and four to which there is no valid adverse claim, shall have the right within six months from the date of the approval of this act to dispose of such improvements to other citizens of the Cherokee Nation entitled to select allotments at a valuation to be approved by an official to be designated by the President for that purpose and the amount for which said improvements are disposed of, if sold according to the provisions of this act, shall be a lien upon the rents and profits of the land until paid, and such lien may be enforced by the vendor in any court of competent jurisdiction: Provided, that the right of any Delaware-Cherokee citizen to dispose of such improvements shall, before the valuation at which the improvements may be sold, be determined under such regulations as the Secretary of the Interior may prescribe." The plaintiff relies upon section 21 of the act of Congress approved July 21, 1902, known as the Cherokee Treaty (32 Stat. L. 716, c. 1375): "Allotment certificates issued by the Dawes Commission shall be conclusive evidence of the right of an allottee to the tract of land described therein, and the United States Indian Agent for the Union Agency shall, under the direction of the Secretary of the Interior, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to him, and the acts of the Indian Agent hereunder shall not be controlled by the writ or process of any court." And upon section 69 of the same act, which is as follows: "After the expiration of nine months after the date of the original selection of an allotment by or for any citizen of the Cherokee Tribe as provided in this act, no contest shall be instituted against such selection, and as early thereafter as practicable patents shall issue therefor."

[1] The first proposition urged is that the petition does not state facts sufficient to constitute a cause of action. It is the law that a petition seeking to establish a trust, based on the erroneous action of the department, must set forth with particularity the acts of the department, including the evidence on which it acted, where its findings on a question of fact is material. *Quinby v. Conlon*, 104 U. S. 420, 26 L. Ed. 800; *James v. Germania Iron Co.*, 107 Fed. 597, 46 C. C. A. 476; *Ross v. Stewart*, 25 Okl. 611, 106 Pac. 870; *Citizens' Trading Co. v. Bass*, 30 Okl. 747, 120 Pac. 1095. But this petition goes far enough. It discloses that she filed on the land and received a certificate of allotment. That the certificate was canceled without notice to her and after it had been agreed between her and Miss Swannock that plaintiff should have the land, and also



shows that she was in possession of the land April 21, 1904, and that she had been in possession for more than a year prior thereto.

[2, 3] The law as well as equity is with the plaintiff in this case. She took possession of the land more than a year prior to the 21st of April, 1904, when the act was passed giving the Delawares the right to sell the improvements upon their surplus holdings. In fact, her testimony is that she had been in possession much longer. The land had not been segregated by the act of July 21, 1902. It was the purpose of section 23 of the act to preserve the rights of the Delaware Indians of the Cherokee Nation, but it was not the intention of Congress to delay the allotment of the Cherokees. It was intended to preserve the rights of the Delawares by segregation enough to fulfill the stipulations of their agreement with the Cherokees, but it was intended that the balance of the lands should be subject to allotment as soon as the rolls were completed. This segregation was to include lands selected and occupied by the Delawares. Outside of this segregation the land was subject to allotment. Doubtless the department would have reserved the particular tract from allotment had it been notified by Miss Swannock that she owned the improvements thereon. That was the rule of the department in all cases, even among members of the same tribe; but, where no notice was given and the land was filed, the certificate became conclusive after nine months, especially when the owner of the improvements did not desire to file in his name or the name of a member of his family. It cannot be believed that Congress meant by Act April 21, 1904, to deprive members of the Cherokee Tribe of allotments lawfully made by them on lands subject to allotment at the time it was allotted, and of which they had taken possession. The purpose was only to permit the Delawares to dispose of improvements of which they were in possession at the time the act was passed. It could not be an injustice to any one to permit the Delawares to dispose of improvements of which they had retained possession, but where they had, as in this case, surrendered possession of the unsegregated land, and had permitted it to be filed on by members of the Cherokee Tribe, great injustice might result as in this case by canceling the filing. Congress did not intend by Act April 21, 1904, nor by Act March 3, 1905, to disturb filings lawful at the time they were made. In this case the plaintiff had not perpetrated a fraud on any one. The land was not segregated for the Delawares. She took possession without any objections from Miss Swannock, or any one representing her, so far as appears from the record. She leased the land for oil and gas purposes, and her lease was approved by the department. Miss Swannock must have known that she was in possession by

her lessee, but never at any time objected to the possession of the lessee. If she had any rights under the act of 1902, she should have asserted them before the expiration of nine months from the time of filing. Of course, if the plaintiff had concealed her filing until after the expiration of nine months, a different question might arise. When the certificate was issued and the nine months had elapsed, the certificate was conclusive except for fraud. In *Ballinger v. Frost*, 216 U. S. 240, 30 Sup. Ct. 338, 54 L. Ed. 464, Mr. Justice Brewer said: "Whenever, in pursuance of the legislation of Congress, rights have become vested, it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a department. However laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of congressional legislation. It must be borne in mind that this allotment provided by Congress contemplated a distribution among the Choctaw and Chickasaw Indians of the lands that belonged to them in common. They were the principal beneficiaries, and their titles to the land they selected should be protected against the efforts of outsiders to secure them. White men settling on town sites were not the principal beneficiaries. Congress, it is true, authorized town sites, and the town of Mill Creek was established in compliance with the statute. It further provided for an enlargement of any town site upon the recommendation of the commission to the Five Civilized Tribes. That recommendation was made in respect to the town of Mill Creek, but disapproved by the Secretary of the Interior. Thereafter the relator selected the land in controversy, a tract of 40 acres, on which were her improvements. Notice was given as required, and the time in which contest could be made—nine months—elapsed. Thereupon, as provided by the statute, the title of the allottee to the land selected became fixed and absolute, and the chief authorities of the Choctaw and Chickasaw Nations executed to her a patent, as required, of the land selected. The fact that there may have been persons on the land is immaterial. They were given nine months to contest the right of the applicant. They failed to make contest, and her rights became fixed. Thereafter the Secretary of the Interior had nothing but the ministerial duty of seeing that a patent was duly executed and delivered." In *Garfield v. U. S. ex rel. Goldsby*, 211 U. S. 249, 29 Sup. Ct. 62, 53 L. Ed. 168, which was a mandamus proceeding to compel the Secretary of the Interior to replace on the rolls a person who had been enrolled and whose name the Secretary had stricken from the rolls without notice to him, Mr. Justice Day said: "By the conceded action of the Secretary prior to the striking of Goldsby's name



from the rolls he had not only become entitled to participate in the distribution of the funds of the nation, but by the express terms of section 23 of the Act of July 1, 1902 (32 Stat. L. 641, c. 1362), it was provided that the certificate should be conclusive evidence of the right of the allottee to the tract of land described therein. We have therefore under consideration in this case the right to control by judicial action an alleged unauthorized act of the Secretary of the Interior for which he was given no authority under any act of Congress." The recent case of *U. S. ex rel. Knight v. Lane*, 228 U. S. 6, 33 Sup. Ct. 407, 57 L. Ed. —, decided March 17, 1913, was a mandamus proceeding to compel the Secretary of the Interior to issue a patent. In that case application to cancel a filing was made within 30 days after the filing, and the person whose filing was canceled had notice and appeared at the hearing. The mandamus was refused, but in the course of the opinion Mr. Justice Van Devanter said: "The decisions in *Garfield v. United States*, 211 U. S. 249, 29 Sup. Ct. 62, 53 L. Ed. 168, are not in conflict with the views here expressed. In the former the writ was awarded to compel the respondent to erase and disregard an entry which he arbitrarily and without notice had caused to be made upon a public record, thereby beclouding the relator's right to an Indian allotment. In the latter the writ was awarded to compel the delivery of a patent which was withheld solely through the unauthorized action of the Secretary in entertaining and sustaining a proceeding in the nature of a contest after the expiration of the time limited by statute for instituting such a proceeding." See, also, *Wallace v. Adams*, 74 C. C. A. 540, 143 Fed. 716, as to the effect of an allotment certificate. Unless the plaintiff recovers in this case, a grave injustice will be done. Not only did she file on the land, but long after the nine months for contest had expired she leased the land for oil and gas purposes. This lease was approved by the Secretary of the Interior, and the lessee entered on the land without objection from Miss Swannock. In fact, a reading of the entire record leads to the conclusion that she was willing for the plaintiff to have the land. The fact that she subsequently gave a bill of sale has very little significance. She knew nothing of the technical descriptions. The lessee bored wells and paid the plaintiff \$2,100 in royalties which she now owes some one if her allotment was rightfully canceled. The department took the position that plaintiff and Miss Swannock could not lawfully make any agreement about the improvements, and that, if plaintiff paid \$200 for permission to file the improvements, she obtained no rights thereby, for the reason that the improvements had not been valued

as required by the act. But it would seem the improvements were subsequently valued at \$12 and sold for that. It would seem that the maxim "*De minimis non curat lex*," would almost be sufficient to prevent the canceling of an allotment and the destruction of vested interests, such as existed in this case for so slight a consideration. The holding that she could not for 16 times their value give plaintiff the right to file on her improvements without complying with the regulations of the department, but when she had complied could give the right to another for an insignificant sum, is simply in line with the policy of the department, which, though probably necessary, has made it so extremely unpopular in the Indian Territory.

The judgment should be affirmed.

PER CURIAM. Adopted in whole.

(37 Ok1. 702)

**FIDELITY & DEPOSIT CO. v. SHEAHAN.**  
(Supreme Court of Oklahoma. April 5, 1913.  
Rehearing Denied June 20, 1913.)

(Syllabus by the Court.)

**1. LIMITATION OF ACTIONS (§ 87\*)—SUSPENSION—"RESIDENCE OUT OF STATE."**

The residence out of the state which suspended the running of the Illinois statute of limitations in that state from October 5, 1897, up to and including October 5, 1907, was the fixed abode entered into with the intention to remain permanently, at least for a time, for business or other purposes.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 456-462; Dec. Dig. § 87.\*]

**2. LIMITATION OF ACTIONS (§ 87\*)—SUSPENSION—RESIDENCE OUT OF STATE—"CHANGE OF DOMICILE."**

It is not necessary that there should be an actual change of the party's domicile in the strict legal sense of that word—that is, an abandonment of his domicile in Illinois and the acquisition of a domicile elsewhere—to bring him within the meaning of the statute of limitations; but he must have acquired a fixed and permanent abode or dwelling place out of that state, at least for the time being.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 456-462; Dec. Dig. § 87.\*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1053, 1054.]

**3. TRIAL (§ 141\*)—PEREMPTORY INSTRUCTION—EVIDENCE.**

Where, upon the issue of limitations, the undisputed evidence shows that plaintiff's cause of action is not barred by operation of the statute, it is error for the trial court to refuse a peremptory instruction to return a verdict for the plaintiff.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 336; Dec. Dig. § 141.\*]

Commissioners' Opinion, Division No. 1. Error from the County Court of Canadian County; H. L. Fogg, Judge.

Action by the Fidelity & Deposit Company

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



against W. A. Sheahan. Judgment for defendant, and plaintiff brings error. Reversed and remanded with instructions.

Robert N. McMillen, of McAlester, and Johnson & Wishard, of Geary, for plaintiff in error. E. E. Blake, of Oklahoma City, for defendant in error.

SHARP, C. The question presented for our consideration is one of limitations. The note sued on was executed at Peoria, Ill., October 5, 1897, and was payable one year after date. Action to recover judgment was begun October 7, 1909, in the county court of Canadian county. The defendant pleaded the Illinois statute of limitations, which provides that actions on promissory notes shall be commenced within 10 years after the cause of action shall have accrued. The plaintiff replied, setting up another provision of the Illinois statute of limitations, which follows: "If when the cause of action accrues against a person, he is out of the state, the action may be commenced within the times herein limited—after his coming into or return to the state; and if after the cause of action accrues, he departs from and resides out of the state, then the time of his absence is no part of the time limited for the commencement of the action." Hurd's Rev. St. 1911, c. 83, § 18. The material facts concerning defendant's departure from the state of Illinois, and his place of residence, were not disputed, and it is urged on the part of the plaintiff in error that the court erred in overruling the plaintiff's request for a peremptory instruction.

[1] If, after the cause of action accrued, the defendant departed from the state of Illinois and resided outside its borders until the date of the institution of the present action, then we think the contention sound. The precise question, therefore, necessary for our determination, is: Did the defendant according to the testimony reside out of the state of Illinois after the accrual of plaintiff's cause of action, for it cannot be denied that he did depart therefrom. The testimony was that defendant's family resided at 914 Oakward Boulevard, Chicago, since May 1, 1906. That defendant was in the employ of the Iron Mountain Railroad Company as its roadmaster at Poplar Bluff, Mo., from April 1 to November 1, 1906, and was at his home in Chicago from the latter date to December 28th following, attending to some personal affairs. On the latter date he was employed by the Rock Island Railroad Company, and a few days thereafter was sent to Geary, Okl., as trainmaster of the Panhandle division of said railroad company, and so continued until June 1, 1908, and remained there until the division offices were removed to El Reno on July 1, 1908, when defendant went to El Reno, retaining his former position as trainmaster, and which position he held until a short time before the trial in the month of July, 1910, when he moved to Eldon, Mo., at which place he was trainmaster for the same

company. While in Geary his family occasionally visited him there. While in Oklahoma he did not vote there or in any other state, but it was shown that on August 10, 1907, a written petition was signed by him, in which he gave Geary, Okl., as his place of residence, and stated that he had resided there for a period of eight months. Much of defendant's time while in the railroad company's employment was occupied with his duties extending over several hundred miles of track, both in and out of the state; but that his office and headquarters were first at Geary, and afterwards at El Reno, is not disputed. It does not appear that defendant visited his family in Chicago from January, 1907, to the time of the trial in July, 1910.

[2] Did the defendant, within the meaning of the statute, reside out of the state of Illinois during the period of his absence therefrom? It was stated by defendant while on the witness stand that he resided in the state of Illinois all the time while employed in Oklahoma, but, considering the testimony as a whole, it is obvious that during said term of years the defendant did not live in Illinois, and that it could only have been intended that during said time defendant maintained his home or domicile in said state. Construing the statute in question, the Supreme Court of Illinois in *Pells et al. v. Snell et al.*, 130 Ill. 379, 23 N. E. 117, said: "The signification of the word 'reside,' as used in the present statute, presents a question not altogether free from difficulty. Numerous definitions of residence are to be found in the books, differing from each other mainly in respect to the greater or less degree of permanence of the inhabitancy or abode which they involve. See Abbott's Law Dict., title, Reside. There seems, however, to be \* \* \* a fixed and permanent abode or dwelling place, at least for the time being, as contradistinguished from a mere temporary locality of existence." The court, after reviewing decisions of the Supreme Court of Massachusetts, Vermont, Maine, and New Hampshire, observed: "We would not be understood as adopting the doctrine of the decisions above cited to the extent of holding that there must be an actual change of the party's domicile, in the strict legal sense of that word, that is an abandonment of his domicile in this state and the acquisition of a domicile elsewhere, to bring him within the meaning of our statute of limitations; all we intend to hold being that he must acquire a fixed and permanent abode or dwelling place out of this state at least for the time being."

As was observed by the Supreme Court of the United States in *Barney v. Oelrichs et al.*, 138 U. S. 529, 11 Sup. Ct. 414, 34 L. Ed. 1037, in construing the words "to reside out of the state," in section 100 of the New York Code of 1849: "We hold that the residence out of the state which operated to suspend the running of the statute under section 100



as originally framed was a fixed abode entered upon with the intention to remain permanently, at least for a time, for business or other purposes, and, as there was no evidence tending to establish such a state of fact here, the judgment must be reversed. The same conclusion has been reached in effect by many of the state courts, and reference to decisions in Massachusetts, Maine, Vermont, and New Hampshire will be found in the well-considered opinion of the Supreme Court of Illinois in *Pells v. Snell*, 130 Ill. 379 [23 N. E. 117], where the terms of the statute were nearly identical with those of that of New York, and the court approved the definition of 'residence' as given in *Re Wrigley*, 8 Wend. [N. Y.] 134, *Frost v. Brisbin*, 19 Wend. [N. Y.] 11 [32 Am. Dec. 423], and *Boardman v. House*, 18 Wend. [N. Y.] 512." The latter case reviews the former decisions of that court in *Penfield v. Chesapeake, O. & S. W. R. Co.*, 134 U. S. 351, 10 Sup. Ct. 566, 33 L. Ed. 940, and a large part of the early decisions of the appellate courts of New York, including the leading case of *Frost v. Brisbin*, 19 Wend. (N. Y.) 11, 32 Am. Dec. 423, and points out with great clearness the difference between the meaning of the words "residence," "domicile," and "inhabitaney." In quoting from *Burroughs v. Bloomer*, 5 Denio (N. Y.) 532, 535, it was said: "The expressions 'and reside out of the state,' and 'the time of his absence' have the same meaning; they are correlative expressions. So that, while the defendant in this case resided out of, he was absent from the state."

The converse then should apply here, under the facts proven; for, if the defendant had departed from, he was not an actual resident of, the state of Illinois. A mere transient visit of a person for a time at a place does not make him a resident while there; something more is necessary to entitle him to that character. There must be a settled, fixed abode, an intention to remain permanently, at least for a time, for business or other purposes, to constitute a residence within the legal meaning of that term. A person may be a resident of one state, and have his domicile in another. He can have two or more places of residence, but only one domicile. Residence is an act; domicile is an act coupled with an intent. *Keller v. Carr*, 40 Minn. 428, 42 N. W. 292; *Long v. Ryan et al.*, 71 Va. 718. Obviously the defendant lived in first the territory afterwards the state of Oklahoma for a period of over three years. That was the place of his actual residence, as distinguished from his domicile, and it is this character of residence that the statute contemplates. The defendant had a settled, fixed abode, while in the discharge of his services to his employer. His employment was continuous for a period of over three years, and it matters

not that he did not vote in the state or elsewhere, or that he took no part in local affairs as a failure to discharge fully all of the privileges and duties of a citizen does not of itself determine the question of one's residence. Where a man's family resides is not necessarily the place of his residence. *Frost v. Brisbin*, supra; *Penfield v. Chesapeake, O. & S. W. R. Co.*, supra; *Forbes v. Thomas*, 22 Neb. 541, 35 N. W. 411; *Krone v. Cooper*, 43 Ark. 547; *Amsbaugh v. Exchange Bank*, 33 Kan. 100, 5 Pac. 384. To our minds the statute contemplated actual residence out of the state, and it being shown and not denied that the defendant did reside for a period of over three years in what is now this state, and while here occupied a permanent position, he therefore had departed from and resided out of the state of Illinois. *Johnson v. Smith*, 43 Mo. 499; *Huss v. Central Railroad & Banking Co.*, 66 Ala. 472; *Hanover Nat. Bank v. Stebbins*, 69 Hun, 308, 23 N. Y. Supp. 529; *Hart v. Kip*, 74 Hun, 412, 26 N. Y. Supp. 522; *Austen v. Crilly*, 13 App. Div. 247, 42 N. Y. Supp. 1097; *Bennett v. Watson*, 21 App. Div. 409, 47 N. Y. Supp. 569; *Weitkamp v. Loehr*, 53 N. Y. Supp. Ct. 79; *De Mell v. De Mell*, 120 N. Y. 485, 24 N. E. 990, 17 Am. St. Rep. 652; *Hanson v. Graham*, 82 Cal. 631, 23 Pac. 56, 7 L. R. A. 127; *Morgan v. Nunes*, 54 Miss. 308; *Lawson v. Adlard*, 46 Minn. 243, 48 N. W. 1019.

[3] From the undisputed evidence, the plaintiff's cause of action was not barred by limitation, and the amount to which it was entitled to recover, if at all, not being controverted, it was error for the trial court not to grant the plaintiff's request for a peremptory instruction to return a verdict for the plaintiff.

The judgment should be reversed and the cause remanded, with instructions to the trial court to render judgment for the plaintiff.

PER CURIAM. Adopted in whole.

(38 Okl. 333)

#### MULLEN v. SHORT.

(Supreme Court of Oklahoma. June 10, 1913.)

(Syllabus by the Court.)

#### 1. INDIANS (§ 20\*)—DESCENT AND DISTRIBUTION—COURTS—APPROVAL OF SALE.

The county court of the county of which a deceased allottee of the Five Civilized Tribes was a resident at the time of his death is authorized, by section 9 of the act of Congress of May 27, 1908 (35 Stat. 315, c. 199), to approve conveyances of any interest of any full-blood Indian heir to or in lands inherited from such deceased allottee, whether a regular proceeding for the settlement of the estate of such decedent has been instituted or not.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 53; Dec. Dig. § 20.\*]

#### 2. INDIANS (§ 18\*)—EVIDENCE—ILLEGITIMACY.

The census card issued by the Dawes Commission showed L. T., a member of the Five

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Civilized Tribes, to be the father of S. T., a deceased allottee. *Held*, that evidence tending to establish that S. T. was an illegitimate child, introduced for the purpose of changing the line of descent from the putative father to the mother was competent.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 49; Dec. Dig. § 18.\*]

Appeal from District Court, Grady County; Frank M. Bailey, Judge.

Action by E. F. Short against J. S. Mullen. Judgment for plaintiff, and defendant brings error. Affirmed.

H. A. Ledbetter, of Ardmore, for plaintiff in error. Adolphus Clark and F. E. Riddle, both of Chickasha, for defendant in error. S. T. Bledsoe, of Oklahoma City, amicus curiae.

KANE, J. This was a statutory action for the recovery of a tract of land, situated in the Chickasaw Nation, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below. Upon trial to the court the issues were determined in favor of the plaintiff, and judgment entered accordingly, to reverse which this proceeding in error was commenced.

The petition of the plaintiff is in statutory form. The answer of the defendant is, first, a general denial, and, second, that the land in controversy was allotted to Sophia Tushka, who subsequent to the allotment thereof died, leaving succeeding her her father, Levi Tushka, and her brothers, Sylvester Tonihka and Silas Tushka; that he purchased the land from Levi Tushka, and also procured a conveyance from Sylvester Tonihka and Silas Tushka, the next of kin on the paternal side, and therefore, if the court found the land to be an estate of inheritance, he was entitled thereto, by reason of the deed from Levi Tushka, the father of Sophia Tushka, and in the event the land was found to be a new acquisition, title passed to him by reason of the conveyances from Sylvester Tonihka and Silas Tushka. He further alleged that the census card issued by the Dawes Commission shows that Sophia Tushka was the child of Esian Nowahima and Levi Tushka, and that this constituted a conclusive adjudication as to the fact as to who was the father and mother of Sophia Tushka. The reply of the plaintiff was a denial of the legal effect of the census card issued by the Dawes Commission, and allegations to the effect that Sophia Tushka, the allottee, was the illegitimate child of Esian Nowahima, the mother of Sophia Tushka, and that the land passed to the plaintiff by conveyance from Esian Nowahima, who inherited it upon the death of her illegitimate daughter, Sophia Tushka. Assignments of error relied upon by counsel for plaintiff in error, as stated in his brief, are: "(1) That before the county court of McCurtain county had jurisdiction to approve the conveyances

made to defendant in error under the act of Congress of May 27, 1908, section 9, there must have been an administration of the estate. \* \* \* (2) That as the census card issued by the Dawes Commission shows Levi Tushka to be the father of Sophia Tushka, it ought to be considered final upon that point."

[1] The first question raised involves the construction of section 9 of the act of Congress of May 27, 1908, which provides: "That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of such deceased allottee." Counsel contends that under the above section the court authorized to approve conveyances of inherited lands by full-blood Indian heirs is the court which has acquired jurisdiction over the settlement of the estate of the deceased allottee, in a proceeding commenced for that purpose in the county of which the decedent was a resident at the time of his death, in accordance with section 5142, Comp. Laws Okl. 1909, which provides: "Wills must be proved, and letters testamentary or of administration granted: (1) In the county of which the decedent was a resident at the time of his death; in whatever place he may have died."

It seems to be admitted that Sophia Tushka, the allottee herein, was a resident of McCurtain county at the time of her death, and that the county court of that county approved the deed executed by Esian Nowahima, and it is reasonably apparent from the record that at the time of the approval no administration proceedings for the settlement of the estate of the decedent were pending, and that the matter of the approval of the deed was a separate and independent proceeding.

It is our opinion that the actual pendency of an administration proceeding is not necessary to confer power upon the county courts of the state to approve conveyances executed by full-blood heirs of Indian allottees to their inherited lands, where it is made to appear to the court that the ancestor from whom the land was inherited resided in the county wherein the application for approval is made at the time of his death. At the time section 9, *supra*, became effective, there were various constitutional and statutory provisions relating to the administration of estates of deceased persons, and providing courts with jurisdiction over such matters.

Section 12, art. 7, Williams' Constitution, provides that: "The county court, coextensive with the county, shall have original jurisdiction in all probate matters. \* \* \*"

And section 13 of the same article provides

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



that: "The county court shall have the general jurisdiction of a probate court. It shall probate wills, appoint guardians of minors, idiots, lunatics, persons non compos mentis, and common drunkards; grant letters testamentary and of administration, settle accounts of executors, administrators, and guardians; transact all business appertaining to the estates of deceased persons, minors, idiots, lunatics, persons non compos mentis, and common drunkards, including the sale, settlement, partition, and distribution of the estates thereof. \* \* \*

Section 5136, Comp. Laws Okl. 1909, which was extended to and put in force in the new state by the terms of the schedule of the Constitution provides: "The county court has jurisdiction, and the judge thereof power, which must be exercised in the cases, and in the manner prescribed by statute."

One of the matters over which it is declared by statute the county court "has jurisdiction" is to grant letters testamentary of administration and of guardianship. The ordinary meaning of the general language used in the foregoing constitutional provisions and legislative enactments is that the county courts of the state have jurisdiction over the administration of the estates of all persons residing therein. It means, broadly, that the county courts of the state are the courts having jurisdiction over the settlement of the estates of decedents. Congress undoubtedly, in passing section 9 of the act of May 27, 1908, had in mind the meaning that is ordinarily given to the general language of our statute which confers probate jurisdiction upon the county courts, and used the words, "having jurisdiction of the settlement of estates of said deceased allottees" in the same broad sense. Congress was not creating a court which should have jurisdiction over such estates. Such a court had been created by the Constitution and laws of the state. What Congress intended was to cast the duty of approving the conveyances of full-blood Indians to their inherited lands upon the courts which already had "jurisdiction over the settlement of the estates of deceased allottees," when administration was necessary. Approving the conveyances of full-blood Indian heirs is in no sense akin to the administration or settlement of the estates of deceased persons, and there is no apparent reason why one should depend on the other. The purpose of Congress was to provide an economical and efficient protection for full-blood Indian heirs against improvident conveyances of their inherited lands. We are unable to see how an administration of the estate of the deceased ancestor from whom such lands were inherited, where no such proceeding would be necessary, except for the purpose of conferring jurisdiction on the court to approve conveyances, would lend

any aid toward either economy or protection. In the great majority of cases involving the inherited lands of full-blood Indians there is no occasion for the administration of the estate of the ancestor in the ordinary sense. As a rule, few of the Indians leave debts, and fewer leave property, especially real estate, subject to the payment of debts. It is true that, in order to protect the interest of the Indian heir as well as that of the purchaser, the court approving the conveyance ought to have considerable of the information concerning the land it would naturally acquire, if legal administration of the estate of the decedent had been had; but this class of information can be acquired with as much certainty, and more expeditiously and cheaply, in an independent proceeding instituted solely for the approval of such conveyances. So, to say that Congress intended that the heir of such an Indian should be required to incur the expense of an administration proceeding for no other purpose than to confer jurisdiction upon the county court to approve conveyance of his inherited lands is to say that Congress required him to do an expensive, unnecessary, and ineffective act.

[2] The second contention of counsel for plaintiff in error cannot be sustained. As stated before, the census card showed that Levi Tushka was enrolled as the father of Sophia Tushka, the deceased allottee, and Esian Nowahima as her mother. We know of no statute or rule of evidence which would preclude evidence tending to show that Sophia Tushka was the illegitimate child of those parties. The undisputed evidence shows that at the date of the birth of Sophia Tushka, Levi Tushka was living in lawful wedlock with a woman other than Esian Nowahima, by whom he had the hereinbefore mentioned Sylvester Tönhka and Silas Tushka, and that at the time of the death of said Sophia Tushka he was still living with the same wife.

In *Yarbrough v. Spalding*, 31 Okl. 806, 123 Pac. 843, and *Campbell v. McSpadden*, 127 Pac. 854, not yet officially reported, this court has held that the act of Congress declaring that the enrollment records of the Commissioners to the Five Civilized Tribes shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman, is not unconstitutional and void, but the valid exercise of the authority vested in Congress. Counsel for plaintiff in error cites the foregoing authorities as supporting his contentions, but we do not believe they are in point. We believe that the findings of the Dawes Commission in matters pertaining to the ascertainment of what persons are entitled to participate in the joint tribal property, to the end that suitable governmental regulations and restrictions might be thrown around them to protect them



against a waste of their property by inconsiderate and ignorant alienation, should be given great weight, and that by act of Congress such findings are made conclusive evidence of the facts found, such act should be upheld. But in the instant case, primarily, the question is which of two Indians of the same quantum of Indian blood shall inherit a certain tract of land which had been duly allotted. If illegitimacy is established, as the court below found it to be, the allotment of Sophia Tushka, instead of going to her putative father, will go to her mother, Esian Nowahima. As we are of the opinion that the evidence tending to establish illegitimacy was competent, it follows that a conveyance by her, when duly approved by the proper county court, must be held to be valid.

As the contentions presented by counsel for plaintiff in error in his brief are found to be untenable, the judgment of the court below must be affirmed. All the Justices concur.

(37 Okl. 639)

# EDWARDS et al. v. BOYLE.

(Supreme Court of Oklahoma. June 19, 1913.)

## (Syllabus by the Court.)

### 1. CONTRACTS (§ 138\*)—ILLEGAL CONTRACT—PARTIES IN PARI DELICTO—CANCELLATION.

Plaintiffs had about 10,000 acres inclosed in a pasture in which they were grazing between 3,000 and 4,000 cattle in violation of the quarantine law. They also had a suit pending against defendant over title to a certain tract of land. Defendant threatened to petition the board of county commissioners to have the section lines opened and the quarantine board to have the cattle dipped unless plaintiffs would dismiss their suit and give him a quitclaim deed to the land. Plaintiffs dismissed the suit and gave defendant the quitclaim deed in consideration of their being allowed to inclose the section lines and to graze their cattle above the quarantine line in violation of law. After they had had the benefit of the pasture, they brought this suit to cancel the quitclaim deed on the ground that it was given under duress. *Held*, the contract being in violation of law and the parties in *pari delicto*, a court of equity will not take cognizance of their rights arising thereunder.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681-700; Dec. Dig. § 138.\*]

### 2. CONTRACTS (§ 138\*)—ILLEGALITY—RELIEF.

Where the purpose of a contract is to violate the law and the parties thereto are equally cognizant of its nature and equal participants in carrying out its purpose, a court of equity will grant relief to neither party, but will leave them to their strict rights.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681-700; Dec. Dig. § 138.\*]

## (Additional Syllabus by Editorial Staff.)

### 3. DEEDS (§ 71\*)—EXECUTION—DURESS—MENACE—FRAUD.

Where the defendant obtained a quitclaim deed of certain land in controversy from complainants in consideration of permitting complainants to violate the law prohibiting the inclosure of several sections of land as a pasture,

and also permitting complainants to violate the quarantine regulations which if complied with would have required complainants to dip a large band of cattle at a great expense, the deed was not subject to vacation as having been obtained by duress, menace, or fraud.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 183-189; Dec. Dig. § 71.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Wagoner County; Chas. Bagg, Judge.

Action by W. C. Edwards and another against Bernard Boyle to cancel a deed and remove a cloud on title to real property. Judgment for defendant, and plaintiffs bring error. Reversed and remanded.

Robert F. Blair and Henry M. Brown, both of Wagoner, for plaintiffs in error. Enloe V. Vernor, of Muskogee, W. W. Padgett, of Ft. Scott, Kan., and W. W. Dillard, of Wagoner, for defendant in error.

HARRISON, C. This action was begun in January, 1909, by W. C. Edwards and J. P. Edwards against Bernard Boyle to cancel a deed to a certain 120-acre tract of land, which deed plaintiffs alleged had been procured from them by defendant through duress, menace, and fraud and without consideration. In October, 1910, the cause was tried and judgment rendered in favor of defendant. Plaintiffs appealed upon six assignments of error, but relying principally on the refusal of the court to give a peremptory instruction in plaintiffs' favor and to the giving by the court of an instruction in favor of defendant.

[1] There was evidence that plaintiffs had inclosed about 10,000 acres of land in a pasture; that they had some 3,200 to 3,400 head of cattle in this pasture; that the cattle had been brought over the quarantine line without being dipped; that, in order to maintain their pasture all in one, plaintiffs had closed all the section lines running through such pasture; that they had made a satisfactory settlement as to their being permitted to close the section lines with all the neighbors and parties interested except the defendant, Bernard Boyle. Boyle had refused to acquiesce in their closing the section lines, it seems principally, on the ground that a suit was pending between plaintiffs and defendant over title to the 120-acre tract of land which is made the subject of controversy here. It seems that each party had a deed to the tract from the original allottee, and the plaintiffs here had brought suit against this defendant to have his deed from the allottee canceled and their deed from the allottee declared valid. The rights of the respective parties in the other suit do not appear in this record, but it seems that the defendant felt himself aggrieved because of such suit and saw the opportunity to force a dismissal of same and to obtain a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



quitclaim deed from plaintiffs by the following procedure: He refused to consent to plaintiffs closing the section lines and to plaintiffs maintaining their cattle above the quarantine line without having them dipped unless plaintiffs would execute a quitclaim deed to the tract of land in question. Plaintiffs objected to defendant's demand and protested against executing the quitclaim deed on the ground that it was a "hold-up," but defendant continued obstinate, claiming that he held the "whip-hand" and that he would force plaintiffs to "come across" or open up "those section lines" and have the cattle dipped, having in the meantime circulated a petition to the board of county commissioners to have the section lines opened and a petition to the quarantine board to have the cattle dipped. Plaintiffs feeling that they would sustain great loss, a loss which they estimated at \$10,000 to \$15,000, if they were forced to open the section lines and have their cattle dipped, finally, though reluctantly, executed a quitclaim deed to the tract of land in April, 1908. In January, 1909, they brought this action to cancel the quitclaim deed. At the conclusion of the testimony the court gave the following instruction: "Gentlemen of the jury, this is a suit filed by W. C. Edwards and J. P. Edwards against the defendant, Bernard Boyle, to cancel a certain deed executed by them on the 21st day of April, 1908, to the defendant, Bernard Boyle, claiming and alleging that same was procured by means of duress, menace, and fraud and without consideration. The defendant, Boyle, filed his answer denying each and every allegation of plaintiffs' petition. The court now instructs you that there has been no proof of any duress, menace, or fraud, and that the plaintiffs cannot raise or question the consideration; there being no fraud in connection with the execution of said deed. You are therefore directed to return a verdict in favor of the defendant, Bernard Boyle."

Following this instruction the jury returned a verdict in favor of defendant. Whereupon the court rendered the following judgment: " \* \* \* The court finds that the quitclaim deed executed by the plaintiffs, W. C. Edwards and J. P. Edwards, on the 4th day of April, 1908, conveying the (describing the land) to the defendant, Bernard Boyle, was not obtained by means of duress, menace, and fraud and without consideration, but is valid and binding between the parties to this action. It is therefore considered, ordered, and adjudged by the court that said quitclaim deed be and the same is hereby declared valid; that plaintiffs take nothing by this action; and that defendant, Bernard Boyle, have and recover of and from the plaintiffs, W. C. Edwards and J. P. Edwards, all his costs herein laid out and expended, for which execution may issue. Chas. Baggs, Judge."

From this judgment plaintiffs appeal upon six assignments of error, but relying principally upon the court's refusal to give the peremptory instruction in favor of plaintiffs and upon the giving by the court of the instruction above.

[3] We are of the opinion that the court was correct in instructing the jury that no duress, menace, or fraud had been proven. An effort to require plaintiff to do that which the law required him to do does not constitute such duress or menace as is contemplated by law. The defendant was not threatening to do anything unlawful, nor were plaintiffs being menaced with any unlawful violence. They were being threatened only with the enforcement of the law. They had violated the quarantine law by bringing their cattle across the line without having them dipped and were evading the road law by maintaining fences across the section lines. Neither in circulating a petition to the quarantine board to have the cattle dipped, nor in circulating a petition to the board of county commissioners to have the section lines opened, was defendant doing anything unlawful. Plaintiffs could have obeyed the law and refused to execute the quitclaim deed. They had their choice and chose to violate the law themselves and purchase an acquiescence in their violation by the quitclaim deed, rather than obey it by opening the section lines and having the cattle dipped. They estimated that by opening the section lines and having the cattle dipped they would sustain a loss of \$15,000. If such be true, then they saved the difference between what the 120 acres of land was worth and the \$15,000 by being permitted to violate the law. This was the real consideration in the transaction. The plaintiffs were in the wrong by violating the law and the defendant in the wrong by acquiescing in such violation for a consideration, and a court of equity will close its doors to such a transaction and leave the parties where it found them.

The contract herein was illegal from its inception. The moving consideration on the part of plaintiffs was that they would give the quitclaim deed in question to be allowed to violate the law, and, on the part of defendant, that he would accept the quitclaim deed and permit them, so far as he was concerned, to violate the law. "The general rule is that, where an illegal contract has been made, neither courts of law nor of equity will interfere to grant any relief to the parties but will leave them where they find them, if they have been equally cognizant of the illegality." 2 Story (C) 486; 2 Parsons, 746; 2 Addison, 715, 724; 1 Pomeroy, 402. The force of this doctrine has been recognized and followed in the following cases: *Shattuck v. Watson*, 53 Ark. 147, 13 S. W. 516, 7 L. R. A. 551; *Haynes v. Rudd*, 102 N. Y. 372, 7 N. E. 287, 55 Am.



Rep. 815; Kelly v. Courter, 1 Okl. 277, 30 Pac. 372; Stanard v. Sampson, 23 Okl. 13, 99 Pac. 796; Los Angeles v. City Bank, 100 Cal. 18, 34 Pac. 510; Garrison v. Burns, 98 Ga. 762, 26 S. E. 471; Winchester Electric Light Co. v. Veal, 145 Ind. 506, 41 N. E. 334, 44 N. E. 353; McIntosh v. Wilson, 81 Iowa, 339, 46 N. W. 1003; Sheldon v. Pruessner, 52 Kan. 579, 35 Pac. 201, 22 L. R. A. 709; Snell v. Dwight, 120 Mass. 9; Atwood v. Fisk, 101 Mass. 363, 100 Am. Dec. 124; Niagara Falls Brewing Co. v. Wall, 98 Mich. 158, 57 N. W. 99; Leveros v. Reis, 52 Minn. 259, 53 N. W. 1155; Storz v. Finkelstein, 46 Neb. 577, 65 N. W. 195, 30 L. R. A. 644; Springfield Fire & Marine Ins. Co. v. Hull, 51 Ohio St. 270, 37 N. E. 1116, 25 L. R. A. 37; Roy v. Harney Peak Tin Min. Mill & Mfg. Co., 21 S. D. 140, 110 N. W. 106, 9 L. R. A. (N. S.) 529, 130 Am. St. Rep. 708; Thomas v. City of Richmond, 12 Wall. 349, 20 L. Ed. 453; Higgins v. McCrea, 116 U. S. 671, 6 Sup. Ct. 557, 29 L. Ed. 764; Dent v. Ferguson, 132 U. S. 50, 10 Sup. Ct. 13, 33 L. Ed. 242.

Hence, while we think the trial court was correct in holding that no duress, menace, or fraud as contemplated by law had been shown, yet we cannot agree with that portion of the judgment decreeing defendant's deed to be valid. The court should have gone no farther after ascertaining the circumstances out of which this action grew than to have ordered the action dismissed and left the parties where it found them. "A court of chancery will not entertain a bill to cancel an obligation, the consideration of which is a violation of chastity, compounding a felony, smuggling, gaming, false swearing, or the commission of any crime, or a breach of good morals." Weakley v. Watkins, 26 Tenn. (7 Humph.) 356. "A plaintiff, who founds his cause of action on an illegal or immoral act, has no standing in a court of equity; and, where both parties have been engaged in an unlawful transaction, the court will neither lend its active aid to the one party to get rid of the securities taken upon such transaction, nor assist the other party in retaining them, but will leave both to their strict legal rights." Kahn v. Walton, 46 Ohio St. 195, 20 N. E. 203.

[2] The case at bar comes clearly within the above rule. It was a contract to violate the law. The parties thereto were equally cognizant of its nature and equal participants in carrying out its purpose. In such cases a court of equity will not take cognizance of rights arising thereunder nor grant relief to either party, but will leave them to their strict legal rights.

The judgment is reversed, and the cause remanded, with directions to dismiss the action.

PER CURIAM. Adopted in whole.

(37 Okl. 665)

# SPRINGFIELD FIRE & MARINE INS. CO. v. NULL.

(Supreme Court of Oklahoma. June 19, 1913.)

(Syllabus by the Court.)

## 1. PLEADING (§ 180\*)—DEPARTURE—ACTION ON INSURANCE POLICY.

Where the breach of "conditions subsequent," in a policy of insurance, has been pleaded as a defense in a suit on the policy, a reply thereto alleging a waiver or estoppel on the part of the company does not constitute a departure.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 358-384; Dec. Dig. § 180.\*]

## 2. INSURANCE (§ 668\*)—ACTION ON POLICY—MISREPRESENTATIONS—QUESTION FOR JURY.

In a suit on an insurance policy, where it is contended that a false and fraudulent misrepresentation or concealment of a material fact by the insured has rendered the contract of insurance void, the burden of proof is upon the company to establish the materiality of the alleged false statement or concealment, as well as the fraudulent intention of the insured. Where the evidence is conflicting, or where different inferences may be legitimately drawn from the evidence, the question should be submitted to the jury under instructions which take into account the materiality of the misrepresentation and the fraudulent purpose, or intent of the insured to deceive.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.\*]

## 3. INSURANCE (§ 645\*)—ACTION ON POLICY—WAIVER—EVIDENCE.

Where an insurance company pleads in its answer the breach of a condition in the policy against "concurrent insurance" and the reply sets up facts which would constitute a waiver or an estoppel, and upon introduction and examination of the policy it is found that "additional or concurrent insurance" is allowed by the terms of the policy, it is then unnecessary to offer any proof of the facts constituting the alleged waiver.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1632-1644; Dec. Dig. § 645.\*]

## 4. INSURANCE (§ 648\*)—ACTION ON POLICY—EVIDENCE.

A special adjuster of an insurance company, who was employed by the day in that particular case, and was not an officer of the company, and had not the duty nor the power to decide as to whether a loss would be paid, and, if not, why not, was asked "if the company had not refused to pay the claim in suit, because of the concealment of the fact of additional insurance," and on objection the court did not allow the witness to so state. *Held*, not error.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1669, 1676; Dec. Dig. § 648.\*]

Commissioners' Opinion, Division No. 2. Error from County Court, Grady County; N. M. Williams, Judge.

Action by G. M. Null against the Springfield Fire & Marine Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Scothorn, Caldwell & McRill, of Oklahoma City, for plaintiff in error. F. E. Riddle, of Chickasha, for defendant in error.



BREWER, C. G. M. Null recovered judgment against the plaintiff in error in the county court of Grady county on an insurance policy issued by it in the sum of \$174 and interest. The policy was for \$300. The property insured consisted of a wooden store building. The insurance company brings error and urges: First, that plaintiff's reply constituted a departure; second, the refusal to give certain instructions; third, insufficiency of the evidence; fourth, refusal to admit certain testimony. Plaintiff's petition, after setting out and declaring upon the policy, alleges: "Plaintiff further avers that he has complied with all the terms and provisions of said policy, with the exception of those waived by the defendant, required of him to be performed."

[1] The defendant in its answer put all the averments of plaintiff's petition in issue by a general denial, and followed this by alleging a number of special defenses consisting of alleged failure to perform conditions required by the policy; such as "the failure to give immediate notice of the loss in writing to the company," and "the failure to furnish proofs of loss," and a violation of the clause relative to carrying more insurance than three-fourths of the value of the property, and the fraudulent concealment by plaintiff of the fact that he had other insurance on the property. A reply was filed to these special defenses, consisting of a general denial and specific allegations of waiver.

The question of departure was raised by a motion to strike the portions of the reply alleging waivers. The special portions above referred to allege a failure to comply with conditions subsequent, and under the doctrine announced in *Western Reciprocal Underwriters' Exchange v. Coon*, 134 Pac. 22 (handed down April 29, 1913, and not officially reported) and *Great Western Life Insurance Co. v. Sparks*, Adm'r, 132 Pac. 1092 (recently decided by this court and not officially reported), the allegations of the reply did not constitute a departure. Those cases exhaustively treat the subject and the reasoning does not need to be repeated.

[2] 2. The next contention made by the insurance company is the refusal of the court to give to the jury its requested instructions Nos. 2 and 4. These instructions follow: No. 2. "You are instructed that if the plaintiff, knowing that he had other insurance on his building which was destroyed by fire, did not inform the defendant of that fact, but permitted the defendant to adjust the loss without such information, he would be guilty of concealing a material fact concerning his insurance, which would render his policy void, and he cannot recover in this action, and your verdict should be for the defendant." No. 4. "You are instructed that if the plaintiff in making his proof of loss concealed from the defendant that he had other insurance on the building which

was destroyed by fire, and permitted the loss to be adjusted without giving the defendant that information, he would be guilty of a fraud which would render his policy void, and he would not be entitled to recover in this action, and your verdict should be for the defendant." These instructions were asked on the theory that the plaintiff had concealed the fact that he had other insurance on the property and that such concealment prevented a recovery, because of the following provision in the policy: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

The proof discloses that at the time of the loss the plaintiff had another policy of insurance on the same property, issued subsequently to that of the policy in this case, in the sum of \$225. There was considerable conflict in the testimony as to the value of the property; the testimony ranging from something over \$400 to between \$600 and \$700. After the fire, the plaintiff in error sent its adjuster to investigate and to adjust the loss. He and the insured met and discussed the matter. The adjuster figured up the material for the building, deducting what he claimed would be the proper amount for depreciation, and agreed with the insured that he was entitled to a certain sum less than the face value of the policy. The insured found the same satisfactory and agreed to take it, and the adjuster proceeded to fill out a form of proof of loss, inserting therein the figures that he had made on the building and the amount of loss properly chargeable under the policy. This, at his request, the insured signed, and the jurat of a justice of the peace stating that insured had made oath thereto was attached. This proof of loss, made after the adjustment, contained the statement that the insured had no other insurance on the property. There is testimony that the insured can neither read nor write; that the statement was not read to him; that he never in fact swore to it; that he was never interrogated as to whether he had another policy; that he had taken the adjuster's figures all the way through, and, being satisfied with the settlement offered, simply signed what was presented to him by the adjuster. On this state of facts, which is briefly summarized, the court refused the instruction set out above, and in lieu thereof instructed the jury as follows: "You are charged that if after the destruction of the premises in question the plaintiff, in pursuance to the terms of said policy, made out his proof of loss and swore to the same, and if you find that he willfully and falsely



made affidavit that he had no other insurance upon said property, and you find that there was other outstanding insurance policies on said premises, all of which was known by the plaintiff at the time he made said affidavit, if the same was made, and it was done for the purpose of deceiving, he would not have a right to recover in this suit, and your verdict should be a verdict for the defendant. If you find that at the time of the alleged making of the false affidavit as set out in the preceding charge the plaintiff did not know the contents of same or that he did not intend to misrepresent said matter, and signed said statement or swore to the same with the only purpose in view of procuring speedy settlement, then and in that event the signing of said affidavit or statement would not prevent his recovery in this case."

We do not think the insurance company was entitled to have the law declared as requested in the instructions it offered, under the facts presented. No. 2 in effect asked that the jury be told that if insured had other insurance (which was admitted) and knew it and did not inform the company about it, whether asked or not, he would be guilty of concealing a material fact and could not recover. This left out the question of "good faith" of "purpose" and of "intent," and would have been very nearly equivalent to instructing a verdict for the company. The other instruction is equally objectionable. In the recent case of *Owen v. U. S. Surety Co.*, 131 Pac. 1091 (not officially reported), where the alleged false statements and misrepresentations were in the application for, and preceded the issuance of, the policy, this court, through Justice Kane, say: "Under section 3784, Comp. Laws 1909, the burden of proof to establish the materiality of a misrepresentation or concealment, as well as the fraudulent intent of the insured, is upon the insurance company, and the burden is not shifted where it is shown that the insured made an untrue answer concerning other insurance; for, if there be a presumption that his failure to mention it was intentional, this is met by the presumption that a man does not make a fraudulent misstatement, and the question is therefore for the jury, upon all the evidence."

If the above rule obtains regarding misrepresentations, which are alleged to have induced the making of the contract, surely it will obtain, as to alleged misrepresentations, which could only affect the right of the insured to a prorating of the loss, and which did not have even this effect, or in any wise injure the company in the case at bar, because the fact of the other insurance was well known before the trial. We think that the court fairly stated the law applicable to the evidence in this case. If the insured was not asked as to the other insurance, did not realize its importance, could

not read and did not have read to him the proofs prepared by the adjuster, did not intend to state falsely or conceal the matter in any way, nor to deceive the company, then he is not precluded from a recovery, and this is the effect of the court's charge.

[3] 3. The contention that the evidence is insufficient to support the verdict is unsound. This contention grows out of this state of facts. The defendant alleged as a special defense that the insured had other concurrent insurance in violation of the policy. The insured replied that the company had waived this. No proof was introduced to show a waiver of this alleged breach, and for that reason the company contends that the proof has failed. Not so. Upon examination, the policy which was pleaded and put in evidence shows that concurrent insurance was permitted under its terms: "Other concurrent insurance permitted, but total insurance shall at no time exceed three fourths of the cash value of each item of the property described herein." When this developed it struck down this particular special defense, and no proof was needed on the question that the fact of concurrent insurance had been waived.

If it is intended to claim, not that the fact of concurrent insurance itself, but the fact that such insurance was in excess of three-fourths of the value of the property, avoided the policy, then the answer is that the value of the property was the subject of much conflict in the evidence, and no point was made on this below, and no instructions asked to cover it. The record shows by solemn admission of counsel that the company's defense was on the alleged false statement in the proof of loss, and on the value of the property as affecting the amount of recovery.

[4] 4. The court sustained an objection to a question asked the adjuster. He was asked if the company did not refuse to pay the loss because of the concealment of the fact of other insurance. The witness was a special adjuster employed by the day in connection with this loss. He was not an officer of the company, and had no decision as to whether the loss would be paid, and, if not, why not. He could have only given his belief or conclusion as to the company's reasons, based on facts which were fully presented to the jury, or upon statements its officers, charged with the power to decide, had communicated to him. Besides, it is not shown therein the evidence would have been of any value to the company. Its pleading gave this very reason as a defense against paying. Its efforts were centered on showing that this fact justified its failure to pay. The fact that it was trying to avoid payment for this particular reason was proclaimed in open court by counsel during the trial. If there was any one thing fully understood in this case and admitted by all, it was that defendant was refusing to pay



this loss, primarily and particularly because of the failure to disclose this additional insurance. There was no error in refusing the evidence.

The cause should be affirmed.

PER CURIAM. Adopted in whole.

(44 Okl. 330)

MOHR v. SANDS.†

(Supreme Court of Oklahoma. July 8, 1913.)

(Syllabus by the Court.)

**1. ATTORNEY AND CLIENT (§ 129\*)—ASSIGNMENT OF CLAIM—FRAUD—EVIDENCE.**

Plaintiff, who resided in New York, employed the defendant, an attorney who resided in Nebraska, to collect a sum due her from the estate of her deceased guardian. Her claim was allowed as a preferred claim, but defendant never informed her of that fact. Defendant admits that he never doubted that it would be paid in full. He wrote plaintiff letters containing expressions indicating that there was some doubt as to whether the claim would be paid in full. He then wrote her a letter purporting to give a complete statement of the status of the estate. The letter contained a statement of the assets and liabilities of the estate, stated that the estate would not likely pay in full, expressed the opinion that it would not pay more than 60 per cent., and advised the acceptance of \$2,500 offered for her claim. Acting upon the statements of the letter, she assigned the claim for \$2,500 to a business associate of defendant. The claim was for nearly \$3,500. At the time she assigned it the defendant knew that \$2,000 would be paid soon, and he had collected that amount before he remitted to the plaintiff, and this with \$250 more was the money she received for the claim. It was paid in full to defendant's business associate. *Held*, that a finding that she was not fraudulently induced to assign the claim is not supported by the evidence, though the defendant had at other times written in effect that he thought she would get her money in full by waiting.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 284-291; Dec. Dig. § 129.\*]

**2. ATTORNEY AND CLIENT (§ 114\*)—TRANSFER OF CLAIM—FRAUD.**

The fact that she may have had information from other sources that her claim would be paid in full will not relieve defendant from the consequences of his fraud.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 228; Dec. Dig. § 114.\*]

**3. ATTORNEY AND CLIENT (§ 114\*)—DUTY OF ATTORNEY TO CLIENT—GOOD FAITH.**

It is the duty of an attorney to act with entire good faith toward his client, and his client has a right to act upon his information and advice as against information received from another, where the client has no means of obtaining knowledge except through information from others.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 228; Dec. Dig. § 114.\*]

**4. ATTORNEY AND CLIENT (§ 114\*)—ASSIGNMENT OF CLAIM—FRAUD—NOTICE.**

The fact that in her original statement of the claim she had asked that it be preferred was not notice to her that the claim would be paid in full, such as relieved defendant from the consequences of the letter fraudulently written

to induce her to assign the claim for less than its value.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 228; Dec. Dig. § 114.\*]

**5. LIMITATION OF ACTIONS (§ 100\*)—FRAUD.**

The statute of limitations does not bar an action for fraud until two years after the fraud is discovered.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480-493; Dec. Dig. § 100.\*]

**6. COURTS (§ 8\*)—JURISDICTION—ENFORCEMENT OF PENALTY UNDER STATUTE OF FOREIGN STATE.**

A statute of Nebraska providing that an attorney guilty of fraud and deceit shall forfeit treble damages imposes a penalty which is not enforceable in the courts of this state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 18, 19; Dec. Dig. § 8.\*]

**7. PLEADING (§ 397\*)—VARIANCE—TREBLE DAMAGES.**

Where a petition alleges all the facts showing fraud and the amount of actual damages, but prays for treble damages, which are not recoverable, the court may disregard the prayer, and render judgment for actual damages.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1337; Dec. Dig. § 397.\*]

**8. LIMITATION OF ACTIONS (§ 100\*)—FRAUD—NOTICE.**

The plaintiff residing in New York is not charged with notice of a fraud practiced upon her by her attorney in Nebraska so as to start the statute of limitations because the records of the court in Nebraska would show the fraud, where the attorney was acting for her in the matter concerning which the record was made, and was charged with the duty of informing her as to the state of the record, and she had no means of ascertaining what the record showed, except by correspondence with her attorney.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480-493; Dec. Dig. § 100.\*]

Error from District Court, Osage County; John J. Shea, Judge.

Action by Lizzie P. Mohr against Archibald Sands. Judgment for defendant, and plaintiff brings error. Reversed and rendered.

Preston A. Shinn and W. G. Hastings, all of Pawhuska, for plaintiff in error. Boone, Leahy & MacDonald, of Pawhuska, for defendant in error.

ROSSER, C. James N. Bullion was the guardian of Lizzie Pett, and as such held \$3,490 belonging to her, and died without paying it to her. Bullion resided in Nebraska at the time of his death, and Miss Pett resided in New York. The defendant, Archibald S. Sands, was an attorney at law practicing in the county where her guardian died. She employed him to represent her in collecting the amount due her from her guardian's estate. The contract between her and Sands was made by mail, and all the business was transacted by mail. On the 29th of August, 1901, her claim against the Bullion estate was allowed as a preferred claim. The estate had ample assets to pay the claim, and Sands admits he never doubted it would be paid in full. On the 17th of September, 1901, Sands

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied.



wrote Miss Pett the following letter: "Sept. 17, 1901. Miss Lizzie Pett, Cullen, N. Y.—Dear Madam: On the computation made by me on the claim in your favor against the estate of Bullion, deceased, which I sent you for signature, I did not credit the estate with a remittance of Jan. 1st, 1901, of \$108.55. The estate filed objections to the allowance of your claim, and claimed the credit for this sum, and produced the draft from the State Bank of De Witt, which bears the indorsement of Mrs. Rachal Pett, as well as your own. I therefore conceded the credit requested, and have secured the allowance of your claim in full, as filed by us, with this exception. On the hearing of the contest thereof, I will secure settlement of as much of this claim as possible as soon as I can, and urge the sale of the real estate with which to pay the balance. Should the widow claim her homestead and allowance, which she had not yet done, I fear the estate will not pay the claims in full. They have made a proposition of \$2500.00 in satisfaction of your claim, and in as much as the administratrix has 18 months in which to settle claims, during which time expenses of administration, cost of sale and accruing interest on the claims will naturally deprecate their value, I do not know but what it might be advisable to accept; depending also somewhat on your desire and immediate use for the money. I leave this entirely with you and await your advice. Very truly yours, A. S. Sands." On the 30th of September he wrote the following letter, which, however, Miss Pett denies having received: "Wilber, Nebr. Sept. 30th, 1901. Lizzie Pett, Cullen, N. Y.—Dear Madam: The administratrix now advises me that she will not pay at this time the full amount she offered for your claim, but would pay a part now, and the balance at the close of the estate or perhaps before that time. I have talked with the County Judge and he will require her to pay \$2000.00 soon, and the balance at the close of the estate, or when the costs and expenses can be satisfactorily estimated. If this is sufficient for your present requirements I would not dispose of the claim. Awaiting your advice, I am, Very truly, yours, A. S. Sands." On the 7th of October he wrote her the following, which she also denies having received: "Wilber, Nebr. Oct. 7, 1901. Miss Lizzie Pett, Mohawk, N. Y.—Dear Madam: I have seen Mr. Lane, who is interested with me in business matters, and he will take your claim at \$2500.00, paying me for my further services therein, and should you dispose of it I will accept 10% in settlement of fees, however, if you can wait for the balance from the administratrix you would realize more in the end. The inquiries which you make are covered in my previous letter of to-day, which, of course, do not effect your claim, except by the way of delay. Awaiting your further advice, I remain, Very truly yours, A. S.

Sands." On the same day he wrote her this letter, which she received, and which she claims is the only one of that date she did receive: "Wilber, Nebr. Oct. 7th, 1901. Miss Lizzie Pett, Mohawk, N. Y.—My Dear Madam: I have your letter of the 2nd inst. and note contents thereof with care. In answer to your letter I would say, that it is impossible to recover anything at all out of the bondsman, Mr. Dawes, as he is financially worthless, and nothing can be enforced against him. The claims allowed against the estate amount to between \$7200.00 and \$7500.00, with about \$3000.00 yet in litigation, which are valid claims, but were not filed in time, and with the limitation fixed by the court for the filing of claims, hence became barred; but the attorney who appears for these claimants has filed three petitions thereby instituting three suits, asking to be permitted to file claims, and for the allowance thereof. These suits which were instituted about the 24th of September, and since I last wrote you, are being contested by the administratrix, and her attorney. Should these be allowed ultimately the aggregate of the claims would be about \$10,000.00, or a little more, and pending this litigation will bear interest at 7% to 10%, according to the particular rates contracted for on the various claims. The assets consist of \$2579.00 cash on hand, 80 acres of deeded land, which is homestead, and sale contracts for 240 acres of school land, partially paid out, which is worth about \$5000.00, partially paid out. The widow is entitled to an allowance of \$200.00 and the homestead, and pending the settlement of the estate, the further sum of \$50.00 per month. The cost of the administration, together with the widow's rights, must first be settled, then the remaining assets applied pro rata to the liquidation of claims. You can see from this that the estate will not likely pay in full any of the claims, and with the litigation recently instituted in the probate court, of which I have made mention, and which in all probability will pass through several courts before final determination, I would deem it advisable to accept the proposition that we have \$2500.00, providing I can now secure it, as these suits will involve, no doubt, considerable expense, and delay the settlement of the estate for a year or two, thus a matter of necessity very much reduces the assets and incurs liability of this estate. \$2500.00 is the only offer I have had by way of settlement of your claim, and I do not believe that we could again procure a settlement more favorable, as at the time this was made, the suits mentioned, had not been instituted, and were entirely unknown. My present opinion is that the estate will not pay to exceed 60%, unless litigation is suddenly brought to a close, which there is no present indications, and my experience has taught me that this class of proceedings are usually, if not always,



protracted. I have herein given you as complete a statement of the present status of this estate as I can and I hope the information may be sufficient to cause you to arrive at a conclusion that will prove to be the most profitable to your interest. Awaiting your further instructions in this matter, I am, Very truly yours, A. S. Sands." Following this letter Sands sent her an assignment of the claim to one Lane for \$2,500, and she assigned the claim to Lane. At the time Sands received from her the assignment of the claim he knew the \$2,000 would be paid soon and before he remitted had already collected from the administrator \$2,000 of the money due her, and this \$2,000 was used to pay that much of the \$2,500 that was to be paid for the assignment of the claim. Sands retained \$250. So that, aside from her own money already in the hands of her attorney, plaintiff only received \$250. Sands represented Lane in the matter of collecting the balance due from the estate, and the entire amount, with interest, was collected. Lane and Sands were intimately associated together in business matters, and according to Sands' statement he received a considerable portion of the balance upon fees that were due him from Lane in connection with the collection of the balance due from the Bullion estate, and also from other matters. Miss Pett did not learn the facts with reference to her claim being allowed, and as to the certainty of its payment until July or August, 1907. This suit was brought on the 7th of June, 1909, to recover difference between the \$2,250 which she actually received for the assignment of the claim, and the amount which was paid by the estate, amounting to \$1,849.42, with interest amounting to \$706.31, or a total of \$2,055.73, and also to recover treble damages for the deceit which she alleges was practiced upon her, which would make the entire claim something over \$6,000. The plaintiff's brief contains 29 assignments of error.

[1] The first assignment that will be considered is that the court erred in finding that there was no fraudulent suppression of truth by the defendant to induce plaintiff to assign her claim, and no fraudulent misrepresentation of its condition. This finding is not supported by the evidence. This is not a case where parties were dealing at arm's length. Sands was the plaintiff's attorney. She had the right to expect that he would tell her the truth and all the truth, and she had the right to believe his statements, regardless of what she may have heard from other sources. "The contract which the law implies from an attorney's employment is that he shall render faithful and honest service to his client in the conduct of the business in which he is employed, and that he shall not use the knowledge gained therein, or the position which he occupies by virtue of his relation, to the prejudice of his client, and that he will

serve in good faith and to the best of his knowledge and ability." *Chatfield v. Simonson*, 92 N. Y. 209. See, also, *Hoopes v. Burnett*, 26 Miss. 428; *Foy v. Cooper*, *The Jurist* 1842, p. 128. An examination of the correspondence set out above shows that the defendant did not disclose the truth to his client. In his letter written September 17, 1901, he says: "Should the widow claim her homestead and allowance, which she has not yet done, I fear the estate will not pay the claims in full. They have made a proposition of \$2500.00 in satisfaction of your claim," etc. He then proceeds in an adroit way to suggest a compromise. This letter was intended to arouse her fears and to dispose her to get the matter settled. He claims to have written then the letter of September 30, 1901. That letter, if written, informed the plaintiff that the judge would require the administrator to pay \$2,000 and the balance later. She denies having received this letter. Then on the 7th of October he wrote her the letter set out in full above. It appears from that letter that she had written him on the 2d of October, recognizing the doubtfulness of collecting the claim in full from the estate, and inquiring whether the bondsmen could not be required to make up the deficiency. He tells her that nothing can be made from them. He then recites the number of claims that had been filed and the number of suits pending, and details the assets of the estate, and tells what the widow is entitled to. He then says: "You can see from this that the estate will not likely pay in full any of the claims, and with the litigation recently instituted in the probate court, of which I made mention, and which in all probability will pass through the several courts before final determination, I would deem it advisable to accept the proposition that we have of \$2500.00 providing I can now secure it, as these suits will involve, no doubt, considerable expense, and delay the settlement of the estate for a year or two, thus a matter of necessity very much reduces the assets and incurs (increases) liability of this estate. \$2500.00 is the only offer I have had by way of settlement of your claim, and I do not believe that we could again procure a settlement more favorable as at the time this was made, the suits mentioned had not been instituted and were entirely unknown. My present opinion is that the estate will not finally pay to exceed 60% unless litigation is suddenly brought to a close, which there is no present indications, and my experience has taught me that this class of proceedings are usually, if not always, protracted." This letter conveyed only one meaning. It told her there was a likelihood that she would never collect all of her claim, probably not over 60 per cent. In another part of the letter he recommends that she accept \$2,500. This was a fraud. He admits that he knew at that time that her claim would be paid in full. The other letters



which he claims to have written of September 30th and of October 7th do not cure the misleading effect of this letter. He does not tell her in either letter that her claim has been allowed as a preference, and would in all probability be paid in full. In the letter of September 30th he begins by telling her that the administratrix will not pay the amount she had previously offered. He does tell her that he had seen the county judge, and that he will require her to pay \$2,000, and the balance at the close of the case, or when the costs and expenses could be estimated. He leaves the impression there that costs and expenses might interfere with her claim. In the other letter of October 7th, he tells her that, if she will wait for the balance from the administratrix, she will receive more than \$2,500 in the end. But was a statement of that sort without the assurance that her claim would be paid in full calculated to dissipate the fears or allay the uneasiness caused by the long letter of the same day, evidently written for the purpose of frightening her into assigning the claim to defendant's business associate? When to these letters are added the fact that the time defendant remitted to her the money due under the assignment of the claim from plaintiff he had \$2,000 in his hands belonging to her, that he knew when negotiating the assignment that the \$2,000 would be paid soon, and that all but \$250 that she received was her own money in the hands of her attorney at the time the remittance was made by him, it is impossible to escape the conclusion that his conduct in the matter was fraudulent.

[2] It is claimed that plaintiff must have learned from two letters written by Mrs. Bullion, the administratrix, that her claim was preferred. The first of these letters tells her that her attorney may be right in telling her the claim was paid before the others; that it is for the court to decide the question. In the second the administratrix informs her that she had told Mr. Sands she would compromise for \$2,500, but adds: "Changes have now occurred and I would not care to do this even if it is a preferred one. I am aware that preferred claims must be paid in full before any general claims just as well as you are, but this is no reason for paying every dollar on hand on your claim at this time, but I can pay probably \$2,000.00 on your claim and the balance when the estate is settled. I suppose the reason that no other surety was supplied by Mr. Bullion was because he had property enough to pay you and did not consider you were running any risk, which, of course, you are not, although you will be obliged to wait for a part of your money." There is a strong implication in this letter that the claim was preferred, but not a direct statement to that effect, and certainly nothing that the plaintiff would be required to believe as against the statement of her lawyer, whose advice and

assistance she was to pay for and in whom she had confidence.

[3, 4] It is also urged that she must have known the claim was a preferred one, because in her affidavit to the account which she filed with the administratrix she asked that it be allowed as a preferred claim. She denies that this request was in the affidavit when she signed it, and much testimony pro and con upon this point is in the record, but this is not a controlling question in the case. The fact that she asked that it be allowed as a preferred claim is not notice to her that it was so allowed. The fact remains that her attorney never told her it was allowed as a preferred claim, and in the letter in which he tells her he has given as complete statement as he can he does not say it was preferred, but, on the other hand, expresses doubt as to whether it will ever be paid and recommends a settlement. He cannot be heard to say that she should not have believed him. She had no other way to get information than by mail, and she would have been justified in accepting his statements as against that of the other parties, even though they had been much more specific in their statements than they were. Besides, she was not a lawyer, and would not have known, except in a general way, what effect as to payment a preference would have on her claim. Even though he had written that it was preferred, the letter of October 7th was of a nature to lead her to believe there was no certainty that she would be paid in full.

[5, 6] The next question presented is whether or not the plaintiff's cause of action is barred by the statute of limitations. The Nebraska statute provides that an attorney who is guilty of any deceitful collusion shall forfeit treble damages to the injured party, and the plaintiff demands treble damages in this case. If this action is one to recover a penalty, it is barred by the fourth subdivision of section 5550, Comp. L. 1909, which provided that an action on a statute for penalty or forfeiture shall be brought within one year. The plaintiff knew of the fraud that had been practiced upon her more than one year before this suit was brought. But she could not maintain the action for treble damages in the courts of this state, even though she had brought it within the year. It is well settled that the courts of one state will not enforce a penalty prescribed by the laws of another. *The Antelope*, 10 Wheat. (U. S.) 66-123, 6 L. Ed. 268; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239; *Jones v. Fidelity Loan & Trust Co.*, 7 S. D. 122, 63 N. W. 553. Penal laws have no extraterritorial force. *Western Trans., etc., Co. v. Kilderhouse*, 87 N. Y. 430; *Scoville v. Canfield*, 14 Johns. (N. Y.) 338, 7 Am. Dec. 467. The only cause of action she had here was for actual damages, and that was not barred until two years after she learned of the fraud.



Comp. L. 1909, § 5550, subsec. 3. Two years from the time she discovered the fraud had not elapsed at the time suit was brought. Therefore the action for actual damages was not barred.

[7] The allegations of the petition are sufficient to sustain a judgment for actual damages. The fact that it also prayed for the penalty does not prevent the court from rendering judgment for actual damages only. *Jones v. Fidelity Loan & Trust Co.*, 7 S. D. 122, 63 N. W. 553. "A plaintiff is entitled to relief to the extent that the averments of his petition are sustained by the proof." *Toy v. McHugh*, 62 Neb. 820. In *Minneapolis, etc., R. Co. v. Brown*, 99 Minn. 384, 109 N. W. 817, the court said: "If the complaint states a cause of action which entitles the plaintiff to some relief, it is not subject to demurrer because all the relief demanded may not be obtainable." In *Walker v. Fleming*, 37 Kan. 171, 14 Pac. 470, the court said: "The facts themselves determine what cause of action the petition states, and not what the pleader may call the cause of action founded upon those facts." In *Smith v. Kimball*, 36 Kan. 474, 13 Pac. 801, the court said: "However strongly a pleader may be bound, and however much he may be estopped by the averments of facts in the body of his pleadings, it is doubtful whether he is bound or estopped by his prayer for relief. He is supposed to know the facts upon which he predicates his action, and to state them as he understands them, but the relief to which he is entitled on the facts related is a question for the court, and over which he has no control." In *Mark v. Murphy*, 76 Ind. 534, the court said: "The fact that the appellant demanded more relief than he was entitled to ought not to defeat his right to recover any relief. The facts stated in his cross-complaint were sufficient to show that the mortgage in suit was a cloud upon the appellant's title to two-thirds of the premises, and that far forth they showed that he was entitled to the relief prayed for." See, also, *Smith v. Smith*, 67 Kan. 841, 73 Pac. 56; *Kleinschmidt v. Steele*, 15 Mont. 181, 38 Pac. 827; *State v. Tooker*, 18 Mont. 540, 46 Pac. 530, 34 L. R. A. 315; *McGillivray v. McGillivray*, 9 S. D. 187, 68 N. W. 316; *McClure v. La Plata County*, 23 Colo. 130, 46 Pac. 677; *Rutenic v. Hamaker*, 40 Or. 444, 67 Pac. 196. It would not be just to prevent the plaintiff in this case from recovering her actual damages for the fraud committed, because she asked for the penalty, and the penalty is barred by the statutes of limitations.

[8] The defendant contends that plaintiff is charged with notice of the fraud because the records of the court showed that her claim had been allowed as a preferred claim and paid in full more than three years before the action was brought, and that she is charged with the knowledge of what appear-

ed upon the record. Ordinarily this would be true, but this rule does not apply in this case. The plaintiff resided in New York and she had no access to the record, and her only means of getting notice of what the record contained was through information which it was the duty of the defendant to give her. The fact that he failed to give her the information which the record shows is an element of fraud in this case. She had a right to look to him for the information, and he cannot be heard to say that she is charged with knowledge of the record when he, in violation of his duty, failed to give her the information, but, on the other hand, misled her as to the condition of the estate.

The judgment should be reversed and here rendered in favor of the plaintiff for the sum of \$1,349.42, with interest at the rate of 7 per cent. per annum from the 16th day of November, 1901.

PER CURIAM. Adopted in whole.

(38 Okl. 300)

GOOCH v. GOOCH et al.

(Supreme Court of Oklahoma. June 10, 1913.)

(Syllabus by the Court.)

1. DIVORCE (§ 328\*)—FOREIGN DECREE—EFFECT ON PROPERTY RIGHTS.

Where a husband residing with his family in this state abandons his family, takes up his residence in another state, and brings an action for divorce, obtains service by publication, and the wife is not personally served, does not appear in the action, and is without actual knowledge of the pendency of the action, whatever effect a decree of divorce by such court may have upon the marital relation, such court is without jurisdiction by its decree to affect the rights that the wife and children have acquired as members of plaintiff's family in his property located in this state.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 831-834; Dec. Dig. § 328.\*]

2. HOMESTEAD (§ 81\*)—EXTENT.

By section 1, art. 12, of the Constitution, and section 3346, Comp. Laws 1909, the homestead of a family may consist of more than one tract of land, and may be owned by either husband or by the wife, or by both jointly, or one tract may be owned by one and the other tract owned by the other, so long as the aggregate number of acres occupied as a home does not exceed 160 acres.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 114-118; Dec. Dig. § 81.\*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3327-3336; vol. 8, pp. 7679, 7680.]

3. HOMESTEAD (§ 18\*)—EXEMPTION TO FAMILY.

The benefits of a homestead exemption provided by the foregoing provisions of the Constitution and of the statute are not reserved to the head of the family alone, but to the entire family, without regard to whether the husband or the wife is the owner of the title.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 22-27; Dec. Dig. § 18.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**4. HOMESTEAD (§ 81\*) — TITLE OF HUSBAND AS AGAINST FAMILY—RIGHT OF ACTION.**

Where the husband, without cause, abandons his family who were residing upon the homestead, he may not maintain an action of ejectment to dispossess his wife and family of said homestead or any part thereof.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 114-118; Dec. Dig. § 81.\*]

Error from Superior Court, Logan County; J. M. Sandlin, Judge.

Action by John A. Gooch against Polina B. Gooch and another. Judgment for defendants, and plaintiff brings error. Affirmed.

Devereux & Hildreth, of Guthrie, for plaintiff in error. Burford & Burford, of Guthrie, for defendants in error.

HAYES, C. J. Plaintiff in error, herein after referred to as plaintiff, brought this action originally in the court below to recover possession of a certain tract of land. The trial was to the court without a jury, who made findings of fact and conclusions of law, upon which he rendered judgment in favor of defendants.

The substantial facts are: That for several years prior to 1905 plaintiff was the owner of the N. W.  $\frac{1}{4}$  of section 14, township 17 N., range 17 W., of I. M., Logan county, and for several years said quarter section had been occupied by him and his family as the family homestead. On the 1st day of November, 1905, family discord having arisen, he executed a deed to defendant Polina B. Gooch, his wife, for the S.  $\frac{1}{2}$  of said quarter section of land, on which was the residence; and his wife executed to him her deed for the N.  $\frac{1}{2}$  of said quarter section. This deed was executed in pursuance of an agreement of separation by which the personal property of the family was also divided between them. In pursuance of the agreement, a fence was built upon the dividing line between the two tracts of land, and defendant Polina B. Gooch and the minor children, one of whom is defendant John H. Gooch, occupied the 80 acres deeded to her. Plaintiff left his family and departed from the state. After two or three years had elapsed, he returned to the state, took up his residence with his family, resumed the marital relation, and cohabited with his wife for a period of about one year. At the time of his return, or shortly thereafter, he told his wife that they might as well destroy the contracts and deeds, for they were no longer of any force; but the evidence fails to disclose that the same were destroyed, or that either ever reconveyed to the other the land theretofore conveyed by the deeds executed in 1905. The partition fence was torn down and plaintiff, with his children, cultivated the entire tract of land for about one year, and the same was occupied during that time and used by the family as its homestead. After the expiration of about one year, plain-

tiff suddenly disappeared, without the knowledge of any one. He departed from the state and took up his residence in the state of Missouri, where, after maintaining his residence for the statutory time required to obtain a divorce, he instituted an action against his wife for divorce and procured service by publication. He prosecuted this proceeding to a judgment in his favor. His wife never appeared in the action and was never served personally, and was without actual knowledge of the proceeding.

[1] The trial court found as conclusions of law that upon assuming the marriage relation the deeds executed by plaintiff and his wife became nullities, and plaintiff became vested with the title to the entire 160 acres of land; but that the residence of himself and family thereupon re-established the homestead upon the entire tract of 160 acres, and that the second abandonment by plaintiff of his family did not destroy the homestead rights of the family in the land, and the decree of divorce of the Missouri court is void. Considerable discussion by counsel for both parties in their briefs has been devoted to what effect should be given to the decree of divorce of the Missouri court by the courts of this state. Since it has been made clear by the evidence in this case that plaintiff abandoned his family who continued their residence in this state, it does not appear to us to be of material consequence what effect the courts of this state shall give to the decree of the Missouri court upon the marriage relation existing between plaintiff and his wife. Since there was no personal service upon her or appearance in the court rendering the decree, and she was not a resident of that state, although the decree may have restored plaintiff to the status of an unmarried man, the court was without jurisdiction by its decree to affect the rights his wife and family had acquired in the property he may have owned in this state. *Lynn v. Sentel*, 183 Ill. 383, 55 N. E. 838, 75 Am. St. Rep. 110; *Doerr v. Forsythe*, 50 Ohio St. 728, 35 N. E. 1055, 40 Am. St. Rep. 706.

[2, 3] We think the trial court committed error in his conclusion of law; that, when plaintiff returned to his home and reassumed the duties he owed to his family and cohabited with his wife, the deeds executed between them became abrogated. Although their agreement of separation may in part have been rescinded, in that they resumed the marital relation, the evidence fails to disclose that there was any return of all the other property involved in the agreement, or any act on the part of either reconveying his or her interest in the land theretofore conveyed. Treating plaintiff as the owner of the title to the north 80 acres of land, for possession of which he sues, and his wife as the owner of the south 80 acres

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



conveyed to her by his deed of 1905, the erroneous conclusion of law of the trial court above mentioned does not require a reversal of the cause. This is not an action brought by plaintiff to compel his wife and other members of his family to permit him to share and enjoy jointly with him the benefits of the homestead of the family, but he seeks to exclude them entirely from the possession and enjoyment of one-half of said homestead. The law of this state does not reserve the homestead to the head of the family. By section 1, art. 12, of the Constitution, it is provided: "A homestead of any family in this state, not within any city, town, or village, shall consist of not more than one hundred and sixty acres of land, which may be in one or more parcels, to be selected by the owner." And section 3346, Comp. Laws 1909, provides: "The following property shall be reserved to every family residing in the state exempt from attachment or execution and every other species of forced sale for the payment of debts, except as hereinafter provided: First, the homestead of the family, which shall consist of the home of the family, whether the title to the same shall be lodged in or owned by the husband or wife." Under these provisions, it seems to us clear that the homestead of the family may consist of more than one tract of land, and may be owned either by the husband or by the wife, or by both jointly, or one tract be owned by one and another tract owned by the other, so long as the aggregate number of acres occupied as the home shall not exceed 160 acres. The benefit of the homestead exemption was intended by these provisions to be vouched safe, not to the head of the family, but to the entire family, without regard to whether the husband or the wife is the owner of the title. When plaintiff returned to his home, tore down the partition fence between the land that he had deeded to his wife, and that she had deeded to him, and the family proceeded to occupy the entire tract as their home and to cultivate the same, it became the homestead of the family; and the right of the family therein cannot be destroyed by plaintiff's abandonment of his family. The authorities are numerous to the effect that the abandoned wife may claim the homestead exemptions; and that a husband cannot by absenting himself from his family disintegrate the family, or change the relation existing between the remaining members. *Hollis v. State*, 59 Ark. 211, 27 S. W. 73, 43 Am. St. Rep. 28; *McDannell v. Ragsdale*, 71 Tex. 23, 8 S. W. 625, 10 Am. St. Rep. 729; *Grace v. Grace*, 96 Minn. 294, 104 N. W. 969, 4 L. R. A. (N. S.) 786, 113 Am. St. Rep. 625, 6 Ann. Cas. 952; *Lynn v. Sentel et al.*, supra; *Roco v. Green*, 50 Tex. 483.

[4] To hold that a husband who deserts

his wife and minor children and refuses to them the care and support that the law imposes upon him may by such violation of his duties become entitled to the exclusive possession of the family homestead, or any part thereof, would be to turn his wrong into a profit, which the law will not do. There can be no doubt that so long as he continues a member of the family and discharges his duty toward them he may be permitted to occupy and enjoy jointly the benefits of the homestead with the members of his family; but the mere fact that he was the head of the family does not give him any superior rights therein, when he himself seeks to sever the family relation by desertion and lives apart from them. In *Ehrck v. Ehrck*, 106 Iowa, 614, 76 N. W. 793, 68 Am. St. Rep. 330, a wife chose to live apart from her husband. The family homestead had been set aside out of property owned by her. The court held that, so long as she chose to live apart from her husband, the husband had full right to live upon and cultivate the homestead; and that the wife was without power to set aside the selection of the homestead and restrain her husband from occupying and using the same. See, also, *Grace v. Grace*, supra.

From the foregoing views, it follows that the judgment of the trial court should be affirmed. All the Justices concur, except WILLIAMS, J., not participating.

(37 Okl. 792)

PERRYMAN et al. v. WOODWARD.

(Supreme Court of Oklahoma. March 19, 1912.  
On Rehearing, June 19, 1913.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§ 195\*)—ALLOWANCE TO WIDOW—ENTIRE ESTATE—EFFECT OF AWARD.

Where the owner of an estate, situated in Indian Territory, of less value in the aggregate than \$300, died in Indian Territory prior to statehood, an order of the United States court, exercising its probate jurisdiction, vesting the entire estate in the widow of decedent, was valid, and passed and vested in the widow, all of such estate both real and personal, under section 3 of chapter 1 of Mansfield's Digest of the Laws of Arkansas.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 724; Dec. Dig. § 195.\*]

(Additional Syllabus by Editorial Staff.)

2. EXECUTORS AND ADMINISTRATORS (§§ 181, 194\*)—ALLOWANCE TO WIDOW—"ESTATE"—VESTING.

Mansf. Ark. Dig. § 3, provides that, when a person dies leaving a widow or children and an estate not exceeding \$300, the court shall order that the estate vest absolutely in the widow or children, as the case may be, etc. *Held*, that the word "estate," as so used, means the whole mass of the intestate's property, both real and personal, so that, if at intestate's death the value is less than \$300, it is given by law

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



to the widow, and vests without an order of court.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 681-685, 713-723; Dec. Dig. §§ 181, 194.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2475-2488; vol. 8, pp. 7653-7654.]

**3. SPECIFIC PERFORMANCE (§ 46\*)—CONTRACT TO PURCHASE LAND—PAYMENT OF CONSIDERATION.**

Possession of land under a contract to purchase where the consideration has been paid entitles the purchaser to specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 128; Dec. Dig. § 46.\*]

**On Rehearing.**

**4. EQUITY (§ 412\*)—HEARING BEFORE MASTER—EVIDENCE—EXCLUSION—MASTER'S REPORT—EXCEPTIONS—RE-OFFER OF EVIDENCE.**

Under the law in force in the Indian Territory prior to statehood, where a copy of a judgment was offered in evidence before a master in chancery, excluded by him and exceptions saved by the party offering it, it was not error for the court upon sustaining the exceptions to the report of the master to consider the judgment so offered without re-referring the case to the master, where the judgment was copied into the report of the master, and was properly admissible in evidence.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 924-926; Dec. Dig. § 412.\*]

**5. INDIANS (§ 22\*)—INDIAN LANDS—IMPROVEMENTS—PATENTS—TITLE OF PURCHASER.**

Where a town lot in the Creek Tribe was scheduled to the owner of the improvements, and after his death was sold by the person in whom the law vested the improvements, and the payments due the tribe were paid by such purchaser, the patent from the tribe in the name of the deceased owner of the improvements inured to and carried title to such purchaser.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 47; Dec. Dig. § 22.\*]

**6. INDIANS (§ 39\*)—STATUTE LAW.**

Section 3 of chapter 1 of Mansf. Dig. of the Stats. of Ark. was not locally inapplicable and was extended over and put in force in the Indian Territory by Act Cong. May 2, 1890, c. 182, 26 Stat. 81, although repugnant to the Constitution of Arkansas so far as it affected homesteads; and an order of the probate court vesting the entire estate of a deceased person in the widow of the deceased was valid and effective where the entire estate did not exceed \$300 in value, though a portion of the estate consisted of improvements on a town lot occupied as a home.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 39.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Muskogee County; John H. King, Judge.

Suit by Patsy Perryman and others against Peggy Woodward to quiet title. Judgment for defendant, and plaintiffs bring error. Affirmed.

Blakeney & Maxey, Gibson & Thurman, Thomas & Foreman, and Benj. & Villard Martin, all of Muskogee, for plaintiffs in error. W. W. Momyer and Bailey & Wyand, all of Muskogee, for defendant in error.

BREWER, C. This suit involves the title to a town lot in Muskogee. It was brought as an equitable proceeding in the United

States Court for the Western District of Indian Territory on September 19, 1906, by the plaintiffs in error as plaintiffs against the defendant in error as defendant. Hereafter the parties will be referred to as they were known in the trial court. We summarize the facts, as follows: Plaintiffs were the adult children of one Squire Saunders. On June 4, 1900, Squire Saunders was in possession and occupying as a home lot 10, block 248, of the town of Muskogee, Creek Nation, Indian Territory, and was entitled under the acts of Congress relating to town sites to have said lot scheduled to him, and the preference right to purchase same at one-half its appraised value. That on said date June 4, 1900, said lot was so scheduled to him by the town-site commission. That on October 22, 1900, Squire Saunders died intestate, leaving a widow, Sarah Saunders, and the plaintiffs, his children, him surviving. That a patent to the land was issued in the name of Squire Saunders by the Principal Chief of the Muskogee (Creek) Nation approved by the Secretary of the Interior June 27, 1904. That on November 16, 1900, after the death of Squire Saunders, the United States court, in the exercise of its probate jurisdiction, made an order determining the value of the estate of Squire Saunders to be less than \$300, and vesting the same in the widow. About a month after this order was made the widow sold the property in controversy to the defendant, who paid the consideration, and went into possession of the property. No deed was executed. The defendant was in possession at the time of suit, and was not disturbed in her possession by the judgment in the case. The defendant after buying and taking possession of the property paid to the proper officers all the purchase price for the lot due the Creek Nation under the town-site law. The evidence was heard by a master in chancery, who made findings of fact and conclusions of law, and filed same, together with the evidence taken in the case. The master found in favor of plaintiffs. Exceptions were filed to the report, and after statehood the district court for Muskogee county, as successor of the United States court, heard the exceptions to the master's report and sustained same. The court made special findings of fact substantially as stated above, and that there was no equity in plaintiffs' petition. A decree was rendered in favor of the defendant. This appeal is prosecuted to reverse that decree.

[1] There are a number of assignments of error in this case, but they all depend in our judgment upon the question of the legal effect of the order made by the United States court on November 16, 1900. It is as follows: "In the United States Court for the Northern District of the Indian Territory, sitting at Muskogee. Probate No. 454. In

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



re Administration of the Estate of Squire Saunders, Deceased. Sarah Saunders, Widow. Order of Court. Now on this 16th day of November, A. D. 1900, the same being one of the regular judicial days of the September Term, the above-styled cause came on for hearing upon the report of Z. T. Walrond, probate commissioner, and the court, being advised in the premises, finds that said report should be sustained. Whereupon, it is considered, ordered, and adjudged by the court that, it appearing that the estate of said deceased does not exceed \$300, the said estate do vest absolutely in Sarah Saunders, the widow of said Squire Saunders, deceased. It is further ordered that the improvements on lot 10, block 248, of the town site in Muskogee, and the horse, saddle, and bridle, and the other personal property described in the petition of the said widow, are declared to be the property of the said widow, and that there be no administration granted upon the estate of the said decedent. The costs of this proceeding, including an allowance of \$5.00 made to the probate commissioner are taxed against the said Sarah Saunders. Approved. John R. Thomas, Judge. [Seal.] This order was made in pursuance of the law of Arkansas in force in Indian Territory at the time the rights of the parties to this suit arose. Mansfield's Digest Ark. § 3, c. 1, is as follows: "When any one shall die leaving a widow or children, and it shall be made to appear to the probate court that the estate of the deceased does not exceed three hundred dollars, the court shall make an order that the estate vest absolutely in the widow or children, as the case may be; and in all cases when the estate does not exceed eight hundred dollars the widow or children, as the case may be, shall be entitled to retain the amount of three hundred dollars of the property at cash price." If this judgment had the effect under the law in force at the time of passing the estate of Squire Saunders in the lot in controversy absolutely, and vesting same in his widow Sarah Saunders, then the judgment of the court in this case is not contrary to the law, or the evidence, the motion for new trial was properly overruled, the report of the master should not have been confirmed, and the judgment for defendant was correct, thus disposing of the main assignments of error urged by plaintiffs. We think it had such effect. The law of Arkansas being in force in Indian Territory at the time of the transactions shown in this record, the interpretation given the statute involved by the Supreme Court of that state prior to its adoption by Congress as a law in Indian Territory is controlling.

[2] This statute had been fully considered and construed by the Supreme Court of Arkansas before its adoption. In *Harrison v. Lamar*, 33 Ark. 824, it was held that the word "estate" used in the statute means the whole "mass" of decedent's property,

both real and personal, and that, if at the date of his death a decedent's property is of less than \$300 in value, it is given by the law proprio vigore to the widow, and that an order of the probate court is not necessary to vest it. This case also holds that a proceeding in the probate court to declare the estate in the widow is in rem, and that no notice to heirs is necessary, and that the order need not recite all the jurisdictional facts. We quote from the body of the opinion in the *Harrison Case*, supra: "There are no grounds for drawing a distinction between real and personal property in the construction of these acts. If there were any, the 'estate' must be considered as more aptly referring to real property. But under our system of administration, which regards the whole mass of property, real and personal, as assets for some purposes, in the hands of the administrator the word estate has acquired a wider application, in a popular sense, and in this sense, doubtless the Legislature meant to use it. It means the mass of property left by decedent, and if that in the aggregate, should be less than \$300 in value, the intention of the acts, taken together, is to give it to the widow, if living, or, if there be no widow, to minor children." And further: "It is a proceeding in rem, fixing the status of the property as to ownership, and declaring to all the world the course of devolution which, under the circumstances, the law gave to the property of the deceased. It did not vest the right so much as declare it, and it was not necessary that it should specify the personal property, or describe the lands by metes, bounds, or numbers. It carried the whole property without reserve, leaving nothing to be determined with regard to its identity, but the fact that it was part of the estate left by decedent." And further: "The statute does not prescribe any notice to be given to heirs or distributees. As to these small estates, they have no prima facie rights; the amount of the estate being admitted. They are taken out of the course of devolution prescribed to larger ones, and, there being no right to be divested out of them, there is no other reason for making them parties than that they should have the right to question the amount of the estate." And further: "The property by the order vested absolutely in fee simple in the widow." In *Hampton v. Physick*, 24 Ark. 562, the syllabus reads: "Although the probate court may fail to make an order vesting the entire estate of a deceased husband in the widow when it does not exceed \$300, she may, in a proceeding against her to account for the estate, show that it did not exceed that sum, and thus avail herself of the benefit of the statute." Other cases more or less in point are *Word, Adm'r, v. West*, 38 Ark. 243; *Smith et al. v. Allen*, 31 Ark. 268.

[3] It is well settled that possession of land under a contract of purchase where the



consideration has been paid entitles the purchaser to have specific performance of the contract. *Kellums v. Richardson*, 21 Ark. 137. Prior to the issuance of patent, the schedulee was the equitable owner of the lot under the doctrine of *De Graffenreid v. Iowa L. & T. Co.*, 20 Okl. 687, 95 Pac. 624. If *Squire Saunders*, the schedulee, after the lot had been scheduled to him, had conveyed it to another, as was done in thousands of cases in Indian Territory before the payments had been made and patents issued, would any one doubt but that his vendee would have taken all his estate in the lot? We think not. Then if the law, under the facts, provided a devolution of the property as an exception to the general rule, because of the insignificance of the estate, and by it passed the lot to the widow, she must have succeeded to his entire interest and estate in the lot. "One who sells land for which no patent has been issued by the government will upon issuance to him of the patent hold title as trustee for his vendee." *Moore v. Maxwell*, 18 Ark. 469; *Peay v. Capps*, 27 Ark. 163. If the law devolved the entire equitable ownership of this lot upon the widow, *Sarah Saunders*, and we hold that it did, and she conveyed it to defendant, and we hold that she did, then it would have been inequitable in a proceeding in equity to decree the possession, rents, and profits and a partition of the lot upon the prayer of those holding, at most, the naked legal title. "Equity regards that as done which ought to be done." A discussion of this maxim appropriate to the instant case is found in *Pomeroy's Equity Jurisprudence* (2d Ed.) § 375, as follows: "The principle is no less truly and directly the source of the equitable ownership regarded as held by the beneficiary in all trusts which arise by operation of law, resulting, implied, or constructive. Although the fiduciary relation is not created by the terms of any direct conveyance, devise, assignment, agreement, yet by the settled doctrines of the equity jurisprudence an equity exists between the parties which is treated as worked out; an obligation to convey the subject-matter rests upon the holder of the legal title, which is treated as though performed. Some modern judges of great learning and ability have said that the relations commonly known as 'constructive' or 'resulting' trusts are only trusts sub modo, are called trusts only by way of analogy, and for want of a better and more distinctive name. Even if this criticism upon the ordinary nomenclature be well founded, it does not deny, and was not intended to deny, the existence of the real, beneficial, equitable property in the beneficiary. He is admitted to be the equitable owner, with all the incidents of ownership, although the legal title is vested in another person. The beneficiary may not have anything which the law requires as a 'title,' he

may even be without any written evidence of his right, his proprietorship may rest wholly upon acts and words, but still he is the equitable owner because equity treats that as done which in good conscience ought to be done."

The remaining assignment of error relates to the action of the court in overruling plaintiff's motion to strike from the case made the order of the United States court, *supra*; this is brought to our attention by a bill of exceptions allowed by the court. This order appears in the testimony filed with the report of the master in chancery, and is followed by this statement of the master: "The foregoing testimony, together with the exhibits hereto attached, was all the evidence offered in the case. *Clark J. Tisdell, Master in Chancery.*" It appears in the body of the testimony, and is not merely exhibited as are certain other documents. There was no proof taken on the question as to this order being the identical one put in the evidence, and counsel has not argued the matter in their brief, nor suggested any good reason why the court should have stricken it from the evidence, and from examining the record we find none; and, the record being against the contention, it cannot be sustained.

Upon a review of the whole record, we have no doubt but that the decree of the court was equitable and just, and ought to be affirmed.

#### On Rehearing.

*ROSSER, C.* [4] Three grounds for reversal are urged in the petition for rehearing in this case. It is urged that the case must be reversed because the order of the probate court vesting the improvements on the lot in controversy in the widow of *Squire Saunders* was not received in evidence at the hearing before the master. The report of the master shows that the order was offered in evidence, but excluded by him. The order, however, is set forth at length in the report, and was considered by the court in passing upon the exceptions to the master's report. The record with reference to the order shows the following:

"By the Master: Case closed, with exception of a certified copy of the order in probate case of the estate of *Squire Saunders*, which it is agreed by Judge Thomas shall be introduced subject to his objection when he has seen it, and that made closes the case.

"Mr. Thomas: Plaintiff objects to the introduction and consideration of the certified copy of the order of the probate court in the matter of the estate of *Squire Saunders*, deceased, for the reason that said order related exclusively to the personal estate of *Squire Saunders* and not to real estate, and therefore is incompetent and inadmissible in this action for partition of real estate."

The master sustained the objection to the



order apparently upon the ground raised by the objection. The material portion of the order of court is as follows: "Whereupon it is considered, ordered, and adjudged by the court that, it appearing that the estate of said deceased does not exceed \$300, said estate be vested absolutely in Sarah Saunders, the widow of said Squire Saunders. It is further ordered that the improvements on lot 10 in block 248 of the township in Muskogee, a horse, saddle, and bridle, and the other personal property described in the petition of the said widow and declared to be the property of said widow, and that there be no administration granted upon the estate of the decedent." The question does not appear to have been specially called to the attention of the trial court in motion for new trial, unless by the general allegation of error that the judgment was contrary to law. It is claimed that the statutes prevented the court from considering the evidence offered as part of the record and required it to re-refer the matter to the master. Section 5269 of Mans. Dig. provides that: "If either party shall except to the competency of any witness, or to the admission or exclusion of any evidence, the master, if required, shall state the particulars of the exceptions in his report." Section 5273 provides that: "Exceptions may be allowed to the master's report where he admitted incompetent testimony, or where he excluded competent testimony, or for any other cause which may be adjudged good by the court, or when it shall be apparent from the face of the report that injustice has been done." Section 5274 provides that: "When exceptions are allowed, the court may refer the report to the master again, with such instructions as may be necessary." Section 5276 provides that: "Where exceptions have been allowed to the master's report, and the account shall have been restated by the court or master, a decree shall be entered accordingly." It will be seen from the section last quoted that the court, under the law in force in the Indian Territory prior to statehood, was not required to re-refer all cases in which exceptions are allowed. The court could pass upon the case without re-referring it; and this is the general rule. *American Freehold L. & Mort. Co. v. Pollard*, 132 Ala. 155, 32 South. 630; *McHenry v. Moore*, 5 Cal. 90; *Davis v. Roberts, Smedes & M. Ch. (Miss.)* 543; *Taylor v. Read*, 4 Paige (N. Y.) 561; *Gaines v. Brouckerhoff*, 136 Pa. 175, 19 Atl. 938; *Huston v. Cassidy*, 14 N. J. Eq. 320.

The order of the probate court vesting the property in the widow was offered in evidence. While the master excluded it, he copied it in his report, and sent it up to the court where it was treated as before the court. The judgment of the court was based upon it. It was not urged or contended that the probate order was not entered, or

that it was not in all respects regular. The only objection made to it was that it was made with reference to personal estate, and not real estate. Its existence is not challenged anywhere in the proceedings. It does not seem that the law would require the case to be reversed and sent back for the purpose of formally offering and receiving in evidence certified copy of the judgment which nobody disputes was entered, and which was offered in evidence and treated by the court as if it had been regularly offered in evidence. The court merely sustained the third exception urged by the defendant, which was that the master erred in refusing to admit the order of court in evidence, and refusing to consider it himself. As was said by Mr. Chief Justice Taney in the case of *Kelsey v. Hobby*, 16 Pet. 269, 10 L. Ed. 961: "There is no propriety in requiring technical and formal proceedings, when they tend to embarrass and delay the administration of justice, unless they are required by some fixed principles of equity law or practice, which the court would not be at liberty to disregard." The case is different from cases in which oral evidence offered has been excluded by the master. In those cases it must be referred in order that the party objecting may be allowed to cross-examine the witness, if his evidence is considered admissible. Even in those cases, according to the practice in most states, the witness may be offered before the court to be heard by him rather than have the case re-referred. But in the present case there was nothing to cross-examine. It was record evidence and the existence of the record was practically admitted, and it was considered by the court.

[6] It is next contended that the order did not pass title to the land to the defendants, and that the deed from the Principal Chief of the Creek Nation to Squire Saunders carried the title to his heirs, and not the defendant Peggy Woodward, who bought the property from his widow. Under the treaty with the Creek Nation, the right to buy the land from the government depended upon the ownership of the improvements on the land. The order of court vested the title to the improvements in Squire Saunders' widow, and she sold them to the defendant. The defendant then paid the purchase price to the Creek Nation. That vested her with full title. It is argued that, where the person in whose name the lot was scheduled died before receiving title, the deed from the Principal Chief conveyed the land to his heirs in the same way that it conveyed land to the heirs of a deceased allottee. This argument is based upon the language of section 23 of the Original Creek Treaty (Act March 1, 1901, c. 678, 31 Stat. 868), which is in part as follows: "The Principal Chief shall, in like manner and with like effect, execute and deliver to proper parties deeds of conveyance in all other cases herein provid-



ed for." It is claimed that this section gave the deeds to town lots the same effect that it did to patents or deeds to allottees. The deed in this case was made since the passage of Act April 28, 1906, c. 1876, 34 Stat. 137. The provisions of section 5 of that act are as follows: "That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs."

It is argued that under this section the patent from the Principal Chief vested the title in the heirs. This argument is not tenable. Section 5, Act April 28, 1906, was passed several years after the Original Creek Treaty was made, and section 5 of said act was intended to apply only to allotments. Allotments could not be sold prior to their selection, but there was no such prohibition with reference to the sale of town lots. They could be sold at any time, and thousands of titles in the towns on the Indian Territory side of the state would be rendered defective if it should be decided that a patent from the Principal Chief of the tribe conveyed the land to the heirs, notwithstanding they or the owner of the lot may have sold it prior to the execution of the patent. In such cases section 642 of Mans. Dig. (which was only declaratory of the common law) applied, and the patent inured to the benefit of the grantee of the patent. The heirs in this case inherited nothing, because the property was worth less than \$300, and vested in the widow.

[8] Lastly, it is urged that section 3 of chapter 1 of Mans. Dig., under which the defendant in this case claims that the order of the court vesting title in her grantor was made, was not in force in Arkansas at the close of the session of the General Assembly of the state of 1883, as published in 1884, in a volume known as Mans. Dig., because it was in conflict with the Constitution of Arkansas with reference to homesteads. It was held in Arkansas, in the case of Sansom v. Harrell, 51 Ark. 429, 11 S. W. 683, that, where the estate or a portion of it was homestead, it would not vest in the widow, although it might not exceed \$300 in value, because the devolution of the homestead was provided for by section 6 of article 9 of the Constitution of Arkansas, which provided that the homestead should vest in the widow during her natural life, with remainder to the children. But in the case of Chapple v. Gidney, 134 Pac. 859, No. 2684, recently decided by this court, it was held in an opinion by Mr. Justice Kane that the statutes mentioned in section 31, Act May 2, 1890, were extended over the Indian Territory if not locally inapplicable, whether they were in force in Arkansas or not. Section 3 of

chapter 1 of Mans. Dig. was not locally inapplicable, and it was extended over the Indian Territory, notwithstanding that it conflicted with the provisions of the Constitution of Arkansas referred to. The order of the court vesting the improvements in the widow of Squire Saunders was therefore valid, and conveyed title.

The former opinion affirming the judgment of the lower court is adhered to.

PER CURIAM. Adopted in whole.

(10 Okl. Cr. 638)

#### WIETELMANN v. STATE.

(Criminal Court of Appeals of Oklahoma.  
July 12, 1913.)

#### CRIMINAL LAW (§ 1182\*)—APPEAL—BRIEF—FAILURE TO FILE—AFFIRMANCE.

Where no brief has been filed or oral argument made when the cause is called for final submission in the Criminal Court of Appeals, the conviction will be affirmed on motion of the Attorney General.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 8203-3214; Dec. Dig. § 1182.\*]

Appeal from County Court, Oklahoma County; John W. Hayson, Judge.

F. Wietelmann was convicted of violating the prohibitory law, and he appeals. On motion to affirm. Sustained.

Edward A. Wagener, of Oklahoma City, for plaintiff in error. The Attorney General, for the State.

PER CURTAM. Plaintiff in error was convicted under an information which charged the unlawful selling of intoxicating liquor, and on the 29th day of January, 1912, he was sentenced in accordance with the verdict of the jury to be confined for 30 days in the county jail and pay a fine of \$50.

No brief has been filed or oral argument in behalf of the defendant made. When the cause was called for final submission, the Attorney General for this reason moved to affirm. The motion to affirm is sustained, and the cause remanded, with direction to enforce the judgment and sentence.

(9 Okl. Cr. 646)

#### JONES v. STATE.

(Criminal Court of Appeals of Oklahoma.  
June 28, 1913.)

#### (Syllabus by the Court.)

#### 1. CRIMINAL LAW (§ 1206\*)—CONSTITUTIONAL LAW (§§ 197, 203\*)—EX POST FACTO—PUNISHMENT.

The act of the Legislature providing that upon a second conviction for a violation of the prohibitory liquor law a higher punishment shall be inflicted is a reasonable classification which the Legislature had the power to make, and it is not ex post facto, although by its

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



terms it may be enforced against one whose former conviction occurred before its passage.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3271-3277, 3279, 3280; Dec. Dig. § 1206;\* Constitutional Law, Cent. Dig. §§ 550, 584-590; Dec. Dig. §§ 197, 203.\*]

**2. WITNESSES (§§ 318, 414\*)—HEARSAY EVIDENCE—IMPEACHMENT—SUPPORTING TESTIMONY.**

When the credibility of a witness is attacked, it may be supported by evidence that the witness had made similar statements about the time of the occurrence testified to; but, in the absence of any attack upon the credibility of a witness, his statements made out of court cannot be introduced against a defendant, and when so introduced upon a material question in a close case constitutes reversible error.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1084-1086, 1289; Dec. Dig. §§ 318, 414.\*]

*(Additional Syllabus by Editorial Staff.)*

**3. CONSTITUTIONAL LAW — "EX POST FACTO LAW."**

An "ex post facto law" is one which renders an act punishable in a manner in which it was not punishable when it was committed.

Appeal from County Court, Craig County; S. F. Parks, Judge.

Dave Jones was convicted of violating the prohibitory liquor law, and he appeals. Affirmed.

James S. Davenport, of Vinita, for appellant. Smith C. Matson, Asst. Atty. Gen., and C. Caldwell, Co. Atty., of Vinita, for the State.

**FURMAN, J.** This is a conviction for violating section 16 of the act of March 11, 1911 (Laws 1911, c. 70) relating to the illegal sale of intoxicating liquors. Said section is as follows: "For the second conviction for the violation of any of the provisions of this act, the penalty shall be a fine of not less than five hundred dollars nor more than one thousand dollars, and by imprisonment for not less than six months nor more than twelve months, and it shall be mandatory upon the trial judge, in cases where any one has been convicted under any of the provisions of this act, to pronounce sentence within ten days from the date of conviction."

The information in this case is as follows: "In the Name and by the Authority of the State of Oklahoma: Now comes C. Caldwell, the duly qualified and acting county attorney in and for the county of Craig, state of Oklahoma, and gives the county court in and for the said Craig county, state of Oklahoma, to know and be informed that heretofore one Dave Jones was indicted in the district court of the Second judicial district of the state of Oklahoma, sitting in and for Craig county, Okl., for the crime of selling whisky to one Dennis Holland in the county of Craig and state of Oklahoma, on the 10th day of October, 1910, and the said indictment against the said Dave Jones for said charge was by order of said district court transferred to the county court in and for Craig county, Okl., for

trial and final disposition, and that the said Dave Jones on the 11th day of April, 1911, personally appeared in open court in the said county court of Craig county, Okl., and entered his plea of guilty to said charge contained in said indictment, and was on the same date sentenced by said court to serve a term of 30 days in the county jail of Craig county, Okl., at hard labor, and to pay a fine of \$50 and costs and that thereafter the said Dave Jones, did, in the county of Craig, in the state of Oklahoma, on, to wit, the 21st day of July, in the year of our Lord, one thousand nine hundred and eleven, and anterior to the presentment hereof, commit the crime of selling, bartering, giving away, and furnishing spirituous, vinous, fermented, and malt liquor in the manner and form as follows, to wit: That the said Dave Jones in the county of Craig, and in the state of Oklahoma, on the 21st day of July, 1911, did knowingly and unlawfully sell, barter, give away, and otherwise furnish one pint of spirituous liquor, one pint of vinous liquor, one pint of fermented and one pint of malt liquor to William Hunt, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state of Oklahoma. C. Caldwell, County Attorney."

The jury returned the following verdict: "We, the jury duly impaneled and sworn to try the above-entitled cause, do upon our oaths find the defendant guilty of having been once convicted of violating the provisions of the prohibitory law of the state of Oklahoma, prior to the 21st day of July, 1911, as charged in the information. And we, the jury duly impaneled and sworn to try the above-entitled cause, do upon our oaths find the defendant guilty as charged in the information. F. M. Collins, Foreman."

Appellant was by the court sentenced to 12 months' imprisonment and to pay a fine of \$500.

[1] In his brief counsel for appellant says: "Section 16, p. 165, Sess. Laws 1910-11, can never be held by any court to authorize an increased penalty for the violation of the prohibition law, where the alleged first offense was committed under some pre-existing law." Counsel for appellant did not make any argument or cite any authorities in support of the position assumed. The contention of counsel for appellant is plausible upon its face, and as a matter of first impression we were inclined to agree with the position assumed upon the ground that the first offense having been committed prior to the enactment of the law could not constitute an element of an offense committed after the passage of the law. It is a well-settled rule of law that criminal statutes cannot have a retroactive effect, and cannot prescribe punishment for acts committed before their enactment. Neither can subsequent legislation

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



increase the punishment for past offenses. But upon further reflection and a critical analysis of the statute, we find that the first conviction is in no sense of the word an element of the second offense. The statute does not attempt to inflict any additional punishment for the first offense. The punishment is exclusively for the second offense. The second offense is complete within itself without reference to any acts which occurred before the enactment of the statute. When the second sale was made appellant knew of his previous conviction, and he was bound to take notice of the law. The first conviction is simply a fact which must be taken into consideration in fixing the punishment for the second offense, which was committed after the passage of the act. It simply requires the court or jury in fixing the punishment for the crime committed after the passage of the law shall consider the past conduct of the defendant. In other words it provides one punishment for ordinary offenders and a higher punishment for incorrigible offenders, and was intended to protect society from the continuous depredations of confirmed criminals. That the Legislature has the power to make such a classification cannot be denied. In this position we are supported both by the letter of the statute and the philosophy of the law.

We find a very able discussion of this question in the case of *Ex parte Gutierrez*, 45 Cal. 430, as follows:

"In 1872 the petitioner was convicted of the offense of petit larceny—a misdemeanor. On the 1st day of January, 1873, the present Penal Code went into effect, containing a provision, in substance, that any person convicted a second time of the crime of petit larceny shall be deemed guilty of a felony, and punished by imprisonment in the state prison. The commitment here sets forth, in the usual form, that the prisoner committed the offense of petit larceny on the 13th of January, 1873, and also that he had been previously convicted of the like offense, and thereupon directs that he be held to answer for felony. It was suggested, rather than urged for the prisoner, that it was not the intention of the Penal Code to take into account, for this purpose, a conviction of petit larceny, occurring anterior to the time at which the Code itself went into effect. There is, however, nothing to be found in the phraseology of the act which can be brought to the support of this view. Those who enacted this law have certainly made no distinction, upon its face, between convictions suffered before and like convictions suffered after the 1st day of January, 1873. Nor is there any principle of interpretation which will avail to restrain the general words of the statute for the benefit of the prisoner in this instance. The established rule of the common law undoubtedly was that statutes of the character of the one now un-

der consideration should receive a strict construction in favor of him upon whom a penalty was to be inflicted; but this rule has been abrogated by the Code, which has constituted itself, in this respect, its own interpreter. Section 4 of the Penal Code is as follows: 'The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects, and to promote justice.'

"1. I have remarked already that there is nothing to be found in the terms or language employed in the act which distinguishes between a first conviction of petit larceny and anterior to January 1, 1873, and such an one had after that day. The object of the Code, evident in this respect, was to protect society from the further depredations of an abandoned class of criminals infesting the cities and larger towns in the state, whose ordinary avocation is larceny, and whose severest punishment has heretofore been confinement in idleness and for inconsiderable periods of time in the county jail, escaping, of course, the graver, though well-deserved, consequences ensuing upon a conviction of a felony. Neither the purposes of justice nor a consideration of the object to be effected will, in my opinion, justify me in giving the Code the interpretation in this respect claimed by the prisoner.

"2. It is next claimed for the prisoner that the Penal Code, sought to be so applied here as to constitute the petit larceny charged against him a felony, is *ex post facto*, and so prohibited by the federal Constitution. Article 1, § 10. Undoubtedly if the purpose of the Code were to aggravate the punishment of a crime committed before the Code took effect, it would be obnoxious to the objection taken. But such is not the case. The offense to be punished by imprisonment in the state prison was one *committed since the Code took effect*. By the rule announced in the Code any person in the situation of the prisoner—that is, any person who had already been convicted of the offense of petit larceny—who should again, and subsequently to the taking effect of the Code, commit the offense of petit larceny, is to be deemed a felon, and punished by imprisonment in the state prison. The act to be punished is, however, only that act done by the prisoner after the Code took effect, and therefore in no sense can the Code be said to become *ex post facto* when applied to the case of the prisoner. The true principle in this respect is well expressed by Judge Cooley in his invaluable work upon Constitutional Limitations, as follows: 'And a law is not objectionable as *ex post facto* which, in providing for the punishment of future offenses, authorizes the offender's conduct in the past to be taken into the account, and the punishment to be graduated accordingly. Heavier penalties



are often provided by law for a second or any subsequent offense than for the first, and it has not been deemed objectionable that in providing for such heavier penalties the prior conviction authorized to be taken into account may have taken place before the law was passed. In such cases it is the second or subsequent offense that is punished, not the first,' etc.

"The adjudicated cases are believed to be uniform in support of the principle of constitutional law, as thus enunciated in the text-book referred to. Among these cases are *Rand v. Commonwealth*, 50 Va. 738, in the Supreme Court of Appeals of Virginia, and *Ross' Case*, 2 Pick. [Mass.] 165, in the Supreme Judicial Court of Massachusetts. Neither of these cases at all distinguishable in its circumstances (so far as those circumstances relate to the point in hand) from the case of the prisoner here. In each of them the statute under which the severer punishment was imposed was enacted *intermediate the first conviction and the commission of the second offense*.

"It results that the prisoner must be remanded; and it is so ordered."

The Supreme Court of New York took the same view of this question in the case of *People v. Raymond*, 96 N. Y. 39, as follows: "That no offense can be considered a second offense under the Penal Code unless it appears that the first offense charged is a crime under such Code by reason of section 719, and the first offense here was before the Code went into operation, is a contention without adequate foundation. The first offense was not an element of or included in the second, and so subjected to added punishment, but is simply a fact in the past history of the criminal, which the law takes into consideration when prescribing punishment for the second offense. That only is punished."

[3] In the case of *State of Iowa ex rel. Gregory v. Jones* (D. C.) 128 Fed. 626, we find the following:

"The contention of the prisoner is that the statute of 1898, as construed and enforced against him, is an ex post facto law. The entire strength of the argument is that the last 15 years of the imprisonment imposed upon him were because of crimes committed prior to the enactment of the statute of 1898. And while it is not material, he seeks to strengthen his claim that not only were his three crimes committed prior to the enactment of that statute, but that he had wholly served the terms of imprisonment imposed for those three crimes before the action of the Legislature of 1898. Prior to the argument of the case at bar, and before reading the decisions of the courts upon the question, it seemed quite plausible that Gregory, under the judgment now assailed, is being imprisoned for 5 years or less for the stealing of the mule in Pottawattamie county in 1899,

and for 15 years or more for his larcenies prior to 1898. But plausible as this statement is, it is only plausible, and not a correct statement. It is unsound. Const. U. S. art. 1, § 9, provides that Congress shall not enact an ex post facto law, and by section 10 of the same article it is provided 'no state shall \* \* \* pass any ex post facto law.' And what is an ex post facto law? In *Fletcher v. Peck*, 6 Cranch, 87, 3 L. Ed. 162, Chief Justice Marshall said: 'An ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed.' A better, or more accurate definition has not been given. From this definition it is seen that the punishment provided for when the crime was committed is the punishment that must be imposed. If no punishment was then provided for, none can be imposed by subsequent legislation. If punishment was then provided for, subsequent legislation cannot be enacted, increasing the punishment, and such legislation can only refer to subsequent crimes. The punishment can be lessened, but never increased, as against any one, for a crime already committed. No more beneficent provision is found in the Constitution for the protection of the individual, and it must be and will be enforced on behalf of the bad citizen or criminal as well as for the good citizen.

"But the learned counsel of the relator concedes that the statute of 1898 is within the Constitution, and therefore valid, but claims that it is only valid when it relates to other convictions committed after the enactment of the statute. But the authorities are against him, whatever might be urged if it were an original question. *Kelly v. People*, 115 Ill. 583, 4 N. E. 644, 56 Am. Rep. 184, is in a measure in point, although it does not go to the extent as claimed. The federal constitutional provision was not relied on nor discussed in that case. But the case of *Commonwealth v. Graves*, 155 Mass. 163, 29 N. E. 579, 16 L. R. A. 256, is in point. In that case the offense pleaded as a prior conviction was committed prior to the enactment of the statute under which the convictions appealed from were enacted. And it was held that the statute, as thus construed, was not an ex post facto law. *Sturtevant v. Commonwealth*, 158 Mass. 598, 33 N. E. 648, is of like holding. And so is *In re Miller* [110 Mich. 376], 68 N. W. 990 [34 L. R. A. 393, 64 Am. St. Rep. 376]. *Blackburn v. State*, 50 Ohio St. 428, 36 N. E. 18, is squarely in point. In that case the defendant was indicted for breaking and entering a building with intent therein to commit larceny April 4, 1890. The indictment also pleaded two former convictions of felonies, one of June, 1881, and the other of October, 1886. The statute was of date May, 1885. So that one of the prior offenses, and convictions as well, was of a prior date to the enactment of the statute. The prisoner



urged the point that the statute, as applied to him, was an *ex post facto* law. The jury finding him guilty as charged, and finding the allegations of the indictment as to the prior convictions to be true, he was sentenced to the penitentiary for life. The judgment was affirmed by the Ohio Supreme Court.

"*Moore v. State of Missouri*, 159 U. S. 673, 16 Sup. Ct. 179, 40 L. Ed. 301, by argument, at least, is in point. The indictment charged a felony as of date May 28, 1893. It also set forth a prior conviction of a felony. The date of the enactment of the statute in question is not given, and therefore it will be assumed that it was prior to the commission of the first offense. The defendant, by reason of the crime charged and the former conviction, was sentenced to prison for life. So far as appears from the opinion, it was not urged that the statute was an *ex post facto* law. At all events, that question was not discussed in the opinion. The point decided was that the statute was not in conflict with the fourteenth amendment. Therefore it cannot be said that the case is an authority on the point now before this court. But the fact is that by argument, at least, much of what is said by the Chief Justice is persuasive on the question now presented, and is worthy of being considered in the case at bar.

"It is always with satisfaction that quotations are made from Cooley's *Constitutional Limitations*—one of the few really great text-books. That work (7th Ed., at page 383) recites: 'And a law is not objectionable as an *ex post facto* which, in providing for the punishment of future offenses, authorizes the offender's conduct in the past to be taken into the account, and the punishment to be graduated accordingly. Heavier penalties are often provided by law for a second or any subsequent offense than for the first, and it has not been deemed objectionable that, in providing for such heavier penalties, the prior conviction authorized to be taken into the account may have taken place before the law was passed. In such case it is the second or subsequent offense that is punished, not the first; and the statute would be void if the offense to be actually punished under it had been committed before it had taken effect, even though it was after its passage.'

"From these authorities it will be seen that a prisoner is convicted and sentenced for the one crime charged, and is not convicted on account of or for the prior crime or crimes. But he is convicted of the crime charged, and as belonging to a class of incorrigibles, for whom punishment does no good—a class into which the accused has voluntarily brought himself, and as against whom society has the right to be protected by placing him for the balance of his life where he cannot prey upon the people. In

this case it was fortunate for Gregory that his sentence was for but 20 years, instead of for life, as it could have been—fortunate because at the end of 20 years, with four convictions behind him, he will have one more chance in life.

"A law is also *ex post facto*, and therefore void, if it alters the rules of evidence, and allows less or different testimony than the law required at the time of the commission of the offense in order to convict the accused. It is therefore urged that the statute changes the rules of evidence, and is therefore void. But this point has already been covered.

"The prisoner was convicted for stealing the mule in Pottawattamie county in the year 1899, after the enactment of the statute, and in stealing the mule, thereby, by his own act, he brought himself into a class of thieves, as distinguished from those not yet classified by judicial records. As already observed, the statute in question covers cases wherein the accused has been twice before convicted.

"The indictment against Gregory recited that he had been three times before convicted, and the trial jury, by special verdicts, found the allegations to be true. And because of such allegations and special verdicts it is claimed that the judgment is void. This cannot be so. It is a familiar, and perhaps elementary, rule of criminal law and pleading that the greater includes the lesser, the same as in mathematics. If he had been three times before convicted, as, of course, he had been twice before convicted, then the indictment would have been good, and the special verdicts valid, if innumerable convictions had been pleaded and proven. Two prior convictions would bring the accused into the class, and 20 prior convictions would do no more. But all this was a question for the Pottawattamie district court, subject only to review by the Iowa Supreme Court, and with which this court has no concern."

The case of *State v. Adams* will be found in 132 Pac. 171, of June 9, 1913. The Supreme Court of Kansas passed upon this very question and said: "Under page 165, Laws 1911, providing a punishment for persistent violators of the liquor law, it is not necessary that the former conviction which aggravates the second offense should occur subsequent to the date upon which the statute became effective. \* \* \* Former conviction of crime is a sufficient basis for the classification of offenders with respect to the severity of the punishment they shall receive. 'The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again con-



victed.' *Graham v. West Virginia*, 224 U. S. 616, 623, 32 Sup. Ct. 583, 585 (56 L. Ed. 917)."

The following authorities are to the same effect. *Com. v. Graves*, 155 Mass. 163, 29 N. E. 579, 16 L. R. A. 256; *Rand v. Com.*, 50 Va. 738; *People v. Butler*, 3 Cow. (N. Y.) 347; *Ross' Case*, 2 Pick. (Mass.) 165; *Com. v. Hughes*, 133 Mass. 496; *Com. v. Marchand*, 155 Mass. 8, 29 N. E. 578.

[2] Second. The state placed William Hunt and Cecil Hunt on the stand as witnesses, and they testified to having purchased whisky from appellant at the time mentioned in the information. The state then placed D. A. Reed on the stand, who testified that he was a policeman in the city of Vinita. He then proceeded to testify as follows: "Q. Do you know William Hunt and Cecil Hunt? A. I know them now, I never seen them before that time. Q. I will ask you if you saw them on or about the 21st day of July, 1911? A. Yes, sir. Q. Just tell the court and jury about it. (The defendant objects to this witness telling anything about William Hunt and Cecil Hunt, unless they were in company with this defendant, for anything that might have happened after the transaction could not be admissible in an offense of this defendant, which objection is overruled, to which ruling of the court the defendant duly excepted). A. Well, on the 21st of July, along between 3 and 4 o'clock I think it was, I was about probably 40 or 50 steps of Mr. Tittle's cab barn, when these two boys passed me going south on Second street. They stopped at Mr. Tittle's barn, and they were around there probably five minutes, maybe a little longer, I didn't just time them, and finally they went south on Second street to Delaware, and after turning the corner on Delaware I went down north on Second and around on Canadian and met them on First street. They went south, and I went north and west. They went west and north. We met on First street. I asked them if they had any whisky. Mr. Hunt said he had a pint. (The defendant moves to strike the conversation between this witness and William Hunt from the record, on the ground that it fails to disclose that the defendant was present when this conversation took place, and any conversation between this witness and the witness William Hunt, in the absence of the defendant, would not be admissible against the defendant, which objection is by the court overruled, to which ruling of the court the defendant objects. Motion denied by the court, to which ruling of the court the defendant duly excepted.) Q. Did you see whether or not he had any whisky? A. Yes, sir. Q. What did he have? A. A pint of whisky. (The defendant objects to that, and moves to strike the answer from the record as not in any way connecting this defendant with the pint of whisky, which

objection and motion are overruled by the court, to which rulings of the court the defendant duly excepted.) Q. Which one had the whisky? A. William Hunt."

Counsel for appellant strenuously objects to this testimony upon the ground that it is hearsay, and that it is permitting statements made by the witness Hunt out of court, and not in the presence of appellant, to be introduced in evidence against appellant. If the court had allowed any statements made by the witness Hunt to the effect that he had purchased the whisky found in his possession from appellant, then this objection would have been good, for the law is that statements made by a witness out of court are not admissible in evidence against the defendant, unless the credibility of such witness is attacked. Under these conditions the statements made by a witness out of court, about the time of the transaction with reference to which he testifies, may be introduced, not as evidence of the guilt of a defendant, but solely for the purpose of sustaining the credibility of such witness. But this is not the case before us. The witness Reed did not testify to any statements made by the witness Hunt as to when, where, or from whom he had obtained the whisky which was found upon his person. The testimony simply shows that the witness Reed had watched the Hunt boys, and that upon their coming from the place where appellant was, he arrested them and found whisky in their possession. There was no issue as to the truthfulness of Reed's testimony, and we think that the fact that William Hunt was found in possession of whisky just after leaving the place where the appellant was, was a proper circumstance for the consideration of the jury.

We find no error in the ruling of the court, and the judgment is affirmed.

ARMSTRONG, P. J., and DOYLE, J., concur.

(9 Okl. Cr. 689)

DE FREECE v. STATE.

(Criminal Court of Appeals of Oklahoma. June 30, 1913.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§ 236\*) — ILLEGAL SALE—EVIDENCE.

See the opinion for evidence held insufficient to sustain a verdict and judgment of conviction for the unlawful sale of intoxicating liquor.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 300-322; Dec. Dig. § 236.\*]

Appeal from County Court, Love County; R. A. Keller, Judge.

J. N. De Freece was convicted of violation of the prohibitory law, and brings error. Reversed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Eddleman & Graham, of Marietta, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

DOYLE, J. This appeal was prosecuted from a conviction had in the county court of Love county on the 20th day of January, 1912, in which, in accordance with the verdict of the jury, the defendant was sentenced to be confined in the county jail for 30 days and pay a fine of \$50. The only question presented is whether the judgment of conviction is supported by the evidence.

The only witness for the state was Geo. S. Newell, who testified as follows: "I live six miles east of Orr, near Simon; have known the defendant 10 years; he has been my family physician in years past. I was in his drug store at Orr, on or about October 23d, and bought 15 cents worth of medicine, and said to him, 'I would love to have a P. T.' He walked back in the back of the drug store then—and I walked back there, and picked up a package, and walked out. I don't think he said anything at all; he was busy there; I do not know what he said. The package was a pint of whisky. I went back to the drug store, and put \$1.15 down on the counter. I think Bob Cartright picked it up. The defendant was not present when I paid the money."

On cross-examination he said he brought cotton to the gin, and that Mr. Greenway went to Orr with him; that on his way home he went by Mr. Greenway's, and found Sheriff Al J. Davis there; that in going to town that morning he had been drinking.

On behalf of the defendant Mr. Greenway testified that he went to town with Mr. Newell on a load of cotton; Mr. Newell laying down, and witness driving; that Mr. Newell was sick and throwing up, and his breath smelled like mean whisky to him; that he drove the wagon to Palmer's Gin and got off and left him there; that Mr. Newell was drunk when he got back to witness' house that evening.

On cross-examination he said he was born in North Carolina, lived in Texas, had never been convicted of a crime; that he drove Newell's wagon back with the cotton seed in it, and Newell returned in Less Harrington's wagon; that when witness got ready to start home Newell had not sobered up, he still staggered; that this was the only time he went with him to town.

Henry Power testified that he was acquainted with the prosecuting witness, Newell, and met him near Mr. Greenway's the day Mr. Greenway went with him to town; that Newell had cotton in the wagon, and seemed like he was drinking. He had a bottle of whisky two-thirds full, and asked witness to take a drink; that he then went on in the direction of Mr. Greenway's house.

Will Hodges testified that he was acquainted with the prosecuting witness, Newell, for

about three years; that "on the day in question I met him in Orr and took him to be intoxicated; he had a bottle of whisky and offered me a drink, and I told him that I did not want any, that he had better be careful or he would get it taken away from him, and Newell said: 'I will put this in Dr. De Freece's store.' When I met Newell he was coming from Palmer's Gin, and when he left me he went towards the defendant's drug store."

The defendant took the stand, and testified that he is a physician and pharmacist with a drug store in the town of Orr; and swore positively that he had never been engaged in the sale of whisky; that he never did, at any time, furnish or sell intoxicating liquor to the prosecuting witness or any other person; that he had been engaged in the drug business about six years, a part of the time at Fletcher, Okl.

On cross-examination he was asked: "Q. Can you account for Geo. Newell coming here and testifying as he has against you that he got this bottle of whisky from you that day? A. I don't know why he did it; I guess that he thought that would clear him from the transaction. Q. You think that would make Geo. Newell lie? A. I don't know."

There was no effort made to impeach any of the witnesses for the defendant, all of whom seem to be creditable men; and, on the part of the only witness for the state, we have the fact that he himself testifies to having drank whisky on his way to town that day; and we must take this into consideration in determining how far we shall credit his statement that the defendant had permitted him to take a pint of whisky from his drug store, as against the strong defense which was presented by the defendant, not only supporting his denial of having delivered the pint of whisky to the prosecuting witness, but showing that said witness was intoxicated, and in possession of a bottle of whisky before he went to the defendant's drug store.

While the cases are very rare in which this court interferes to disturb the judgment of the trial court, and it is only in a case where the verdict is clearly contrary to the evidence, or when from the doubtful character of the evidence against the defendant and the preponderance in his favor is such that it is evident that the jury were influenced by passion or prejudice, that a judgment will be reversed because the evidence is insufficient to sustain it. In this case, we think that the evidence, unless we are to discredit entirely the testimony of unimpeached witnesses, falls within the rule laid down by these cases, and that a new trial should be granted. The judgment is therefore reversed.

ARMSTRONG, P. J., and FURMAN, J., concur.



(10 Okl. Cr. 12)

## NICHOLS v. STATE.

(Criminal Court of Appeals of Oklahoma. July 8, 1913.)

*(Syllabus by the Court.)*

## CRIMINAL LAW (§ 510\*)—CONVICTION—EVIDENCE OF ACCOMPLICE.

To allow a conviction to stand upon the testimony of an accomplice not corroborated by any other evidence tending to connect the defendant with the commission of the offense would be in direct violation both of the letter and spirit of section 5884, Rev. Laws 1910, Procedure Criminal. The requirement of the law in this respect cannot be satisfied by any amount of corroborate evidence which does not tend to connect the defendant with the commission of the offense charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124-1126; Dec. Dig. § 510.\*]

Appeal from County Court, Craig County; S. F. Parks, Judge.

Charles Nichols was convicted of violation of the prohibitory law, and appeals. Reversed and remanded.

Edw. H. Brady, of Vinita, for plaintiff in error. The Attorney General, for the State.

DOYLE, J. The plaintiff in error, Charles Nichols, and one Roscoe Barney were jointly charged by information, filed February 15, 1911, with the unlawful sale of one pint of whisky to Lee Wilson, on the 11th day of February, the same year. On April 3d, plaintiff in error appeared, waived arraignment, and entered a plea of not guilty, and the case was set for trial on the next day. April 4th, the court on a motion of the state granted a severance and the state elected that plaintiff in error be first tried. Thereupon he filed an application for continuance. The affidavit in support of his application states that Ad Holden, who resides at Centralia, Craig county, is a material witness in his behalf, and if present would testify that he was with this defendant from 9 o'clock in the morning of said day until 9 or 10 o'clock that evening, and knows that this defendant did not sell, barter, give away, or otherwise furnish any intoxicating liquor to Lee Wilson, and that this defendant was not at the place where it was claimed that he sold the liquor, and that said testimony is true and that said witness can be secured by the next term of court, and that said facts cannot be proven by any other witness; that when the case was set for trial the day before he caused a subpoena to be issued and delivered to the sheriff; that Centralia is 22 miles distant from Vinita and the roads between are now almost impassible and that the sheriff has been unable to serve said subpoena, and the defendant has not had sufficient time to secure this evidence. Which application was overruled and exception allowed.

Wesley Mowrey, the first witness for the state, testified that he was 14 years of age; that on February 11th between 7 and 8 o'clock p. m. he was with Lee Wilson at the Star barn in Centralia, and there met Roscoe Barney, and Lee Wilson bought a half pint of whisky from Roscoe Barney; that he did not know the defendant Charles Nichols.

Lee Wilson testified that he was 14 years of age, did not know the defendant Charles Nichols, but knew Roscoe Barney; that on Sunday evening he, with Wesley Mowrey, was at the Star barn and asked Roscoe Barney if he could get them some whisky and he said he thought he could get a little from Nick; that he gave him 50 cents and he went to the Johnston Hotel and returned with a half pint of whisky and gave it to them.

Thereupon the state asked for a dismissal of the case as to the defendant Roscoe Barney, and it was so ordered by the court. Roscoe Barney was then called as a witness on behalf of the state and testified that he lived at Centralia; had worked five or six months at the Star livery barn for Frank Nix. That Lee Wilson and Wesley Mowrey came to the barn about 8 o'clock that evening and they wanted whisky, and he went over to the hotel and called Mr. Nichols out and got a half pint of whisky from him, paid him 50 cents for it, and brought it back and gave it to the boys. On cross-examination he stated that he left the county about that time.

Charles Nichols, the defendant, as a witness in his own behalf, testified that he lived on his farm six miles west of Centralia, and he never did at any time sell or furnish whisky to Roscoe Barney, that he never did see Lee Wilson until he testified as a witness in this case, and knew nothing about Roscoe Barney selling or furnishing whisky to Lee Wilson.

The jury returned a verdict finding the defendant guilty as charged in the information. Motion for new trial was duly filed, and overruled on April 8, 1912, at which time the court pronounced judgment, and sentenced the defendant to be confined in the county jail for four months and to pay a fine of \$500. From the judgment the defendant appealed by filing in this court, May 23, 1912, his petition in error with case-made.

We have not been favored by either a brief or oral argument in behalf of the defendant. The petition sets forth 29 assignments of error, and from our examination of the record it would seem that each and all are well taken. However it suffices for the disposition of this appeal to say that the verdict and judgment are not supported by the law and the evidence. There was no evidence adduced that tended to connect the defendant with the commission of the offense charged.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ed, except that of his codefendant, who upon his own testimony is an accomplice, and a verdict of guilty upon the uncorroborated testimony of an accomplice is contrary to law and the evidence. *Thompson v. State*, 132 Pac. 695; *Hoad v. State*, 131 Pac. 937.

Our view of the evidence necessarily disposes of and determines the case; however, it is apparent from the record in this case that the most simple and plain rules of evidence and procedure were disregarded upon the trial. A record of this kind, we should not pass by in silence, lest our silence should be interpreted into an indorsement of, or indifference to, such practices.

We think it was an abuse of discretion to permit the severance and to overrule the application for a continuance upon the showing made. But assuming that the action of the court on these matters did not constitute error, owing to the charity which may be indulged in on account of the mistaken view on the part of the county attorney that he might be able to connect the defendant with the sale of the whisky to these boys by Roscoe Barney, but after they had testified positively that Lee Wilson bought the whisky of Roscoe Barney the county attorney should have known that he could not make a case against the defendant on the uncorroborated testimony of an accomplice, and for this reason the court erred in permitting the county attorney to dismiss the case against Roscoe Barney. As clearly it was a miscarriage of justice to grant immunity to Roscoe Barney, when the evidence of his guilt was undisputed. The rule of law forbidding a conviction upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense is under the statute (section 5884, Rev. Laws) positive and peremptory.

The state only demands the punishment of a citizen when his guilt has been clearly established according to the forms and rules of law prescribed for ascertaining his guilt. It is not to shield the guilty, but to protect the innocent that courts are steadfast in upholding the forms and rules of law by which it may be lawfully determined who are guilty. A fair trial is a legal trial, or one conducted in all material things in substantial conformity to law. And one of the first lessons which a county attorney should learn is that the state does not expect and will not tolerate the use of any unfair means or methods to secure the conviction of one charged with crime. If a conviction of the defendant cannot be had fairly, then the state does not ask for a conviction, because such a conviction would be tainted with, if not founded upon, injustice and wrong. An unfair trial in a criminal case is a reproach of the administration of public justice and casts grave responsibility not only upon the

prosecuting attorney, but also upon the trial judge.

Because the evidence, independent of the testimony of the codefendant Roscoe Barney, does not tend to connect the defendant with the commission of the offense charged, the judgment of the county court of Craig county herein is reversed and the cause remanded with direction to dismiss.

ARMSTRONG, P. J., and FURMAN, J., concur.

(10 Okl. Cr. 28)

# YOTA v. STATE.

(Criminal Court of Appeals of Oklahoma. July 12, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1070\*)—APPEAL—DEATH OF APPELLANT—ABATEMENT.

In a criminal prosecution, the purpose of the proceeding being to punish the defendant in person, the action must necessarily abate upon his death; and where it is made to appear to the court that a plaintiff in error has died, pending the determination of his appeal, the cause will be abated.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2700, 2701; Dec. Dig. § 1070.\*]

Appeal from District Court, Latimer County; W. H. Brown, Judge.

Levi Yota was convicted of grand larceny, and appeals. Prosecution abated.

Charles H. Hudson, of Wilburton, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for the State.

DOYLE, J. Plaintiff in error, Levi Yota, was tried on an indictment by which he was charged with the theft of \$123, the personal property of Sophia Carr; and on the 14th day of October, 1911, in accordance with the verdict of the jury, he was, by the court, sentenced to be imprisoned in the penitentiary for a term of 18 months. To reverse the judgment an appeal was perfected by filing in this court on April 11, 1912, a petition in error with case-made.

Since the appeal was taken, and before the final submission of the cause, to wit, April 15, 1913, he departed this life, as shown by the affidavits of Ben Hoklotubbu and Silas Pusley, who depose and say that they personally knew and were well acquainted with the plaintiff in error, Levi Yota, for 20 years during his lifetime, and that he died at his home near Blanco, Pittsburg county, Okl., on said date. These affidavits are attached to and made a part of the suggestion of the death of the plaintiff in error, made by the Attorney General, and filed in this court on July 3, 1913.

In a criminal action, the purpose of the proceeding being to punish the defendant in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 133 P.—17



person, the action must necessarily abate upon his death. It is therefore considered that the proceedings in this prosecution do abate.

It is so ordered.

ARMSTRONG, P. J., and FURMAN, J., concur.

(10 Okl. Cr. 1)

COPELAND et al. v. STATE.

(Criminal Court of Appeals of Oklahoma.  
July 5, 1913.)

(Syllabus by the Court.)

1. ADULTERY (§ 4\*)—PERSONS ENTITLED TO PROSECUTE.

Except where persons are living together in open and notorious adultery they cannot be prosecuted under the laws of Oklahoma unless such prosecution is commenced and carried on by the wife or husband of one or the other of the offending parties.

[Ed. Note.—For other cases, see Adultery, Cent. Dig. §§ 8, 9; Dec. Dig. § 4.\*]

2. LEWDNESS (§ 1\*) — PERSONS ENTITLED TO PROSECUTE—"OPEN AND NOTORIOUS ADULTERY."

To constitute living together in open and notorious adultery the parties must reside together publicly, in the face of society, as if the conjugal relations existed between them, and their illicit intercourse must be habitual.

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. §§ 1-4; Dec. Dig. § 1.\*]

Appeal from District Court, Delaware County; John H. Pitchford, Judge.

J. R. Copeland and another were convicted of living together in open and notorious adultery, and they appeal. Reversed.

Preston S. Davis, of Vinita, for appellants. Smith C. Matson and C. J. Davenport, Asst. Attys. Gen., for the State.

FURMAN, J. The prosecution in this case is under section 2431, Rev. Laws 1910, which is as follows: "Adultery is the unlawful voluntary sexual intercourse of a married person with one of the opposite sex; and when the crime is between persons, only one of whom is married, both are guilty of adultery. Prosecution for adultery can be commenced and carried on against either of the parties to the crime only by his or her own husband or wife, as the case may be, or by the husband or wife of the other party to the crime: Provided, that any person may make complaint when persons are living together in open and notorious adultery."

The evidence in the case discloses that appellant Riley Copeland was a married man and had a living wife from whom he was not divorced. The testimony for the state is all circumstantial, and at best there is only one act of adultery testified to.

[1] Counsel for appellant requested the court to instruct the jury as follows: "The court charges the jury that although you believe after a careful consideration of all

the evidence in this case beyond a reasonable doubt that the defendants did have on one or two or more separate and distinct occasions illicit carnal intercourse with each other, yet if you also believe from the evidence in the case that on said occasion or occasions, as the case may be, that said illicit carnal intercourse was indulged in by the defendants in secret, and not in an open and notorious manner, that then and in that case you should acquit the defendants and each of them, although you may further believe from the evidence in this case that the defendants were observed by a third person while engaged in the act of secret illicit carnal intercourse on one of such occasions." The court erred in refusing to give this instruction. In fact, under the testimony and the law, the defendants if guilty at all could only be convicted in a prosecution commenced and carried on against the other by the wife of Riley Copeland. The record shows conclusively that the wife of Copeland had nothing to do with the prosecution. It was therefore unauthorized by law and the court should have instructed the jury to find the appellants not guilty.

If adultery is not open and notorious it is not a crime punishable by law, unless the prosecution is commenced and carried on by the wife or husband of one of the offending parties; for such a crime is a personal offense against the injured wife or husband and such wife or husband alone can complain. See *Heacock v. State*, 4 Okl. Cr. 806, 112 Pac. 949. This question has often been passed upon by other courts in harmony with the views herein expressed.

[2] Simply having occasional illicit intercourse, without a public or notorious living together, is not sufficient to constitute the offense of living in a state of open and notorious adultery. The parties must reside together publicly, in the face of society, as if the conjugal relation existed between them; their illicit intercourse must be habitual. *State v. Crowner*, 56 Mo. 147; *Brevaldo v. State*, 21 Fla. 789. It was so held under an indictment for living together in an open state of fornication in *Searls v. People*, 13 Ill. 597. The offense of open and notorious lewdness must, of necessity, consist of a series of acts of association which, taken together, make out the offense. For a further discussion on this question, see *People v. Salmon*, 148 Cal. 303, 83 Pac. 42, 2 L. R. A. (N. S.) 1186, 113 Am. St. Rep. 268.

There are cases in which facts similar to those in *People v. Salmon* have been held sufficient to constitute an offense, but these are under statutes which do not use the words "open" and "notorious."

For the reasons hereinbefore given, the judgment of the lower court is reversed and the cause remanded, with directions to the trial court to dismiss this prosecution and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



discharge the defendants, upon the ground that the prosecution was unauthorized by law, not having been commenced and carried on by the wife of the appellant Copeland.

ARMSTRONG, P. J., and DOYLE, J.,  
concur.

(10 Okl. Cr. 4)

**IRVINE v. STATE.**

(Criminal Court of Appeals of Oklahoma.  
July 5, 1913.)

(*Syllabus by the Court.*)

**1. INTOXICATING LIQUORS (§ 236\*)—PROSECUTION—SUFFICIENCY OF EVIDENCE.**

For evidence sustaining a conviction for unlawfully conveying liquor, see opinion.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 300-322; Dec. Dig. § 236.\*]

**2. CRIMINAL LAW (§ 622\*)—SEPARATE TRIAL.**  
In misdemeanor cases defendants jointly indicted may be tried separately or jointly, in the discretion of the court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1380-1383, 1385, 1386, 1388-1395; Dec. Dig. § 622.\*]

**3. WITNESSES (§ 337\*)—CROSS-EXAMINATION OF ACCUSED—INTOXICATING LIQUORS.**

Where a defendant takes the stand as a witness in his own behalf, his antecedents and previous occupation may be inquired into, and he may be asked if he had not paid for a United States revenue license to sell intoxicating liquors in Oklahoma at a time prior to the date of the offense for which he is upon trial. This is permissible, not as original evidence to prove that the appellant is guilty of the crime charged, but it is admissible solely for the purpose of effecting his credibility as a witness.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1113, 1129-1132, 1140-1142, 1146-1148; Dec. Dig. § 337.\*]

**4. CRIMINAL LAW (§ 1119\*)—APPEAL—CASE-MADE—ARGUMENT OF COUNSEL.**

Objections to the argument of the county attorney placed in the case-made by counsel for a defendant will not be considered unless they are included in the recitals made by the trial judge and unless they also set out the language used by the county attorney and show that the same was excepted to at the time.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2927-2930; Dec. Dig. § 1119.\*]

Appeal from County Court, Caddo County; C. Ross Hume, Judge.

James Irvine was convicted of unlawfully conveying intoxicating liquors from one point in Caddo County to another, and he appeals. **Affirmed.**

Bristow & McFadyen, of Anadarko, for appellant. Smith C. Matson, Asst. Atty. Gen., for the State.

FURMAN, J. [1] The evidence on the part of the state was that this defendant and a man by the name of Gus Sanders, jointly informed against, were caught by the city marshal of Hinton, and a deputy sheriff by the name of Holt, in the act of conveying 5 quarts and 28 half pints of whisky,

above set out, in a buggy. When approached by the officers, the night was very dark, and this defendant jumped out of the buggy and attempted to escape. His codefendant, Sanders, whipped up the horses and attempted to drive over the city marshal, who had grasped the rein. A search was immediately made of the buggy, and the whisky was found. This whisky was in a gunny sack, or wrapped up in a cloth of some kind and stored in the front part of the buggy. When arrested these men were traveling in the direction of this defendant's place of business, where he claimed to be operating at that time a rooming house and a restaurant. The defendant himself says they were going to his place of business. His codefendant, Gus Sanders, remained with him during the time he stayed in the town of Hinton, but the evidence does not disclose that he had any particular trade or business.

[2] Sanders escaped before trial, as the record discloses; at least his whereabouts were unknown at the time Irvine was tried. This necessitated a separate trial of Irvine, of which he strenuously complains in this case, claiming that the court had no authority to try him separately. This contention is without merit.

Section 5878, Rev. Laws 1910, is as follows: "When two or more defendants are jointly prosecuted for a felony, any defendant requiring it must be tried separately. In other cases defendants jointly prosecuted may be tried separately or jointly, in the discretion of the court." See *Bates v. State*, 8 Okl. Cr. 436, 128 Pac. 163.

The evidence on the part of the state was that these men were immediately arrested and on the following day were taken to Anadarko; the whisky being taken along by the deputy sheriff. On the train Mr. Gentry, one of the county commissioners of that county, had a talk with the defendant about the whisky, and the defendant told him that he would show that it was not Sanders' whisky, and Gentry asked him whose it was, and defendant replied that it belonged to him (defendant). The defendant did not deny that he had any such conversation, but on this point his recollection was poor. He said he did not remember it. He also attempted, or at least counsel for him did, to raise a doubt as to whether he referred to this particular whisky, assuming that the defendant was a common offender and that he had been arrested for liquor violations on numerous occasions, and that perhaps he referred to whisky seized on another occasion, but in rebuttal it was shown by the state that Gentry got on the train on this particular occasion and that there was no other time on which defendant was arrested and taken to Anadarko and whisky carried along.

[3] It was also contended by the defendant that the court erred in admitting testi-



mony showing the payment by him of a special retail liquor dealer's tax covering the particular premises which he was occupying, for the reason that the payment was made in April, 1911, and the tax expired on June 30, 1911, and this alleged crime was not committed until July 14, 1911. This matter was brought out on the cross-examination of the defendant. It was certainly competent as affecting his credibility, and also as a circumstance throwing light on the particular purpose for which the liquor was being conveyed.

In this case it was immaterial, however, whether or not the defendant was transporting this liquor for the purpose of selling. The essence of the offense is the transportation of an unlawful purchase of intoxicating liquor.

There was no question raised in this case, nor was it contended for by the defendant, that this was a lawful purchase of intoxicating liquors. His defense was that it did not belong to him, and that he had nothing to do with it. There were only two questions, then, for the jury to determine: First, did the defendant convey this liquor, or aid, assist, and abet another to convey it; and, second, was it a lawful purchase such as is authorized by the laws of the state of Oklahoma?

The evidence objected to was immaterial to the issues involved, and, under any view, we think was harmless; but, as it was brought out on cross-examination of defendant himself, we think it was a proper matter to go to the jury as affecting his credibility in view of his statement that the liquor belonged to the other fellow. See *Terry v. State*, 7 Okl. Cr. 430, 122 Pac. 559; *Crawford v. Ferguson*, 5 Okl. Cr. 377, 115 Pac. 278.

[4] It is also contended that there was error committed by the county attorney in his closing argument to the jury.

The case-made contains the following statement: "Counsel for defendant object to the statement of the county attorney to the effect that the government license dates beyond the time of the offense and it makes no difference to you when the date expires and asks the court to instruct the jury to not consider said statement." Signed by *Bristow & McFadyen*, attorneys for defendant. It will be noted from the foregoing statement that it is not a recital by the trial judge of anything that occurred during the trial, nor does it set out the language used by the county attorney, or show that the same was excepted to at the time, or the court requested to withdraw it from the consideration of the jury. The signed statement of counsel for defendant filed with the clerk of the court is not the proper way to raise the question of improper argument. This matter must be presented to the court

at the time, and the court given an opportunity to rule upon it, and such ruling must clearly appear from the record. In this respect there is nothing properly before this court to act upon. See *Saunders v. State*, 4 Okl. Cr. 264, 111 Pac. 965, Ann. Cas. 1912B, 766; *Cockran v. State*, 4 Okl. Cr. 379, 111 Pac. 974.

Here are two men caught in the act of transporting this liquor at the dark hour of 12:30 a. m. When approached by the officers they both made an effort to escape. On the next day, the defendant admits to one of the most respected citizens of that county that this was his liquor, but, after the other fellow has escaped, he thinks a good opportunity exists to lay all the blame on him. Sanders was nothing but the tool of Irvine; his man "Friday," so to speak. The mixed defense put up by Irvine is so palpably tainted with perjured testimony as to be unworthy of belief. His explanation of why he was out at that hour of the night, and of his meeting with Sanders, and of Sanders stopping the buggy and getting him in, are such unusual occurrences and so contrary to human experience that we deem further comment unnecessary.

We are of the opinion that justice has been done appellant in this trial, and that the judgment of the court should be affirmed.

ARMSTRONG, P. J., and DOYLE, J., concur.

(10 Okl. Cr. 21)

#### MCGARRAH v. STATE.

(Criminal Court of Appeals of Oklahoma.  
July 12, 1913.)

#### (Syllabus by the Court.)

#### 1. DISTRICT AND PROSECUTING ATTORNEYS (§ 3\*)—AUTHORITY—DELEGATION TO ASSISTANT.

A county attorney is vested with a personal discretion and responsibility as a minister of justice, and not as a mere licensed attorney, and he must act impartially, as well in refraining from prosecuting as in prosecuting. He must guard the real interests of public justice in behalf of all concerned, and he is disqualified from becoming in any way entangled with private interests or grievances connected with the private practice of law, and, while he may employ assistants in various ways not involving his official discretion or responsibility, he cannot delegate this discretion except to an assistant, duly appointed and qualified as provided by law.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 10-17; Dec. Dig. § 3.\*]

#### 2. INDICTMENT AND INFORMATION (§ 51\*) — EXECUTION — SIGNATURE OF ASSISTANT COUNTY ATTORNEY.

An information signed in the name of the county attorney by a duly appointed and qualified assistant county attorney is valid.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 161; Dec. Dig. § 51.\*]



### 3. DISTRICT AND PROSECUTING ATTORNEYS (§ 8\*)—ASSISTANTS—AUTHORITY.

Under the statute (section 1563, Rev. Laws 1910), authorizing county attorneys with the assent of the board of county commissioners to appoint not to exceed four assistants in counties having a population of over 60,000 at salaries fixed by the statute to be paid by the county, an additional assistant appointed and paid by the county attorney himself is not a legally constituted assistant county attorney.

[Ed. Note.—For other cases, see District and Prosecuting Attorneys, Cent. Dig. §§ 10-17; Dec. Dig. § 3.\*]

### 4. INDICTMENT AND INFORMATION (§ 51\*) — MISDEMEANOR — SIGNATURE OF ASSISTANT COUNTY ATTORNEY.

The conviction of a person under an information charging a misdemeanor, not signed by the person designated by law, is void for want of jurisdiction in the trial court.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 161; Dec. Dig. § 51.\*]

Appeal from County Court, Oklahoma County; John W. Hayson, Judge.

John McGarrah was convicted of violating the prohibitory law, and appeals. Reversed and remanded.

Prulett, Sniggs & Wilson and Harris & Nowlin, all of Oklahoma City, and Kenneth C. Crain, of Louisville, Ky., for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson and E. G. Spilman, Asst. Attys. Gen., for the State.

DOYLE, J. This appeal is prosecuted from a conviction had in the county court of Oklahoma county, in which plaintiff in error was found guilty under an information which charged that he did have in his possession intoxicating liquors with the intent to sell, barter, give away, and otherwise furnish the same in violation of law. On the 8th day of January, 1912, he was sentenced in accordance with the verdict of the jury to be confined in the county jail for a period of six months and to pay a fine of \$500.

It is first assigned as error that the court erred in refusing to quash the information and in overruling the defendant's objection to the introduction of any evidence, upon the ground of the insufficiency of the information, and particularly because the same was not signed and preferred by the county attorney. Said information is signed and verified as follows:

"Sam Hooker,

"County Attorney Oklahoma County.

"State of Oklahoma, Oklahoma County—ss.:

"I, H. M. Peck, being duly sworn on my oath, declare that the statements set forth in the above information are true. H. M. Peck.

"Subscribed and sworn to before me this 15th day of Aug. 1911. James S. Powers, clerk County Court. [Seal.]

"I have examined the facts in this case and recommend that a warrant do issue.

Sam Hooker, County Attorney, by H. M. Peck, Deputy County Attorney."

In this connection counsel contend that the proof showed that H. M. Peck, who signed the county attorney's name thereto, was not a legally appointed assistant county attorney of Oklahoma county.

The defendant called Sam Hooker, county attorney, who testified that he as county attorney did not sign the information; that he had five assistant county attorneys and appointed H. M. Peck in January, 1911; that Mr. Peck does not draw a salary from the county; that he personally paid him for his services as an assistant.

H. M. Peck was called as a witness by the defendant and testified that he qualified as an assistant county attorney on the 9th day of January, 1911, having been designated as an assistant county attorney by the board of county commissioners.

It is elementary that there can be no conviction or punishment for a crime without a proper and sufficient accusation, and in the absence thereof the court acquires no jurisdiction whatever, and, if it assumes jurisdiction, such trial and conviction are a nullity. It is essential to the validity of an information charging a misdemeanor that it be signed by the county attorney, as his signature is expressly required by the statute.

Section 5694, Rev. Laws, provides: "The county attorney shall subscribe his name to informations filed in the county, superior or district court." An unqualified reading of the words of the statute would make it necessary for the county attorney himself to subscribe his own name to all informations; but it has been held that the county attorney need not himself subscribe his name to an information, as it is sufficient if it be done by his legally appointed assistant. As is said in *Reed v. State*, 2 Okl. Cr. 589, 103 Pac. 1042: "The laws of this state only prohibit persons other than the county attorney, or his deputies, from performing such acts in the prosecution of crimes as are strictly official, such as appearing before and advising the grand jury; signing and preferring informations; approving complaints, etc. The assistance of private counsel in the trial of criminal cases is not prohibited. This is a matter entirely in the discretion of the county attorney, who has complete control in conducting public prosecutions, subject only to the supervision of the court upon the trial."

With reference to the office of county attorney our statutes provide:

Section 1557, Rev. Laws: "The county attorney shall not engage in the private practice of law, but in addition to his annual salary, which shall be the same as that of the county judge, he shall receive twenty-five per cent. of all forfeited bonds and recognizances by him collected; nor shall any county attorney while in office be eligible to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



or hold any judicial office whatever; but if the county attorney of one county shall be requested to go to another county, or from one part to another part of his county to transact any business as county attorney, he shall be paid by his county the amount of his necessary expenses in transacting such business, in addition to the salary."

Section 1558: "The district court, whenever there shall be no county attorney for the county, or when the county attorney shall be absent from the court, or unable to attend to his duties, or disqualified to act, may appoint, by an order to be entered in the minutes of the court, some suitable person to perform for the time being the duties required by law to be performed by the county attorney, and the person so appointed shall thereupon be vested with all the powers of such county attorney for the purpose. Such attorney shall be paid a reasonable compensation for his services by the county for which he is so appointed."

Section 1563: "In all counties having a population of not over twenty-five thousand the board of county commissioners may, in their discretion, allow one assistant county attorney at a salary of not to exceed seventy-five dollars per month; and in counties having a population of over twenty-five thousand they shall allow one assistant county attorney a salary of not to exceed one hundred dollars per month; and in counties having a population of over thirty-five thousand and not over sixty thousand they may, in their discretion, allow one additional assistant county attorney a salary of not to exceed seventy-five dollars per month; and in counties having a population of over sixty thousand, two additional assistant county attorneys at a salary of one at one hundred and fifty dollars and one at one hundred dollars per month; such salaries to be paid monthly out of the county treasury by order of the board of county commissioners."

The contention of counsel for the defendant is that the sections above quoted construed together limit the appointing power of the county attorney to the number of deputies prescribed by section 1563, and that, as the proof shows that H. M. Peck was apparently not one of the number appointed within these limits, he was not at the time of signing this information a legal assistant county attorney of Oklahoma county.

This court will take judicial notice of the fact that Oklahoma county is a county having a population of over 60,000. The section quoted only authorizes the allowance of four assistants. The county attorney testified that Mr. Peck, who signed his name to the information in this case, draws no salary from the county, but was paid by the county attorney himself. H. M. Peck was evidently, therefore, not a salaried assistant county attorney, and we think he cannot be regarded as a legally constituted assistant county

attorney of Oklahoma county, and the signing of the county attorney's name to an information by a person other than a duly appointed and qualified assistant is not a defect or imperfection in matter of form only, within the curative provision of the statute, section 5747, which provides: "No indictment or information is insufficient, nor can the trial, judgment, or other proceedings thereof be affected, by reason of a defect or imperfection in the matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

[2, 3] We know of no rule of law whereby a public officer may delegate power or authority involving official discretion or responsibility, except as prescribed by the statute. The law has very carefully guarded the administration of public justice from any interested or unauthorized intermeddling. The county attorney is a very responsible officer, selected by the people and vested with a wide personal discretion, intrusted to him as a minister of justice. There are many reasons why a power of this kind should be confined to the prosecuting officer. He is expected to be impartial in abstaining from prosecuting, as well as in prosecuting, and to guard the real interests of public justice in favor of all concerned.

It is therefore of the highest importance to the public that this power should be carefully exercised, and that the responsibility should rest upon the officer to whom it is confided.

[1] By section 1557, supra, a county attorney is disqualified from becoming in any way entangled with private interests, or grievances connected with the private practice of law. The office of county attorney is quasi judicial, and the county attorney and his legally appointed assistant must be exclusively the representative of public justice, and stand indifferent as between the defendant and any private interest. No doubt a county attorney may employ assistants in various ways, not involving his official discretion or responsibility; but our laws have only allowed his official discretion to be delegated where assistant county attorneys have been provided for by the statute. The public have a right to insist upon the performance of public duties that are strictly official in the prosecution of crime by county attorneys and assistants duly appointed and qualified as provided by law, and we think it would be directly contrary to public policy to allow or permit any general delegation of the county attorney's power or responsibility in this respect.

[4] It is our opinion that, the county attorney's name not having been subscribed to the information by himself or by a legally constituted assistant, the court acquired no jurisdiction to try the case, and the conviction and sentence of the defendant are void.

It also appears that the evidence is in-



sufficient to support the verdict and judgment.

The judgment of the county court of Oklahoma county is therefore reversed, and the cause remanded thereto to be disposed of as required by law.

ARMSTRONG, P. J., and FURMAN, J., concur.

(10 Okl. Cr. 638)

### WHITE v. STATE.

(Criminal Court of Appeals of Oklahoma. July 12, 1913.)

Appeal from County Court, Oklahoma County; John W. Hayson, Judge.

W. D. White was convicted of violating the prohibitory law, and he appeals. Reversed and remanded.

Pruett, Sniggs & Wilson, of Oklahoma City, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for the State.

**PER CURIAM.** This appeal is prosecuted from a conviction had in the county court of Oklahoma county, in which plaintiff in error was found guilty under an information which charged that he did have in his possession intoxicating liquors with intent to dispose of the same contrary to the provisions of the prohibitory liquor law. On the 15th day of February, 1912, he was sentenced in accordance with the verdict of the jury to be confined in the county jail for a period of six months and to pay a fine of \$500.

Error is assigned upon the action of the court in refusing to quash the information and in overruling the defendant's objection to the introduction of any evidence upon the ground of the insufficiency of the information, and particularly because the same was not signed and preferred by the county attorney.

The proof was the same as that in the case of *McGarrah v. State*, 133 Pac. 260, decided at this term, and presents the same question.

For the reasons given in the opinion in that case the judgment of the county court of Oklahoma county is reversed, and the cause remanded thereto to be disposed of as required by law.

(10 Okl. Cr. 9)

### HAGER v. STATE.

(Criminal Court of Appeals of Oklahoma. July 5, 1913.)

(Syllabus by the Court.)

#### 1. WITNESSES (§ 236\*)—MODE OF EXAMINATION.

Police court methods in the examination of witnesses in courts of record in Oklahoma will not be tolerated.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 817-826; Dec. Dig. § 236.\*]

#### 2. WITNESSES (§ 268\*)—CRIMINAL LAW (§ 919\*)—CROSS-EXAMINATION—INSULTING INSINUATIONS.

Great latitude should be allowed in the cross-examination of witnesses, and they may be interrogated in a proper manner with reference to any matter which may tend to affect their credibility, but they should not be asked questions which are full of insulting insinuations and intimations that they are guilty of

some other crimes than that for which they are upon trial.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 931-948, 959; Dec. Dig. § 268; \**Criminal Law*, Cent. Dig. §§ 2197-2201; Dec. Dig. § 919.\*]

#### 3. CRIMINAL LAW (§ 919\*)—NEW TRIAL—MISCONDUCT OF PROSECUTING ATTORNEY.

Where the record shows that counsel for the state in a prosecution of a person charged with crime has been guilty of conduct calculated to arouse prejudice or passion against the defendant and to prevent the accused from having a fair and impartial trial, a conviction had will be set aside, and a new trial granted.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2197-2201; Dec. Dig. § 919.\*]

(Additional Syllabus by Editorial Staff.)

#### 4. CRIMINAL LAW (§ 1166½\*)—HARMLESS ERROR—EXTENT OF DOCTRINE.

The doctrine of harmless error will not be extended to such an extent as to deprive a defendant of a fair trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3114-3123; Dec. Dig. § 1166½.\*]

Appeal from County Court, Pottawatomie County; Ross F. Lockridge, Judge.

Montel Hager was convicted of giving away whisky, and appeals. Reversed.

S. P. Freeling and I. C. Saunders, both of Shawnee, for appellant. C. J. Davenport, Asst. Atty. Gen., for the State.

FURMAN, J. [1] Appellant was prosecuted for giving away whisky; and, being upon the stand as a witness in his own behalf, was subjected to the following cross-examination:

"Q. You kept whisky at the camp ever since you have been employed haven't you? (Objected to as incompetent, irrelevant, and immaterial, which objection was overruled by the court. Defendant excepts.) A. I have not. Q. Been furnishing the convicts whisky? (Objected to as incompetent, irrelevant, and immaterial, which objection was overruled by the court. Defendant excepts.) A. I have not. Q. Do you remember the occasion about two weeks ago of holding up the Indian agent out by the slaughter pens and drawing your gun; you was drunk and made him get out of your way?

"By S. P. Freeling: The defendant objects as incompetent, irrelevant, and immaterial.

"By the Court: Objection overruled. To which ruling of the court the defendant excepts.

"Q. You had a camp out there didn't you? A. Where was it? Q. Out there by the slaughter pens at that bridge across the Canadian river, between here and Shawnee? A. No, sir; I didn't. Q. The county had a camp there? A. Yes, sir. Q. You had charge of it? A. No, sir. Q. You was there as guard? A. Yes, sir. Q. Who had charge of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



camp? A. G. T. Redding. Q. You don't remember seeing the Indian agent come along there last fall? A. I don't think I did. Q. Was you ever drunk? A. No, sir; I don't think I was, not at the bridge. Q. Was you ever drunk any place else when you were on the road as guard?

"S. P. Freeling: Defendant objects as incompetent, irrelevant and immaterial.

"The Court: Objection overruled. To which ruling of the court the defendant excepts.

"A. I have drank some. Q. Along in the winter, didn't you drive one of the county's teams in town and stop in front of the court house and fall off the wagon? You was so drunk you fell down there?

"S. P. Freeling: Defendant objects as incompetent, irrelevant, and immaterial.

"The Court: Objection overruled. To which ruling of the court the defendant excepts.

"A. I don't know. Q. You was so drunk you don't know? A. I don't remember. Q. If you had done it, you would have remembered it, wouldn't you? A. Well I don't know. Q. You don't know whether you did or whether you didn't?

"S. P. Freeling: Defendant objects as repetition.

"By the Court: Objection overruled. To which ruling of the court defendant excepts.

"A. I couldn't say. To the best of my recollection I didn't. I wouldn't answer positively. Q. How long have you been working for the county? A. In what capacity? Q. In connection with the road camp. A. I think it was the last part of last March. Q. March, 1911? A. Yes, sir. Q. When did you quit? A. The 13th day of February.

"S. P. Freeling: Defendant objects as incompetent, irrelevant, and immaterial.

"By the Court: Objection overruled. To which ruling of the court the defendant excepts.

"A. I was arrested charged with giving the boys whisky. Q. Did you resign? A. I did not. Q. How were your connections with the road camp severed? A. The way it was commenced I presume. Q. By the same authority that placed you there? A. I don't know how it was."

We cannot indorse this method of treating a defendant.

In the case of *Will Harris v. State*, 132 Pac. 1121, decided at the last term of the court, this court endeavored to emphasize its views as to the necessity of treating a defendant fairly at every stage of his trial. See, also, *Thompson v. State*, 132 Pac. 695, decided at the last term of this court. In the case of *Jelts v. State*, 7 Okl. Cr. 734, 123 Pac. 1130, this court said: "There is other prejudicial cross-examination disclosed by the record. This court has always been exceedingly liberal with the prosecuting attor-

neys of this state, and endeavors always to uphold every proper conviction brought here on appeal. But a prosecuting attorney should not permit his high office to be prostituted in the interest of malice or oppression. He should not be guilty or indulging in the character of examination disclosed by this record. It does not make any difference how guilty a man is, he ought to be tried in a fair and impartial manner, and according to law. Prosecuting attorneys are not charged with the duty of securing convictions by improper methods. They should see that substantial justice is meted out in the manner provided by law, and no conviction should be sought or demanded unless it can be had by compliance with the safeguards and rules established to prevent oppression. A conviction had under the circumstances disclosed by the record under consideration cannot be sustained."

[4] The doctrine of harmless error will become intolerable if absolute fairness is not accorded defendants upon trial. The idea which some prosecuting attorneys and trial judges appear to entertain, that, when a defendant is upon trial charged with a criminal offense, he has no rights which courts and prosecuting attorneys are bound to respect, has no foundation in justice or in law. Every man is presumed to be innocent until his guilt has been established in a fair trial to the satisfaction of the jury beyond a reasonable doubt.

[2, 3] It is true that great latitude should be allowed attorneys in cross-examining witnesses, but their questions should not contain insulting insinuations and intimations that a defendant is guilty of some other crime. See *Watson v. State*, 7 Okl. Cr. 590, 124 Pac. 1101. In that case this court said: "When the record discloses that counsel for the state, in the prosecution of a person charged with crime, has been guilty of conduct calculated to arouse the prejudice or passion of the jury and prevent the accused from having a fair and impartial trial, a conviction had should be set aside by the trial court, and a new trial awarded." The cross-examination in the case at bar is full of insinuations and intimations that appellant was guilty of a number of offenses, which could not be otherwise than prejudicial to appellant, and upon this ground alone the judgment of the trial court will be reversed and the cause remanded for a new trial. This court stands squarely for the doctrine of harmless error, but it is equally committed to the doctrine that fairness must prevail in the trial of criminal cases. We will not tolerate police court methods in courts of record. Trial courts should confine the cross-examination of witnesses to legitimate subjects of inquiry, and should not permit a witness to be brow-beaten or asked insulting questions.

The judgment of the trial court is re-



versed, and the cause is remanded for a new trial.

ARMSTRONG, P. J., and DOYLE, J., concur.

(9 Okl. Cr. 676)

### HUFF v. STATE.

(Criminal Court of Appeals of Oklahoma. July 5, 1913.)

#### (Syllabus by the Court.)

#### 1. COURTS (§ 97\*) — RULES OF DECISION — STATE AND FEDERAL COURTS.

The Supreme Court of the United States having decided that the acts of Congress are valid which suspend for 21 years after the admission of Oklahoma into the Union the interstate federal laws which otherwise would have permitted persons residing in that portion of the state which formerly comprised Indian Territory to introduce into the state as interstate commerce intoxicating liquors for their own use, and this being a federal question, such decisions of the Supreme Court of the United States are binding upon all of the officers and people of the state of Oklahoma, and it is the plain duty of this court to follow these decisions.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 329-333; Dec. Dig. § 97.\*]

#### 2. INTOXICATING LIQUORS (§ 188\*)—CRIMINAL OFFENSE—WHAT CONSTITUTES.

A person residing in any portion of the state of Oklahoma who may introduce into the state intoxicating liquors and distribute the same among persons who may have furnished him money to purchase said liquors thereby violates the law and is liable to prosecution and conviction for illegally conveying such liquors from one point in the state to another point in the state.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 148; Dec. Dig. § 138.\*]

Appeal from County Court, Love County; R. A. Keller, Judge.

Sam Huff was convicted of violating the prohibitory law, and appeals. Affirmed.

E. M. Eskew testified for the state that he was at the depot when defendant Huff got off the train about 11:30 p. m. about 60 feet south of the depot. He had a package under his arm and started on up, passed the depot, with Green White and Sam Huff, when they were stopped and the whisky was taken from them. Said they had the whisky for club. A good many people were present. This occurred at the depot. In the conversation that took place, defendant said that he and Green White went after the whisky, and that Marshall Herd was the secretary of the club. This transaction took place in Love county, Okl. On cross-examination witness said that Green White was making the talk about the club. He gave the name of the club members and said each had a quart of the whisky.

C. F. Cochran testified for the state that he was present at the depot when the defendant and Green White arrived with the whisky. Judge Keller was also present. They were

being detained by Judge Keller. When witness walked up, they had a package under each arm and were talking when he came up. They said they had whisky. Witness took defendant and Green White to Steel's restaurant and took from them each four quarts of whisky. Green White did all the talking in the presence and hearing of the defendant and said that he got the whisky at Gainesville, Tex., at the express office and signed up for it.

Marshall Herd testified for appellant that he remembers when Sam Huff and Green White were caught with whisky in their possession on March 2, 1912. Eight of the boys made up a pot to get the whisky and defendant and Green White went after it. Whisky came in Green White's name. Witness had a quart of it. He and Tom Waters ordered it. "I got Bass, depot agent, to write the order; ordered it from Marshall Wright, Ft. Worth, Tex.; directed it to be sent to Gainesville, Tex., to Green White."

Sam Gill testified for appellant that he was a restaurant keeper near the depot at Marietta, testified that he was interested in the whisky brought there on March 2d by the defendant and Green White. He owned one quart. On cross-examination witness testified that he was to go to Sam Huff's home to get his whisky.

Tom Waters testified for appellant that he had an interest of one quart in the whisky. Witness was to go and get his whisky from either Huff's or Green's.

Chas. Springfield testified for appellant that he owned one quart of the whisky taken from defendant and Green White.

Dick McCullough testified for appellant that he owned one quart of the whisky seized and paid his proportion for it.

Marshall Herd recalled by the state, testified that the amount raised for the whisky was \$6.

Horace McCullough testified that he paid for and owned one quart of the whisky. Green White was to bring it to him.

Appellant testified in his own behalf that he was assisting Green White to bring the whisky from Gainesville, Tex., to Marietta; that he owned one quart which he had in his possession at the time of his arrest; that the rest of the whisky was to be distributed among the owners. Marshall Herd ordered the whisky.

Eddleman & Graham, of Marietta, for appellant. E. G. Spilman, Asst. Atty. Gen., for the State.

FURMAN, J. (after stating the facts as above). [1] First Appellant, who lives in Love county, Okl., which was formerly a part of the Indian Territory, was convicted for having conveyed whisky from one point in said state and county to another point in said state and county. The defense was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



that the whisky being conveyed was brought by him from Gainesville, Tex., on the railroad train and that it belonged to a club of eight, each of whom contributed a proportionate amount to pay for it, and that appellant was conveying the whisky from the depot to his home for distribution among the owners.

Counsel for appellant rely upon a number of decisions of this court as to the right of a citizen of Oklahoma to purchase intoxicating liquors in another state and ship them as interstate commerce to his home for his own use. All of these decisions were rendered in obedience to the previous decisions of the Supreme Court of the United States to that effect, for this is purely a federal question and one with reference to which we are bound by the acts of Congress and the decisions of the Supreme Court of the United States. Since the decisions of this court relied upon by counsel for appellant were rendered, the Supreme Court of the United States in the case of *Ex parte Webb*, rendered June 10, 1912, and reported in 225 U. S. 669, 32 Sup. Ct. 769, 56 L. Ed. 1248, has expressly held that the interstate commerce clause in the Constitution of the United States, under which the right of a citizen of Oklahoma to purchase whisky in another state and ship it as interstate commerce to his home or place of business for his own use, was not applicable to the Indian Territory portion of the state of Oklahoma and would not be until the expiration of 21 years from the date of the admission of Oklahoma into the Union. On this question that court said:

"The reservation of the authority of Congress to legislate in the future respecting the Indians residing within the new state is clearly supportable under the federal Constitution, art. 1, § 8, which confers upon Congress the power 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.' It has been repeatedly held by this court that under this clause traffic or intercourse with an Indian tribe or with a member of such a tribe is subject to the regulation of Congress, although it be within the limits of a state. *United States v. Holliday*, 3 Wall. 407, 418, 18 L. Ed. 182, 186; *United States v. 43 Gallons of Whisky* (*United States v. Lariviere*) 93 U. S. 188, 195, 197, 23 L. Ed. 846-848; *Dick v. United States*, 208 U. S. 340, 28 Sup. Ct. 399, 52 L. Ed. 520, and cases cited.

"And it is as clearly consistent with the Constitution to maintain in force an existing act of Congress relating to such traffic and intercourse, so that it shall continue effective within the limits of the new state, as it is to reserve the right to enact new laws in the future upon the same subject-matter.

"We must read the proviso contained in section 1 of the enabling act, and also the declaration in section 21 that 'the laws of

the United States not locally inapplicable shall have the same force and effect within the said state as elsewhere within the United States,' in the light of the existing relations, then recently established by treaties and by acts of Congress between the government of the United States and the Five Civilized Tribes that occupied the area known as the Indian Territory. Although those tribes had long been treated more liberally than other Indians, they remained none the less wards of the government and in all respects subject to its control. *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 653, 10 Sup. Ct. 965, 34 L. Ed. 295, 301, and cases cited. And after Congress in the year 1893 had inaugurated the policy of terminating their tribal existence and government and allotting their lands in severalty (*Acts of March 3, 1893, c. 209, § 16, 27 Stat. at L. 645*), agreements were negotiated by the Dawes Commission with each of the tribes designated to carry out the objects indicated; and in each of those agreements there was some recognition of the importance of preserving restrictions upon the introduction of intoxicating liquors from without and the traffic in them within the Indian Territory.

"The agreement with the Seminoles was made in 1898 (30 Stat. 567, c. 542), with the Creeks in 1901 and 1902 (31 Stat. 861, c. 676; 32 Stat. 500, c. 1323), with the Choctaws and Chickasaws in 1898 (30 Stat. 507, c. 517) and in 1902 (32 Stat. 641, c. 1362), and with the Cherokees in the latter year (32 Stat. 716, c. 1375).

"Section 73 of the agreement with the Cherokees (32 Stat. 727, c. 1375) continued in force in that nation the fourteenth section of an act of June 28, 1898, entitled 'An act for the protection of the people of the Indian Territory and for other purposes' (30 Stat. 500, c. 517), which contained a proviso against the sale of liquor in the territory and against the introduction thereof into the territory.

"In the first Choctaw and Chickasaw agreement there was a provision (30 Stat. 509, c. 517) that no law or ordinance should be passed by any town interfering with the enforcement of or conflicting with the laws of the United States in force in said territory, 'and the United States agrees to maintain strict laws in the territory of the Choctaw and Chickasaw tribes against the introduction, sale, barter, or giving away of liquors and intoxicants of any kind or quality.'

"In the Choctaw-Chickasaw Agreement of 1902, § 64, which provided for the cession to the United States of lands at the Sulphur Springs, contained a provision (32 Stat. 656, c. 1362) that, 'until otherwise provided by Congress, the laws of the United States relating to the introduction, possession, sale, and giving away of liquors or intoxicants of any kind within the Indian country or Indian reservations shall be applicable to the lands so ceded, and said lands shall remain within the jurisdiction of the United



States court for the southern district of Indian territory.'

"The Seminole agreement likewise provided that 'the United States agrees to maintain strict laws in the Seminole country against the introduction, sale, barter, or giving away of intoxicants of any kind or quality.' 30 Stat. 568, c. 542.

"The first Creek agreement provided that 'the United States agrees to maintain strict laws in said nation against the introduction, sale, barter, or giving away of liquors or intoxicants of any kind whatsoever.' Acts of March 1, 1901, c. 876, § 43, 31 Stat. 872. And this was not modified by the supplemental agreement. Acts of June 30, 1902, c. 1323, 32 Stat. 500.

"It seems to us that the provisions of the enabling act show that Congress recognized that, because of these agreements or otherwise, the government of the United States was under a duty to the inhabitants of the Indian Territory different from its duty to the inhabitants of the other territory that went to form the new state. We are unable otherwise to explain the insertion in the proposed Constitution of the clause establishing liquor prohibition within the Indian Territory and the exclusion of the other territory from the operation of this clause. This action is indicative of a purpose on the part of Congress to fulfill the spirit as well as the letter of the agreements with the Five Tribes. There were differences in those treaties, so far as the liquor traffic is concerned. But in the enabling act all the tribes were treated alike and in a manner to fulfill the amplest promise given to any tribe, so far—but only so far—as the establishment of general prohibition *within* the new state was concerned.

"But, if the federal law that had prevented the bringing in of intoxicating liquors from without the state was at the same time repealed, the pledges of the government were thereby in a material part broken. For manifestly it would be of comparatively little use to prohibit the manufacture of intoxicating liquors within the territory and their shipment from other parts of the state into the territory, if at the same time all laws prohibiting the introduction of such liquors from other states into the territory were to be repealed.

"And it is clear that in framing the enabling act Congress was mindful not only of its jurisdiction over commerce with the Indian tribes but was mindful that traffic in liquors between one state and another is subject only to the control of Congress. *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; *Id.*, 1 Interst. Com. R. 823; *Lelsy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; *Id.*, 3 Interst. Com. R. 36; *Lottery Case (Champion v. Ames)* 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492. \* \* \* We are reminded that laws which create crime

ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid' (*United States v. Brewer*, 139 U. S. 278, 288, 11 Sup. Ct. 538, 35 L. Ed. 190, 193), and that ambiguity and uncertainty about the meaning of a criminal statute ought to be resolved by a strict interpretation in favor of the liberty of the citizen.

"But there is no uncertainty or ambiguity about the prohibition of the act of 1895 against carrying intoxicating liquors into the Indian Territory. It is not suggested that there is any express repeal of that prohibition. And we are unable to see that a pro tanto repeal by implication leaves anything doubtful or ambiguous in the meaning of that which remains.

"It is not our purpose to qualify the doctrine established by repeated decisions of this court that the admission of a new state into the Union on an equal footing with the original states imports an equality of power over internal affairs. The cases cited by counsel for the petitioner under this head are cases that dealt with matters wholly internal. *United States v. McBratney*, 104 U. S. 621, 26 L. Ed. 869; *Draper v. United States*, 164 U. S. 240, 17 Sup. Ct. 107, 41 L. Ed. 419; *Re Heff*, 197 U. S. 488, 505, 25 Sup. Ct. 506, 49 L. Ed. 848, 855. And see *Ward v. Race Horse*, 163 U. S. 504, 16 Sup. Ct. 1076, 41 L. Ed. 244; *United States v. Celestine*, 215 U. S. 278, 288, 30 Sup. Ct. 93, 54 L. Ed. 195, 199; *United States v. Sutton*, 215 U. S. 291, 294, 30 Sup. Ct. 116, 54 L. Ed. 200, 202; *Hallowell v. United States*, 221 U. S. 317, 323, 31 Sup. Ct. 587, 55 L. Ed. 750, 753; *Dick v. United States*, 208 U. S. 340, 28 Sup. Ct. 399, 52 L. Ed. 520.

"The most recent decisions of this court upon the subject of the proper construction of acts of Congress passed for the admission of new states into the Union is *Coyle v. Smith*, 221 U. S. 559, 31 Sup. Ct. 688, 55 L. Ed. 853, where it was held that the Oklahoma enabling act (34 Stat. at L. c. 3335, p. 267), in providing that the capitol of the state should temporarily be at the city of Guthrie and should not be changed therefrom previous to the year 1913, ceased to be a limitation upon the power of the state after its admission. The court, however, was careful to state (221 U. S. 574 [31 Sup. Ct. 693, 55 L. Ed. 853]): 'It may well happen that Congress should embrace in an enactment introducing a new state into the Union legislation intended as a regulation of commerce among the states, or with Indian tribes situated within the limits of such new state, or regulations touching the sole care and disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new state, nor by reason of its acceptance of such



enactment as a term of admission, but solely because the power of Congress extended to the subject, and therefore would not operate to restrict the state's legislative power in respect of any matter which was not plainly within the regulating power of Congress.

"We are here dealing with one of those matters such as are referred to in this citation. The power of Congress to regulate commerce between the states, and with Indian tribes situate within the limits of a state, justifies Congress when creating a new state out of a territory inhabited by Indian tribes, and into which territory the introduction of intoxicating liquors is by existing laws and treaties prohibited, in so legislating as to preserve those laws and treaties in force to the extent of excluding interstate traffic in intoxicating liquors that would be inconsistent with the prohibition. *Dick v. United States*, 208 U. S. 340, 353, 28 Sup. Ct. 399, 52 L. Ed. 520, 525. This being so, and since we find in the Oklahoma enabling act no repeal, express or implied, of the act of 1895 so far as pertains to the carrying of liquor from without the new state into that part of it which was the Indian Territory (saving as to liquor brought in by the state for the use of state agencies established under the provisions of the enabling act), it follows upon the admitted facts that the United States District Court has jurisdiction to punish the petitioner for the offense that he has committed."

On the 26th day of May, 1913, the Supreme Court of the United States, in the case of *United States v. Wright*, 229 U. S. 226, 33 Sup. Ct. 630, 57 L. Ed. —, again passed upon this question. Mr. Justice Pitney, delivering the opinion of the court, said:

"The defendant in error was indicted in the United States District Court for the Eastern District of Oklahoma; the charge being that 'on the 19th day of March, in the year 1912, in the county of Muskogee, in the said district, and within the jurisdiction of said court, the said county and district then and there being a portion of the Indian country of the United States, (he) did at the time and place aforesaid unlawfully, willfully, knowingly, and feloniously introduce into said Indian country one quart of malt, vinous, spirituous, distilled, ardent, and intoxicating liquor, to wit, whisky, contrary to the form of the statute in such case made and provided,' etc.

"The District Court sustained his demurrer, and the case is brought here under the Criminal Appeals Act.

"The statutes involved are: Section 2139 of the Revised Statutes, as amended by the act of July 23, 1892 (chapter 234, 27 Stat. 260), and by the act of January 30, 1897 (chapter 109, 29 Stat. 506), also section 8 of the act of March 1, 1895 (chapter 145, 28

Stat. 693), and the Oklahoma Enabling Act of June 16, 1906 (chapter 3335, 34 Stat. 267). Extracts from these are set forth in footnotes to the opinion in *Ex parte Webb*, 225 U. S. 663, 671, 677 [32 Sup. Ct. 769, 56 L. Ed. 1248]. Muskogee county is a part of what was the Indian Territory.

"The District Court in effect construed the indictment as charging, not an interstate transaction, but an introduction of liquor from a point within the state of Oklahoma but outside of what is now Indian country into such Indian country. The decision of this court in the *Webb Case*, which had to do with section 8 of the act of March 1, 1895, and the effect of the Enabling Act upon it, and also the decisions of the Circuit Court of Appeals for the Eighth Circuit in *United States Express Co. v. Friedman*, 191 Fed. 673 [112 C. C. A. 219], and *Mosier v. United States*, 198 Fed. 54 [117 C. C. A. 162], both of which turned upon the effect of the Enabling Act upon the act of January 30, 1897, were reviewed by the District Court, and the conclusion reached, principally because of the line of reasoning expressed in the opinion in the *Webb Case*, was 'that the provisions of R. S. § 2139, as amended by the act of 1892 and the act of 1897, so far as they related, if at all, to the introduction of liquor into the Indian Territory from points outside of that territory but within what is now Oklahoma, must be considered as having been repealed by the Enabling Act.'

"And again: 'This confines offenses of this character, of which the federal court has jurisdiction, to those in which the liquor is introduced from a point without the state. It is a violation of the state law, as established by the constitutional provision above referred to, to introduce liquor into what was formerly Indian Territory from some other portion of Oklahoma, but such violation is an offense exclusively within the jurisdiction of the state court. In order to give the federal court jurisdiction, it is necessary that the introduction of the liquor should have been from a point without the state. This is an essential element of the offense, so far as the federal court is concerned, and should therefore be charged in the indictment. It follows that the demurrer must be sustained.'

"The Criminal Appeals Act (Act March 2, 1907, c. 2564, 34 Stat. 1246) provides for a writ of error, to be taken by the United States from the District Court direct to this court, from a decision or judgment sustaining a demurrer to an indictment, 'where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded.' The present case is clearly within this act, as previously interpreted and applied. *United States v. Sutton*, 215 U. S. 291, 294 [30 Sup. Ct. 116, 54 L. Ed. 200]; *United States v.*



Kettel, 211 U. S. 370, 385 [29 Sup. Ct. 123, 53 L. Ed. 230]; *United States v. Biggs*, 211 U. S. 507, 518 [29 Sup. Ct. 181, 53 L. Ed. 305]; *United States v. Stevenson*, 215 U. S. 190, 195; *United States v. Miller*, 223 U. S. 599, 602 [32 Sup. Ct. 323, 56 L. Ed. 568]; *United States v. Patten*, 226 U. S. 525, 535 [33 Sup. Ct. 141, 57 L. Ed. —]; *United States v. George*, 228 U. S. 14, 17 [33 Sup. Ct. 412, 57 L. Ed. —]; *United States v. Anderson*, 228 U. S. 52 [33 Sup. Ct. 500, 57 L. Ed. —]; *United States v. Pacific & Arctic Co.*, 228 U. S. 87, 100 [33 Sup. Ct. 443, 57 L. Ed. —].

"Upon the merits, the principal question is whether the acts of 1892 and of 1897 were repealed, as to intrastate transactions, by the effect of the Enabling Act and the admission of the state with the constitutional prohibition of the liquor traffic that was prescribed by that act. It is not contended that there was any express repeal. The insistence that there was a necessary repeal by implication is supported by arguments that may be outlined as follows: \* \* \*

"Upon the whole, while the matter is not free from difficulty, it seems to us the better argument is against the implied repeal. It follows that the District Court erred in holding the acts in question, viz.; section 2139, Rev. Stat., as amended by the acts of 1892 and 1897, to be no longer in force, and erred in sustaining the demurrer to the indictment. The judgment should be reversed, and the cause remanded for further proceedings in accordance with the views above expressed." It matters not what the personal opinion of any member of this court may be; this involves a federal question which, under the Constitution of the United States, the Supreme Court of the United States alone has the right to settle. The judges of this court are sworn to support the Constitution of the United States, and, when that court has spoken upon a federal question, this ends the discussion with us, and we are bound to decide in conformity with the opinions so rendered.

In the case of *Titsworth v. State*, 2 Okl. Cr. 268, 101 Pac. 288, this court said:

"If the decisions of the Supreme Court of the United States are wrong, application should and can be made to that court for a reversal of these decisions. It is a waste of time, money, and labor to appeal to this court to set aside anything which that court has decided. The Supreme Court of the United States of necessity must be the final judge of the construction of the United States Constitution. Otherwise we would have a hydra-headed judicial system in which 47 independent appellate courts could construe this instrument as they pleased, which would result, not only in confusion, but in civil war. Each tribunal would be supported by the military force of the government which it represented. This would result in death

and destruction to our form of government. Certainly no reasonable person desires this court to adopt a policy which would bring about such serious consequences as this. It would be treason itself. One thing can be depended upon, and that is that this court will not make any such insane attempt."

We cannot consider the convenience or desires of the people living on the east side of the state. The Legislature itself is powerless to pass any law which would in the least evade the federal decisions on this question. If it is illegal to introduce intoxicating liquors into that portion of the state which formerly comprised Indian Territory, as the Supreme Court of the United States now holds, then the purchase of such liquor is illegal and such liquor could not lawfully be conveyed from one point in that portion of the state to another.

In the case of *Maynes v. State*, 6 Okl. Cr. 487, 119 Pac. 644, this court, speaking through Judge Armstrong, said:

"The law clearly forbids the conveyance from one place to another of intoxicating liquor for any purpose, except such liquor as is purchased at a lawful sale."

[2] Second. But there is another view to take of this question which has already been decided adversely to the contention of counsel for appellant in the case of *Landrum v. State*, 132 Pac. 830, decided at the last term. In that case appellant's defense was that he was the representative of a wholesale liquor house situated in Ft. Worth; that upon application of persons desiring whisky he would write to his house, which, upon receipt of his order, would ship the whisky direct to the persons ordering the same; and that he (appellant) had no interest in the whisky whatever. On this statement of facts this court said:

"The trial court was authorized to find from the agreed statement of facts that this entire transaction was a cunningly devised subterfuge deliberately planned for the purpose of defeating the law. This case is but an illustration of the fact that men who are engaged in the illegal sale of intoxicating liquors in Oklahoma will resort to any expedient or subterfuge for the purpose of carrying on their illegal business. If this judgment is reversed, every liquor house in the United States could establish an agent in every town in Oklahoma to whom persons could apply and get such agent to write letters and sign the name of the purchaser and forward them to his house, which, seeing the letter written in the handwriting of their agent, would take it as an indorsement of the solvency of the purchaser and would, upon receipt of such letter, ship whisky to entire strangers of whom they knew nothing. If this can be done, the prohibitory law of Oklahoma will become the laughing stock of all intelligent persons, and this court would be open to the most severe censure



for its misconstruction of the law. It is our duty in good faith to so construe the laws of Oklahoma as to enable them to be enforced with reasonable certainty."

If a person cannot send in orders as the representative of a whisky house and have intoxicating liquors shipped into the state, neither can he, as the representative of others, go out of the state and bring intoxicating liquor into the state and distribute it among those who gave him such orders. If we were going to hold that such conduct was legal, we ought in good faith to place as a syllabus to the opinion, "Bootlegging made safe in Oklahoma." It matters not what the members of this court may think of prohibition, the people of Oklahoma have placed it in the law and it is our duty in good faith to so construe the law that it can be enforced, and this we are going to do, it matters not who may be offended or made to suffer thereby. There is no danger of any man being punished in Oklahoma who obeys the law. The jail is made alone for those who violate the law, and, if a man is sent to jail for violating the law, he has no one except himself to blame.

We fully approve the views expressed by Supreme Court Commissioner Ames in the case of *Blunk v. Waugh*, 32 Okl. 618, 122 Pac. 717, 39 L. R. A. (N. S.) 1093, as follows:

"If plaintiff was the agent of the brewery and was distributing its beer for its benefit, it is manifest that he was furnishing such liquor within the prohibition of the statute. If, on the other hand, the plaintiff received this consignment as the agent of the 105 persons to whom the beer was to be delivered, it is plain that after he received it from the railroad company it had been delivered to the consignee, he being the consignee, and that his subsequent acts in delivering the 105 casks to the 105 owners was conveying it from one place to another within this state. It is likewise manifest, if the plaintiff was engaged in the business on his own account, that he was merely operating a saloon in this ingenious manner, and that therefore he was either selling or giving away, or otherwise furnishing, the beer. It is manifest, therefore, that the business of the plaintiff is in violation of the laws of this state. \* \* \*

"The argument is made by the plaintiff, however, that if these 105 casks of beer might have been shipped in 105 separate express packages, and have been delivered by the express company to the 105 consignees, there is nothing illegal in the business which he is transacting. This argument, however, overlooks the fundamental and substantial difference between the plaintiff and the express company. The express company is a common carrier pure and simple and can be compelled to accept for transportation and delivery any legitimate article of commerce, and its entire service, rendered

in connection with a shipment of intoxicating liquors, is in the actual transportation and delivery thereof. For us to believe this of the plaintiff requires an amount of credulity which we do not possess. The plaintiff is engaged in the business of receiving large consignments of intoxicating liquor by interstate carrier and distributing them to a large number of small consumers in Oklahoma City. He is either the bona fide consignee of these large shipments or he is not. If he is the bona fide consignee, it is plain that the shipment is terminated when received by the plaintiff, and certainly his disposition of it thereafter cannot possibly be protected as a part of interstate commerce. To do so would in substance reinstate the original package law, which Congress has expressly legislated against. If the plaintiff is not the bona fide consignee, then his business involves a violation of the sections in the Penal Laws of 1909, which we have quoted. It therefore seems to us a demonstrable fact that the business of the plaintiff is not and cannot be protected by the Constitution and laws of the United States, and this conclusion is reached without considering several other aspects of the plaintiff's business which seem to conflict with those sections of the Penal Laws."

We find that the facts and law of this case are against appellant. The judgment of the lower court is therefore in all things affirmed.

ARMSTRONG, P. J., and DOYLE, J., concur.

(10 Okl. Cr. 8)

#### TYLER v. STATE.

(Criminal Court of Appeals of Oklahoma. July 5, 1913.)

(Syllabus by the Court.)

CASE FOLLOWED.

*Huff v. State* (No. A1750) 133 Pac. 265, reaffirmed and followed.

Appeal from County Court, Love County; R. A. Keller, Judge.

S. P. Tyler was convicted of violating the prohibitory law, and appeals. Affirmed.

Eddleman & Graham, of Marietta, for appellant. E. G. Spilman, Asst. Atty. Gen., for the State.

FURMAN, J. Appellant who resided in Love county, Okl., went to Ft. Worth, Tex., and there purchased 12 quarts of whisky, four quarts for himself and eight quarts for other persons residing in Love county, and returned to Love county with the whisky and attempted to deliver the eight quarts purchased for other persons in Love county when he was arrested. He was convicted for unlawfully conveying intoxicating liquors from one point in Oklahoma to another point in Oklahoma.



The questions of law involved in this case were discussed and decided adversely to the contention of counsel for appellant in the case of *Huff v. State*, 133 Pac. 205, decided at the present term. It is therefore not necessary to repeat here what was said in *Huff's* case.

The judgment of the lower court is therefore affirmed.

ARMSTRONG, P. J., and DOYLE, J., concur.

40 Okl. Cr. 16)

**BENSON v. STATE.**

(Criminal Court of Appeals of Oklahoma.  
July 8, 1913.)

(*Syllabus by the Court.*)

**INTOXICATING LIQUORS (§ 236\*) — CRIMINAL LAW (§ 1159\*) — APPEAL — VERDICT — EVIDENCE — SUFFICIENCY.**

While it is well settled that this court will not disturb the verdict on account of the evidence, when there is evidence to support it, the converse rule is equally well settled that it is not only the province, but the duty, of the court to set aside such a verdict, when it is contrary to the evidence, or where there is no evidence to support it. The performance of this duty on the part of the court is the exercise of legal discretion and judgment as to the sufficiency of the evidence to overcome the legal presumption of innocence, to which every one is entitled who is put upon his trial for an offense. (See opinion for evidence held insufficient to support the verdict and judgment.)

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 300-322; Dec. Dig. § 236; \* *Criminal Law*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

Appeal from County Court, Murray County; Harry W. Fielding, Judge.

R. C. Benson was convicted of violating the prohibition law, and appeals. Reversed.

Kendrick, Davis & Smith, of Davis, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen. (Herbert M. Peck, of Oklahoma City, of counsel), for the State.

DOYLE, J. Plaintiff in error, R. C. Benson, was convicted in the county court of Murray county. On the 8th day of February, 1912, judgment was entered and he was sentenced to be imprisoned for 60 days in the county jail and to pay a fine of \$100. From the judgment he prosecutes this appeal.

The record shows that on November 29, 1911, G. E. Mook made complaint before G. P. Dickinson, justice of the peace in and for the town of Davis in said county, against R. C. Benson, charging the said Benson with the crime of selling spirituous liquor on the 26th, 27th, and 28th days of November. Upon said complaint the justice issued a warrant for said Benson. He was arrested and immediately gave bond for his appearance before the county court. On December 2d the justice filed with the clerk of the county

court a transcript of the proceedings. On January 31, 1912, an information was filed in the county court, charging that R. C. Benson did on or about the 26th day of November unlawfully sell, barter, give away, and otherwise furnish spirituous liquor, to wit, whisky and alcohol, to Ed. Grayson, contrary to, etc. Which information was signed, E. W. Fagan, County Attorney, by Ira M. Roberts, Assisting County Attorney, and the same was verified by Ira M. Roberts. Trial was had on February 5th on the said information which resulted in a verdict of guilty.

Ed. Grayson, the first witness for the state, testified that he lived at Davis, and was acquainted with the defendant. His testimony as shown by the transcript is then as follows: "Q. Do you remember going with Mr. Mook down to the house of R. C. Benson? A. Yes, sir. Q. State when that occurred? A. He said he didn't have anything; said possibly he would have in some, or something like that; don't remember; quite a while ago; but I went down to get some, and he didn't have it. I did this on his account. Q. Tell the jury if on or about the 26th day of November, 1911, don't care about the exact date just so within a year, did you see Mr. Benson personally, and did he furnish you any whisky or alcohol in any amount? A. I have told the jury all I know about the whisky I bought. Q. Answer the question. A. No. Q. About that time, did Mr. Benson give you a drink of alcohol? A. He gave me a drink of alcohol. I suppose it was him; at that time I didn't know him, until some time ago. And one night he gave me a drink of alcohol out of a bottle. It must have been in July, somewhere along there; don't remember what time it was, but quite a while ago. He gave me a drink one night. Q. Did you pay him for that, or did he just give it to you? A. Didn't pay him for it. Q. Did he give it to you? A. Yes, sir. Q. In Murray county, state of Oklahoma? A. Yes, sir. Q. About what day? A. Couldn't tell you to save my life—two or three months before Christmas, July or August. Q. 1911? A. Yes, sir." Cross-examination: "Q. You say in the month of July Curley gave you a drink of alcohol? A. Don't remember whether it was July or August. It was several months ago in the summer. Q. Did you know it was alcohol? A. It tasted like it to me. Q. You don't know it was alcohol? A. No, sir; only tasted it."

G. E. Mook testified that he was a deputy sheriff and knew the defendant for several months, that during that time he was a restaurant cook. He then stated: "I had information brought to me from certain parties that the defendant was selling whisky, and I tried to catch him, tried most every way I could think of, and I got after Mr. Grayson. He had a drink or two, and I was satisfied was wanting more whisky, and I

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



says to him, 'I will lay out in the dark.' At that time Mr. Benson was boarding at Bus Caton's house, west of the railroad track, and I says, 'Will lay out in the grass where I can hear the conversation and see the transaction between you and the defendant, and he won't know I am there.' So he went up, and this night the defendant seemed to be under the influence of whisky pretty strong, and he had to talk very rough to him to get him woke up, so he asked him if he had any whisky or alcohol, and he said he didn't, but would have some in to-morrow. We walked back up town, and that is about all to it." On cross-examination he stated: "I don't remember the date, I judge it to be along in August or September, something like sixty days before I made the complaint."

The state rested. Thereupon the defendant demurred to the evidence and moved to be discharged, which was overruled by the court, and exception allowed.

R. C. Benson, the defendant, as a witness in his own behalf testified that he was a cook in a city café at Davis; that he did not give witness Grayson a drink of whisky or alcohol in the month of July or of August, or at any other time; that he was confined in the county jail of Murray county during the months of July and August and was released some time in September; that some time in November Grayson came to where he was boarding and woke him up and asked him for whisky, but he did not give him any. On cross-examination he stated that he was in jail for carrying beer across the street.

This was all the evidence in the case. The only question of moment presented is the sufficiency of the evidence to support the verdict and judgment.

It is well settled that this court will not disturb the verdict on account of the evidence when there is evidence to support it. The converse rule is equally well settled that it is not only the province but the duty of the court to set aside such a verdict when it is contrary to the evidence, or where there is no evidence to support it.

Section 5937, Rev. Laws, Procedure Criminal, provides that a new trial shall be granted "when the verdict is contrary to law or evidence." Under this provision the responsibility of determining whether or not there has been adduced before the jury a sufficient amount of legal and competent evidence as would render it safe to allow the verdict to stand is imposed upon the trial court in the first instance and on appeal upon this court.

The performance of this duty on the part of the court is the exercise of legal discretion and judgment as to the sufficiency of the evidence to overcome the legal presumption of innocence to which every one is entitled who is put upon his trial for an offense.

We are of opinion that the verdict and

judgment in this case is clearly contrary to the evidence, and that the trial court erred in refusing to advise the jury to acquit the defendant.

We have fully set forth the proceedings with a view of illustrating the necessity of an observance of proper procedure in cases of this kind. The justice of the peace had no jurisdiction to entertain a complaint charging an unlawful sale of intoxicating liquor, and the evident purpose of such procedure was to create claims for official fees.

The information recites that the county attorney's name was signed by an "assisting" county attorney. Our Procedure Criminal (section 5694, Rev. Laws) provides that: "The county attorney shall subscribe his name to informations filed in the county, superior or district court." And section 1563, Rev. Laws, provides that: "In all counties having a population of not over twenty-five thousand the board of county commissioners may, in their discretion, allow one assistant county attorney." The information here shows that the county attorney's name was signed by an "assisting" county attorney. No doubt a county attorney may employ assistants in various ways not involving official discretion or responsibility, but he cannot authorize his name to be signed to informations by a person other than his duly appointed and qualified assistant. The law has carefully guarded the administration of public justice from any interested or unauthorized intermeddling. It may be that the attorney who signed the information as "assisting" county attorney was the "assistant" county attorney. However, the proper practice is that the assistant county attorney should designate his office by using the statutory words.

Because the verdict is contrary to the evidence, the judgment is reversed.

ARMSTRONG, P. J., and FURMAN, J., concur.

(165 Cal. 677)

Ex parte ELLSWORTH. (Cr. 1,774.)

(Supreme Court of California. June 14, 1913.)

1. CRIMINAL LAW (§ 13\*) — ORDINANCES — NECESSITY OF PENALTY.

An initiative ordinance of a county declaring that no one shall sell liquor in any part of the county, outside of any city or town therein, unless he conducts a bona fide hotel having at least 35 separate sleeping rooms furnished for the accommodation of guests, and a dining room at which meals are served at regular hours to boarders and the traveling public, but not making the violation thereof a misdemeanor, nor providing any punishment for a violation, does not make a violation an offense, though it be treated as amendatory of a prior ordinance making it a misdemeanor to sell liquor without a license, or construed with it as dealing with the same subject-matter; and one who has a license under the prior ordinance, but who does not conduct a hotel, is not guilty of any crime,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



notwithstanding Pen. Code, § 435, making one guilty of a misdemeanor who carries on a business without obtaining the requisite license therefor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 13, 14; Dec. Dig. § 13.\*]

## 2. CRIMINAL LAW (§ 13\*)—"CRIME"—STATUTES.

Under Pen. Code, § 15, defining a "crime" as an act committed or omitted in violation of a law forbidding or commanding it, and to which punishment is annexed on conviction, a description, definition, and denouncement of acts necessary to constitute a crime do not make the commission of the acts a crime, unless a punishment is annexed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 13, 14; Dec. Dig. § 13.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1736-1740; vol. 8, p. 7623.]

## 3. INTOXICATING LIQUORS (§ 10\*)—REGULATION OF LIQUOR BUSINESS—POWER OF SUPERVISORS.

The supervisors of a county adopting an initiative ordinance, declaring that no one shall sell intoxicating liquor outside of the limits of any municipality of the county unless he conducts a bona fide hotel, may remodel the liquor license ordinance of the county so as to penalize a violation of the initiative ordinance.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 7-12; Dec. Dig. § 10.\*]

## 4. COUNTIES (§ 55\*)—REGULATION OF BUSINESS—POWER OF SUPERVISORS.

The supervisors of a county may make a general provision whereby the violation of any ordinance shall be a misdemeanor.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 71, 72; Dec. Dig. § 55.\*]

## 5. INTOXICATING LIQUORS (§ 40\*) — LOCAL OPTION—STATUTES.

A supervisory district of a county which votes, at an election under the Wyllie act (St. 1911, p. 599), in favor of licensing the sale of liquor is subject to such regulatory or prohibitory ordinances as the supervisors of the county may adopt, or as the people by the initiative may adopt, but a supervisory district, voting against licensing the sale of liquor, cannot be subjected to the terms of any regulatory license.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 34; Dec. Dig. § 40.\*]

## 6. INTOXICATING LIQUORS (§ 1\*) — PROHIBITION—LEGISLATIVE POWER.

The power to prohibit the liquor traffic coexists with the power to regulate it.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 1; Dec. Dig. § 1.\*]

## 7. INTOXICATING LIQUORS (§ 14\*)—REGULATION—STATUTES—VALIDITY.

A statute which permits the electors of the municipalities of a county to vote on the question of license or no license in the territory outside of the municipalities is not invalid.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 16; Dec. Dig. § 14.\*]

## 8. INTOXICATING LIQUORS (§ 162\*) — ORDINANCES—CONSTRUCTION.

An initiative ordinance of a county, declaring that no one shall sell intoxicating liquor outside of the municipalities of the county unless he conducts a bona fide hotel, etc., requires the hotels to be located within the county outside of the municipalities thereof.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 178; Dec. Dig. § 162.\*]

## 9. INTOXICATING LIQUORS (§ 15\*) — ORDINANCES—REASONABLENESS.

The objection that an ordinance of a county which limits the right to sell liquor outside the limits of municipalities of the county to the

managers of hotels containing 35 guestrooms and upwards is unreasonable cannot be sustained without a clear showing of the absolute unreasonableness of the limitation.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 17, 18; Dec. Dig. § 15.\*]

In Bank. Application for habeas corpus by E. N. Ellsworth under arrest, under a warrant charging a criminal violation of a county ordinance. Petitioner discharged.

T. J. Geary and T. J. Butts, both of Santa Rosa, for petitioner. Clarence F. Lea, Dist. Atty., of Santa Rosa, and J. E. Pemberton and J. E. White, both of San Francisco, for respondent.

HENSHAW, J. The undisputed facts are that petitioner is under arrest by virtue of a warrant issued by a justice of the peace of the county of Sonoma, charging him with the criminal violation of the ordinances of the county of Sonoma regulating the traffic in alcoholic liquors. In June, 1912, the supervisors of the county of Sonoma passed their ordinance No. 89 for the licensing of saloons and other places where alcoholic liquors were vended or given away, and regulating the conduct of this business. Petitioner maintains a saloon in the county of Sonoma without the corporate limits of any municipality. He paid for and procured the license contemplated by ordinance 89, and by virtue of this ordinance and of his license thereunder insists that he has violated no law. Ordinance 89, it should be added, makes it a misdemeanor to sell or give away alcoholic liquors "without first having procured a license so to do from the tax collector of Sonoma county, as required by this ordinance."

[1, 2] In November, 1912, an initiative ordinance was voted upon by the electors of the county, including those electors resident within municipalities, and upon the 14th day of November, 1912, the board of supervisors of Sonoma county duly declared this ordinance to have been passed and adopted. This initiative ordinance is here quoted in full:

"An ordinance of the county of Sonoma, state of California, relating to the retail liquor business of Sonoma county, and limiting the issuing of licenses to bona fide hotels.

"The people of the county of Sonoma do hereby ordain as follows:

"No person, corporation, firm or association shall sell, or engage in the business of selling, offering for sale or giving away distilled, fermented, malt, vinous or other spirituous or intoxicating liquors, wines or beer, in any portion of Sonoma county lying without the corporate limits of any city or town of said Sonoma county, except such person, corporation, firm or association engaged in the business of conducting a bona fide hotel,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 133 P.—18



having at least thirty-five separate sleeping apartments properly furnished for the accommodation of guests, and having a dining room at which meals are served at regular hours to boarders and the traveling public; and except physicians, surgeons or chemists, selling distilled, malt, vinous, or other spirituous liquors to be used in the due course of medicine; and except manufacturers or producers of such distilled, malt, vinous or other spirituous liquors, selling their own manufacture or production in quantities of not less than one gallon."

At a glance it will be observed that this initiative ordinance neither declares the violation of any of its terms to be a misdemeanor, nor provides any punishment for such violation. The theory of the respondent answering to this writ is, as is evidenced by the criminal complaint lodged against petitioner, that the earlier ordinance No. 89 was not repealed in toto by the initiative ordinance, and that the penalties prescribed by ordinance No. 89 may be lifted bodily from that ordinance and inserted in and made applicable to the initiative ordinance. And therefore, so runs the argument, as petitioner is admittedly not conducting a hotel of 35 guestrooms, and is not a person who comes within any of the other exceptions of the initiative ordinance, he is guilty of a violation of the provisions of the initiative ordinance and may be punished therefor by force of the penalty prescribed for a violation of ordinance No. 89. This fairly states the situation touching this particular matter. Other of petitioner's points and arguments attacking the validity of the initiative ordinance and the answers made thereto will be set out in due course.

The effort to transport the penal provisions of ordinance 89 into the initiative ordinance, or, conversely, the attempt to treat the initiative ordinance as but amendatory of ordinance 89, so that the penal provisions of ordinance 89 may be still made to apply, cannot be sustained. So far as the construction of the two ordinances is concerned, one or more of three things must be true: (1) That the later ordinance is amendatory of the earlier; (2) that the two ordinances dealing with the same subject-matter are to be construed together and harmonized if possible; and (3) that the later ordinance, if repugnancy exists, repeals the earlier. As to the first of these, the initiative ordinance does not in terms purport to be amendatory of ordinance 89. Excepting in its title it makes no reference to licenses, it fixes no fee, and does not exact or even contemplate the exaction of a license from those persons whom it permits to vend or give away alcoholic liquors. It declares simply that no person shall give or sell such intoxicants unless he is either conducting a hotel or is a physician or surgeon or chemist or a manufacturer who sells his own product in quantities of not less than one gallon. It does

not say that these persons so exempted from the inhibition of the statute must procure a license before they sell, nor does it declare, or even intimate, that if they do so sell without a license they have in any wise committed a crime. The same is true of all others who are forbidden to sell. The declaration is that they shall not sell. If they do sell their acts are illegal, but their acts are not denounced as criminal. It should be unnecessary to point out the tremendous distinction that exists between acts which are simply illegal and for which therefore a civil liability alone results, and those which are criminal, for which penal as well as civil liability arises. A crime is an act committed or omitted in violation of a law forbidding or commanding it, "and to which is annexed, upon conviction, either of the following punishments: Death, imprisonment, fine, removal from office, or disqualification to hold and enjoy any office of honor, trust or profit in this state." Pen. Code, § 15. A description, definition, and denouncement of acts necessary to constitute a crime do not make the commission of such act or acts a crime, unless a punishment be annexed, for punishment is as necessary to constitute a crime as its exact definition. *People v. McNulty*, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61. There is in this statute, therefore, not only no crime declared, but there is not even an intimation that it was intended to declare a crime. So, whether the initiative ordinance be treated as amendatory of ordinance 89, or whether it be construed with it as dealing with the same subject-matter, the result is the same. The petitioner has not violated the terms of the original ordinance 89, but has complied with all those terms, and holds a license issued by the authorities under that ordinance. If it be said that he is violating the provisions of the initiative ordinance, it must be answered that the initiative ordinance, neither in substance, in terms, nor in reasonable intendment either denounces the act as a crime or contemplates criminal punishment for it. Nor is the situation aided by the state law (Pen. Code, § 435), which declares that every person who owns or carries on any business, trade, profession, or calling for the transaction or carrying on of which a license is required by any law of this state, without taking out or procuring the license, is guilty of a misdemeanor, first, because the petitioner has procured the license called for, and, second, because the initiative ordinance is not in any of its terms a license ordinance, does not prescribe a license, fix a fee, or, as has been said, except in the allusion contained in the title of the act, does not even contemplate the issuance of a license to those persons who it declares may engage in the business of selling intoxicants.

Ex parte Christensen, 85 Cal. 208, 24 Pac. 747, relied on by respondent, dealt with a license ordinance which in terms required a



payment of a specified license fee and made the conduct of the business without the procuring of such a license a misdemeanor, punishable by fine and imprisonment. The argument was not that the ordinance did not fix a penalty, but that it fixed a penalty in conflict with that of the general state law found in Penal Code, § 19, and this court said: "If, for example, the order provided no punishment whatever for doing business without a license, but merely provided what the license should be, it would be valid, and the statute would supplement it by making the failure to comply with the order a crime, and providing the penalty." But as has been repeatedly pointed out, the ordinance here not only does not provide for a license fee, but does not provide for a license at all. In *Richter v. Lightston*, 161 Cal. 260, 118 Pac. 790, Ann. Cas. 1913B, 1028, another case upon which respondent relies, the ordinance under consideration established limits within which retail and wholesale liquor licenses could be granted. Other ordinances of the city provided in terms for the issuance of such liquor licenses, and the contention advanced upon the part of the petitioner in mandate seeking the issuance of a license was that the ordinance establishing the limits within which liquor licenses should be granted was void as a police regulation, in that it fixed no penalty for a violation of its terms. That argument was met by this court in the following language: "Its terms, it will be noted, are prohibitory. It forbids the issuance of a license within the inhibited district. It is the province of other ordinances to impose fines and penalties for the conduct of the prohibited business without a license, and in the case of the city of San Jose the charter itself makes such provision."

[3, 4] It would be competent therefore for the supervisors of Sonoma county to remodel their liquor license ordinance, under the intimations contained in this initiative ordinance, and to penalize for a violation of its terms. It would be competent also for the supervisors to make general provision whereby the violation of the terms of any of its ordinances should be declared a misdemeanor. But so far as we are at present advised this has not been done.

What has been said disposes of the criminal charge against this petitioner. But, as has been intimated, the defect may be cured in future proceedings by the adoption of a suitable ordinance by the supervisors. In view of other objections advanced by petitioner, and going to the validity of the initiative ordinance as a whole, a consideration of these propositions may be advantageously had, for the disposition of questions which are not only in this case but which are certain, if not disposed of, to arise in other cases.

[5] It appears that in the May preceding

the November at which the initiative ordinance was adopted, an election was held under the Wyllie law in that part of the first supervisorial district outside of the municipalities therein, and at such election the district voted in favor of licensing the sale of liquors in the district. In the succeeding June a similar election was held in the second supervisorial district, which voted against the licensing of liquors. It is urged and argued that the people of the entire county could not adopt the initiative ordinance which here they did adopt under section 4058 of the Political Code. The argument in this behalf is that as the first supervisorial district had voted in favor of licensing the sale of liquors, its determination in this respect could not be controlled or modified by any general county ordinance; that, the second supervisorial district having voted against the sale of liquors, no county ordinance could authorize the sale of liquors within this territory, either with or without license. And, finally, it is argued that under the Wyllie law the supervisorial districts without the limits of municipal corporations are made the units for the exercise of local option, and that it does violence to this general state law to permit the county at large, and in particular the electors of the county residing within municipalities, to control these units by such an initiative ordinance. Support for this view is sought in *Ex parte Zany* (App.) 129 Pac. 295. *Ex parte Zany* did not come under the review of this court, and for the reasons given by this court in denying a petition for a hearing in that matter, it could not come before this court. See *Ex parte Zany*, 130 Pac. 710. That decision, therefore, cannot be regarded as having received the tacit sanction of this court.

The force of petitioner's objections really rest upon a construction of the Wyllie act—its meaning and its scope. In *Ex parte Beck*, 162 Cal. 701, 124 Pac. 543, this court considered at length objections raised to the constitutionality of the act, holding it to be constitutional. In the course of the discussion it is there said: "The act involved in this proceeding is practically one prohibiting the sale, etc., of alcoholic liquor in any incorporated city or town of the state, or the portion of any supervisorial district not included within the boundaries of any such city or town, in which at least 25 per cent. of the electors petition for an election on the question, unless a majority of the electors voting on the question declare themselves in favor of such sale, etc. By it, the Legislature practically determined that it is inexpedient to allow the sale of such liquor in any such territory when the sentiment of the inhabitants thereof, as shown by the expression of its electorate, is to so large an extent opposed thereto, and denounced the sale under such circumstances as a crime.



\* \* \* The act calls for no legislation on the part of the supervisory district, and the vote of the electors thereof does not make the law at all. The electors thereof perform no legislative function whatever. The act is wholly one of the state Legislature, in force all over the state so far as the right of the people of the respective localities mentioned to avail themselves thereof is concerned; the only thing left to the electors of each such locality to determine being whether they will avail themselves of the prohibitions contained therein." Here is the key to the construction and scope of the Wyllie act. That this act was drawn with circumspection and care its history leaves no doubt. It is safe to say that whatever is found therein is designedly there; whatever is omitted therefrom was purposely excluded. It does not, so far as the electors of its units are concerned, vest in them legislative power, but it does in a limited sense confer upon them the power to fix their administrative status. Limited in this, that while upon a unit which has voted no license, the sale of intoxicants may not be imposed even under license, yet when another community has voted for license, this amounts to no more than an expression of the electors' pleasure in the matter, and is not controlling upon the legislative body, either the board of supervisors, the common council of a municipality, or the electors at large acting through the initiative.

[6] In this state, and under our Constitution and laws, the power to prohibit the liquor traffic coexists with the power to regulate it. *Ex parte Young*, 154 Cal. 317, 97 Pac. 822, 22 L. R. A. (N. S.) 330. That power is not in the least impaired by the expression of the electors' preference for license. The control of this matter, originally vested in the supervisors, has not by the Wyllie act been either taken away or modified, and it is still within the power of the supervisors, where a district has voted "wet," to pass such regulatory or prohibitory ordinance as they may deem best. That the law in this respect is one-sided may at once be conceded, but this concession does not militate against its validity, for the last section of the act itself declares that "Nothing in this act shall be construed as putting any limitations, except such as are positively stated herein, upon the police powers now possessed by cities, towns and counties." Wyllie Act, Stats. 1911, § 22, p. 605.

[7] The same may be said of the argument that it is unreasonable to permit the electors of a municipality, having at the most but very limited and indirect interest in the liquor question of the outlying supervisory districts, to control by their votes the question of regulating and prohibiting that traffic when these regulations in no way affect them, their municipality, or the liquor traffic conducted therein. It is quite true, as urg-

ed, that the electors in the outlying portions of supervisory districts have quite as much concern with the liquor traffic of municipalities as the electors of municipalities have with the liquor traffic in the outside districts, and it is foreign to the conception of autonomous government and home rule that electors not interested should be permitted to have a voice in and to a great extent control such a matter of purely local concern. But the same answer must be made to this argument; that it is addressed to what is conceived to be the unjust operation of the law, and not to the validity or invalidity of the law itself. Supervisors elected from municipalities within a county have the same power of control over the districts outside of their municipality, and under the initiative the only change wrought is that, that which the supervisors representing the whole county could do, it is now permitted the electors of the whole county themselves to do.

It follows herefrom that the first supervisory district which voted in favor of licensing the sale of liquors will be subject to the terms of such regulatory or prohibitory ordinance as the county of Sonoma may adopt; that the second supervisory district, which voted against the licensing the sale of liquors, cannot be subjected to the terms of any regulatory license. But this fact, of course, does not render the ordinance void as to such other parts of the county as are subject to its operation.

[8] One or more matters of minor consequence still merit consideration. It is pointed out that the initiative ordinance is vague and uncertain in this: That it authorizes keepers of hotels having at least 35 guest-rooms to sell liquor within the county, but does not attempt to say that the hotels themselves shall be within the county, so that under the terms of the ordinance one who keeps such a hotel in the city and county of San Francisco is thereby authorized to vend liquors in Sonoma county. Such of course was not the meaning of the ordinance, though it must be conceded that in this respect it is inartificially drawn.

[9] The objection that the ordinance is unreasonable in limiting the right to sell liquors to the managers of hotels containing 35 guestrooms and upwards cannot be sustained without a clear showing of the absolute unreasonableness of the limitation. *Grumbach v. Leland*, 154 Cal. 684, 98 Pac. 1059; *In re Kidd*, 5 Cal. App. 159, 89 Pac. 987; *In re Murphy*, 8 Cal. App. 442, 97 Pac. 199; *Ex parte Burke*, 160 Cal. 300, 116 Pac. 755.

For the reasons herein given, the prisoner is discharged.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; MELVIN, J.; SLOSS, J.



(165, Cal. 568)

In re HAYNE'S ESTATE. (L. A. 3,337.)

(Supreme Court of California. June 5, 1913.  
Rehearing Denied July 5, 1913.)**1. WILLS (§ 190\*)—CODICIL—REPUBLICATION—EFFECT.**

Where testatrix executed a codicil in which she declared that the statements made in her will, other than those in relation to certain trusts, were confirmed, ratified, and approved, and she declared that advancements mentioned in the will to two of her sons were correct as therein stated, and further declared that another son had received by way of advancement \$5,000, the codicil was not only effective as a republication of the will as modified, as provided by Civ. Code, § 1287, but it in legal effect constituted a re-execution of the will as of the date of the codicil.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 498; Dec. Dig. § 190.\*]

**2. WILLS (§ 759\*)—DISTRIBUTION OF ESTATE—ADVANCEMENTS.**

Civ. Code, § 1396, provides that, if the amount advanced to any heir by the decedent in his lifetime exceeds the share of such heir, he must be excluded from any further portion in the distribution of the estate, and section 1397 declares that all gifts and grants are made as advancements, if expressed in the gift or grant to be so made, or if charged in writing by the decedent as an advancement, or acknowledged in writing as such, by the child or other successor or heir. *Held*, that no special form of writing or signature of the decedent is required to constitute a charge of the advancement in writing as prescribed by the statute, but it will be sufficient if the writing was done by the decedent and shows an intent to charge the money or property given as an advancement rather than a gift or loan, so that an express statement to that effect in the decedent's last will is sufficient therefor.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1961-1966; Dec. Dig. § 759.\*]

**3. WILLS (§ 535\*)—ADVANCEMENTS—CODICIL.**

One of testatrix's sons having received certain advancements, testatrix recited in her will that he had received more than would be his share of her estate, and therefore she left him nothing by the will, and declared that therefore he had no interest in her estate. The rest and residue of her property she bequeathed in equal shares to her remaining four sons, and, after the death of one of the four, she executed a codicil reaffirming the will and declaring the advancements made therein to two of her sons were correct, and also declared another advancement to another son. *Held* that, as the codicil was made after the death of one of the sons and with knowledge thereof, it would be deemed that the testatrix's statement concerning the son to whom nothing was bequeathed, meant that his advancement amounted to more than his share in the estate and also his share in his deceased brother's interest, and hence testatrix did not die intestate as to such interest, but it passed to the remaining residuary legatees.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1157-1160; Dec. Dig. § 535.\*]

**4. WILLS (§ 758\*)—ADVANCEMENTS—PARTIAL INTESTACY.**

Under Civ. Code, § 1309, relating to the share of a child unprovided for in a will and making the doctrine of advancements applicable to such child, the doctrine is not limited to cases where the decedent died wholly intestate,

but may be applied in cases of partial intestacy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1957-1960, 1976, 1977; Dec. Dig. § 758.\*]

**5. WILLS (§ 759\*)—ADVANCEMENTS.**

The rule that advancements made before the execution of the will cannot be considered in making a distribution of the estate does not apply where the will shows a contrary intent or expressly declares that a full advancement has been made to a particular heir, and that the intestacy, if any, did not occur because of ignorance of the extent of the property testatrix owned, but either from inadvertence or design or mistake as to the legal effect of the residuary clause.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1961-1966; Dec. Dig. § 759.\*]

**6. WILLS (§ 759\*)—EFFECT—ADVANCEMENTS.**

The rule that it is the intention of the decedent at the time the property is transferred to the heir apparent that determines whether it is an advancement or a gift, and that, if it was then transferred and vested as a gift, a subsequent written declaration by the decedent, not part of the *res gestæ*, that it constituted or should be taken as an advancement, does not apply to invalidate a subsequent declaration contained in a legally executed and probated will that the property delivered to the heir should be treated as an advancement.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1961-1966; Dec. Dig. § 759.\*]

**7. EXECUTORS AND ADMINISTRATORS (§ 314\*)—INTEREST IN RESIDUE—WAIVER.**

Three sons of testatrix mentioned in the residue clause of her will petitioned for distribution, alleging that the residue vested in them as a matter of law. One of the sons, not a residuary legatee, answered, asserting intestacy as to one-fourth of the estate to which a deceased son would have been entitled had he lived, and asked that the same be distributed in shares of one-fifth each to the four surviving sons and to the grandson. The latter on the same day filed a petition declaring his understanding of testatrix's intent to be that the whole residue should go to his three remaining uncles named in the residuary clause, and asked that distribution be made to them. *Held*, that such instrument constituted an effectual transfer of all of the grandson's interest, and the court should have distributed the residue accordingly.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1274-1297; Dec. Dig. § 314.\*]

Department 1. Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Judicial settlement of the estate of Margaretta L. Hayne, deceased. From a determination that testatrix died intestate as to one-fourth of the residue of her estate, being the share of the residue purporting to have been given to a son since deceased, and that that part shall be distributed to her four sons and grandson surviving, the three living sons appealed. Reversed, with directions.

Robt. Harrison and Brewton A. Hayne, both of San Francisco, for appellants. E. W. Squier, of Santa Barbara, for respondent.

SHAW, J. The decision of the case depends upon the meaning and legal effect of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexer



the last will and codicil of the decedent. There was a residuary clause naming as recipients of the residue of the estate four sons, one of whom had died without issue before the making of the codicil. The decedent left, as surviving heirs, four sons and a grandson, to wit: Benjamin Stiles Hayne, Brewton Alston Hayne, and Stephen Duncan Hayne (who with Arthur Perronneau Hayne, deceased, were the persons named in the residuary clause) and William Alston Hayne, the sons, and Robert Y. Hayne, the grandson; the latter being the son of Robert Y. Hayne, another son of decedent who had died before her will was made. The court below held that the decedent died intestate as to the one-fourth of the residue, being the share which the residuary clause purported to give to Arthur Perronneau Hayne, by name, and that part of the estate was distributed by the decree in shares of one-fifth each to the four sons and grandson surviving. From this portion of the decree this appeal is prosecuted by the three living sons named in the residuary clause, Benjamin, Brewton, and Stephen, so far as it gives a part of said residue to the other persons aforesaid.

The propositions advanced by the appellants are: (1) That, under the terms of the will and codicil, William Alston Hayne is excluded from participation in the estate upon the ground that the will declares that he had already received, by way of advancement, his full share of the whole estate, including the one-fourth of the residue as to which it is claimed she died intestate. (2) That, because of the fact that at the time she made the codicil testator knew that one of the four persons named as a donee in the residuary clause of the will was dead, the legal effect of the clause was to vest the entire residue in the other three as the only persons then capable of taking. (3) That, if this is not the legal effect, the terms of the other parts of the will and codicil show that it was so intended and require it to be given that construction. Under either of the two theories last mentioned, there would be no intestacy.

The will was executed on November 24, 1906. The following are the provisions relating to the questions in controversy: "At the request of my son Robert Y. Hayne now deceased, I left nothing to him by my former will [referring to a will which had been destroyed by fire], leaving to him only certain family portraits." Then follows a bequest of the portraits to the grandson, Robert Y. Hayne. "I declare that my son, William Alston Hayne, has received from me at different times, by way of advancement, certain tracts of land [specifying three deeds made in 1879, 1885 and 1890, respectively, embracing 23.59 acres]; and that my said son William Alston Hayne has also received from me at various times certain

loans, notes for which I have canceled, so that my said son William Alston Hayne has received already more than what would be his share of my estate, and therefore I leave to him nothing by this my last will, and declare that he has now no interest in my property and estate." Then follow two clauses, one giving certain silver received from her uncle in trust for a grandson, the other giving the rest of her silver plate, the other portraits, jewelry and personal effects to her sons William Alston Hayne, Brewton Alston Hayne, Stephen Duncan Hayne, and Arthur Perronneau Hayne. Next is the residuary clause: "All the rest and residue of my property and estate I hereby give, devise and bequeath in equal shares to my sons Benjamin Stiles Hayne, Brewton Alston Hayne, Stephen Duncan Hayne and Arthur Perronneau Hayne—provided however" (here follows a declaration that the share of Benjamin is to go to Stephen in trust for Benjamin; it not being material here). "If any of my sons Benjamin Stiles Hayne, Brewton Alston Hayne, Stephen Duncan Hayne or Arthur Perronneau Hayne should die during my lifetime, leaving issue, the share of such deceased son under this my last will, shall go to his issue by right of representation." Next is a provision that if "any of my said sons shall have received" from her during her lifetime by way of advancement, or shall owe her, any sums, the same shall be deducted from the share of such son, and thereupon states that Benjamin has been advanced certain lands which are to be valued at \$250 per acre.

Arthur died on April 2, 1907, unmarried and without issue. The testatrix knew of these facts. Thereafter on April 18, 1907, she made the codicil, stating therein that it was a codicil to the will of November 24, 1906. It begins by canceling the bequest of silver to a grandson and the devise to Stephen in trust for Benjamin as made in the will, and giving said property absolutely to Benjamin, less the advancements to him mentioned in the will, and then proceeds as follows: "I further declare that the statements made in my said will other than those in relation to the said trusts are hereby confirmed, ratified and approved. And I declare that the advancements mentioned in said will to my sons Benjamin Stiles Hayne and William Alston Hayne are correct as therein stated, and I further declare that my son Stephen Duncan Hayne has received from me by way of advancement the sum of five thousand (\$5,000.00) dollars."

[1] It is to be observed at the outset that while the legal effect of a codicil referring to a previous will is to republish the will as modified by the codicil (Civ. Code, § 1287), this codicil does far more. In effect, it reiterates and repeats the will, both as to the dispositions of property made thereby and as to the advancements mentioned



therein. Its legal effect is the same as if the entire will, with the changes made by the codicil, had been executed on April 18, 1907, after the death of Arthur. We must determine its meaning in view of the facts existing and known to her at that time, remembering, of course, that she did not then rewrite the will but repeated it and remade it by reference and express approval.

[2] The doctrine of advancements is said to be of statutory origin, although a somewhat similar rule prevailed at common law. In this state, the rules governing the subject are embraced in the Civil Code (sections 1395, 1396, 1397, 1398, 1399, 1300, 1351). If the amount advanced to any heir by the decedent in his lifetime exceeds the share of such heir, he must be excluded from any further portion in the distribution of the estate. Section 1396. Section 1397 is as follows: "All gifts and grants are made as advancements, if expressed in the gift or grant to be so made; or if charged in writing by the decedent as an advancement, or acknowledged in writing as such, by the child or other successor or heir." Similar statutes exist in many other states. It is the established rule that no special form, nor even the signature of the decedent, is required to constitute a charge of the advancement in writing as prescribed by such statutes. It will be sufficient if it appears that the writing was done by the decedent and shows the intent to charge the money or property given as an advancement rather than as a gift or loan. Unsigned statements in the form of a charge entered in a book or on leaves inserted at the back of a book of miscellaneous accounts, the circumstances being such as to exclude the idea that it was charged as a debt, have been held sufficient. *Fellows v. Little*, 46 N. H. 27; *Brown v. Brown*, 16 Vt. 197; *Weatherhead v. Field*, 26 Vt. 665; *Bulkeley v. Noble*, 19 Mass. (2 Pick.) 337; *Clark v. Warner*, 6 Conn. 355; *Shayes v. Baker*, 5 R. I. 460; *Wilkinson v. Thomas*, 128 Ill. 363, 21 N. E. 596. There could be no written evidence of the intent to charge an advancement more convincing than an express statement to that effect in the last will of the decedent. The declaration in the will of Mrs. Hayne that William Alston Hayne had received property, by way of advancement, amounting to more than his share of the estate, is clearly a sufficient charge in writing to constitute legal evidence of an advancement under the Code.

[3] It is true that when the statements were first made in the will Arthur was alive and the share of William would have been only one-sixth, whereas after Arthur's death his share was one-fifth, and William's advancements might have exceeded one-sixth without equaling one-fifth. But the codicil expressly confirms, ratifies, and approves, thus, in effect, reiterating, the statement of the will that William had been advanced more than his share of the estate, that he

was to receive nothing therefrom and had no interest therein. As this was made after Arthur's death, childless and unmarried, and with knowledge thereof, it must be deemed to be a statement that the amounts received by William more than equaled the one-fifth which would then have been his share.

[4] It is suggested by the respondent that the statutory provisions regarding advancements do not apply, except in cases where the decedent died wholly intestate. Some of the decisions so declare because the statute under consideration was believed to contain such a limitation. *Kent v. Hopkins*, 86 Hun, 611, 33 N. Y. Supp. 767, where the statute begun with the words, "if any child of an intestate," is an example. Our Code contains no words which imply a similar limitation. Section 1309, referring to the share of a child unprovided for in the will and making the doctrine of advancements applicable to such child, shows conclusively that our statute may apply, in proper cases, to partial intestacy. There are some general statements in the text-books which apparently support the respondent's claim in this behalf. But upon examination we find that they are either modified by other portions of the text or are based on decisions in states where the limitation is in the statute.

[5] It is, of course, true that as a general rule advancements made before the will was executed cannot be considered in making distribution of the estate. The reason is that it is to be presumed that a testator had in view all previous advancements when he made his will and that he adjusted his testamentary dispositions accordingly, so as to make the final division conform to his actual wishes. *Needles v. Needles*, 7 Ohio St. 432, 70 Am. Dec. 85; *Bowron v. Kent*, 190 N. Y. 432, 83 N. E. 472. But this rule has no place, and reasonably could have none, where the terms of the will itself show the contrary, and particularly where it expressly declares that a full advancement has been made and it appears, as here, that the testatrix in making this declaration had in mind her entire estate and the shares of each heir therein under the law of descent, and that the intestacy, if any, did not occur because of ignorance of the extent of the property she owned, but either from inadvertence or design or from a mistake as to the legal effect of the residuary clause. *Estate of Tompkins*, 132 Cal. 175, 64 Pac. 268.

[6] Respondent also invokes the rule followed in many decisions, and which we do not here dispute, that it is the intention of the decedent at the time the property is transferred to the heir apparent that determines whether it is an advancement or a gift, and that, if it was then transferred and vested as a gift, a subsequent written declaration by the decedent, not part of the *res gestæ* of the transaction, that it constituted or should be taken as an advancement is of no force and is incompetent as evidence that it was an



advancement. *Elliott v. Western C. M. Co.*, 243 Ill. 614, 90 N. E. 1104, 134 Am. St. Rep. 398, 17 Ann. Cas. 884; *Sherwood v. Smith*, 23 Conn. 521; *Bradsher v. Cannady*, 76 N. C. 448; *Mitchell v. Mitchell*, 8 Ala. 422; *Clark v. Warner*, *supra*. These decisions, however, all qualify the rule by the additional statement that, if the subsequent declaration is contained in a legally executed and probated will, it is competent evidence of the advancement and must prevail. Obviously this must be so, since it then, in effect, becomes a part of the testamentary disposition of the estate and is evidence of the original intent. See *Estate of Tompkins*, *supra*.

Our conclusion is that the will and codicil show that William Alston Hayne has received his full share of the estate and that he should be excluded from any share thereof in the distribution. There is no merit in the claim that the making of the advancement in question was not put in issue. The death of Arthur was alleged and admitted. The question of these advancements thereupon arose upon the face of the will and codicil.

[7] We find it unnecessary to consider the other propositions made by appellants. The petition for distribution alleged the facts, asserted that the residue vested, as matter of law, in Benjamin, Brewton, and Stephen, the three who survived of the recipients named therein, and prayed for distribution of the residue to them accordingly. William filed an answer asserting intestacy as to the one-fourth of the residue destined to Arthur by name in the residuary clause, and asking that the same be distributed in shares of one-fifth each to the four surviving sons and Robert Y. Hayne, the grandson. On the same day said Robert Y. Hayne filed a petition declaring, in substance, that he understood his grandmother's intent as expressed in the will and codicil to be that the residue should go entirely to his uncles, Benjamin, Brewton, and Stephen, and asking that distribution thereof be made to them. Afterwards, and before decree of distribution was made, he signed and filed a supplemental paper, reciting his former petition and that it had been suggested to the court that the former petition was or might be taken as a waiver or transfer by him of his legal interest in the residue to the contestant William Alston Hayne, avowing that he did not so intend it, and concluding with a formal assignment and transfer of all his interest in the residue to said Benjamin, Brewton, and Stephen, and again requesting that distribution thereof be made to them. This instrument is an effectual transfer of all his interest to the persons named. The court below could properly have made distribution to the assignees as provided in section 1678 of the Code of Civil Procedure. *Estate of Vaughn*, 92 Cal. 192, 28 Pac. 221. Perhaps it would have done so if the assignment had been called to its

attention. At all events, the assignment vests in the appellants all the interest of Robert Y. Hayne in the residue in controversy and makes it unnecessary to consider or determine whether there was an intestacy as to one-fourth of the residue or whether the will and codicil vested it all in the appellants. Upon the going down of the remittitur, the court below may enter a decree distributing the residue to the appellants.

The order appealed from is reversed, with direction to the court below to enter a decree of distribution in accordance with this opinion.

We concur: SLOSS; ANGELLOTTI, J.

(165 Cal. 497)

AMERICAN - HAWAIIAN ENGINEERING  
& CONSTRUCTION CO. v. BUTLER  
et al. (S. F. 5,888.)

(Supreme Court of California. May 28, 1913.  
On Rehearing, June 27, 1913.)

1. CONTRACTS (§ 306\*)—BUILDING CONTRACTS  
—STIPULATIONS FOR TERMINATION OF CONTRACT—CONSTRUCTION.

Where a building contract contains provisions authorizing the owner, on certificate of the architect, and after notice to the contractor, to provide labor and materials, or terminate the contract, the certificate of the architect must substantially comply with the contract, and the notice to the contractor, following the certificate, must fully advise the contractor of what the owner demands.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1528-1533; Dec. Dig. § 306.\*]

2. CONTRACTS (§ 306\*)—BUILDING CONTRACTS  
—CONSTRUCTION.

A building contract which provides that, on the architect certifying to the failure of the contractor to supply skilled workmen or proper material, or to prosecute the work with promptness, the owner may, after three days' notice, provide labor and materials and deduct the cost thereof from any money then or thereafter to become due the contractor, and that, if the architect shall certify that the failure is sufficient grounds for such action, the owner may terminate the employment, and enter on the premises, and employ persons to finish the work, and, in case of discontinuance of the employment of the contractor, he shall not receive any further payment until the work shall be finished, does not contemplate a termination of the employment of the contractor for only a part of the work, but as to any part of the work touching which, according to the architect's certificate, the contractor is delinquent, the owner may furnish the necessary labor and material to be used by and charged to the contractor, but may not oust the contractor from that part of the work and undertake to perform it independent of him, though, where the contractor has become so delinquent as to justify a termination, the owner, on the architect's certificate to that effect, may, after proper notice, terminate it.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1528-1533; Dec. Dig. § 306.\*]

3. CONTRACTS (§ 306\*)—BUILDING CONTRACTS  
—TERMINATION OF EMPLOYMENT.

Where an owner, employing a building contractor, fails to give lawful notice to the contractor of the termination of the contract, as authorized by the contract, on receiving a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



proper architect's certificate, the owner may not take charge of the work, or any part thereof, and the contractor may resist the attempt of the owner to do so.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1528-1533; Dec. Dig. § 306.\*]

**4. CONTRACTS (§ 287\*)—BUILDING CONTRACTS — DECISION OF ARCHITECT — CONCLUSIVENESS.**

Where a building contract authorizes the architect to determine and certify the existence of a fact, material to a proceeding under the contract, the certificate of the architect, duly made, that the fact exists is conclusive on the parties as to the thing to be done to which the fact relates, or as to which, under the proceeding, it is to affect the rights of the parties, except for fraud or gross mistake amounting to fraud.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1308, 1309, 1312-1316, 1318-1338, 1340-1342, 1344-1346, 1348, 1350, 1351; Dec. Dig. § 287.\*]

**5. CONTRACTS (§ 306\*)—BUILDING CONTRACTS — STIPULATIONS—CONSTRUCTION.**

The provisions in a building contract, which authorize the owner to terminate the contract on the architect certifying that the delinquencies of the contractor justify such action, and which authorize the owner, on terminating the contract, to enter on the premises and complete the work, and provide that, in case of discontinuance of the employment, the contractor shall not be entitled to receive any further payment until the work is finished, do not affect the right of the contractor, under the provision for partial payments as the work progresses, to receive moneys due him for work already done, unless there is an actual discontinuance of the employment, in which case he is not entitled to any further payment until the work has been completed by the owner, and the architect's certificate of delinquency, authorizing a termination of a contract, is conclusive for the purpose of authorizing a termination, and for the purpose, after termination, of authorizing the owner to refuse further payments, and where the architect merely certifies to the failure of the contractor to prosecute the work diligently, the contractor is entitled to the partial payment stipulated for during the month preceding the making of the certificate.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1528-1533; Dec. Dig. § 306.\*]

**6. CONTRACTS (§ 355\*)—BUILDING CONTRACTS — PARTIAL PAYMENTS—GROUNDS FOR FAILURE TO PAY.**

Where an owner, required to pay the building contractor monthly as the work progressed, refused to make a monthly payment on the ground that he had lawfully terminated the employment, and the owner, when sued by the contractor for the value of the work done, did not rely on the existence of a claim against the contractor, in favor of a subcontractor, as an excuse for the refusal to pay, the owner could not complain of a judgment for plaintiff with a direction that a subcontractor's claim should be paid out of the amount of the judgment.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 355.\*]

**7. CONTRACTS (§ 290\*)—BUILDING CONTRACTS — PARTIAL PAYMENTS—ARCHITECT'S CERTIFICATES.**

Where it was the custom for a contractor, entitled to monthly payments on certificates of the architect, to present each month to the architect an estimate of the work done and material furnished the preceding month, and for the architect to examine the work and certify that it was done to his satisfaction, and when a monthly estimate was presented to the ar-

chitect, the architect replied that he had been instructed by the owner not to give the certificate, and the owner declared that he would not make any more payments, and there was no claim that the work for the preceding month had not been properly done, or any suggestion that the want of the architect's certificate was the ground for refusing payment, and the work for the month was, in fact, well done, the payment for the work became due, though the architect did not approve and certify to the work.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1317; Dec. Dig. § 290.\*]

**8. WORK AND LABOR (§ 14\*)—BUILDING CONTRACTS—BREACH—EFFECT.**

Where an owner, required to make monthly payments to the contractor as the work progressed, wrongfully refused to make a monthly payment, it was a breach of contract, and the contractor could rescind and sue on a quantum meruit for the work done and materials furnished.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 29-33; Dec. Dig. § 14.\*]

**9. CONTRACTS (§ 261\*)—BUILDING CONTRACTS — BREACH—RESCISSION.**

The rule that a rescission of a contract by one party thereto, without the consent of the adverse party, cannot be made except by one who is not in default applies where the obligations on which each party is in default are dependent and concurrent, or where the rescinding party's default is so related to the obligation in which the adverse party has failed that it, in some manner, affects performance, or the duty of the latter to perform, but does not apply to a building contractor whose sole default is that he has not been diligent in performance; and where the owner refuses to make a monthly payment due under the contract, the contractor may rescind.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1174-1180; Dec. Dig. § 261.\*]

**10. CONTRACTS (§ 306\*)—BUILDING CONTRACTS — CERTIFICATES OF ARCHITECTURE — CONCLUSIVENESS.**

A certificate of an architect that the contractor has failed to prosecute the work with diligence, made pursuant to a stipulation in the contract authorizing a termination of the contract on the architect certifying that the delinquencies of the contractor justify it, is at most only prima facie evidence in any collateral matter, and is not conclusive in an action by the contractor for the value of work done and material furnished.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1528-1533; Dec. Dig. § 306.\*]

**11. CONTRACTS (§ 322\*)—BUILDING CONTRACTS — TIME OF PERFORMANCE—WAIVER.**

Evidence held to sustain a finding that an owner, employing a contractor to construct a building, waived the time of performance specified in the contract, so that he could not recover damages for delay in completing the work.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 322.\*]

**12. CONTRACTS (§ 242\*)—BUILDING CONTRACTS — ORAL MODIFICATION—VALIDITY.**

A substantial performance of an oral agreement for an extension of time for the completion of a building contract reduced to writing makes the oral agreement a lawful alteration of the written contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1127; Dec. Dig. § 242.\*]

**13. CONTRACTS (§ 305\*)—BUILDING CONTRACTS — TIME OF PERFORMANCE—WAIVER.**

Where time of performance of a building contract, made of the essence, is once waived, another date for performance can only be fixed

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



by definite notice, or by conduct equivalent thereto.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1398, 1399, 1400, 1463, 1464, 1467-1475; Dec. Dig. § 305.\*]

**14. APPEAL AND ERROR (§ 1040\*)—HARMLESS ERROR — ERRONEOUS RULINGS ON PLEADINGS.**

Where the issues on a cross-complaint were tendered by the affirmative allegations of the answer of defendant, and the evidence relating thereto was fully presented, and the findings embraced them all, overruling of demurrers to the answers to the cross-complaint was not prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.\*]

In Bank. Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by the American-Hawaiian Engineering & Construction Company against Emma G. Butler, in which the Western Expanded Metal & Fireproofing Company was made a party. From a judgment for plaintiff against defendant Butler, she appeals. Affirmed.

Rehearing denied; BEATTY, C. J., dissenting.

See, also, 17 Cal. App. 764, 121 Pac. 709.

Charles W. Slack, of San Francisco, for appellant. Edgar C. Chapman and Robert H. Countryman, both of San Francisco, for respondent.

SHAW, J. The defendant, Butler, appeals from the judgment and from an order denying her motion for new trial. The following statement of the case and discussion of the first question presented are taken from the opinion prepared by Mr. Justice HENSHAW, upon which the case was decided in department:

"Plaintiff's complaint is in the form of a common count for the value of labor and material furnished defendant. Defendant's answer is by denial, by certain affirmative defenses, and by counterclaim. To the end that complete equity might be done, the court ordered the respondent, the Western Expanded Metal & Fireproofing Company, a corporation, and a subcontractor of plaintiff, to be brought in. This was done under a cross-complaint filed by defendant. The purpose of so bringing in the Metal & Fireproofing Company was that there might be made by the court an apportionment to it of such share of the judgment awarded to the plaintiff as might be just, so that the defendant might not be subjected to further litigation and perhaps compelled to pay a double judgment. The judgment was in favor of plaintiff in the sum of \$67,326.43, of which the Metal & Fireproofing Company, as a subcontractor, was awarded \$21,373.68.

"The plaintiff had been engaged in the construction of a building for defendant under a written contract. Defendant, contend-

ing that plaintiff had violated the terms of the contract, completed the building at her own expense, and her counterclaim is composed of the items of liquidated damages, of the excess which she was obliged to pay for the completion of plaintiff's contract over and above the contract price, and of lost rents. The contractor, upon the other hand, insists that defendant first breached the contract, and that, by reason of this breach, he was justified in rescinding, as, in fact, he did rescind, and therefore is entitled to recover in his action of quantum meruit and valebant the value of the labor and material which he had bestowed upon and placed in defendant's building. This, in skeleton form, presents the general controversy between the parties. As one of the specific defenses, defendant set up the contract; pleaded the failure and neglect of plaintiff for more than the period of two years to supply the sufficiency of workmen and material, and a failure to prosecute the work with promptness and diligence; pleaded the certificate of the architect authorizing the defendant to terminate the employment of plaintiff; and that accordingly, 'on or about the 12th of September, 1907, the defendant terminated the employment of the plaintiff as mentioned in said notice, and attempted by her agents and servants to enter upon the premises'; that the entry of her agents and servants was resisted, and 'thereafter, on or about the 14th day of September, A. D. 1907, the defendant, because of such resistance, and because of the continued failure and neglect of the plaintiff to supply a sufficient number of workmen and of materials, and the continued failure of the plaintiff to prosecute the work, wholly terminated the employment of the plaintiff for the said work provided in the said contract, and thereafter, on or about the 17th day of September, A. D. 1907, the plaintiff quit work on the said building, and left the said building in an unfinished condition.'

"The contract between these parties is in the form approved by the Architects' Association, and is in general use throughout the United States and Canada. The terms of this contract pertinent to the questions under consideration are the following:

"By paragraph 1 the contractor agreed that it would 'well and sufficiently perform and finish, under the direction and to the satisfaction' of the architects, all work agreed by the contractor to be performed by it.

"By paragraph 7 time is declared to be of the essence of the contract.

"By paragraph 8 the contractor agreed to prosecute the work with diligence and to complete it according to the plans on or before September 1, 1906. The contractor agreed to pay \$200 a day as liquidated damages for every day after the date fixed for completion on which the contract stood uncompleted.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



"By paragraph 10 provision is made for extending the time for the completion of the contract when delay was caused by the owner or by the act of God, but extensions were not to be recognized unless a claim were presented in writing by the contractor at the time of the delay, whereupon the architects were to ascertain and certify the amount of additional time to be allowed.

"Paragraph 16 is as follows: 'Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements on his part herein contained, such refusal, neglect, or failure being certified by the architects, the owner shall be at liberty, after three days' written notice to the contractor, to provide any such labor and materials, and to deduct the costs thereof from any money then due, or thereafter to become due, to the contractor under this contract; and if the architects shall certify that such refusal, neglect, or failure is sufficient grounds for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work, and enter upon the premises and take possession of all materials thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor, he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor, but if such expense shall exceed the unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner, as herein provided, either for furnishing materials or for finishing the work and any damage incurred through such default, shall be audited and certified by the architects.'

"By paragraph 17 payments of monthly installments were to be made to the contractor. These payments were to be 75 per cent. of the value of the workmanship and materials incorporated by the contractor in the building during the previous month. No progress payments were to be made until the architects certified, in writing, that all the work upon the performance of which the payment is to become due had been done to their satisfaction, and until satisfactory evidence was produced that the premises were free from liens and claims chargeable to defendant.

"Paragraph 18 is as follows: 'It is further mutually agreed between the parties hereto that no certificate given or payment made

under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part against any claim of the owner, and no payment made (even the final payment) or the partial or complete release of any sureties, given in connection with this contract, shall be construed as an acceptance of defective work, or as a release of the contractor from the obligation to promptly repair and make good such defective work, as soon as discovered, and to reimburse the owner for any loss or damage resulting from such defective work.'

"The certificate given by the architects to the owner is as follows:

"August 26, 1907.

"To Mrs. Emma G. Butler, 2005 Sutter Street, San Francisco, California: We hereby certify that the American-Hawaiian Engineering & Construction Company, Limited, the contractor for certain work on your building in course of construction on the southwest corner of Geary and Stockton streets, in the city and county of San Francisco, state of California, has failed and neglected to supply a sufficient number of workmen, and has failed and neglected to supply sufficient materials to perform the following of the said work according to the terms of its contract, namely: The plumbing work, the ornamental iron work, the work on the sidewalk arches, the sidewalk work generally, the work on the elevator tops, and the work connected with the main roof of the said building. And we hereby further certify that the said contractor has failed and neglected to prosecute the above-mentioned work, and the work generally to be performed by it under its said contract with promptness and diligence. And we hereby further certify that the said failure and neglect of the said contractor is seriously delaying, interrupting, and preventing the proper prosecution of the work on other branches of the said building not included in the said contract. And we hereby further certify that the said failure and neglect of the said contractor are sufficient grounds to warrant you in terminating the employment of the said contractor for the said work, and to warrant you in entering upon the said premises and taking possession of all materials thereon, and in employing any other person or persons to finish the said work, and to provide the materials therefor. Reid Bros., by Jas. W. Reid, Architects of the Said Building.'

"The notification given by the owner to the contractor is as follows:

"San Francisco, Cal., September 3, 1907.

"To the American-Hawaiian Engineering & Construction Company, Limited, 332 Turk St., San Francisco, Cal.: You are hereby notified that Reid Brothers, architects of the building in course of construction for the undersigned on the southwest corner of Geary and Stockton streets, in the city and



county of San Francisco, state of California, have issued a certificate of which the inclosed is a copy. And you are hereby further notified to supply a sufficient number of workmen and sufficient materials to perform the following work on said building which you are required to perform under your contract with the undersigned, and to prosecute the said work with promptness and diligence: The plumbing work, the ornamental iron work, the work on the sidewalk arches, the sidewalk work generally, the work on the elevator tops, and the work connected with the main roof generally. And you are hereby further notified that if you fail or neglect, for the period of three days after this notice shall have been served upon you, to supply a sufficient number of workmen and sufficient materials to perform the said work and to prosecute the said work with promptness and diligence, the undersigned will terminate your employment for the said work, and will enter upon the said premises and take possession of all materials thereon, and will employ others to finish the said work, and will provide the materials therefor, and will otherwise proceed as in the said contract provided. Yours, etc., Emma G. Butler, by H. C. Breeden, Her Attorney in Fact'

"Certain of the court's findings are as follows:

"(8) That on the 4th day of September, 1907, plaintiff made and presented to defendant its estimate of all of the materials and labor incorporated in said building by plaintiff during the month of August, 1907, amounting to the sum of \$16,311.58, accompanied with a demand that 75 per cent. of the amount thereof, to wit, \$12,233.64, be paid to plaintiff; but said 75 per cent. of said last-mentioned estimate was not then or ever paid by defendant, nor did defendant ever pay or offer to pay plaintiff any portion of the same, nor has defendant ever paid or offered to pay plaintiff for any materials and labor incorporated in said building subsequent to the month of July, 1907.

"(9) That on or about the 17th day of September, 1907, plaintiff again demanded of defendant the payment to it of the sum of \$12,233.69, the same being 75 per cent. of the value of the materials and labor so as aforesaid incorporated in said building during the month of August, 1907, but defendant, without stating any reason, cause, or excuse for so doing, did then and there refuse, and has ever since refused, to pay 75 per cent., or or any per cent., of said last-named sum or any sum of money whatever.

"(10) That after such last-mentioned refusal on the part of defendant on to wit, the 17th day of September, 1907, plaintiff rescinded the said contract so as aforesaid made and entered into on said 29th day of June, 1905, by and between defendant and plaintiff, and did cease to furnish any materials or perform any labor for, upon, or

about, said building after said 17th day of September, 1907.'

"(17) That from and after the 1st day of September, 1906, down to and including the 17th day of September, 1907, the defendant paid plaintiff monthly as the work of the construction of said building progressed, excepting only for work done thereon during the months of August and September, 1907, without deducting or attempting to deduct from any of the said estimates of plaintiff, so as aforesaid presented by it, or making any claim for damages, liquidated or otherwise, by reason of any delay in completing said contract of June 29, 1905, within the time fixed therein for completion thereof, to wit, September 1, 1906. And in this connection the court finds the fact to be that both plaintiff and defendant well knew that said building could not be completed pursuant to the terms and provisions of said original contract pertaining thereto, unless and until defendant should first complete the work so as aforesaid damaged and destroyed, and that the conditions surrounding and affecting all building operations in said city and county of San Francisco were so uncertain and abnormal that neither plaintiff nor defendant was in a position to determine the time within which the said restoration work could be completed. And the court further finds that shortly after said fire and earthquake, and at the time said last-mentioned contract was so as aforesaid entered into, plaintiff and defendant then and there mutually agreed to carry out the work of the construction of said building, according to the original plans and specifications thereof and under the terms and provisions of said original contract, except as to time of completing said work; and in this behalf the court finds that no time was agreed upon by and between plaintiff and defendant as to time of completing said building.

"(18) That, except as herein otherwise stated, it is not true that plaintiff failed and neglected, or failed or neglected, for more than a period of two years, or any other period of time, to supply a sufficiency of workmen and materials, or a sufficiency of workmen or materials, or failed to prosecute the said work as provided in said contract with promptness and diligence, but in this behalf the court finds that plaintiff proceeded with said work with promptness and diligence from and after the 20th day of June, 1905, to and including the 17th day of September, 1907, and except as to time of performance complied with all of the terms and provisions of said contract on its part to be performed.

"(19) \* \* \* And, in this behalf, the court finds that \* \* \* at the time said notice of September 3, 1907, and the copy of said certificate of August 26, 1907, were so as aforesaid served upon plaintiff, there had been no delay upon the part of plaintiff in



the work of constructing said building, nor had plaintiff failed to supply a sufficient number of workmen or sufficient materials to perform the work mentioned in said notice, or in said certificate; but, on the contrary, the court finds the fact to be that all of the work specified in said notice and said certificate was being performed with promptness and diligence, and in a manner to meet all of the requirements of the terms and provisions of said contract on the part of the plaintiff to be performed. That on the 28th day of August, 1907, and subsequent thereto, the general progress of the work of the construction of said building did not require the immediate furnishing of any ornamental iron work, the putting in of the sidewalk arches, the building of the sidewalks generally, the work on the elevator tops, or the work connected with the main roof generally. And, in this connection, the court finds that said last-named work could have been performed within the period of 30 days, while the interior work of the building was being performed, which interior work would necessarily require several months to perform. That after, as well as at all times prior to, the receipt of said notice of September 3, 1907, by plaintiffs, plaintiff performed the plumbing work pertaining to said building with promptness and diligence; and also performed with promptness and diligence all other work pertaining to said building at all of the times and during all the periods of time from and after the 29th day of June, 1905, to and including the 17th day of September, 1907.

"(20) That on the 12th day of September, 1907, without any fault on the part of plaintiff, defendant, without cause, provocation, or excuse, attempted to terminate the employment of plaintiff to as much only of said work as is set forth in said notice of September 3, 1907, by entering upon said premises by her agents and servants, and by attempting to take from plaintiff forcible possession of a portion of said premises and also forcible possession of a portion of the materials thereon, and to employ others to finish such of the work only as was and is set forth in said notice of September 3, 1907; but no attempt was made by said agents and servants of defendant to take possession of the whole of said premises, or of all of the materials thereon, or to employ others to finish the entire work of the construction of said building as set forth in said contract of June 29, 1905; defendant's said agents and servants were then and there resisted in said attempt to take forcible possession of any portion of said premises, or forcible possession of any of said materials, or to perform any labor in said building by the agents and servants of the plaintiff, whereupon the agents and servants of the defendant did then and there desist from any further attempt, either to take possession of said prem-

ises or any of said materials, or to perform any labor in, upon, or about said building.

"(21) That on the 17th day of September, 1907, the plaintiff ceased all of the work on said building under said contract of June 29, 1905, modified as aforesaid, and left said work in an unfinished condition, but, in this behalf, the court finds that on said last-named day plaintiff rescinded said contract upon the ground that defendant was indebted to plaintiff for materials and labor incorporated in said building during the month of August, 1907, amounting to \$12,233.64, for which it, plaintiff, had not been paid, after demand having been duly made by plaintiff upon defendant for such payment.'

[1] "Analyzing paragraph 16 of the contract, it means that, the architect having certified to the owner the refusal or neglect of the contractor in any of the indicated particulars, the owner, after three days' notice to the contractor to supply the deficiency or make good the neglect, and upon the contractor's failure after three days' notice so to do, may provide any such labor or material and deduct the money from the amount due, or to become due, to the contractor. The architect may further certify to the owner that the refusal or neglect of the contractor is sufficient ground to justify the owner in terminating the whole contract, in which case, upon the three days' notice from the owner to the contractor, so declaring the owner's intent, the owner 'may enter upon the premises, take possession of all material thereon, and employ any other person or persons to finish the work.' In other words, this is a provision for a rescission of the contract at the instance of the owner for the default of the contractor. The provision of paragraph 16 of this contract, touching the termination of the whole contract, needs no further elucidation. The provision authorizing the owner to provide the necessary labor and material, when the contractor fails so to do, does not contemplate a termination of the whole contract, and does contemplate nothing more than the supplying of a sufficient number of properly skilled workmen, or the supplying of a sufficiency of proper material to be used by the contractor under his contract, in the event that he himself shall have refused or neglected to supply them. As it contemplates that the material thus furnished by the owner shall be used by the contractor under his contract, so, also, it contemplates that the skilled workmen furnished by the owner shall also be employed by the contractor under his contract. Referring to the certificate of the architect, it will be noted that it conforms in all respects to the provisions of paragraph 16 of the contract, and that it is a certificate authorizing and empowering the owner not alone to supply labor and material, but also to terminate the contract because of the failure and neglect of the contractor properly to



prosecute his work. Specifically, the architect's certificate enumerated six branches of the work as to which the contractor was delinquent. The notice by the owner called upon the contractor to supply a sufficient number of workmen and sufficient material to perform those six specified pieces of work, and declared that if the contractor failed, for the period of three days, to supply a sufficient number of workmen and sufficient materials to perform the work, and to prosecute the work with promptness and diligence, 'the undersigned will terminate your employment for the said work, and will enter upon the said premises and take possession of all materials thereon, and will employ others to finish the said work.' But, springing from the nature of such certificates, their power for weal or woe, and the fact that they contemplate forfeitures and the right of rescission, the terms of the certificates themselves are strictly construed. In other words, to make such a certificate operative, there must be a substantial compliance by the architect with the terms of the contract touching its issuance. *O'Keefe v. St. Francis Church*, 59 Conn. 551, 22 Atl. 325; *White v. Mitchell*, 30 Ind. App. 342, 65 N. E. 1061; *Charlton v. Scoville*, 144 N. Y. 691, 39 N. E. 304.

[2] "The same reasons call for the same strict construction of the notice following the architect's certificate which the contract requires shall be given by the owner to the contractor. By this it is not meant that any precise form of words is required in the notice, but the notice must be such as fairly and fully to advise the contractor of what the owner demands, and what the owner will do in the event of a noncompliance with the demand. The notice given in this case misconceived the meaning and import of paragraph 16 of the contract. That paragraph does not contemplate a termination of the employment of the contractor for only a part of the work. As to any part of the work touching which, according to the architect's certificate, the contractor is delinquent, the owner may furnish the requisite labor and material, which shall be used by and charged to the contractor. But the owner may not oust the contractor from that part of the contract, and undertake to perform it himself, independent of the contractor. This is what the notice here declared that the owner proposed to do. Such a construction, we say, is foreign to the meaning of paragraph 16, and would lead to utter confusion and inharmony. It can be readily seen that it would be practically impossible to proceed with work under such conditions. If the contractor has become so delinquent as to justify the owner in terminating his contract, then, under the architect's certificate to this effect, the owner may do so, after notice. The authorization so to do was in this instance given to the owner by the architect's certificate, but the owner did not notify the contractor that she

proposed to exercise her right in this regard."

[3] The consequences of this failure on the part of the owner to follow up the architect's certificate with a lawful notice to the contractor that its employment would be terminated are that the owner was not authorized to take charge of the work or premises, or any part thereof, as she attempted to do on September 12, 1907, that the plaintiff was justified in resisting such attempt, and that the alleged attempt of the owner, on September 14, 1907, to terminate the employment of the plaintiff under the contract, in accordance with paragraph 16 thereof, even if it had been proven that such attempt extended to the whole work instead of only parts thereof, would have been ineffectual and vain. In the light of this conclusion, we must consider whether or not the plaintiff was justified in rescinding the contract, because of the owner's refusal to pay the money due to it for the work done during the month of August, 1907. The right of the plaintiff to recover fails, unless it appears that it rightfully rescinded.

[4] It is well settled that, where the parties to a building contract thereby authorize the architect, as arbiter, to determine and certify the existence of a fact, when such fact becomes material to a proceeding under such contract, the certificate of the architect, duly made, that the fact exists is conclusive upon the parties with respect to the thing to be done to which such fact relates, or as to which, under the proceeding, it is to affect the rights of the parties, and that such certificate can be impeached as to such facts only for fraud, or for gross mistake amounting to fraud. *Dingley v. Greene*, 54 Cal. 333; *Moore v. Kerr*, 65 Cal. 519, 4 Pac. 542; *City Street Imp. Co. v. Marysville*, 155 Cal. 419, 101 Pac. 308, 23 L. R. A. (N. S.) 317. There can be no doubt that if, in pursuance of said certificate, the owner had given a proper notice terminating the employment, the certificate, if not so impeached, would be conclusive evidence of the delinquency of the contractor in the particulars therein stated, in any controversy growing out of such termination. It is not, however, strictly speaking, a common-law award. *Church v. Seitz*, 74 Cal. 295, 15 Pac. 839; *Foster v. Carr*, 135 Cal. 86, 67 Pac. 43.

[5] The object and purpose of paragraph 16, in this regard, was to provide a proceeding whereby the owner might terminate the employment in case the contractor failed in any respect to perform the contract. It does not purport to qualify or affect the right of the contractor to receive the moneys due him for work already done at the time of his failure, unless the proceeding is carried to the extent of an actual discontinuance of the contractor's employment. To provide for that contingency the paragraph declares that, "in case of such discontinuance of the employment of the contractor, he shall not be entitled to



receive any *further* payment under this contract," until the work shall have been wholly finished by the owner. It will be seen that the right to receive the regular monthly payments under the seventeenth paragraph does not cease until, nor unless, there has been a valid termination of the employment in the manner provided, and that such termination bars only the right to "any further payment." The certificate of delinquency is conclusive thereof for the purpose of authorizing a termination, and for the purpose, after such termination, of authorizing the owner to refuse further payments under the contract. The certificate here given does not state that any of the work done was defective or not in conformity with the contract. All it declares is that part of the work had not been diligently prosecuted. Under the terms of the contract, the plaintiff was entitled, on the 1st day of each month, to a payment equal to three-fourths of the value of the work and materials put into the structure during the preceding month. The facts stated in the certificate had no bearing whatever upon the right of plaintiff to the September payment for the August work. No matter how slowly the work was carried on, the plaintiff, until its employment was lawfully discontinued under the contract, was entitled to the contract payments for the work properly done. It follows that the facts stated in this certificate, admitting for the present that it is conclusive, did not deprive plaintiff of the right to demand and receive payment for the August work, nor justify the owner in refusing to make said payment.

[6] Paragraph 17 of the contract, with regard to the monthly payments, provided "that before each payment, if required, the contractor shall give the architects good and sufficient evidence that the premises are free from all liens and claims chargeable to the said contractor; and further, that if at any time there shall be any lien or claim for which, if established, the owner of said premises might be made liable, and which would be chargeable to the said contractor, the owner shall have the right to retain out of any payment then due, or thereafter to become due, an amount sufficient to completely indemnify himself against such lien or claim." The requirement or demand mentioned in the first part of this provision was not made. At the time of the demand for payment for August work, there was a claim against the contractors in favor of the Western Expanded Metal & Fireproofing Company, on account of which Mrs. Butler might have withheld that payment, if she had so desired. The refusal to pay was not based on that fact, but on the fact that she then believed that she had lawfully terminated the plaintiff's employment. Neither the lack of evidence of freedom from liens, nor the existence of the said claim, was pleaded in the answer as an excuse for the refusal to pay. Under

these circumstances, the absence of a finding on the subject is immaterial. The amount of the claim is stated in the findings and judgment. But as the only relief given to that defendant is a direction that its claim be paid only out of the sum found due to the plaintiff, Mrs. Butler has no further substantial interest concerning it.

[7] The findings do not, in terms, state that the architects did not certify in writing that the August work, for which payment was demanded, had been done to their satisfaction. The general finding is that plaintiff rescinded the contract upon the ground that the amount owing for August work had not been paid, "after demand having been duly made by plaintiff upon defendant for such payment." This finding appears to be sufficient to support the judgment, so far as this point is concerned. The evidence shows a state of facts under which the owner would not be authorized to insist that there was no architects' certificate that the work was satisfactorily done. It appears that the custom was for plaintiff, each month, to present to the architects an estimate of the work done and material placed during the preceding month, that this was understood to constitute a request to the architects to examine the work and certify that it was done to their satisfaction. Until September, 1907, this had always been done. When the September estimate was presented, the architects said that they were instructed by the owner not to give the certificate. The owner also declared that she would not make any more payments. There was never any claim that the work for August had not been properly done, nor any suggestion that the architects' certificate was desired. The refusal to pay was wholly based upon reasons having no relation to the character of the work. As matter of fact, the work for August was well done. The architects should therefore have given their certificate to that effect. Under these circumstances, the payment for the August work became due; notwithstanding the fact that the architects did not approve and certify to the work, the preliminary certificate must be considered as having been waived, and the demand for payment must be deemed to have been duly made. *Copley v. Durand*, 153 Cal. 281, 95 Pac. 38, 16 L. R. A. (N. S.) 791; *Tally v. Ganahl*, 151 Cal. 421, 90 Pac. 1049; *Wyman v. Hooker*, 2 Cal. App. 40, 83 Pac. 79; *Antonelle v. Kennedy, et al.*, 140 Cal. 309, 73 Pac. 986; 30 Am. & Eng. Ency. of Law, 1245, 1249; 6 Cyc. 36.

[8] The finding of a due demand is supported by this evidence. The refusal of the owner to pay for three-fourths of the August work was therefore unjustifiable and was a breach of the contract. As to the contractor, the consideration of the contract had thereby, to that extent, failed. In such cases the refusal to pay is a sufficient cause for a rescission by the contractor, and authorizes



a suit upon the quantum meruit for the reasonable value of the work and materials by it incorporated into the building. *San Francisco B. Co. v. Dumbarton, etc., Co.*, 119 Cal. 272, 51 Pac. 335; *Porter v. Arrowhead R. Co.*, 100 Cal. 502, 35 Pac. 146; *Golden Gate L. Co. v. Sahrbacher*, 105 Cal. 116, 38 Pac. 635; *Carlson v. Sheehan*, 157 Cal. 696, 109 Pac. 29; *Fairchild, etc., Co. v. Southern R. Co.*, 158 Cal. 273, 110 Pac. 951.

[9] We are here met with the suggestion that a rescission without the consent of the other party cannot be made except by one who is not himself in default. The rule is usually stated in this general language. *State v. McCauley*, 15 Cal. 458; *Fairchild, etc., Co. v. Southern, etc., Co.*, supra. Where the respective obligations upon which each party is in default are dependent and concurrent, the justice and necessity of the rule is obvious. So, also, in cases where the rescinding party's default is so related to the obligation in which the other party has failed that it in some manner affects the performance thereof, or the duty of the other party to perform, the rule is plainly applicable. But no case which has been cited applies this rule to a delinquency of the rescinding party which has no relation to the obligation of the other party, in respect of which the right of rescission is claimed, and which does not excuse, prevent, or interfere with his performance of that obligation, or affect or impair his duty to perform it. Nor have we found any case in which it has been claimed that the rule is thus applicable. It is, in truth, an application of the maxims that he who seeks equity must do equity, and must come into court with clean hands. It is well understood that this rule does not apply to all derelictions by the complaining party, but only a delinquency "connected with the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties, and arising out of the transaction." 1 *Pomeroy, Eq. Jr.*, § 399; *Lewis' Appeal*, 67 Pa. 166; *American Ass'n, Limited, v. Innis*, 109 Ky. 605, 60 S. W. 388; *Rice v. Rockefeller*, 134 N. Y. 186, 31 N. E. 907, 17 L. R. A. 237, 30 Am. St. Rep. 658; *Bethea v. Bethea*, 116 Ala. 272, 22 South. 561. Here the default of the plaintiff, as claimed, was negative; it had not been diligent in performance. The contract provided a remedy for that neglect, a remedy which the owner did not pursue. The neglect specified in the certificate, still conceding its conclusive effect, did not, as we have said, in any way affect the liability of the owner to pay for the work actually done. The plaintiff's dereliction was not connected with the default in the payment or with the obligation to pay, but was wholly collateral thereto. The rule referred to does not apply to this case.

[10] There is another sufficient answer to the above suggestion. The court found that

the allegations of the answer that the plaintiff had failed and neglected to supply sufficient workmen and materials and to prosecute the work with diligence were untrue. There is ample evidence to sustain these findings. The claim is that the certificate of the architects, above set forth, relating to the abortive attempt to terminate the contract, is conclusive as to the fact of such failure, not only upon any question properly arising in connection with the proceeding for the termination of the plaintiff's employment, or as to which it would be material, but also conclusive between the parties at all times and upon all occasions to which the fact certified to may relate, although upon a matter collateral to the proceeding in and for which the certificate was authorized, and not in any way connected therewith or dependent thereon. We are of the opinion that it is not conclusive in a matter collateral to the proceeding in and for which alone it was authorized to be given. Its sole function was to serve as a basis for a notice terminating the contract. Upon any matter dependent on or arising out of that proceeding, it would be conclusive. But the proceeding failed for want of a proper notice, and it thereupon lapsed and became wholly ineffectual. The certificate made to initiate that proceeding, being unauthorized for any other purpose, falls with it, at least so far as its conclusive effect as evidence upon collateral matters is concerned. *Newall v. Elliott, 1 Hurst. & C. 797*. At most it could be no more than *prima facie* evidence in any collateral matter. The court below properly held that it was not conclusive, and was justified by the evidence in finding contrary to its statements of fact.

[11] It is claimed that the plaintiff was in default in failing to complete the building on or before September 1, 1906, as the original contract provided, and upon this ground the defendant, Butler, claims liquidated damages under the contract at \$200 for each day's delay, amounting to \$115,000, or damages for loss of rents during the delay, amounting to \$113,433.27.

The court found, in effect, that after April, 1906, a new contract was made by the parties for the completion of the building, providing that it should be completed according to the original plan and specifications and under the terms of the original contract, except that no time of completion thereof was fixed, but the same was left indefinite. It also found other facts which, if true, would operate as a waiver of the claim for damages caused by the delay. If these findings are true it necessarily follows that no damages could be recovered by the owner for the delay in question. It is contended that these findings are contrary to the evidence. We think they are sufficiently supported. When the great fire of April, 1906, occurred, the building was partially completed. The fire destroyed everything in it that was combus-



tible. It also, for several months, completely prevented the resumption of ordinary business in San Francisco. Under the contract, the owner was bound to restore the destroyed parts of the building and put it in such condition that the remainder of the work could be done. She elected to do so, and for that purpose she employed the plaintiff to do the work of restoration. She knew it could not be done until after September 1, 1906, the time fixed in the original contract for the completion of the entire building, but she did not specify any time within which the work of restoration should be completed. In fact, it was not completed until more than two months after the above date. She made no complaint of this delay whatever, but thereupon directed the plaintiff to proceed with the work and complete the building in accordance with the original plans. Thereafter she directed the work to proceed, made the monthly payments regularly as they became due, and allowed the contractor to go on expending large sums of money in the building, without ever mentioning the fact, now claimed, that liquidated damages at \$200 a day, or damages by loss of rents, from September 1, 1906, had been and were accruing, and without ever claiming or suggesting the right to deduct such damages from the monthly payments. The stipulations as to time and damages were both for the benefit of the owner, and she could waive them if she desired.

[12] The suggestion that the supplemental agreement was oral, and therefore was not effectual to alter the written contract, is disposed of by the fact that the new agreement for an extension of time was relied on by the plaintiff, and was acted upon by it to such an extent as to be a practical performance thereof and sufficiently to estop the owner from denying either the making of the agreement for an indefinite extension or the waiver of the covenants aforesaid. This substantial performance of the oral agreement would make it lawful as an oral alteration of a written contract.

[13] Furthermore, the time of performance even when it is made of the essence, if it is once waived, sets the matter at large, and another date for performance can only be fixed by a definite notice, or by conduct equivalent thereto. *Boone v. Templeman*, 158 Cal. 297, 110 Pac. 947, 139 Am. St. Rep. 126. The facts found clearly show a waiver of the right to demand damages for delay in completion after September 1, 1906. The evidence still more clearly establishes such waiver.

[14] The question whether the demurrers to the answers of the plaintiff and the other defendant to the amended cross-complaint of Mrs. Butler, on the ground that they were uncertain and ambiguous, were properly overruled is of no importance. The issues arising upon the cross-complaint were all tendered

by the affirmative allegations of her answer, the evidence relating thereto was fully presented, and the findings embrace them all. If the answers were uncertain or ambiguous, as claimed, it is clear that the owner was in no wise prejudiced or misled thereby.

The judgment and order are affirmed.

We concur: HENSHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; SLOSS, J.; MELVIN, J.

On Rehearing.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing. The validity of the judgment in favor of the contractor depends upon his right to rescind the written contract, and he had no right to rescind if it was not a breach of the contract on the part of Mrs. Butler to refuse payment of his demand for the August work. She had a perfect right to refuse payment of that demand if, as is conceded, there was a claim of the Western Expanded Metal & Fireproofing Company—as subcontractor—then existing for more than the contractor's claim. And the fact that she did not put her refusal on that ground is of no consequence unless her failure to do so in some way raises an estoppel. I cannot see that it does.

(165 Cal. 597)

#### In re SPRECKELS' ESTATE.

SPRECKELS et al. v. SPRECKELS et al.  
(S. F. 6357, 6358.)

(Supreme Court of California. June 13, 1913.)

#### 1. EXECUTORS AND ADMINISTRATORS (§ 314\*)—PROCEEDINGS FOR DISTRIBUTION—APPEAL—EFFECT.

Appeals from an order denying a petition for partial distribution of an estate suspended the superior court's power to distribute the estate pending the appeal, the prosecution or abandonment of which is within the control of appellants.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1274-1297; Dec. Dig. § 314.\*]

#### 2. EXECUTORS AND ADMINISTRATORS (§ 314\*)—OBJECTION TO DISTRIBUTION—PERSONS ENTITLED.

Persons having no interest in an estate cannot question the manner of its distribution.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1274-1297; Dec. Dig. § 314.\*]

#### 3. EXECUTORS AND ADMINISTRATORS (§ 314\*)—PROCEEDINGS FOR DISTRIBUTION—APPEAL—ABANDONMENT.

While the pendency of appeals from an order denying a partial distribution of an estate would prevent the superior court from decreeing a final distribution until the appeals were disposed of, it would not prevent appellants from such order, while asserting their rights under the will in the partial distribution proceedings, from making a claim to the estate as heirs on the theory of decedent's intestacy, on an application for final distribution made while such appeals were pending, so that appel-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



lants' assertion in the final distribution proceedings of a right to the entire estate, if the will should be invalid, was not an election to claim as heirs at law instead of under the will so as to operate as an abandonment of their appeal from the decree denying partial distribution.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1274-1297; Dec. Dig. § 314.\*]

**4. EXECUTORS AND ADMINISTRATORS (§ 314\*)—FINAL DISTRIBUTION.**

On final distribution of an estate, the court is required to decide who is entitled thereto, and the parties may show any fact in support of their various claims to the estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1274-1297; Dec. Dig. § 314.\*]

**5. EXECUTORS AND ADMINISTRATORS (§ 296\*)—FINAL DISTRIBUTION.**

A decree of final distribution could not be had until the settlement of the final accounts of the executors.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1185-1198; Dec. Dig. § 296.\*]

**6. EXECUTORS AND ADMINISTRATORS (§ 315\*)—DECREE OF DISTRIBUTION—CONSTRUCTION.**

The superior court filed its written opinion in proceedings for the settlement of an estate on the question of allowing advancements, and the clerk made an entry in the court's minutes as to what he considered the court's conclusion, but thereafter the minute order was set aside by the court and the clerk directed to enter in substitution thereof an order that the court was of the opinion that one-half of the estate, subject to testamentary disposition and to the jurisdiction of the court, should be divided equally among decedent's children, due regard being had for the rights of those entitled to the income accruing upon the properties of the estate and ordered that findings "and decree of final distribution be prepared accordingly." *Held*, that such minute entry was not intended as a decree of distribution.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1298-1314; Dec. Dig. § 315.\*]

**In Bank.** Appeal from Superior Court, City and County of San Francisco; *J. V. Coffey*, Judge.

In the matter of the estate of Claus Spreckels, deceased. From a decree of partial distribution, and from a decree of final distribution, John D. Spreckels and another appeal. Affirmed.

Morrison, Cope & Brobeck, Peter F. Dunne, Samuel M. Shortridge, Wesley N. Hohfeld, and Edward Lynch, all of San Francisco, for appellants. Cushing & Cushing and William H. Gorrill, all of San Francisco, for respondents.

**LORIGAN, J.** In the above estate two appeals are taken, one from a decree of partial distribution and the other from a decree of final distribution of the estate of decedent. As both appeals are presented on the same record, and the same points for a reversal of both decrees are urged, they will be considered and disposed of together.

The following facts will illustrate the

points made. Appellants and respondents and their sister Emma C. Ferris are the children and heirs at law of Claus Spreckels, deceased. The will of the latter was admitted to probate in June, 1909. Certain trusts were created by it and respondents made trustees thereof. They were also named and qualified as executors and were with Emma C. Ferris made the ultimate beneficiaries thereunder; the testator declaring in his will that he made no provision for appellants, having already given them a large part of his estate. The will is set forth at length in *Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371, and no more particular reference to its terms is necessary.

On August 23, 1909, the respondents filed an amended petition for a partial distribution of the estate of decedent to them as trustees under the will. Demurrers thereto were interposed by the present appellants as heirs at law of the deceased, which were sustained by an order made February 18, 1910; the superior court holding that the trusts created by the will were invalid and denying partial distribution under its provisions. On April 14, 1910, respondents appealed to this court from such order. On May 13, 1910, after such appeals were taken, respondents, as executors of said will, filed their final account, accompanied by a report of the condition of the estate and a petition for final distribution, praying that the residue of the estate be distributed to the persons who in law were entitled thereto. Appellants immediately thereafter filed an appearance joining with the said executors in said petition for final distribution. Subsequently the respondents, as trustees of a trust created in the will in favor of Emma C. Ferris, and each individually, as devisees and legatees thereunder, filed answers to said petition and alleged therein that they were entitled under and pursuant to said will to receive an undivided one-sixth of all the estate of said testator as trustees of said trust in favor of Emma C. Ferris, and further that pursuant to said will each of them was individually entitled to receive an undivided one-sixth of the estate of which said testator died seised. As a separate answer these respondents, both as said trustees and individually, alleged that neither of the present appellants had any interest in the estate of deceased and were not entitled to participate in the distribution thereof because each had received by way of advancements more than his share in the estate, and prayed for distribution to them, as said trustees, in accordance with the provisions of the will, of one-sixth of the estate, and to them each individually of one-sixth thereof, which was the amount to which they were entitled under the will.

A hearing was had before the court under these several petitions; the principal, in fact the main issue, being as to the alleged ad-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



vancements to the appellants asserted by respondents.

In October, 1910, the court filed its written opinion in the matter of such alleged advancements, and the courtroom clerk made an entry in the minutes of the court of what he considered was the conclusion of the court under its views expressed in the opinion. On December 12, 1910, this minute order was set aside by the court under stipulation of the parties, and the clerk was directed by the court to and did enter "in substitution of the minute order heretofore vacated and set aside the following order, to wit: The court is of the opinion that one-half of the estate of deceased, subject to his testamentary disposition and subject to the jurisdiction of this court, shall be divided equally among the children of said deceased, due regard being had for the rights of those entitled to the income accruing upon the properties of the estate; \* \* \* and it is ordered that findings and decree of final distribution be prepared accordingly." This order to that extent, at least, disposed adversely of the claim of respondents that, if appellants were otherwise entitled to take any part of the estate of the decedent, they were precluded from doing so by reason of alleged advancements.

On January 18, 1912, a motion on the part of these appellants to settle the findings upon final distribution was brought on for hearing. The present respondents objected to further proceedings towards final distribution on the ground that the superior court, by reason of the pending appeals to this court in the matter of partial distribution was without jurisdiction in the matter. Before action was taken on the motion, these respondents applied to this court for a writ of supersedeas, and on February 20, 1912, an order was made on such application enjoining the superior court from signing findings or a decree of distribution until the petition for the writ could be heard. This order was in effect when on April 10, 1912, this court reversed the order of the superior court of February 18, 1910, denying partial distribution, and sustained the validity of the trusts declared by the will. On May 28, 1912, these respondents applied to the superior court for partial distribution as asked under said original application therefor of August 23, 1909, and on the same day a decree therefor was made. This is the subject of one of the present appeals now under consideration (No. 6357). On May 29, 1912, the respondents, under the proceedings for final distribution heretofore mentioned, applied for distribution to them under the terms of the will, and a decree to that effect was made May 31, 1912. This is the subject of the other appeal now under consideration (No. 6358).

These decrees were made in conformity with the terms of the will and the judgment of this court sustaining its validity rendered

on the appeals from the order denying partial distribution. That judgment is conclusive on the appellants who were parties to the proceedings in which it was rendered, is res adjudicata as to who were entitled to take the estate on distribution, and the decrees appealed from made in favor of respondents in conformity with it were correctly made, unless the attack which appellants make on the judgment of this court on the former appeals is to be sustained.

[1] Premising a statement of their position upon said attack with the announcement of the unquestioned legal proposition that the appeals by respondents from the order denying their petition for partial distribution suspended all power of the superior court to distribute the estate of the decedent during their pendency and that the prosecution or abandonment of such appeals was a matter entirely under the control of respondents, the appellants then claim that when the respondents, after perfecting such appeals, applied for final distribution of the estate and tendered the issue of fact as to advancements (which it is asserted could only be relevant in case of intestacy), they deliberately reinvoked the suspended and superseded jurisdiction of the superior court under another and different claim of right, namely, as heirs at law and not as devisees under the will, and under a new remedy, namely, that of final distribution; that this action on the part of respondents under the later proceeding for final distribution in which they asserted rights to the estate on the theory of the intestacy of the decedent was radically inconsistent with their claim under the will which they were asserting in their then pending appeals, constituted an abandonment of their claims as beneficiaries under the will, and amounted to an election to claim as heirs at law, by which election respondents were bound; and that this conduct on the final distribution proceedings was in legal effect a dismissal or abandonment of their previous appeals which deprived this court of jurisdiction to pronounce a judgment under them available to respondents, and equally deprived the superior court of jurisdiction to enter any decree in favor of respondents based upon such judgment.

It is further claimed that the order of December 12, 1910, was an adjudication of the rights of the parties, had become final and conclusive, and the superior court was therefore without jurisdiction thereafter to make the decrees appealed from.

We find nothing in the record which affords any support for these claims; nothing that in any legal sense can be construed into an election by respondents in the proceedings for final distribution to assert a right or pursue a remedy at all inconsistent with their claims under the will or which in any respect indicates an abandonment of the appeals under which they were endeavoring to have the provisions of the will under which they



claimed sustained. It is not pretended that the pleadings filed by respondents in the matter of final distribution contain any admission or intimation that they were abandoning any rights which they were asserting on appeal or which they claimed under the will. The claim, however, of appellants is that from the position taken by respondents in the proceedings for final distribution this resulted as a necessary legal consequence.

The transcript on these appeals, aside from the pleadings, is largely made up of the proceedings, including arguments of the attorneys for the respective parties upon the hearing on the matter of advancements, which was the only issue litigated, and the remarks of the court during its progress, which show the exact attitude of all the parties in the matter. It is to be observed that these respondents appeared in various capacities under the will of the decedent; they were the executors and likewise trustees under its trust provisions, and as individuals were legatees and devisees. As executors they filed a final account accompanied by a report concerning the estate and a petition for distribution. In such report they mentioned the pendency of the appeals from the orders of the court on the petition for partial distribution and referred therein to reservations of certain matters made by the superior court in settling their first account and which could not be passed on definitely, until such appeals were disposed of. In their answers to the petition as trustees and individually they asserted their rights under the will and asked that the estate be distributed to them under its terms, with the alleged claim of advancements made by the testator to the appellants. At all times thereafter in presenting the evidence on the issue of advancements and in the arguments before the court on that matter in connection with final distribution, it was clearly made to appear by the attorneys for respondents that they were relying upon the appeals which they had taken and that they would be pressed in this court. No suggestion was made by counsel for appellants during the hearing or arguments that respondents had or were waiving any rights whatever, even when, on an offer in evidence by appellants of the papers on partial distribution, the respondents objected to their introduction on the ground that appeals were pending therein and that the order in that matter had not become final. The court understood that respondents were not waiving any rights in the course of the proceedings, because in response to the declaration of the attorneys for respondents that, while asserting what they considered were their rights under the claim of advancements to appellants, their clients stood upon the validity of the will and were pressing the appeals in this court which they had taken to sustain it, the superior court said, "You want, of course, to preserve all of your rights fully,"

which it is clear respondents were endeavoring to do. That the court understood that the respondents had waived no rights is further indicated by the fact that it ultimately signed the decrees appealed from. It is quite clear what the position of respondents was under these proceedings on final distribution. They were not asking that the estate be distributed to them on the theory that the decedent had died intestate, and that, as the appellants had received from the decedent as advancements more than any share that they would be entitled to as heirs at law, they were therefore excluded from participation in his estate, and the respondents of Emma C. Ferris were entitled to the entire estate as the only other heirs at law. They were not asking a distribution to them as heirs at law under any claim of the intestacy of the decedent. Under their petition for distribution and on the argument addressed to the question of advancements in connection therewith, the attorneys for respondent asked for a distribution under the terms of the will, and in that connection insisted that, even if the will were invalid, the appellants, on account of the advancements claimed to have been made to them exceeding any interest they would take of the estate of decedent if he had died intestate, were not persons interested in his estate, and therefore were not in a position at all to interfere in the distribution or to question the rights of the respondents to take the estate under the will. Their position was that as respondents and Emma C. Ferris were the only ones who were entitled to the estate, even if the will were invalid, as appellants had no standing at all to interfere in the matter of how distribution should be had, and as respondents and Emma C. Ferris consented to a distribution under the terms of the will, they were entitled, as the only persons interested in the estate, to have it so distributed.

[2] It is of course, well settled that persons who have no interest in an estate have no standing to question the manner of the distribution of it, and it is of no concern to them how it is distributed. *Estate of Walker*, 148 Cal. 167, 82 Pac. 770; *Estate of Fleming*, 162 Cal. 530, 123 Pac. 284.

But assuming, as it is claimed by appellants, that respondents in the proceedings on final distribution were asking distribution to them of the estate solely as heirs at law of decedent on the theory of his intestacy, while at the same time they were asserting rights to his estate under the pending appeals on the partial distribution proceeding, we perceive no legal inconsistency arising from this fact.

[3] While the court, by reason of the pendency of the appeals in the partial distribution proceeding, might not make a decree of final distribution until those appeals were disposed of, it was not without power to settle upon initiative of all the parties upon pe-



tion for final distribution and in advance, and in anticipation of an ultimate decree therefor any questions affecting their rights to the estate. This would be simply in aid of final distribution to be made at the earliest possible time when the court could make it in view of the pending appeals. Certainly the devisees under a will may on proceedings for final distribution assert any right to an estate which they may have; they may assert their rights under the will; or rights they may possess should it be determined to be invalid. The fact that the respondents had asserted their rights under the terms of the will in the proceedings in the partial distribution and were endeavoring to sustain them on appeal did not preclude them from setting up on the application for final distribution, made while the appeals were pending, any claim to the estate as heirs at law on the theory of the intestacy of decedent. If the proceeding and appeals on partial distribution had not been taken at all, undoubtedly the respondents might, on final distribution, assert rights under the will, or in case of its invalidity assert them as heirs at law to the exclusion of appellants by reason of full advancements to the latter of any share to which they otherwise would have been entitled, and we cannot perceive how, as both such claims might be asserted on final distribution, respondents were precluded from asserting one right upon the proceedings for partial distribution and the other upon final distribution.

[4] On final distribution the court is called upon to decide who is entitled to succeed to the estate of the decedent, and the parties claiming the right may show any fact in support of it. In such proceedings the respondents were entitled to present any reason they had why they were entitled to the estate and the appellants were not. At all times while relying on the terms of the will, they might further insist that, whether there was or was not a will, the appellants were not entitled to any part of the estate. They had a right to insist that the will was valid and to claim the entire estate under it; they had a further right to assert that if it were invalid the appellants, by reason of advancements to them, were precluded from taking any share of the estate, and respondents were entitled to all of it. Either position, if valid, would sustain the claim of the respondents and was entirely consistent with the only right which they were asserting under either, namely, that they were entitled to take the entire estate, and that appellants were entitled to none of it. In assuming this position, there was nothing in the nature of an election on the part of the respondents to claim as heirs at law or that constituted a waiver of the prosecution of their previous appeals or an abandonment of their right to claim under the will.

It is further insisted by appellants that the

minute order of December 12, 1910, was a judgment determining the rights of the parties to the estate of the decedent; that the court thereby exercised its jurisdiction and disposed of the rights of the parties, which, having done, it was without jurisdiction subsequently to enter the decrees appealed from, and they are therefore void. Little need be said on this point. The minute order which is claimed by appellants to have the force of a judgment followed the announcement in its written opinion of the views of the superior court on the question of advancements; that court finding against the respondents on that issue and as a consequence (under its previous decision holding the will invalid) was of the opinion that the estate of the decedent should be equally divided among his children. But such order was not a final judgment or decree nor intended to be such or so considered by either court or counsel when it was entered.

[5] Aside from the evidence on the face of the order itself, which clearly shows that it was not so intended, the fact is that the estate was not then in a condition to be closed, as there had been at that time no settlement of the final account, and a decree of final distribution could only be had after such settlement. Code Civ. Proc. § 1665; *Smith v. Westerfield*, 88 Cal. 380, 26 Pac. 206.

[6] On its face the minute entry, claimed to be in effect a judgment, is designated as an order, and its terms show that it could not have been intended as a decree of distribution. It preserved for future consideration (independent of the fact that no final account had been settled) other matters to be adjusted before a final decree could be made. It does not name the distributees, except in a general way, and contains no description of the property to be distributed which the law contemplates a final decree should contain. But, as convincing proof that it was not intended to be and was not a final decree, it ordered "that findings and a decree of final distribution be prepared accordingly." The order at most, taken in connection with the circumstances under which it was made, shows that it amounted only to an opinion of the court as to how the estate should be distributed in view of its conclusion against the claims of the respondents that the appellant should be excluded from participation in the estate by reason of alleged advancements, and that the distribution of the estate would only be had on findings, and a decree of final distribution to be thereafter prepared and signed.

The attorneys for appellants fully understood that this was the only effect of the order, as 13 months after its entry they were moving the court for the settlement of findings and for a decree of final distribution in harmony with its terms when further action of the superior court in that regard was re-



strained by the supersedeas issued by this court.

As the points made for a reversal are in our opinion untenable, both the decrees appealed from are affirmed.

We concur: HENSHAW, J.; MELVIN, J.; ANGELLOTTI, J.; SHAW, J.; SLOSS, J.

(165 Cal. 576)

**EGAN v. CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 6526.)**

(Supreme Court of California. June 11, 1913.)

**1. MUNICIPAL CORPORATIONS (§ 268\*)—POWERS—CONSTRUCTION OF OPERA HOUSE—CHARTER PROVISIONS.**

San Francisco city charter, as amended January 27, 1913, art. 2, c. 2, § 10, after empowering the board of supervisors to acquire land to establish a civic center, declares that it may authorize the erection of an auditorium by the Panama-Pacific International Exposition Company, or of an opera house, or other structure, provided the ownership shall always be vested in the municipality. *Held*, that such grant was not limited to the right to erect only one of the various buildings described, but constituted an express grant to the supervisors of power to authorize the erection of an opera house to be owned by the city, which carried with it the necessary power to use the building so owned for public entertainments.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 717; Dec. Dig. § 268.\*]

**2. MUNICIPAL CORPORATIONS (§ 59\*)—POWERS.**

Municipal corporations have only the powers expressly conferred, and such as are necessarily incident to those expressly granted, or essential to the declared objects and purposes of the corporation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 149; Dec. Dig. § 59.\*]

**3. MUNICIPAL CORPORATIONS (§ 717\*)—POWERS—CONSTRUCTION OF OPERA HOUSE—MANAGEMENT.**

The city and county of San Francisco, having been authorized by charter amendment, January 27, 1913, art. 2, c. 2, § 10, to construct an opera house on property belonging to the city, had no power to contract with a private corporation that the latter should erect a building on land belonging to the city, the opera house when completed to become a part of the realty, with title to be vested in perpetuity in the city, but in trust for the uses, trusts, and purposes set forth in the agreement, which provided that the occupation, conduct, control, management, and possession of the building should be vested in a board of trustees, a majority of whose members the municipality was not to select, and whose actions it had no power to control.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1526; Dec. Dig. § 717.\*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by George C. W. Egan against the City and County of San Francisco and the Musical Association of San Francisco. Judgment for defendants, and plaintiff appeals. Reversed.

H. S. Young, of San Francisco, for appellant. John H. Riordan, of San Francisco, amicus curiae. Percy V. Long, Thos. E. Haven, and Henry H. Hart, all of San Francisco (Heller, Powers & Ehrman and Joseph D. Redding, all of San Francisco, of counsel), for respondents.

SLOSS, J. The plaintiff, as a taxpayer of the city and county of San Francisco, brought this action to enjoin the carrying out of the terms of a certain agreement, entered into between the city and county and the Musical Association of San Francisco, and looking to the erection and management of an opera house. He also sought to have the agreement, and an ordinance authorizing its execution, declared null and void. A demurrer to the complaint was sustained, and judgment in favor of the defendants entered. The plaintiff appeals from the judgment.

The agreement in question, briefly stated, after reciting the incorporation of the Musical Association of San Francisco (which we shall hereinafter designate as the "Association") for the purpose of fostering and promoting the art of music and encouraging a taste therefor, and declaring the desirability of these purposes, provides as follows: The association agrees to build, erect, furnish and equip upon a described block of land owned by the city and county, and forming a part of the tract set apart as a civic center, an opera house, and to expend in the construction, decoration, and equipment thereof not less than \$750,000. The opera house, when completed, is to become a part of the realty, and title to the land and building shall be vested in perpetuity in said city, "but in trust for the uses, trusts and purposes hereinafter set forth." The building to be erected is to be used exclusively for the production of operas, music dramas, ballets, and concerts, and other musical and dramatic purposes. When not in use for these purposes, it may, for the purpose of deriving a revenue to be applied to such purposes, be rented by the trustees hereafter named. The perpetual use of the land and building, as above stated, shall never be changed except by the consent of both parties to the agreement. The construction, decoration, furnishing, and equipment of the opera house is to be under the direction, control, and supervision and at the expense of the association, but the exterior design is to be approved by the board of supervisors of the city and county. The city agrees, so far as it has power so to do, that no taxes shall be assessed or levied on the building or its contents, or upon the box, loge, or seat privileges in the opera house. The expense of parking and gardening the grounds about the building is to be borne by the city.

The seventh paragraph of the agreement provides that "the occupation, conduct, con-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



trol, management and possession of said opera house and its contents shall be vested in perpetuity in a board of fifteen trustees, or their respective successors, to be constituted as follows": Nine trustees to be appointed from the membership of the association by the board of governors, one to be the mayor of the city and county of San Francisco, one the head of the department of education of said city, one a supervisor of the city and county appointed by the mayor, one a citizen, not in public office, to be appointed by the mayor, one a professor of the University of California, and one a professor of Leland Stanford, Jr., University, the two last named to be appointed by the presidents of the respective universities. The following paragraph declares that: "The said trustees for all the purposes herein contemplated shall be vested with the full control, possession and management of the said opera house and its contents, and except as hereinabove provided, of the land above particularly described. \* \* \*" The trustees are authorized to lease the opera house to companies, managers, or individuals for the purposes contemplated by the agreement; they are to have the sole right to direct and prescribe the quality of performances to be given, and the amount to be paid for admission, except that at least 400 seats are to be reserved for sale to the public at a price not exceeding \$1.50 per seat. The agreement contains a number of further provisions, but what we have set forth will sufficiently illustrate the principal points which are to be here considered.

In the final analysis, there is but one question to be decided, and that is, Has the city and county of San Francisco, acting through its board of supervisors, the power to enter into an agreement like the one here attempted to be made. If the requisite authority is lacking, this court has, of course, no concern with the desirability of such an arrangement. No doubt the citizens who, by their subscriptions to the association, have made it possible for that body to undertake to erect, without cost to the city, a monumental structure, dedicated to the encouragement and advancement of artistic effort, are actuated by motives of altruism and civic pride rather than by any purpose of personal advantage. No doubt, too, the supervisors, in authorizing this contract, were impelled by the laudable desire to add to the attractions and benefits which the city has to offer to its inhabitants. But, however worthy the motive, however advantageous to the public the result sought to be attained, it must always be remembered that municipal corporations are public bodies of limited powers, and that the validity of their acts must be judged by an examination of the charter or law defining their powers, rather than by a view of the purposes or results of those acts. If the city and county has not the power to enter into such a contract as the one before

us, that contract must fall, even though every member of this court should be convinced that the construction of an opera house on the agreed plan would be of the greatest benefit to the city and those residing within it.

Notwithstanding the earnest and able arguments advanced on behalf of the respondents, we are unable to find any legal warrant for upholding the validity of the agreement. The effect of the transaction is simply that the city and county agrees with a private corporation that the latter may erect a building upon land belonging to the city, and that the entire control and management of the land, with the building, are to be turned over to a board composed, for the main part, of persons whom the municipality has not selected, and whose actions it cannot direct. It is true that, under the terms of the agreement, the ownership of the land and building is to be vested in the city and county. But the beneficial attributes of ownership, over and above the naked legal title, are taken from the city and county, and are placed in the hands of private persons. The trustees have the "occupation, conduct, control, management and possession" of the opera house in perpetuity; they are authorized to lease the premises; they are to prescribe the performances to be given, and to regulate the prices to be charged for admission to the house. In short, they exercise virtually every right which could be exercised by one holding under a perpetual lease which contained no restriction except that the building was to be used only for the purposes of an opera house. And, as has been already suggested, this exclusive control and possession, in the nature of things as well as by the express terms of the agreement, extends to the land to be covered by the building no less than to the structure itself.

[1] In endeavoring to ascertain whether the arrangement here sought to be consummated is authorized, we need not consider, at any length, the contention of appellant that the construction and conducting of an opera house is not, under any circumstances, a municipal function. Even without relying upon a specific provision of the San Francisco charter, to be mentioned hereafter, we should hesitate to say that the providing of a place for the production of musical performances was not within the proper scope of municipal activities, as now understood. The trend of authority, in more recent years, has been in the direction of permitting municipalities a wider range in undertaking to promote the public welfare or enjoyment. Thus, the appropriation of money for public concerts has been held to be proper under a statute authorizing appropriations for armories, for the celebration of holidays, and for "other public purposes." *Hubbard v. Taunton*, 140 Mass. 487, 5 N. E. 157. So, too, the erection of an auditorium has been regarded



as properly falling within the purposes for which a municipal corporation may provide by charter. *Denver v. Hallett*, 34 Colo. 393, 83 Pac. 1066. Similar views have been expressed in a case involving the levy of taxes for the purpose of building a hall to be used as a memorial to soldiers and sailors who served in the War of the Rebellion. *Kingman v. Brockton*, 153 Mass. 255, 26 N. E. 998, 11 L. R. A. 123. Generally speaking, anything calculated to promote the education, the recreation, or the pleasure of the public is to be included within the legitimate domain of public purposes. *Hubbard v. Taunton*, supra; see *Spilres v. Los Angeles*, 150 Cal. 64, 87 Pac. 1026, 11 Ann. Cas. 465; *Laird v. Pittsburg*, 205 Pa. 1, 54 Atl. 324, 61 L. R. A. 332.

[2] Assuming then that authority to erect and conduct an opera house may be conferred upon a city, the question whether a given municipality has that authority must be answered by a reference to the charter or law defining the powers of the particular municipality. The rule is elementary that municipal corporations have only the powers expressly conferred and such as are necessarily incident to those expressly granted, or essential to the declared objects and purposes of the corporation. *Dill. Mun. Corp.* (5th Ed.) § 357; *Von Schmidt v. Widber*, 105 Cal. 151, 38 Pac. 682; *Gassner v. McCarthy*, 160 Cal. 82, 116 Pac. 73. Whether or not the grant of powers contained in the charter of San Francisco, as originally adopted, is broad enough to authorize the city and county of San Francisco to conduct an opera house, it seems clear that the power to engage in such enterprise, at least under certain conditions, is necessarily implied from the language of section 10 of chapter 2, article 2, added to the charter by an amendment ratified by legislative resolution on January 27, 1913. The section, after empowering the board of supervisors to acquire land within a certain district for the purpose of establishing a civic center, and giving the board certain powers with respect to such land, provides that "it (the board of supervisors) may authorize the erection of an auditorium by the Panama-Pacific International Exposition Company, or of an opera house, museum, or other structure, provided the ownership of such structure shall always be vested in the municipality." We cannot agree with appellant's contention that the use of the alternative "or" limits the grant to that of the right to erect only one of the various buildings described. There is more force, however, in the claim that the requirement that the building shall be erected by the Panama-Pacific International Exposition Company applies to all of the structures designated, and not merely to the auditorium. This question need not, however, be here resolved. Assuming that the section gives authority for the construction by others than the Exposition

Company of an opera house, museum, or other structure of like kind (but not an auditorium), the provision constitutes an express grant to the supervisors of power to authorize the erection of an opera house to be owned by the city, and this carries with it, as a necessary incident, the power to use the building so owned for the purposes to which it is adapted.

[3] But, granting that the city and county has the right to own and to conduct an opera house, has it the power, after acquiring the ownership of such structure located upon land belonging to the municipality, to turn over in perpetuity to a private corporation, or to a body of private citizens, the absolute control and management of such land and building? There is nothing in the amendment quoted above to indicate that it was designed to authorize the supervisors to provide for anything other than public structures and activities. On the contrary, the proviso that the ownership of the structure shall always be vested in the municipality shows clearly that it was intended to permit the construction of public buildings only. The charter does not here or elsewhere, so far as we have been able to discover, contain any clause authorizing the city to delegate or part with its right and duty of managing, through its own officers or agents thereunto authorized by law, city property applied to public purposes. It would certainly not be claimed that property devoted to the more familiar municipal purposes, such as policing, fire protection, or the assessment and collection of taxes, could be turned over to be administered by private agencies. How, then, can such action be justified in this case? The public use of public property cannot, under any provisions of charter or statute to which our attention has been directed, coexist with private management and control of such property.

This principle is well illustrated by several decisions of this court. In *Cal. Academy of Sciences v. City and County of San Francisco*, 107 Cal. 334, 40 Pac. 426, the board of supervisors, assuming to act under the ordinance relating to the "outside lands," ratified by the Legislature in 1868 (*Stats. 1868*, p. 379), set apart a lot "for the use of the Academy of Sciences," a private corporation organized for scientific research. The ordinance authorized the board to set apart lots "for public uses." It was held that the "Academy of Sciences," although its activities were beneficial to the public, was essentially a private, and not a public, corporation, and that land could not be set apart to it as for a "public use." A like conclusion was reached in *Horne, etc., of the Inebriate v. City & County of San Francisco*, 119 Cal. 534, 51 Pac. 950. In each of these cases it was held that the plaintiff had no right to the possession of the land so sought to be set apart to it. Similarly, in *La So-*



cleta, etc., v. City and County of San Francisco, 131 Cal. 169, 63 Pac. 174, 53 L. R. A. 382, the court denied the power of the board of supervisors to grant a part of the city cemetery to a benevolent society, for burial places, although the society agreed to and did expend money in improving the grounds, and buried a number of persons without charge. The essential ground of the decision, in the three cases just cited, was that a use by a private corporation was not a public use. For this reason the property of the city, held in trust for public uses, could not be turned over to such corporation. And the conclusion was not altered by the circumstance that the purposes to which the property was to be applied were, to some extent at least, within the scope of municipal activities. The same reasoning applies here. If the management of an opera house constitutes a public use, the public character of the use can exist only so long as the control is retained in the hands of some public agency. The powers of control, vested in the board of trustees by the agreement before us, undoubtedly require the exercise of judgment and discretion. In so far as the proposed use is public, these powers necessarily devolve upon some officer or board of the municipality, and, under the well-settled rule, powers of this character cannot be delegated. *Scollay v. County of Butte*, 67 Cal. 249, 7 Pac. 661; *Holley v. Orange*, 106 Cal. 420, 39 Pac. 790; *Knight v. Eureka*, 123 Cal. 192, 55 Pac. 768.

There may, of course, be power to lease public property, but the agreement under consideration does not purport to be a lease, and, besides, the proceedings, requisite for the leasing of city lands (charter, art. 2, c. 2, § 1, subd. 32) were not followed. It is suggested in one of the briefs that there is no provision prohibiting the city and county from disposing of its property. But in the case of a municipal corporation power to do an act is not to be implied from the fact that the act is not expressly or impliedly prohibited. As we have already stated, the power does not exist, unless it is granted in express terms or by necessary implication.

The objection now under discussion is not met by the consideration that the city is given a representation on the board of trustees which is, under the contract, to have the possession and management of the opera house. A majority of the board is to be appointed by the Musical Association, and the city is given no voice in the selection of such majority, or of their successors. It goes without saying that the association, naming 9 members of a board of 15, exercises a power which cannot be effectively disputed by the city and county, having a direct representation of not over four members. Whatever might be said of an arrangement under which the representation was equal (see *Laird v. Pittsburg*, 205 Pa. 1, 54

Atl. 324, 61 L. R. A. 332), it cannot be disputed that the purpose and effect of the contract before us was to vest the management and direction of the opera house in a board that should be essentially beyond the control of the municipality or its officers.

The respondents advance, as a distinct ground for sustaining the transaction, the argument that the erection of the opera house, under the terms of the agreement before us, amounts to a gift to the municipality, in trust for purposes germane to the objects of the corporation. It is well settled that municipal corporations may accept such gifts (*Estate of Robinson*, 63 Cal. 620; *Worcester v. Eaton*, 13 Mass. 371, 7 Am. Dec. 155; *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401; *Phillips v. Harrow*, 93 Iowa, 92, 61 N. W. 434; *Beurhaus v. Cole*, 94 Wis. 617, 69 N. W. 986), even where the gift is made subject to the performance of certain obligations by the municipality. *Budd v. Budd* (C. C.) 59 Fed. 735. Article 1, section 1, of the San Francisco charter provides in terms that the city and county may "receive bequests, gifts and donations of all kinds of property, in fee simple, or in trust for charitable and other purposes, and do all acts necessary to carry out the purposes of said gifts, bequests and donations, with power to manage, sell, lease or otherwise dispose of the same, in accordance with the terms of the gift, bequest or trust." In so far as it is proposed to make a gift to the city, it is not to be doubted that the section quoted authorizes the city to accept the gift in trust, and subject to the conditions agreed upon by the donors and the city. But the charter does not purport to authorize the city to make gifts, or to subject its property to a trust. The "trust" here sought to be created embraces, not only the building to be erected by the association, but the land upon which that building is to stand. So long as the opera house is in existence, the land is withdrawn from any other use. It is as completely dedicated to the purposes of an opera house as is the structure standing upon it. Giving the fullest effect to the claim that the city may accept a gift of an opera house, upon condition that the management of that opera house shall be for all time vested in a private body, we cannot see how this argument tends to sustain the position that the city may turn over its land to be used, controlled, and managed by such private body for the purposes of an opera house. If it were proposed to erect this building upon private property, and then to present the land and the building to the city, upon the conditions embodied in the agreement, the transaction might well be sustained upon the ground suggested by respondents. But the case before us is a very different one, and, however much we may regret the result of our holding, we feel bound to declare that, in our judgment, there is no au-



thority in law for the carrying out of the agreement here attacked.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

(165 Cal. 645)

**PEOPLE v. WATSON. (Cr. 1,716.)**

(Supreme Court of California. June 14, 1913.)

**1. HOMICIDE (§ 338\*)—APPEAL—HARMLESS ERROR.**

In a trial for murder committed by defendant while in a room occupied by himself and decedent's wife, where the prosecution did not show that defendant knew of the relationship of the woman to deceased, defendant could not complain of the introduction of the record of their marriage where the woman, when called as a witness for the defense, testified that her name was Mrs. John Bury and that deceased was her husband.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 709-713; Dec. Dig. § 338.\*]

**2. HOMICIDE (§ 165\*)—EVIDENCE—RELATION OF PARTIES.**

In a prosecution for murder by defendant who was found in the room of decedent's wife, where the state introduced the record of the marriage of the woman and deceased, and where defendant asserted that he did not know that deceased was her husband, evidence that she and the deceased had never lived together as husband and wife at all was admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 319; Dec. Dig. § 165.\*]

**3. HOMICIDE (§ 165\*)—EVIDENCE—RELATION OF PARTIES.**

In a prosecution for murder where defendant asserted that he did not know that the woman with whom he had been consorting was the wife of deceased, the testimony of the woman as to whether as far as she knew defendant knew or had any reason to suppose that she was a married woman was admissible, so that she should have been permitted to state whether she or any one in her presence had ever told defendant of her marriage.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 319; Dec. Dig. § 165.\*]

**4. HOMICIDE (§ 339\*)—APPEAL—HARMLESS ERROR.**

Error in the exclusion of such evidence was not cured by her testimony that her statement after the death of deceased that she had been married to him, was the first time she had told defendant of her marriage, since it did not deny as a negative answer to the original answer would have done that defendant might have possessed, to her knowledge, information regarding the marriage from other sources.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 714; Dec. Dig. § 339.\*]

**5. CRIMINAL LAW (§ 421\*)—EVIDENCE—RELATION OF PARTIES—REPUTATION.**

In a prosecution for murder where defendant asserted that he did not know that the woman in whose company he was found was the wife of deceased, he was entitled to proof of the common report regarding her status, and to show that at the place where she was living apart from deceased she was known under another name than that of decedent's wife, and to show that she had called him up by telephone using such name, and to show by her employer that she was invariably called by that name.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 976-983; Dec. Dig. § 421.\*]

**6. HOMICIDE (§ 339\*)—APPEAL—HARMLESS ERROR.**

In a prosecution for murder where the woman in whose company defendant was found was not allowed upon direct examination to state why she desired to have a lock put upon her door, but on cross-examination fully stated her reasons, defendant could not object to the court's ruling.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 714; Dec. Dig. § 339.\*]

**7. CRIMINAL LAW (§ 663\*)—EVIDENCE—DIAGRAM OF PREMISES.**

In a prosecution for murder it was proper for the county surveyor to introduce and explain a diagram of the premises where the killing occurred.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1602; Dec. Dig. § 663.\*]

**8. CRIMINAL LAW (§ 448\*)—EVIDENCE—CONCLUSION OF WITNESS.**

In a prosecution for murder an answer of a witness that she had struggled with deceased outside the door for five or ten minutes, giving defendant ample time to escape if he had wished to do so, was inadmissible as a conclusion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1035-1039, 1041-1043, 1045, 1048-1051; Dec. Dig. § 448.\*]

**9. CRIMINAL LAW (§ 1044\*)—DECISIONS REVIEWABLE—MOTION TO STRIKE.**

Error in the admission of an answer stating a conclusion, was of no avail to defendant where no motion was made to strike the answer out.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2672, 2674, 2675; Dec. Dig. § 1044.\*]

**10. CRIMINAL LAW (§ 656\*)—TRIAL—REMARKS OF TRIAL JUDGE.**

Where a witness in a murder trial testified regarding a threat made by deceased against defendant and said that deceased did not seem like a human being he was in such a frenzy, the remark of the court that perhaps a witness had stated her impression too graphically, and, on her protest that she had stated the absolute truth, his further remark that her language was very strong, though he had no doubt of its truth, was not objectionable as tending to influence the jury to believe that he considered the testimony an exaggeration.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1524-1533; Dec. Dig. § 656.\*]

**11. CRIMINAL LAW (§ 798\*)—INSTRUCTIONS—ADMONITION TO JURY.**

An instruction that defendant on trial for murder was entitled to the independent judgment of every juror, and that if after listening to the evidence and the instructions any juror upon retiring entertained a reasonable doubt as to defendant's guilt and should for the sake of convenience vote for the conviction of murder in the second degree, or even manslaughter, he would be violating his oath and doing a grievous wrong to defendant was without substantial error, although the word "even" qualifying "manslaughter" might well have conveyed a suggestion that there would be something less of moral turpitude in convicting an innocent man of manslaughter than of a higher degree of homicide.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1940, 1943; Dec. Dig. § 798.\*]

**12. CRIMINAL LAW (§ 857\*)—CONDUCT OF JURY—AGREEMENT UPON VERDICT.**

While a juror is bound to consider the evidence carefully, and to pay respectful attention to the opinion of his associates, he is not

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



required to endeavor at all hazards to agree with them, since the purpose of a consultation is to get, if possible, a true and conscientious determination.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2054, 2055; Dec. Dig. § 857.\*]

**13. CRIMINAL LAW (§ 822\*)—TRIAL—CONSTRUCTING INSTRUCTIONS TOGETHER.**

Instructions are to be read together.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. § 822.\*]

**14. CRIMINAL LAW (§ 798\*)—INSTRUCTIONS—AGREEMENT UPON VERDICT.**

An instruction that the jury were oath bound to reach some sort of a verdict, that to vote time after time in accordance with the first ballot cast was reprehensible, that failure to try to reach a verdict would render the offending jurors guilty of a flagrant violation of their oaths, that a jury is seldom of the same mind on the first ballot, was prejudicial as tending to a verdict of manslaughter, although they believed that defendant had acted in self-defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1940, 1943; Dec. Dig. § 798.\*]

**15. CRIMINAL LAW (§ 823\*)—HARMLESS ERROR—INSTRUCTIONS.**

Error in such instruction was not cured by an admonition as to the individual duty of each of them to maintain his conscientious opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.\*]

**16. CRIMINAL LAW (§ 814\*)—INSTRUCTIONS—ISSUES AND EVIDENCE.**

In a prosecution for murder where the proof showed that deceased and his wife had not been living together for months, and that she was employed as a waitress in the hotel where she and defendant were when deceased was killed, and was not, when the fatal shot was fired, in the room where defendant was, and in-to which knowing her absence, deceased sought to force his way, an instruction that no person had a right to exclude the husband from the wife's dwelling unless he was seeking to enter it for the purpose of killing or doing great bodily injury was objectionable as submitting an issue not raised by the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.\*]

**17. HOMICIDE (§ 123\*)—RIGHTS OF HUSBAND—WIFE'S DWELLING.**

A husband has no right to enter his wife's dwelling with force and against her will.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 182, 183; Dec. Dig. § 123.\*]

In Bank. Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Edwin James Watson was convicted of homicide, and he appeals. Reversed.

W. H. Carlin and Waldo S. Johnson, both of Marysville, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

MELVIN, J. A rehearing was granted after decision of this case by the District Court of Appeal. We quote from the opinion of that court the statement of facts:

"Bury and his wife were married at Se-

bastopol in Sonoma county on the 16th day of August, 1910. She remained there until the latter part of the month when she returned to the home of her parents in Marysville. After the expiration of a month she returned to her husband, but remained only till the middle of November. She then came back to Marysville and went to work as a waitress at the Western Hotel where she was engaged until the tragedy on the night of February 9, 1911. Bury and his wife did not live together after they parted in November. He came to Marysville twice, however, after that. One of these occasions was about the 1st of December, when he stayed over Sunday and exhibited a pistol to Mrs. Bury's father and threatened to kill the defendant. The second visit was on the 9th of February, the morning before the homicide, when he met his wife at the hotel and, exhibiting his pistol, he again threatened to kill the defendant. She left a note at the table used by defendant, who was boarding at the hotel, warning him of his danger. At the noon hour the defendant obtained the note, and he went and purchased a pistol. He also procured a bolt for the door of the room occupied by Mrs. Bury, as she had requested of him some days before. That evening, after work, he went to her room in the annex of the hotel, placed the bolt on the door, and he and the woman retired together. The deceased came to Marysville that night from Sacramento, arriving between 1 and 2 o'clock. He inquired for the location of Mrs. Bury's room of the porter, and the latter accompanied him to the place. After telling the porter to go away he knocked on her door. The woman heard him first and informed the defendant that the man was Bury. Both got out of bed and began to dress. Mrs. Bury opened the door and went out into the hall and talked with Bury, trying to induce him to go away. As she went out of the door into the hall she called to the defendant not to let Bury in or he would kill him. While struggling with Bury near the head of the stairs leading from the building to the street, Mrs. Bury saw her father, who was a police officer, pass down the street, and she called to him, but he did not hear. Mr. Bury broke away from her and returned to the door. She ran down the stairs and at the foot called her father who turned and ran back, and as he was about halfway up the stairs, his daughter in advance of him, two shots were fired. When the officer arrived at the door the woman had already entered, and Bury was reeling and he was caught by the officer and died shortly afterwards, having been shot through the heart. After Mrs. Bury ran downstairs Mr. Bury sought to force the door, breaking the lock, but not the bolt, but straining the casement through which the lock and bolt were fastened away from the post a quarter of an inch. The door itself

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



was cracked. While the deceased was trying to break open the door, the defendant, who had heard Mrs. Bury run downstairs calling her father, endeavored to hold the said door and did so for some time. Finally there came a crash and something struck defendant which was probably the 'ketch' broken off the door, and he believed that he had been shot and that the door was coming in, and, believing that his life was in danger, he fired one shot directly through the door and then he swung around and a second shot was fired involuntarily, the bullet going diagonally through the door and penetrating the wall beyond. The first shot was the one that struck deceased while he was in a crouching position with his left shoulder against the door. The defendant had never met the deceased personally, and he had no knowledge that the woman was married to Bury until after the shooting, when she returned to the room and said to defendant: 'I married that man.' Defendant had been working in Marysville as head draughtsman for the Yuba Construction Company for about two years and was a man of excellent character, as testified to by many witnesses."

From the foregoing statement the District Court of Appeal concluded that a verdict of not guilty might well have been rendered on the ground of self-defense, but because Mrs. Bury immediately after the shooting asserted to those in authority that she had shot her husband; because she at first failed to testify about the warning which she later said she gave to the defendant after she went out to meet Bury in the hall; because at the trial she said that Bury had a pistol in his hand on the night of his death, while at the preliminary examination she had testified that he had no weapon at the time of the tragedy; and by reason of the fact that many of the leading circumstances of the killing were related only by the defendant and by Mrs. Bury, who was obviously friendly to him, the jury might have been justified in disregarding some of the testimony upon which the theory of self-defense was based. Conceding all this to be true, nevertheless the evidence tending to support that theory was so very strong that any radical invasion of the defendant's rights must have operated necessarily to deprive him of a fair determination regarding his guilt or innocence. Upon a careful review of the evidence we have found such departure from the rules of law in criminal cases as impels us, under all the circumstances, to a conclusion that the judgment must be reversed and a new trial must be ordered.

Defendant's counsel insist with much force that Watson was convicted, not because he killed Bury, but because at the time of the shooting he was in a room which he and Bury's wife had been occupying.

[1] The district attorney was permitted, over the objection of defendant's counsel, to

introduce the record of the marriage of Bury and Edith Schmidt. The woman had been married to and divorced from a man named Schmidt, and it was shown by abundant evidence that after her brief residence with Bury as his wife she was known in Marysville, following her return, as Edith Schmidt. Defendant's counsel assigns as error the introduction of the record of the marriage of the woman to Bury, especially in view of the fact that the prosecution made no effort to show that Watson knew of the relationship of the woman called Edith Schmidt to Bury. Naturally the proof of the marriage would tend to prejudice the defendant in the eyes of the jury, and would throw upon him the burden of showing, if he might, that he was not consciously committing adultery. He cannot complain, however, of the mere introduction of this evidence, because the woman, when she was called as a witness for the defense, testified that her name was "Mrs. John Bury" and that deceased was her husband.

[2] But this evidence of the marriage having been introduced, the defendant was entitled to the widest latitude in showing circumstances tending to support his assertion that he was acting in utter ignorance of the fact that the man seeking to attack him was the husband of the woman with whom he had been consorting. The court sustained an objection to the question propounded to Mrs. Bury: "From the time of your return, this time, going back about a month and a half after your marriage, up to the night of the shooting, did you and Mr. Bury live together at all?" An answer to this question should have been allowed by the court, but perhaps the error was cured by a later question: "Did you and Mr. Bury live together as husband and wife at Marysville at all?" and the answer "No, sir."

[3] But material error was committed by the court in sustaining an objection to the following question: "I will put it this way, Mrs. Bury. *As far as you know yourself*, up to and including the night of the shooting and until after the shots were fired, did Mr. Watson know or had he any reason to suspect that you were a married woman or had ever been married, after being divorced from Herman Schmidt?" The objection to this question was that it was incompetent, irrelevant, immaterial, and leading. The objection should have been overruled. Any legal evidence tending to show the defendant's ignorance of the marriage was proper. The woman should have been permitted to state whether she or any one in her presence had ever told defendant of her marriage to Bury or whether the defendant himself had ever intimated to her anything indicating such knowledge.

[4] Nor was the error cured by her subsequent statement in which she told how she had exclaimed to Watson, immediately after



the death of Bury, "I was married to that man," that being, as she explained, the first time she had imparted to the defendant the fact of her marriage. This explanation, of course, did not include the elements which would have comprised an answer to the question to which an objection was sustained. It did not deny, as a negative answer to the original question would have done, that defendant might have possessed, to her knowledge, information regarding the marriage from other sources.

[5] The defendant should have been allowed the widest scope in his proof that Mrs. Bury was known to the people of Marysville and particularly to him as "Edith Schmidt." While both she and the defendant testified that he knew her by the name which was hers after her first marriage, he was entitled to proof of the common report regarding her status. Such testimony would not be hearsay, as the lower court seemed to think it would. If she had been generally known as "Mrs. Bury," Watson would have been charged with knowledge of that fact, not because he would have been presumed to know of the marriage certificate which was of record in another county, but because of the common report that she was a married woman. Married people are, as a rule, known as such by general repute in the communities in which they reside; therefore the evidence of the woman's marriage to Bury having been admitted, the jurors would naturally suppose that she was regarded as a wife by the people of Marysville who knew her. To repel this supposition the defendant was entitled to prove, if such were the fact, not only that Bury did not live with and support his wife, but that she did not bear his name. Defendant roomed at the home of Mrs. Garrett. He offered to show by her that the woman frequently called up the defendant by telephone, always using the name "Edith Schmidt." He also offered to show by the manager of the dining room in which she worked that she was invariably called "Edith Schmidt." This evidence was erroneously excluded, for if admitted it would have had a direct tendency to support his declaration that he always knew her as "Edith Schmidt."

[6] Appellant complains because Mrs. Bury was not allowed, on direct examination, to state why she desired to have a lock put upon her door. On cross-examination, however, she fully declared her reasons. He cannot, therefore, justly object to the court's ruling in this behalf.

[7] It was proper for the county surveyor to introduce and explain a diagram of the premises where the killing occurred. *People v. Loper*, 159 Cal. 21, 112 Pac. 720, Ann. Cas. 1912B, 1193.

[8, 9] Officer McCoy was asked to relate, and did detail, over defendant's objection, a conversation between himself, Edith Schmidt,

and the district attorney, in which the woman said that she wrestled with Bury outside the door for five or ten minutes, giving Watson ample time to escape if he had wished to do so. The impeaching question was not in proper form and the latter part of the answer was a conclusion. The first error was harmless because the foundation had been amply laid by a question to Mrs. Bury regarding the time during which the wrestling outside the door had lasted, according to her statement to McCoy. Neither error is of any avail to defendant, because no motion was made to strike the answer out.

[10] Testimony was given by Miss Rena Ryant regarding a threat made by Bury against Watson in the year 1910. In describing the excited condition of Bury, she said: "He didn't seem like a human being in that frenzy—he was in such a frenzy." In denying a motion to strike out this answer as being the mere opinion of the witness, the court remarked: "I think she has stated perhaps too graphically her impression." Witness protested that what she had stated was "absolute truth," and the court replied: "I mean your language is very strong, your conclusion; but I have no doubt of your being truthful." While the first comment of the court standing alone, might have been misleading and might have caused the jury to believe that the court considered Miss Ryant's testimony an exaggeration, we think this tendency was checked by the court's prompt disclaimer of any intention to impugn her veracity.

[11] A number of alleged errors are predicated upon instructions given and refused, but it will not be necessary to notice any save the ones that follow. In the course of the charge the court used this language: "I further instruct you that the defendant in this action is entitled to the independent judgment of every juror selected to try him; and after listening to all the evidence in this case and the instructions of the court and upon retiring to the jury room for deliberation any juror entertaining a reasonable doubt as to the defendant's guilt of any offense included in the information who should, nevertheless, for the sake of his own convenience or the convenience of any other juror, or for any other reason, while entertaining such reasonable doubt, vote for the conviction of defendant of murder in the first degree, murder in the second degree, or even manslaughter, would be perpetrating upon the defendant a grievous wrong and violating his own oath as juror."

This instruction was substantially correct, although in view of a later instruction the word "even" qualifying "manslaughter" might well have conveyed a suggestion to the jurors that there would be something less of moral turpitude in convicting an innocent man of manslaughter than of a higher degree of homicide. However, the instruction was



in line with the admonition to the jury approved in *People v. Dole*, 122 Cal. 495, 55 Pac. 581; *People v. Howard*, 143 Cal. 324, 76 Pac. 1116; and *People v. Wong Loung*, 159 Cal. 535, 114 Pac. 829.

[12-15] But later, and indeed as the last declaration of the law applicable to this particular case (except the purely formal matters of selection of a foreman, the styles of verdict and the like), and consequently occupying a place of peculiar emphasis, this instruction was delivered: "Gentlemen of the jury: This case is now submitted to you for your consideration and decision. You and each of you solemnly swore that you would decide it in accordance with the testimony of the witnesses and the instructions of the court. To comply with your oath, it will require of you calm deliberation, and careful consideration. A jury is seldom of the same mind on the first ballot, but for that reason the jurors should not sit back and refuse to compare notes with their fellow jurors, but work all the more earnestly to arrive at a verdict and thus comply with their oaths. To vote time after time in accordance with the first vote cast, and not try to arrive at a verdict is to deliberately set aside the oath you took on being accepted as jurors, to wit: That you would return a verdict in accordance with the testimony delivered in the case. This, each one of you can do and do no violence to your conscience as fair-minded, conscientious, and intelligent jurymen."

By the foregoing instruction the jurors were told, in effect, that they were oath bound to reach some sort of a verdict, that to vote time after time in accordance with the first ballot cast was something most reprehensible—indeed that failure to try to reach a verdict would render the offending jurors guilty of a flagrant violation of their oaths. While a juror is bound to consider the evidence carefully and to pay respectful attention to the opinions of his associates, the very thing he is *not* required to do is to endeavor at all hazards to agree with them. We are mindful of the rule that instructions are to be read together, and that all of the law on one subject may seldom be stated in a single instruction, but although during the delivery of the charge the jurors had been properly admonished regarding the individual duty of each of them to maintain his conscientious opinion, we do not think that admonition neutralized the error of the later instruction. After most solemnly reminding them of their sworn duty, the court informed the jurors that "a jury is seldom of the same mind on the first ballot," and that therefore arose the duties of consultation with fellow jurors and agreement on a verdict. It may or may not be true that a verdict is seldom determined by the first vote taken in the jury room. Whether it is true or not, the statement of that supposed fact

has no proper place in an instruction as a reason why jurors should consult and "compare notes with their fellow jurors." The purpose of consultation is to reach, if possible, a true and conscientious determination. Jurors are not called upon to compare notes merely because other jurors have agreed after an initial diversity of opinion. Such an instruction, particularly in this case wherein the evidence which is admittedly true (to say nothing of the testimony open to possible doubt), gives very strong support to the theory of self-defense, must have operated to defendant's great disadvantage. Jurors retiring to deliberate, with the court's most emphatic and practically final declaration in their minds, might reach a verdict of manslaughter (thinking that thus they would avoid the deliberate setting aside of their oath), notwithstanding the firm belief on the part of some of them that the defendant acted as a reasonable man in self-defense.

[16] The proof showed that Bury and his wife had not been living together for months, and that she was employed as a waitress in the hotel. The uncontradicted testimony of the defendant, of Mrs. Bury, and of her father was that when the shots were fired the woman was not in her apartment at all. Yet the court gave the following instruction: "I further instruct you, gentlemen of the jury, that the Civil Code of this state declared that 'Neither husband nor wife has any interest in the property of the other, but neither can be excluded from the other's dwelling.' If you find from the evidence beyond a reasonable doubt that on the night of the homicide the deceased, John F. Bury, and the witness Edith Bury were, then and there, husband and wife, then as matter of law the husband had the right to seek and demand entrance into and to enter said room if it was shown to your satisfaction that said room was then and there the dwelling room of said Edith Bury; and I further instruct you that no person had a right to exclude said husband from said dwelling unless you find from the evidence that he, the said husband, was then and there seeking to enter said dwelling room with and for the purpose of killing, or doing great bodily injury to, such or any person therein or committing therein any felony." This was followed by instructions that, notwithstanding the marriage relation and the right of a husband to access to his wife's dwelling, he may not seek to enter her abode by force for the purpose of killing or doing great bodily injury to any person who may be therein with his wife's consent. These instructions, particularly the one which we have quoted verbatim, should not have been given. Their only effect must have been to give the jury the idea that Bury was acting under some peculiar privilege of access to that room which Watson was bound to respect, unless he was sure that the former meditated great



violence. Under the evidence there could be no essential difference between these men and any other two individuals, one of whom was trying to break in a door to reach the other. Bury was not seeking his wife's society. He had seen her run down the stairway and had heard her calls for help. There was no claim nor any evidence that Bury's errand was one other than of vengeance. He resided in another city and not with the woman who, although his wife, was living under the name she bore prior to their marriage. The question of reasonable access to a spouse's dwelling was not involved, and the natural result of the instructions upon that subject would be to convince the jurors that the defendant was a trespasser, and as such he had a very limited right to defend himself, but must flee if such a course were at all possible. The giving of these instructions was error.

[17] The defendant offered an instruction which might have cured the error produced by the other instructions upon access by a husband to a wife's dwelling. This instruction, however, was refused. It was in the following language: "I instruct you that while the Civil Code of this state provides that the husband cannot be excluded from the wife's dwelling, yet he has no right to enter her dwelling with force and against her will."

While defendant's conduct with the woman was immoral, it did not take away from him the natural right of self-defense, and the very fact that the jury would probably look with reprehension upon his gross impropriety made it all the more necessary that he should be tried upon the actual issues involved—that his rights should not be jeopardized by prejudice.

The judgment and order are reversed.

We concur: HENSHAW, J.; LORIGAN, J.; SHAW, J.

(185 Cal. 687)

LUM v. AMERICAN WHEEL & VEHICLE CO. et al. (S. F. 5,720.)

(Supreme Court of California: June 14, 1913.)

**1. CORPORATIONS (§ 175\*) — ASSESSMENTS — PAID-UP STOCK.**

Under Civ. Code, § 331 et seq., providing that directors of any corporation after one-fourth of its capital stock has been subscribed may levy assessments as therein prescribed, the directors may levy assessments upon the capital stock after, as well as before, its par value has been fully paid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 654-656; Dec. Dig. § 175.\*]

**2. CORPORATIONS (§ 186\*) — STOCKHOLDERS — AGREEMENT WITH STOCKHOLDERS.**

A corporation may agree with its stockholders to do or refrain from doing something, when such action or abstention is not contrary to express law or to public policy, and may

even provide for a surrender by one of the parties of some privilege granted by law.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 695-701; Dec. Dig. § 188.\*]

**3. CORPORATIONS (§ 247\*) — STOCKHOLDERS' PERSONAL LIABILITY—WAIVER.**

A corporation may agree to require, as part of all its contracts, a stipulation by its creditors that they will waive their rights to enforce the personal liability of the stockholders imposed by the Constitution.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 983-997; Dec. Dig. § 247.\*]

**4. CORPORATIONS (§ 175\*)—RIGHT TO ASSESS STOCK—LIMITATION OF STOCKHOLDERS' LIABILITY — CONSTITUTIONAL AND STATUTORY PROVISIONS.**

Under Const. art. 12, § 3, providing that each stockholder of a corporation shall be personally liable for his proportionate part of all its debts incurred while he was a stockholder, Civ. Code, § 331, giving the directors of a corporation the right to levy assessments upon paid-up stock, and section 332, imposing certain limitations upon the general power of assessment, an agreement between a corporation and its stockholders that the stock should be issued as fully paid and nonassessable, as recited in the certificate, was valid, where the rights of creditors are not directly involved, so that the corporation could not levy an assessment against such stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 654-656; Dec. Dig. § 175.\*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by William Tappan Lum against the American Wheel & Vehicle Company and others. Judgment for defendants, and plaintiff appeals. Reversed.

A. F. St. Sure, of Oakland (Clark & Tardy, of Oakland, of counsel), for appellant. Frank A. Duryea, of San Francisco, for respondents. Wm. B. Bosley and James S. Spillman, both of San Francisco, amici curiæ.

MELVIN, J. This case was decided by the District Court of Appeal and an order of the superior court dissolving an injunction pendente lite against the sale of plaintiff's stock for nonpayment of an assessment was upheld. This court granted a rehearing, and upon a further consideration of the matter we have reached a different conclusion. However, we adopt the statement of fact from the opinion of the District Court of Appeal as follows: "The defendant in this case is a corporation organized and existing under the laws of the state of Arizona. Its principal place of business is designated at Phoenix, Ariz., and it also maintains an office for the transaction of business in the city and county of San Francisco. The corporation is empowered to and is doing business in the state of California. All of the directors and officers of the corporation are residents of the state of California, and all of the meetings of its board of directors have been held in the state of California. The plaintiff is a stockholder in the corporation defendant, and all of his stock therein was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.



issued to him as fully paid and nonassessable, and at the time of its purchase it was understood and agreed between the plaintiff and the corporation defendant that such stock would continue to be nonassessable. Prior to the commencement of this action the corporation defendant levied an assessment of one cent per share upon its capital stock and notified its stockholders that their stock would be sold at public auction if the assessment was not paid within a designated time. After a failure to pay the assessment, the defendant threatens to sell the plaintiff's stock, and the plaintiff seeks in this action to have said assessment declared null and void, and to perpetually enjoin the corporation and its directors from making the threatened sale. Upon the filing of the complaint the lower court granted and issued its injunction pending the litigation, enjoining the sale of the plaintiff's stock. This appeal is from an order dissolving the injunction, and the case comes here upon a bill of exceptions made up of the plaintiff's complaint, the record of the defendant's motion to dissolve, and the affidavits offered in support of the motion and used upon the hearing thereof. It appears from the affidavits, and it is also admitted here, that previous to and at the time of the levying of the assessment complained of the corporation defendant was indebted in the sum of \$24,235 to various firms and persons, which indebtedness was legitimately and necessarily incurred in the maintenance and operation of the business of the corporation, and that the defendant had no funds on hand or income sufficient to pay said indebtedness, or to enable it to pay its necessary operating expenses as they accrued in the ordinary course of its business. In short, it was shown, and not disputed upon the hearing of the motion to dissolve the injunction, that the defendant was heavily in debt and practically insolvent, and that the assessment in question was levied primarily for the purpose of paying the claims of creditors of the corporation. It is conceded by both parties that, although organized under the laws of the state of Arizona, the corporation defendant was created and chartered for the purpose of doing business in the state of California, and that therefore the laws of Arizona authorizing corporations organized there to issue stock as fully paid up and nonassessable have no bearing upon the question of the right of the defendant to levy and collect the assessment in controversy here. It is further admitted that the fact that the defendant is a 'foreign corporation' doing business in this state does not entitle it to any consideration different from or more favorable than that which would be accorded to a corporation organized and existing under the laws of the state of California."

It is submitted by William B. Bosley, Esq., and James S. Spilman, Esq., who have filed briefs as amici curiæ, that the concessions mentioned above were unnecessary. It is as-

serted by these counselors that a foreign corporation in California is governed in all matters of internal concern by its charter and the law under which its charter was granted, citing *Reife v. Rundie*, 103 U. S. 222, 26 L. Ed. 337; *Republican Mountain Silver Mines v. Brown*, 58 Fed. 644, 7 C. C. A. 412, 24 L. R. A. 776; *Giesen v. London & N. W. Am. Mortgage Co.*, 102 Fed. 584, 42 C. C. A. 515; *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076. They maintain that article 12, § 15, of the Constitution does not require a foreign corporation doing business within this state to transact business here upon conditions *identical* with those attached to domestic corporations, but that it must not be allowed to operate upon more *favorable* conditions than those prescribed for Californian corporations; that the power to levy assessments upon fully paid stock is an advantage and not a detriment; and that therefore the limitation contained in the contract between this defendant corporation and its stockholders is a *less* favorable condition than that usually existing with corporations formed within this state and a condition not prohibited by our Constitution. This is a very interesting subject but one which we need not examine carefully in the case at bar. In view of the agreement of counsel for the respective parties to this action, we shall discuss the question which they consider the crux of the whole matter, and we shall assume, only for the purposes of this case, that the problem before us is exactly the one which would exist if the defendant were a corporation organized under the laws of California. Accepting, then, the agreement of counsel regarding the law governing this form of corporation, the question and the only one, as counsel for appellant indicates in his brief, is this: Where a Californian corporation sells shares of its capital stock upon an express agreement that the said stock shall be issued as fully paid and shall be nonassessable and the certificates of stock recite that the stock is fully paid and nonassessable, may the corporation levy an assessment upon such stock where no rights of a creditor are directly involved?

[1] It is undoubtedly true that ordinarily under section 331 et seq. of the Civil Code, the board of directors of a corporation may levy assessments upon the capital stock *after* as well as *before* the par value of such stock has been fully paid. *Santa Cruz R. Co. v. Spreckles*, 65 Cal. 193, 8 Pac. 661, 802; *Green v. Abletine Med. Co.*, 96 Cal. 325, 31 Pac. 100; *Campbell v. Santa Maria Oil & Gas Co.*, 153 Cal. 282, 95 Pac. 39. Is an agreement between a corporation and its stockholders embodied in its articles of incorporation and expressed in its certificate, that its capital stock shall not be assessed after it is paid in full, a valid contract as between the stockholders and the corporation?

[2] That a corporation may enter into an agreement with its stockholders to do or to-



refrain from doing something when such action or abstention is not contrary to express law or to public policy can scarcely be doubted. Section 1667, Civ. Code; *Stephens v. Southern Pacific Co.*, 109 Cal. 89, 41 Pac. 783, 29 L. R. A. 751, 50 Am. St. Rep. 17. Such contracts may even go so far as to provide for a surrender by one of the parties of some privilege otherwise granted by law.

[3] It has been held that a corporation may agree to require, as part of all its contracts, a stipulation by its creditors that they will waive their right to enforce the personal liability of the stockholders given by the Constitution itself. *French v. Teschemaker*, 24 Cal. 558; *Wells v. Black*, 117 Cal. 161, 48 Pac. 1090, 37 L. R. A. 619, 59 Am. St. Rep. 162.

[4] In the opinion of the learned District Court of Appeal it is declared that the contract here under review is inconsistent with the provisions of section 3 of article 12 of the Constitution and with sections 331 and 332 of the Civil Code. The material portion of the above-cited section of the Constitution is as follows: "Each stockholder of a corporation, or joint-stock association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock, or shares of the corporation or association." It will be seen at a glance that this refers to the direct personal liability of the stockholder to the creditor and not to the relations existing between the corporation and its stockholders. Section 331 of the Civil Code, while it gives the directors of a corporation the right to levy assessments upon paid-up stock, contains nothing which compels them to do so; while the following section merely announces certain limitations upon the general power of assessment. It is the contention of the respondents that the provisions of the Constitution and Code enter into every contract with reference to the sale and purchase of stock, and the District Court of Appeal in its opinion cited, in this behalf, *Union Savings Bank v. Leiter*, 145 Cal. 699, 79 Pac. 441; but it must be borne in mind that, in the case cited, the suit was one upon an assessment for part of an unpaid subscription to the capital stock levied by a board of directors engaged in the liquidation of the debts of an insolvent corporation. What was said in the opinion in that case was said with reference to the particular facts of that case, which were fully set forth in the opinion. It was determined under the rule well settled in this state that *unpaid subscriptions* upon the capital stock of a corporation are assets available to the creditors, and that they are collectable by assessment in a proceeding solely for the benefit of creditors, notwithstanding the fact that a by-law of the

company declared that such subscriptions should not be called, except by a two-thirds vote of the stockholders. In view of the fact that the assessment was one levied by directors of a corporation that had been adjudged to be insolvent, and who were engaged under the judgment of insolvency and under the direction of the bank commissioners in liquidating its affairs for the benefit of its creditors, the proceeding was one directly on behalf of creditors for the purpose of subjecting the unpaid capital to the satisfaction of their claims. In the case at bar the assessment is one levied by a corporation that has not been adjudged insolvent, and that is actually engaged in the transaction of its ordinary business.

The question before us in this case was not presented to the court in *Union Savings Bank v. Leiter*, supra. It has been discussed, however, in a well-considered opinion rendered by the Supreme Court of Idaho involving the construction of statutes practically identical with ours. *Wall v. Basin Mining Company, Ltd.*, 16 Idaho, 317, 101 Pac. 738, 22 L. R. A. (N. S.) 1013, was an action to establish the plaintiff's right as a stockholder in the defendant corporation. The court, following *Santa Cruz R. R. Co. v. Spreckels*, supra, held that fully paid up stock is assessable, but that, as between the corporation and the stockholder, there may be an agreement that the stock is fully paid and non-assessable. The opinion contains the following discussion: "In this connection we call attention to the fact that the controversy in this case arises between the corporation and a stockholder, that the rights of a creditor to enforce his claim against a stockholder, or the liability of a stockholder to a creditor for corporate debts, is not involved. This distinction should be kept in mind in order to apply and distinguish the cases dealing with this subject and cited by counsel, for in the case under consideration the question to be determined is: Can a corporation agree with its stockholders that the stock issued by such corporation shall not be subject to assessment? That is: Can such an arrangement or agreement be made which is binding as between the corporation and the stockholder? Revised Codes, § 2750, provides: 'The directors of any corporation formed or existing under the laws of this state, after one-fourth of its capital stock has been subscribed, may, for the purpose of paying expenses, conducting business or paying debts, levy and collect assessments upon the subscribed capital stock thereof, in the manner and form, and to the extent, herein provided.'" It will be noticed that this statute is in the same language as section 331 of our Civil Code, with the trifling and immaterial exception of the transposition of the last two words. Continuing, the court says: "As we have held, this section gives a corporation power to levy an assessment



against capital stock fully paid up. Counsel for respondent argue that the word 'may,' as used in this section, means 'must'; and that the corporation *must* levy an assessment for the purpose of paying expenses, conducting business, or paying debts. This section of the statute is in the nature of a grant of power, and authorizes a corporation to make a levy and collect assessments for certain purposes; but it is not compulsory that the corporation do so. The corporation may conclude that it will be to its advantage and to the advantage of its stockholders to permit its corporate property to be sold to satisfy its debts, rather than to levy assessments and sell the corporate stock; and if the argument of counsel for respondent is correct, and the word 'may' means 'must,' and the only course left to a creditor or stockholder contracting with a corporation would be to enforce the mandatory duty thus conferred upon the corporation, the creditor and the stockholder, with whom the corporation had contracted, would thereby be denied their action at law; but such construction is not authorized by the language of the section. The purpose and intent of the Legislature by enacting this statute was to confer upon the corporations the power to do the things therein enumerated. The inquiry then arises: Does the fact that a certificate of stock, issued by a corporation, bears upon its face the words 'fully paid up and nonassessable' amount to a contract between the corporation and the stockholder; and has the corporation power to make the same? The power of a corporation to make a contract with a stockholder, with reference to the issuing of stock to such stockholder, has been considered in many cases by the courts of this country, and generally upheld." After quoting from several opinions and citing other authorities, the court continues: "Our attention has not been directed to any statutory provision, and we know of none, which prohibits the articles of incorporation from containing a provision to the effect that the stock issued by the corporation is 'nonassessable.' Neither is there any provision of the statute which would prohibit a corporation from so providing in its by-laws. The effect of such provision would be in the nature of an agreement between the stockholders of the corporation and between the stockholders and the corporation, to the effect that the corporate stock of such corporation could not be 'assessed,' thereby agreeing that if obligations of the corporation were to be discharged, and the corporation did not have the money with which to pay the same, then the corporate property should be subjected to and applied in discharge of such indebtedness instead of raising the same by assessment against the stock. So, when the corporation certifies that the shares represented by a certificate are 'nonassessable,' such provision becomes a part of the contract between the corporation and the stockholder,

and as between the corporation and stockholder such agreement may be relied upon and enforced."

But respondent insists that the Idaho case is not authority in California, for the reason that in Idaho the stockholder is not personally liable except for the par value of his stock, while in California he is charged with a greater responsibility as defined by section 3 of article 12 of the Constitution. Speaking of the recital in the certificate of stock that the shares were "nonassessable," the court used the following language: "The argument urged by counsel for respondent and recognized by many authorities, that such provision would be a fraud upon the creditors, has no controlling force in this state, for the reason that a stockholder is not personally liable under the Constitution, except for the amount of stock for which he has subscribed, and if the stock subscribed has been fully paid, the personal liability ceases, and the creditor would have no right of action against a stockholder for any assessment made in excess of the amount of stock owned, and can only resort to the corporate property to satisfy his claim; but even if it be admitted that an arrangement or contract between the stockholders of a corporation, by which it is provided that stock is not assessable, would be void as against creditors, still there is no provision of law which prohibits such contract being entered into and binding the parties thereto, the stockholder and the corporation." Answering the argument that a contract thus limiting the power of assessment ordinarily enjoyed by the directors might result in utter loss of the corporate property and the destruction of the value of the stock, the court quoted with approval from the case of *Garey v. St. Joe Mining Co.*, 32 Utah, 521, 91 Pac. 377, 12 L. R. A. (N. S.) 554. A part of the quotation is as follows: "It may be true, as was suggested by counsel, that in many instances it may be wise and expedient for corporators to make additional contributions of capital to discharge corporate indebtedness, so as to preserve the corporate property, or to make such contributions for the successful conduct of the business. But that is something which the corporators should consider when they make their contracts. Courts are organized to enforce contracts as made, unless they contravene good morals or public policy. They cannot create new contracts, nor can they permit the parties themselves to do so without the consent of all, upon any theory that the original contract was not the most beneficial or advantageous, or that the enterprise contemplated by the terms of the contract cannot be successfully operated under it. By their solemn agreement the parties have here defined and limited their contributions of capital to the corporation for corporate purposes."

The enforcement of contracts between a corporation and its stockholders is, as we



have indicated, no novel thing. In *O'Dea v. Hollywood Cemetery Ass'n*, 154 Cal. 67, 97 Pac. 6, the court held valid a contract whereby stock was issued as fully paid in exchange for property which was of less value than the nominal worth of the shares. Speaking of findings announcing the good faith of the directors of the corporation making the exchange, Mr. Justice Lorigan, who delivered the opinion of this court, said: "These findings were all in harmony with the evidence. Every stockholder of the new corporation assented to this transaction, and the directors authorized, approved, and ratified it. Samuelson, himself, was one of the actors in the matter, and these plaintiffs, who have succeeded to the shares of stock, which he then held, cannot be heard to question the validity of the issue of this paid-up stock for inadequacy of its price. Directors of a corporation have the right to issue stock as fully paid up, upon such terms and at such price as they see fit, and in the absence of fraud, as far as the stockholders or their assigns are concerned, the action of the directors in issuing it is final, and the action of the corporation cannot be attacked by the stockholders, or the validity of the issue assailed on the ground, merely, that the consideration was inadequate for which the corporation issued it as fully paid up. Creditors may attack the transaction; stockholders cannot. *Cook on Corporations*, § 35; *Stein v. Howard*, 65 Cal. 616, 4 Pac. 662; *Vermont Marble Co. v. Declez Marble Co.*, 135 Cal. 579, 67 Pac. 1057 [56 L. R. A. 728], 87 Am. St. Rep. 143; *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 20 Sup. Ct. 311 [44 L. Ed. 423]."

In *Green v. Abletine Medical Co.*, supra, this court held that the defendant was estopped by its contract with its stockholders to assert that stock issued as fully paid had been in fact sold for one-fourth of its par value.

In *Dickerman v. Northern Trust Co.*, 176 U. S. 202, 20 Sup. Ct. 319, 44 L. Ed. 423, Mr. Justice Brown, delivering the opinion of the Supreme Court of the United States, said: "The contract with Stein provided that the stock to be issued to him should declare upon the face of the certificates to be fully paid and unassessable, and we know of no principle upon which it can be held that innocent bondholders can be required to deduct from the face of their bonds the amount unpaid upon their stock. The very authorities which hold that the declaration that the stock is fully paid and unassessable is not binding upon creditors, also hold that the corporation cannot repudiate it and proceed to collect either from the person receiving the stock or his transferee the unpaid part of the par value. Thus in *Scovill v. Thayer*, 105 U. S. 143, 153 [26 L. Ed. 968], in which a similar declaration was held to be invalid

against creditors, it was said: 'The stock held by the defendant was evidenced by certificates of full-paid shares. It is conceded to have been the contract between him and the company that he should never be called upon to pay any further assessments upon it. The same contract was made with all the other shareholders, and the fact was known to all. As between them and the company this was a perfectly valid agreement. It was not forbidden by the charter or by any law or public policy, and as between the company and the stockholders was just as binding as if it had been expressly authorized by the charter.' There is no doubt that, if this were a suit by creditors to enforce payment of the unpaid portion of the stock subscriptions, the fact that the stock certificates declared that they were fully paid and unassessable would be no defense; but it is a suit of stockholders in the right of the corporation, and as between the corporation and its stockholders the declaration that the shares are fully paid up and unassessable is a valid one." See, also, *First National Bank v. Gustin-Minerva Consolidated Mining Co.*, 42 Minn. 327, 44 N. W. 198, 6 L. R. A. 676, 18 Am. St. Rep. 510; *Thompson v. Knight*, 74 App. Div. 316, 77 N. Y. Supp. 600.

We decide, therefore, that the agreement between the corporation and its stockholders was valid, and that where, as here, the rights of creditors are not directly involved, the corporation may not, by its directors, levy an assessment against the stock so protected.

It follows that the order from which the appeal is taken should be reversed, and it is so ordered.

We concur: SHAW, J.; ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J.; SLOSS, J.

(165 Cal. 607)

IN RE DE LAVEAGA'S ESTATE.  
(S. F. 6,092.)

(Supreme Court of California. June 14, 1913.  
Rehearing Denied July 14, 1913.)

1. WILLS (§ 31\*)—TESTAMENTARY CAPACITY.

One may be mentally incompetent to make a will by reason of a want of development of the mental faculties, though he is not a lunatic nor an idiot nor possessed by delusions.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 66-68; Dec. Dig. § 31.\*]

2. WILLS (§ 50\*) — "TESTAMENTARY CAPACITY."

One to possess testamentary capacity must understand the nature of the business in which he is engaged, and understand and recollect the property which he means to dispose of, his relations to his relatives and those around him, and the manner in which the property is to be distributed, and where he is unable to fairly consider the character and extent of his property, the persons who are related to him, and the persons to whom and the manner and pro-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



portion in which he wishes his property to go, he does not possess testamentary capacity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 96-100; Dec. Dig. § 50.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 6929-6931.]

### 3. APPEAL AND ERROR (§ 931\*) — PRESUMPTIONS—FINDINGS—EVIDENCE.

The court in determining the sufficiency of the evidence to sustain the findings of the trial court, attacked on the ground of insufficiency of the evidence, must look at the evidence in the light most favorable to the conclusion of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. § 931.\*]

### 4. WILLS (§ 55\*) — TESTAMENTARY CAPACITY—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a finding that testatrix was incompetent to make a will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-158, 161; Dec. Dig. § 55.\*]

### 5. APPEAL AND ERROR (§ 1011\*)—FINDINGS—CONCLUSIVENESS.

A finding on conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

### 6. WILLS (§ 155\*) — "UNDUE INFLUENCE"—NATURE.

Undue influence to vitiate a will must destroy the free agency of testator at the time and in the very act of making the will, and must bear directly on the testamentary act.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 375-381; Dec. Dig. § 155.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7166-7172.]

### 7. WILLS (§ 166\*)—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY.

The evidence to warrant the setting aside of a will on the ground that it was procured by undue influence must raise more than a suspicion, and must be substantial and show facts inconsistent with a claim that the will was the spontaneous act of testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.\*]

### 8. EVIDENCE (§ 590\*)—WEIGHT AND SUFFICIENCY—TESTAMENTARY CAPACITY—UNDUE INFLUENCE—TESTIMONY OF BENEFICIARIES.

The court in proceedings to probate a will contested on the grounds of testamentary incapacity and undue influence is not bound by the testimony of the principal beneficiary and her husband, who alone were present at the time of the making of the will, but the court may consider all the surrounding circumstances and determine the facts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2439; Dec. Dig. § 590.\*]

### 9. WILLS (§ 166\*)—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a finding that a will was procured by undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.\*]

### 10. WILLS (§ 53\*)—TESTAMENTARY CAPACITY—EVIDENCE—ADMISSIBILITY.

Where, in proceedings to probate a will contested on the grounds of testamentary incapacity and undue influence alleged to have been exerted by proponent, who sustained confidential relations to testatrix, letters written by proponent, a sister of testatrix, to a brother, contestant, acknowledging receipt of a monthly draft for testatrix and advising the brother

how much she would need per month for the future, were admissible to show the actual transaction of the business of testatrix by proponent, as showing the acts and conduct of testatrix.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 111, 112, 120-130; Dec. Dig. § 53.\*]

### 11. WILLS (§ 53\*)—TESTAMENTARY CAPACITY—EVIDENCE—ADMISSIBILITY.

In proceedings to probate a will contested on the ground of testamentary incapacity, the manner in which testatrix was treated by her family is not, taken alone, competent substantive evidence to prove incompetency, but it is proper evidence when given in connection with the conduct of testatrix under such treatment as illustrating and explaining such conduct.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 111, 112, 120-130; Dec. Dig. § 53.\*]

### 12. WILLS (§ 53\*)—TESTAMENTARY CAPACITY—EVIDENCE—ADMISSIBILITY.

Absolute acquiescence by testatrix in a course of conduct on the part of those around her with relation to her property and affairs, which no person of sound mind would acquiesce in, may be proved to show testamentary incapacity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 111, 112, 120-130; Dec. Dig. § 53.\*]

### 13. EVIDENCE (§ 121\*)—RES GESTÆ—TESTAMENTARY CAPACITY.

Where the business of testatrix was transacted by third persons by means of letters and cablegrams from one to another, the letters and cablegrams were a part of the res gestæ in the matter of the actual transaction of the business.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 303, 307-338, 1117, 1118; Dec. Dig. § 121.\*]

### 14. EVIDENCE (§ 226\*)—CONTESTS—DECLARATION OF BENEFICIARY—ADMISSIBILITY.

The interest of the legatees and devisees under a will are several, and declarations of one beneficiary, though the principal one, are inadmissible on the issues of testamentary capacity and undue influence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 815-821; Dec. Dig. § 226.\*]

### 15. WITNESSES (§ 257\*)—USE OF INSTRUMENTS TO REFRESH RECOLLECTION—ADMISSIBILITY OF INSTRUMENTS IN EVIDENCE.

An instrument used solely to refresh the memory of a witness, as authorized by Code Civ. Proc. § 2047, is not testimony for the party calling the witness and using the instrument, but the adverse party may treat the instrument as evidence after it has been used to refresh the memory of the witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 892; Dec. Dig. § 257.\*]

### 16. WITNESSES (§ 386\*) — IMPEACHMENT — PROOF OF CONTRADICTORY STATEMENTS.

A party entitled as authorized by Code Civ. Proc. §§ 2049, 2052, to impeach a witness by proof of contradictory statements may not show prior statements made by the witness as to matters concerning which he failed to testify or concerning which he stated that he did not remember.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1226, 1227; Dec. Dig. § 386.\*]

### 17. WITNESSES (§ 383\*)—IMPEACHMENT—CONTRADICTORY STATEMENTS—COLLATERAL MATTER.

Where, in response to questions put by a party to a witness, testimony is given against him, the party may not impeach the witness by proof of inconsistent statements as to collateral or irrelevant matters.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1224; Dec. Dig. § 383.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**18. WITNESSES (§ 392\*) — IMPEACHMENT — PROOF OF CONTRADICTORY STATEMENTS.**

Where, in proceedings to probate a will contested on the ground of testamentary incapacity, the proponent testified against contestant on the issue of testamentary incapacity, a letter written by proponent to contestant, stating that contestant, a brother of testatrix and proponent, should not take it badly because testatrix did not write to him and that he knew that she did not know how to write, was admissible for purposes of impeachment.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1294-1251, 1257; Dec. Dig. § 392.\*]

**19. WITNESSES (§ 383\*) — IMPEACHMENT — PROOF OF CONTRADICTORY STATEMENTS.**

Whether proponent remained with testatrix in Europe pending a litigation because she desired to avoid scandal or because of fear of incompetency proceedings against testatrix involved a purely collateral matter and proponent could not be impeached thereby.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1224; Dec. Dig. § 383.\*]

**20. TRIAL (§ 84\*)—EVIDENCE—OBJECTIONS—SUFFICIENCY.**

A general objection to evidence offered to impeach a witness does not reach the point that it was attempted to impeach the witness on a collateral matter, and is not sufficiently specific to call the trial judge's attention to that fact.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 211-218, 220-222; Dec. Dig. § 84.\*]

**21. TRIAL (§ 83\*)—RECEPTION OF EVIDENCE—OBJECTIONS—SUFFICIENCY.**

Where proponent of a will contested on the ground of testamentary incapacity testified against contestant on the issue and stated that the mother of testatrix, and also of proponent and contestant, had not made in her will any request that they should care for and protect testatrix, the will, containing such a provision, was properly received in evidence as against a general objection that it was incompetent on the ground that the beneficiaries are not bound by the extrajudicial declaration of the mother.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 193-210; Dec. Dig. § 83.\*]

**22. TRIAL (§ 91\*)—RECEPTION OF EVIDENCE—MOTION TO STRIKE OUT EVIDENCE.**

The court need not strike out evidence received without a sufficiently specific objection, practically available to the party before the admission of the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 242-244, 252; Dec. Dig. § 91.\*]

**23. WILLS (§ 53\*)—TESTAMENTARY CAPACITY—EVIDENCE—ADMISSIBILITY.**

In proceedings to probate a will contested on the ground of testamentary incapacity, a settlement of account for goods sold from a ranch owned by testatrix and her relatives, including proponent, in which testatrix took no part was admissible to show that the business affairs of testatrix were settled without consultation with her, as bearing on the issue of mental capacity.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 111, 112, 120-130; Dec. Dig. § 53.\*]

**24. WILLS (§ 53\*)—TESTAMENTARY CAPACITY—EVIDENCE—ADMISSIBILITY.**

Evidence that a compromise of a claim by testatrix and relatives in the estate of a deceased relative was effected by the relatives without consulting with testatrix and without calling the matter to her attention was admissible as bearing on testamentary incapacity.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 111, 112, 120-130; Dec. Dig. § 53.\*]

**25. TRIAL (§ 85\*)—RECEPTION OF EVIDENCE—OBJECTIONS—SUFFICIENCY.**

An objection to evidence as a whole, while only a part of it is incompetent is properly overruled, especially where the objectionable part was not called to the court's attention.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 222, 223-225; Dec. Dig. § 85.\*]

**26. APPEAL AND ERROR (§ 533\*)—RECORD ON APPEAL—OPINION OF TRIAL JUDGE.**

The opinion of the trial judge is not a part of the record on appeal, and cannot be considered on appeal as indicating what operated on the judge's mind in coming to a conclusion on the ultimate facts of the case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2339, 2400; Dec. Dig. § 533.\*]

**27. WILLS (§ 54\*)—TESTAMENTARY CAPACITY—EVIDENCE—ADMISSIONS.**

In proceedings to probate a will contested on the ground of testamentary incapacity of testatrix, 52 years old, the testimony of a witness as to the contents of a lost letter of the father of testatrix, accompanying his will, in which he recommended testatrix to the care of her eldest sister and a brother on account of her weak mind, was properly received in evidence where it was a part of a transaction at a meeting of the members of the family, including testatrix, following the father's death, when the will and letter were read aloud in the presence and hearing of testatrix, then over 17 years of age, and the remoteness of the occurrence goes only to the weight of the evidence.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 131-134, 136; Dec. Dig. § 54.\*]

**28. WITNESSES (§ 386\*)—IMPEACHMENT — INCONSISTENT STATEMENTS.**

Where, in proceedings to probate a will contested on the ground of testamentary incapacity, a witness failed to give expected testimony in favor of contestant, but did not give any evidence against him, the opinion of the witness, expressed in a letter, that testatrix was incapable of taking care of herself, was inadmissible.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1226, 1227; Dec. Dig. § 386.\*]

**29. WITNESSES (§ 396\*)—IMPEACHMENT — INCONSISTENT STATEMENTS.**

Where a party uses the deposition of a witness to cross-examine him by calling his attention to statements claimed to have been made by the witness in the deposition, the adverse party may show the connection of the statements thus called to the attention of the witness, but he may not use the deposition for any other purpose.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1261-1264; Dec. Dig. § 396.\*]

**30. WITNESSES (§ 410\*)—IMPEACHMENT—SUSTAINING WITNESS.**

Where a witness, in proceedings to probate a will contested on the ground of testamentary incapacity, testified in favor of contestant and on cross-examination admitted that he had executed a bond with testatrix as surety, without calling the court's attention to the mental capacity of testatrix, it was not error to permit contestant to show by the witness that the members of the family of testatrix recognized that she was mentally incapable of managing her affairs, but did not disclose her incompetency, and adopted the policy of transacting her business in her own name under their immediate supervision, which fact was known to the witness at the time he gave the bond.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1284; Dec. Dig. § 410.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Proceedings by Maria Josefa Cebrian to probate the will of Maria Concepcion De Laveaga, deceased, in which Miguel A. De Laveaga appeared as contestant. From a judgment denying probate, the proponent appeals. Affirmed.

Timothy J. Lyons, P. F. Dunne, and S. M. Shortridge, all of San Francisco, for appellants. E. S. Pillsbury, of San Francisco, and Oscar Sutro, of San Francisco (Pillsbury, Madison & Sutro, of San Francisco, of counsel), for respondent.

ANGELLOTTI, J. The deceased died in Madrid, Spain, on February 4, 1909. At the time of her death she was 52 years of age, and was a resident of the city and county of San Francisco. She left an estate valued approximately at from \$1,500,000 to \$2,000,000, consisting of real and personal property and located for the most part in San Francisco. She had never been married, and left surviving her as her only heirs at law her sister, Maria Josefa Cebrian, wife of J. C. Cebrian, and the proponent of the will here in question, and her brother, Miguel A. De Laveaga, the contestant here.

On June 12, 1909, Mrs. Cebrian filed in the superior court of the city and county of San Francisco a paper written in the Spanish language, purporting to be the olographic will of deceased. A translation of this paper is as follows:

"In the name of God, Amen.

"I, Maria C. De Laveaga, declare that this is my testament.

"I leave to my brother Miguel or to his children Eighty Thousand Dollars.

"I leave to my sister Pepa Five Thousand Dollars for alms, and One Thousand Dollars for masses, and Fifteen Thousand Dollars for Clemente's children.

"I leave to my nieces Mimi and Pepita Cebrian my wearing apparel, furniture and jewelry.

"I leave all the rest of what I possess to my sister Pepa or to her children, if she does not survive me.

"I nominate executor and executrix my brother Miguel and my sister Pepa, without bonds.

"And I sign it in San Francisco, California, the 15th day of February, 1893.

"Maria C. De Laveaga."

It is conceded that by "Pepa" was meant Mrs. Cebrian, the same being a name by which she was known and referred to in the family. With the purported will, Mrs. Cebrian filed her petition for the admission to probate of said paper as the last will of deceased and the issuance to her of letters testamentary, her coexecutor, Miguel A. De Laveaga, having failed to consent to act as executor.

On July 12, 1909, said Miguel filed his grounds of opposition to the probate of this paper, the grounds specified being, first, that at the time of the execution of the will by deceased, if the same was ever executed by her, she was not of sound mind and was not competent to make a last will; second, that the execution of the same, if executed at all, was procured by undue influence; and, third that the execution of the same, if executed at all, was procured by duress and fraud. Answers were filed by Mrs. Cebrian and two of her children, designated in the alleged will as "my nieces Mimi and Pepita Cebrian." The issues thus made were tried by the court, without a jury, the trial commencing on October 28, 1909, and continuing, with some interruptions, to February 20, 1911.

On June 29, 1911, the trial court filed its decision in writing. The findings of fact upon the issues of incompetency and undue influence were that deceased at the time of the writing and signing of said instrument was not of sound mind and was not competent to make said purported will, or any will; and that although said instrument was written and signed by the hand of said decedent, she did not compose said instrument or any part thereof, and did not understand the meaning or the purpose of said instrument, or any part thereof, and that the writing and signing was procured as follows: While said decedent was of unsound mind, and not competent to make a will, decedent was caused by a designing person, or persons, who directed, dictated, and dominated the manual performance of the act, to write and sign said instrument from a form presented by said person or persons, and that decedent in writing and signing the instrument did not understand, and was, by reason of her unsoundness of mind and mental incompetency, unable to understand and incapable of understanding her mechanical act in writing and signing said instrument, or the meaning or effect of her mechanical act in writing and signing said instrument. Upon these findings an order was made on June 29, 1911, adjudging that said paper is not the will of deceased and is not entitled to probate, and refusing to admit it to probate. We have before us an appeal from such order by Mrs. Cebrian and her two children who appeared in the court below.

The record and briefs presented on this appeal are voluminous. The appellants brought up, under section 953 et seq. of the Code of Civil Procedure, in lieu of a bill of exceptions, a phonographic report of the trial, consisting of 29 volumes containing an aggregate of 16,496 typewritten pages. Appellants' opening "brief" consists of four volumes of printed matter, containing 2,239 pages, and an appendix of 469 pages, and their reply brief contains 700 pages. The respondent has filed a brief consisting of four volumes, with an aggregate of 1,666 printed pages.



We mention these facts as to the briefs in no spirit of complaint, for we do not see either that learned counsel for appellants could have properly presented their complaints as to findings and the many rulings of the trial court, with the evidence necessary to explain the same, in much, if any, more compact and concise way, or that learned counsel for respondent could have put their claims in reply to appellants' contention in fewer words.

The claim is earnestly made by appellants that the findings of the learned trial judge are without sufficient support in the evidence, and much of their briefs is devoted to argument in support of this claim, with an analysis of the testimony opposed thereto. Especially is this claim made as to the finding of undue influence. A careful consideration of the evidence has satisfied us that there is no good basis for any such claim, either as to the finding of incompetency or that of undue influence. We shall not attempt in this opinion to do more than to state in a very general way some of the facts relative to the evidence upon which we base this conclusion.

The deceased was born at Mazatlan, Mexico, in December, 1856, and was the youngest of six children. The family moved to San Francisco in 1867, and thenceforth resided there. In 1874 her father died testate, leaving a large estate. In 1882 her mother died. Thenceforth to the year 1888 deceased, who had lived with her mother and her sister Ignacia to the time of her mother's death, her sister Maria Josefa having married Mr. Cebrian in 1875, lived with Ignacia. In 1884 Ignacia and Maria, with four women as companions and servants, went to Europe, where they remained together until Ignacia's death, which occurred in Rome on February 16, 1888. At that time the Cebrian family were in Paris, and Mr. Cebrian at once went to Rome, and deceased returned with him to Paris, and became a member of the Cebrian household. She continued a member of that household to the time of her death, a period of 21 years, being with them at that time on a visit to a married daughter of the Cebrians in Madrid. Shortly after Ignacia's death, the Cebrians, with deceased, returned to San Francisco, where they occupied the Cebrian residence at 1801 Octavia street. There, on February 15, 1893, according to the testimony of Mr. and Mrs. Cebrian, the alleged will was executed. In 1896 the Cebrian family, with deceased, again went to Europe, remaining there until the winter of 1903, and returning to San Francisco in the spring of 1904. They remained at home until August, 1908, when they went to Madrid.

All of the property owned by deceased was property received by her under the wills of her father and mother, and the rents, issues, and profits thereof. At all times after the death of her mother, her property in

California was managed for her by her brother Miguel, the contestant here.

The only direct evidence as to the execution of the will was that given by Mr. and Mrs. Cebrian. Substantially their testimony in regard to this was as follows: On the day of its date, deceased, at the family home on Octavia street, called them into her room and showed them this paper which she said she had written. She told them that her brother Vicente (Jose Vicente De Laveaga) had told her several times that she should make a will, that it was very easy to do privately, that all she had to do was to write it out and date it with no printing or other matter on the paper, and that when she saw how easy it was she just sat down and wrote it. She then went to her desk, and subscribed her name to it in their presence. She then gave it to Mr. Cebrian to read and he commenced reading it aloud, but before he had finished Mrs. Cebrian went into her own room which adjoined that of deceased. Shortly thereafter Mr. Cebrian and deceased came into Mrs. Cebrian's room, and the will was delivered by deceased to Mrs. Cebrian. Deceased told Mrs. Cebrian to keep it, and Mrs. Cebrian at first put it in a drawer and locked the drawer, and some time later placed it in a trunk where she kept a lot of photographs and papers. It remained in that trunk continually thenceforth until after the death of deceased and the subsequent return of the Cebrians from Madrid. Nothing was ever said by either of the Cebrians concerning the existence of any such paper until after the death of deceased. Mr. Cebrian testified that at the time he read the will, he asked her first why she left nothing to her brother Vicente, and that she told him that Vicente told her not to, and that he was not leaving anything to any of them. He then asked her substantially why she did not leave more to her brother Miguel, and she said: "Never mind about that; that is my wish, and even if I had twice or ten times what I have, I would not leave him any more. He is just as rich or richer than I am. His children will inherit all his riches. His children have a rich uncle besides, and then, as you know, everything I have in this world is for Pepa. Pepa is the person I love most in this world, and such is my will." The testimony of Mr. and Mrs. Cebrian was to the effect that deceased wrote this will without assistance from any person and without the aid of any form, book, or copy. The only persons mentioned in the will as beneficiaries, outside of Mrs. Cebrian and two of her children, and her brother Miguel, to whom was given only \$80,000, were "Clemente's children," Clemente being Clemente De Laveaga, a first cousin of deceased. Deceased never thereafter spoke of the will, so far as the testimony shows, to any person other than Mr. and Mrs. Cebrian, except, according to his testimony, to a son of the Cebrians, Henry De L. Cebrian, on one



occasion. He testified that he asked deceased to whom she had given or was going to give a certain picture in her room, if she had given it to his sister Josie, and she said, "I have. I will give it to her when I die," and that she told him that she had left it to her when she died. The alleged will contains no such disposition of the picture. In the same connection, he testified that he had asked her if she had made a will, and she told him "Yes," and that his mother "has it kept for me," and that she must not tell it to anybody.

[1] The theory of contestant was not that the decedent was a lunatic, an idiot, or an imbecile, or in any way a victim of insane delusions, but that her mind was arrested in development during childhood and never materially progressed, with the result that in so far as her mind was concerned she was practically a child to the day of her death, and that she was never mentally competent to dispose of her immense estate by will. It is of course not disputed that one may be mentally incompetent to make a last will by reason of a want of development of the mental faculties, although he is neither a lunatic nor an idiot, or in any way possessed by delusions. As said by the Supreme Court of Arkansas, in *Pulaski County v. Hill*, 97 Ark. 450, 457, 134 S. W. 973, 975: "The question in all such cases where incapacity arising from defect of the mind is alleged is, not whether the mind is itself diseased or the person is afflicted with any particular form of insanity, but rather whether the powers of the mind have become so affected, by whatever cause, as to render him incapable of transacting business like the one in question. As a general rule, it may be stated that, in order to have that measure of capacity required by law to be of sound mind, a person must have capacity enough to comprehend and understand the nature and effect of the business he is doing."

[2] It has been substantially declared by this court that it is essential to the sound and disposing mind requisite for the making of a will that the testator have an understanding of the nature of the business in which he is engaged, and an understanding and recollection as to his property which he means to dispose of, of his relations to his relatives and those around him, of the persons who are the objects of his bounty, and the manner in which it is to be distributed. See *Estate of Huston*, 163 Cal. 166, 124 Pac. 852; *Estate of Motz*, 136 Cal. 558, 69 Pac. 294; *Estate of Dole*, 147 Cal. 188, 81 Pac. 334. If for any reason his mind is in such condition that he is not able to fairly and rationally consider the character and extent of his property, the persons who are related to him, or who otherwise may have claims upon him, and the persons to whom and the manner and proportion in which he wishes his property to go, he has not the sound and

disposing mind essential to his competency to make a will.

[3-5] The theory of contestant in this behalf was amply sustained by testimony that was competent and properly admitted as bearing upon the issue of mental incapacity. In saying this we are not to be understood as intimating that incompetent evidence improperly admitted is not to be considered in support of a finding or verdict as against an objection of insufficiency of evidence. But excluding from consideration all evidence given on the trial as to which such objection may reasonably be urged, we find ample evidence to support the conclusion of the trial court as to the claim of contestant. There was a great deal of testimony in support of this claim given by persons who were held to be "intimate acquaintances" within the meaning of subdivision 10 of section 1870 of Code of Civil Procedure, which authorizes the giving in evidence of "the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given." Very many of the "intimate acquaintances" who testified as to their opinion on the ultimate question of mental sanity were examined in great detail as to their observation of the deceased, her conduct, acts, manner, and mental attainments, the evidence thus elicited not only furnishing the essential accompaniment for their opinion on the ultimate question of mental sanity under subdivision 10 of section 1870, but also constituting original evidence of the acts and conduct of the person whose sanity is in question. The evidence given on the part of contestant as to the acts, conduct, etc., of the deceased covered the whole period of the life of deceased from the time she first came to California, a child of 11 years of age. Much of it was given by those who were intimately associated with her in her home life, either in San Francisco or in Europe when she was abroad, and much by those who were most intimately associated with the conduct of her business affairs. Looking at the great volume of this evidence in the light most favorable to the conclusion of the trial court, as we are bound to do, we find portrayed a woman utterly incompetent at any time to understandingly and intelligently consider her property with a view to its proper disposition by will, and moreover, utterly incompetent, alone and unaided, to compose and write the admirably constructed document, in so far as phraseology is concerned, which was offered for probate as her last will. Contestant's evidence tended to show, among other things, that as a girl and young woman she was unable to materially progress in so far as the simplest kind of education was concerned; that her mind remained to the time of her death as that of a child, unable to comprehend anything beyond the most simple matters; that she was always dependent upon those around her in matters



concerning which a normal person acts for himself; that she went where she was told to go and did what she was told to do by the person with whom she lived after her mother's death, first her sister Ignacia, and then the Cebrians; that when in the presence of strangers she suffered her relatives to reply to remarks addressed to her; that her powers of conversation were limited to the most simple things of everyday life, much as a young child's powers of conversation are limited; that during the whole time she was with Ignacia, 1882 to 1888, she was really, so far as her own conduct implied, "in charge" of Ignacia, who handled the money sent from San Francisco for her maintenance, acknowledged its receipt, selected the places where they should stay, made all the arrangements and paid all the bills, chose her clothes and amusements, and, in short, uniformly treated her as a young child; that during all this time she neither personally acknowledged receipt of a single one of the monthly drafts sent for her by Miguel from San Francisco, nor wrote him a single line, although he at all times had the active management of her valuable properties in California; that when Ignacia was seized by her fatal illness and was lying desperately ill in Rome, deceased sent no word whatever to the Cebrians, who were then in Paris, and that the Cebrians were finally advised of Ignacia's condition only a day or two before she died by a note from Juanita Laveaga, a cousin and companion of deceased; that during this illness of Ignacia, deceased took no part in the management of affairs or in the care of Ignacia; that Mr. Cebrian upon his arrival in Rome found her entirely helpless, and that she then began to occupy in the household of the Cebrians a similar position to that occupied by her with Ignacia's; that her sister Mrs. Cebrian was thenceforth the director of all her movements; that she was never consulted in regard to where she should go or what she should do, and went and did as she was instructed without protest or demur; that she never handled in toto even the income of her property devoted monthly to her support and use, the amount being given to Ignacia when she was with her, and to the Cebrians when she was with them; that she never attempted to learn anything with relation to her property, or made any inquiry about it; that her brother Miguel had the actual custody of her stocks and bonds, she not even having a key to the safe deposit boxes in which they were kept, and that he managed all her property as he would his own, except for such consultations as he might have with her brother Vicente while he was alive and with the Cebrians, and never consulted with deceased as to what should be done, and that she suffered all this without complaint, and indeed without any suggestion of interest in the matter; that she knew nothing about the extent and character

of her property; that she signed her name when she was instructed to sign by Ignacia, or the Cebrians, or Miguel, to any paper presented to her for signature, of which there were many, including drafts, leases, deeds, bonds, and a power of attorney to Miguel, all without any inquiry whatever as to its nature or effect; that the gifts made by her to members of the family were practically made by those with whom she lived; that she never indicated her ability unaided to compose and write any paper beyond the simplest and most childish message, the few writings of any other character shown, exclusive of the alleged will, having been produced with great and laborious effort and under such circumstances as to indicate the aid and assistance of others.

There was opposed to this, it is true, the evidence of many reputable witnesses who, as "intimate acquaintances," testified that in their opinion deceased was of sound mind, and gave their reasons for their opinion. We cannot undertake to here enter into an analysis of the evidence thus given, for it would unduly lengthen this opinion to no useful purpose.

[5] What we have already stated as to the testimony on behalf of contestant shows that there was ample evidence to sustain the finding of the trial court as to the incompetency of the deceased to make a will, and it cannot matter that there was evidence opposed thereto, in view of the well-settled rule that the determination of a trial court upon conflicting evidence is conclusive upon appellate courts. But it is proper to note that there was in the evidence introduced on behalf of proponents no successful attempt at contradiction on the part of those witnesses, who were in a position to know the facts, of the testimony going to show entire acquiescence on the part of the deceased in the absolute management and disposition of her property and personal affairs going even to absolute control of her own movements, by her brothers and sisters, without consultation with her, from the death of her mother to her own death. Nor was there any serious attempt on their part to explain this somewhat remarkable situation of affairs upon any theory consistent with the possession by deceased of a mind that had developed beyond that of a mere child. It is also worthy of note that, so far as we have been able to find, Mrs. Cebrian, the proponent of this will, and the person most intimately associated with the decedent for the last 20 years of her life, did not testify on the trial that she was of sound mind.

[6-8] The evidence is likewise amply sufficient to sustain the finding of undue influence. Of course there can be no claim that the evidence does not sufficiently show the relation of trust and confidence between the deceased and the Cebrians, and the complete and perfect control of the deceased by them.



There was certainly sufficient proof of interest and opportunity. The claim of learned counsel in this regard is that there was no proof that any undue influence was brought to bear directly upon the testamentary act. It is well settled that "undue influence, \* \* \* must in order to avoid a will destroy the free agency of the testator at the time, and in the very act of the making of the testament. It must bear directly upon the testamentary act" (Estate of Higgins, 156 Cal. 261, 104 Pac. 8); "there must be substantial proof of the pressure which overpowers the volition of the testator at the time the will was made" (Estate of Ricks, 160 Cal. 462, 117 Pac. 537). And to warrant the setting aside of a will on this ground there must of course be substantial evidence of the exercise of undue influence on the testamentary act. "Substantial evidence must do more than raise suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are proved which are inconsistent with the claim that the will was the spontaneous act of the alleged testator." Estate of Ricks, *supra*. And it is said that the only evidence as to the execution of this will was that given by Mr. and Mrs. Cebrian, and that this evidence shows without conflict that there was nothing in the way of influence, undue or otherwise, attempted to be exerted upon deceased in the matter. But the court was not bound to accept as true the testimony of the Cebrians in this regard. If it was sufficiently made to appear that the deceased was absolutely incompetent to understandingly and intelligently consider her property with a view to its proper disposition, and alone and unaided to compose and write the paper offered for probate as her will, to warrant the trial judge in so concluding, as we have seen is the fact, we have substantial proof of undue influence bearing directly upon the testamentary act; and in view of the testimony of Mr. and Mrs. Cebrian that they were the only persons present at the time of the execution of the will, taken in connection with the other matters to which we have referred, it is certainly a reasonable, if indeed not an irresistible, inference, that whatever undue influence was in fact exerted, was exerted by one or the other or both of them. In addition to the matters already stated as being shown by sufficient evidence, it is proper to note that the evidence shows that Mr. Cebrian was a man of education, and one with a considerable knowledge of law and legal forms; and also that the alleged will indicated on its face that in so far as the actual writing was concerned it was a laborious effort. As said by the learned trial judge: "It is quite plainly the product of much manual exertion. If she was not following copy or taking dictation, she was certainly engaged in hard work in the writing of this will; it is not an example of fluency in penmanship

nor of accuracy in spelling." It is also proper to take into consideration the improbability that deceased, if she was of sound and disposing mind and memory, and not acting under undue influence, would have so discriminated against her brother, who, in the language of the trial judge "had been a great service to her for many years and who had conserved her estate without the diminution of a dollar, indeed with increase, and without retaining anything for personal benefit," and of whom, as the evidence shows, she was very fond.

The main complaint of learned counsel for proponent in the matter of rulings on evidence is that many extrajudicial statements were received as competent evidence upon the question of the mental competency of deceased. It is urged that in point of fact the case of contestant was made largely by such declarations, found generally in letters written in the course of correspondence between members of the family, and also found in other papers, and in the conduct and parol statements of certain members of the family. From the mass of evidence complained of in the opening brief in this connection, we have extracted the following as containing matters concerning which the claim of prejudicial error merits notice here.

[10-13] A. A great many letters written by Mrs. Cebrian to contestant prior to the death of deceased were introduced in evidence. Mrs. Cebrian was called as a witness by the contestant. She was examined as to matters referred to in a particular letter, and when she, in response to the questions of counsel for contestant, gave answers not in accord with statements contained in the letter, or failing to measure up to the same, the letter was offered in evidence and received over the objection of proponent's counsel to the effect that as a declaration of the witness it was incompetent against the other beneficiaries in the will, and therefore generally and wholly incompetent in the case. This was the course pursued as to all the letters so introduced. Most of the letters were free of matter as to which any claim of prejudicial error can reasonably be made. Some of these letters, such for instance as Exhibit 29, being a letter from Mrs. Cebrian to Miguel of date August 15, 1896, acknowledging receipt of a monthly draft for deceased, and advising him how much she will need per month for the future, were, we think, admissible as tending to show the actual transaction of the business of deceased by Mrs. Cebrian, a matter going to the acts and conduct of deceased herself. Of course, the manner in which a person whose sanity is in question was treated by his family is not, taken alone, competent substantive evidence tending to prove insanity, for it is a mere extrajudicial expression of opinion on the part of the family (see *People v. Pico*, 62 Cal. 50, 53), but it is proper evidence when



given in connection with the conduct of the alleged insane person under such treatment, as illustrating and explaining such conduct. Absolute acquiescence by the person whose soundness of mind is in question in a course of conduct on the part of those around him with relation to his property and personal affairs, which no person of sound mind would tolerate or acquiesce in, is competent evidence tending to show an unsound mind. A great deal of the evidence received in this case was competent evidence along these lines. And where, as was the case here during a large portion of the time, business of the person is transacted by others by means of letters and cablegrams from one to the other, such letters and cablegrams constitute a part of the *res gestæ* in the matter of the actual transaction of business. Among others, the letters referred to hereafter do probably contain what are in effect statements of Mrs. Cebrian going to show that she was of the opinion that deceased was mentally incompetent. Contestant's Exhibit 1 was a letter written by her in Paris to Miguel, on April 19, 1888, shortly after Ignacia's death, in which she said, among other things: "Dear Miguel, do not take it badly that poor Maria does not write to you the unfortunate one. You well know that she does not know how to write. If she had known how to write, they would not have concealed from me the state of sickness of Nacha."

In 1894, deceased's brother, Jose Vicente, died, leaving a will, the partial invalidity of which created a partial intestacy. An illegitimate son of another deceased brother, Jose Maria, alleged the right to participate as an heir, as the legitimate and adopted son of his own deceased father, in the estate of his natural uncle. Whether he was a son of Jose Maria, and if so, whether he had been so legitimated and adopted that he could inherit from the brothers and sisters of his father, were questions involved in the controversy that followed. The controversy in court was commenced by the filing of a petition for distribution on behalf of the surviving brothers and sisters of Jose Vicente in the winter of 1896. The illegitimate son, referred to throughout these proceedings as Anselmo, answered this petition, setting up his claim to a portion of the estate. Shortly before the inauguration of this controversy in court, Mr. and Mrs. Cebrian with their family and deceased, hurriedly left for Europe and remained abroad during the protracted litigation that followed, returning to the United States only in the month of December, 1903, and to San Francisco to live only when, in the early part of 1904, the controversy was finally terminated against Anselmo's claim of right to inherit from the brother and sisters of his natural father by the decision of this court on February 19, 1904. *Cebrian v. De Laveaga*, 142 Cal. 158, 75 Pac. 790. It was the theory of contestant that the departure for and stay in Europe of the

Cebrians with deceased during all this time was due to the fear on the part of all her relatives that proceedings to have deceased adjudged incompetent might be inaugurated against her by Anselmo if she remained in California, with the result that if the same were successful, and Anselmo was further successful in obtaining a decree adjudging his right to inherit from any brother or sister of his father in the event that he or she died without making a valid disposition by will of all his property, he would necessarily inherit from deceased, because she could not make a valid will by reason of her incompetency; and, moreover, that any attempted disposition by deceased of any of her property by will would be ineffectual for any purpose. Many letters of Mrs. Cebrian containing statements tending to show this fear on her part, and a desire to conceal the real reason for their stay in Europe, were received in evidence. For instance, in a letter to Miguel dated September 20, 1899 (contestant's Exhibit 5), speaking of a proposed flying visit to California, she said: "But as it would not be prudent that Maria should go there" until the matter is finally decided, "I will have to leave her and go alone with Cebrian and the babies"; and in a letter to Miguel dated August 28, 1897 (contestant's Exhibit 6), she speaks of her children as "the pretext for being here" (in Europe), and that if she could leave the children in Europe "it would be a good pretext that Maria should remain with the children." In a letter to Miguel dated January 16, 1898 (contestant's Exhibit 7), she says: "The only hope which I now see is the Supreme Court, and while that does not decide, it is impossible that Maria should return to San Francisco. \* \* \* How many difficulties will arise then about Maria's return to San Francisco to be attacked and insulted by that malevolent, besides being robbed of her money? It shocks me and horrifies me to think of that which would happen." In a letter to Miguel dated December 28, 1897 (contestant's Exhibit 10), she said: "But until the Supreme Court decides, the danger to Maria remains, that this man will get her in his claws in San Francisco. He will not wait until she dies to harass her in her life, as well as the rest of us." In a letter to Miguel dated June 10, 1897 (contestant's Exhibit 12), she said that if they decide he is not able to inherit, "it occurs to me that all of us will be able to return. Is it not so?" In a letter to Miguel dated December 7, 1897 (contestant's Exhibit 17), she said: "I see that after the decision of Judge Coffey, Maria cannot return there under any circumstances until the Supreme Court answers." Other letters showed her anxiety to enable deceased to escape the necessity of giving testimony before a commissioner in Europe to be used in such controversy, for fear that she would therein show her incompetency, and the successful efforts of herself and husband to prevent the same. The sum and substance of all these



letters in so far as the question of any possible improper prejudicial effect is concerned, was that they constituted extrajudicial expressions of her opinion to the effect that deceased was in fact mentally incompetent.

B. Mr. Cebrian was likewise called as a witness by the contestant, and the same course was followed as to him as was followed with Mrs. Cebrian, with the result that extrajudicial expressions of his opinion to a similar effect were disclosed by certain of his letters received in evidence.

C. Upon the examination by contestant of Mrs. Cebrian as a witness, the will of the mother, Dolores De Laveaga, dated December 15, 1881, was received in evidence. The seventh paragraph thereof was as follows: "Most fervently I charge my said executors with the care and protection of their younger sister, Maria Concepcion, as long as she may live." It is said that there was thus admitted the extrajudicial declaration of the deceased mother of deceased as to the competency of deceased.

D. Contestant's Exhibit 39 was a settlement of account for chicken feed sold from the ranch near Hollister then owned by Ignacia, Mrs. Cebrian, deceased, Jose Vicente, and Miguel, signed by Ignacia as follows: "I, for my account with M." (It was testified without objection that deceased took no personal part in this transaction.)

E. Contestant's Exhibit 267 was a letter from Jose Vicente to Miguel, dated June 23, 1888. On her deathbed Ignacia was married to one Cervera, who asserted a claim under her will to a portion of her property. A settlement was finally effected with Cervera by the remaining brothers and sisters, except deceased, on behalf of all the brothers and sisters, including deceased, under which he was paid \$160,000. The letter was written by Jose Vicente in relation to a proposed compromise, stating the terms thereof and assenting thereto, and among other things Jose Vicente said therein: "I with you will take the responsibility for Maria," a declaration, it is claimed, by Jose Vicente, to the effect that in his opinion deceased was incompetent.

F. Contestant's Exhibits 205 and 206 were two letters of Ignacia to Miguel, one dated March 11, 1887, the other January 21, 1887, when Ignacia and deceased were together in Europe. In that of March 11, 1887, Ignacia said, among other things, after acknowledging a receipt of a draft for Maria for £308, and saying that thereafter he may send the money for deceased in the name of deceased, because if she signed once she could do so at other times: "The observation I made was to save her who is short the pain of doing it before people; but if it's more convenient for you the other way you can do so. What is the word." The Spanish word used in this letter for "short" is "corta," which apparently is equivalent to various English words, "short," "scanty,"

"small," "little," "dull," "weak of intellect," "timid," "short of words," "defective." In that of January 21, 1887, she had asked for extra money for Maria, specifying it and her needs, and had also said: "If at any other time I have to draw on you for Maria it will be better always to send me the money in my name, for you know her and to go to sign it at the bank or before a clerk the poor thing suffers. When I telegraph you, if it is for me, I will tell you, and if it is for her, the same." The claim is, of course, that these letters contained extrajudicial statements of the deceased Ignacia tending to show that she regarded deceased as being mentally incompetent.

G. Parol testimony as to the contents of a letter accompanying the will of the father of deceased, who died in 1874, was received from Mr. Le Breton, the paper itself having been lost. Mr. Le Breton testified that his recollection of the paper was that it recommended deceased to the care of her eldest sister, Maria Ignacia, and Miguel, "on account of her weak mind," and that it requested them always to have her under their charge. The claim is that there was thus admitted in evidence extrajudicial statements of the deceased father of deceased as to her competency.

H. Encarnacion S. De Pena, a witness in Mexico, had written to contestant on December 15, 1909, saying among other things: "I knew your sister personally and had intimate relations with her from the time when she was very much of a child. For that reason I assure you conscientiously that she was completely incapable of taking any determination for herself. I am ready and will have much pleasure in giving this testimony orally or as you may think necessary." Her deposition was subsequently taken in Mexico, and she testified that she was of Maria (deceased) no more than an acquaintance, that she had not formed an opinion whether she was of sound or unsound mind, and: "I say nothing of the opinion which I formed—considerations for the family prevent me from talking," and "I say nothing on that." On the question of competency she gave no testimony whatever. Thereupon, the letter, having been shown to have been written by her, was attached to the deposition. When the deposition was read in the trial court, this letter was admitted in evidence over proper objection that the same was incompetent, on the ground of surprise. Of course, it contained an extrajudicial statement of the lady as to the competency of the deceased.

I. The correspondence between Mrs. Cebrian and contestant, and Mrs. Cebrian and J. V. De Laveaga, son of contestant, subsequent to the death of deceased and prior to the filing of the alleged will.

[14] A. As to the matters referred to under the heading "A," viz. the letters and conduct of Mrs. Cebrian indicating her opinion



as to the competency of deceased. Although the aggregate amounts given to others than Mrs. Cebrian and Miguel by this will are a mere trifle in proportion to the total value of the estate, being only \$15,000 given to Clemente's children, \$6,000 to Mrs. Cebrian for alms and masses, and "wearing apparel, furniture and jewelry" to two of Mrs. Cebrian's children, it is admitted that the rule declared in *Estate of Dolbeer*, 149 Cal. 227, 245, 86 Pac. 695, 9 Ann. Cas. 795, to the effect that a declaration of any number of legatees or devisees less than all upon the question of the mental competency of the deceased is not admissible in evidence on the issue of competency, is applicable as to the declarations of Mrs. Cebrian, executrix, proponent, and principal beneficiary. While there is some conflict in the authorities in other jurisdictions upon this general question, the great weight of authority appears to be in accord with the view declared in the *Dolbeer* Case, as is shown by the authorities cited in the opinion. The conclusion is based principally on the fact that the interests of the legatees and devisees under a will are several and not joint, and that it would be unjust under these circumstances to allow the interest of one to be affected by the admissions of another with whom he is not in privity. In *Estate of Dolbeer*, 153 Cal. 652, 662, 96 Pac. 268, 15 Ann. Cas. 207, it was held that the same rule holds where the evidence is addressed to the question of undue influence. This rule was followed in *Estate of Purcell*, 128 Pac. 932, decided December 10, 1912, and must be now accepted as the settled law of this state.

As against the general objection of incompetency for the reason we have stated, counsel for contestant earnestly asserts that in no instance was any of such evidence as to admissions offered either for the purpose of showing a declaration against interest, or admission, or as independent evidence on the issue of competency or undue influence, or received by the trial court for any such purpose. So far as we have been able to find on an examination of the record, it appears to have been the opinion of the learned trial judge, as shown by his remarks in ruling on objections, that such evidence was not admissible as independent substantive evidence on the issues of incompetency and undue influence, and apparently he consistently sustained objections to questions calling for evidence that he conceived to be admissible on no other theory. And this, as we understand the record, was his attitude throughout the trial to all the evidence complained of on this score. Under these circumstances it would appear not to be a fair assumption for an appellate court to make that the trial judge considered the evidence for any other purpose than the purpose for which it was admitted, in coming to his conclusion upon the issues made by the pleadings. And this is so, notwithstanding certain language used

by the trial judge in his written opinion filed in deciding this case, which is pointed out by learned counsel for appellants.

The avowed theory upon which the evidence referred to under this head (A) was offered and received, was substantially, as we gather from the record, as follows: Mrs. Cebrian, the proponent, was a witness greatly interested against and extremely hostile to contestant. By reason of her long and intimate association with deceased, she was in a position to testify very fully as to her acts and conduct, a matter very material to the issues. Contestant had the right to assume that she would give testimony on these matters in accord with her statements in the numerous letters he had received from her. He had the right to refresh the memory of the witness with these letters. On account of her interest and hostility, he had the right to rigidly cross-examine her, and was entitled to be given the widest latitude in such cross-examination, for the purpose of enabling him to elicit the truth. If, in response to his questions, she gave evidence against him, he was entitled to prove previous statements on her part inconsistent with her present testimony, on the theory of surprise. Furthermore, he had the right to refresh her memory with these letters.

[15] We are by no means prepared to hold that all the letters complained of were admissible for any of the reasons specified. None of the letters was admissible in evidence upon the theory that it was necessary for the purpose of refreshing the memory of the witness. A paper used solely for such a purpose is in no sense testimony, except in so far as it is testified to by the witness to be true, and thus made a part of his evidence on the trial. As was said in *Estate of Packer*, 129 Pac. 778, "to permit this (the introduction of such letters as evidence) to be done by the party producing the witness would open the door to the admission of hearsay and manufactured evidence without limit." The other party may, if he sees fit, treat it as evidence after it has been used to refresh the memory of the witness, but not the party using it for that purpose. Code Civ. Proc. § 2047; *Estate of Packer*, supra.

[16] Assuming that contestant had the right on the ground of surprise to impeach Mrs. Cebrian by showing that she had made, at other times, statements inconsistent with her present testimony (Code Civ. Proc. §§ 2049 and 2052), he had no right to show previous statements made by her as to matters concerning which she failed to testify at all on the trial, as for instance upon matters as to which she said that she did not remember. See *People v. Creeks*, 141 Cal. 530, 75 Pac. 101, and cases there cited.

[17] And even where in response to his questions she had given testimony against him, he was not entitled to impeach her by showing previous inconsistent statements as



to matters that were purely collateral or irrelevant. See *Jordan v. McKinney*, 144 Mass. 438, 11 N. E. 702. And the test whether a matter is collateral has been put as follows: "Could the fact as to which the inconsistency is predicated have been shown by evidence by other witnesses, independently of the inconsistency." 1 *Greenleaf on Evidence*, § 461f.

[18] Some of the letters were admissible for the purpose of impeachment. For instance, contestant's Exhibit 1, hereinbefore referred to, was so admissible. The matter upon which Mrs. Cebrian was then being examined was the question whether deceased had written to her as to Ignacia's desperate sickness, a matter clearly material and competent upon the issue of competency. She had given testimony against contestant upon this proposition, and statements in her letter (Exhibit 1) were clearly inconsistent with her testimony on the trial upon this subject. Limited to purposes of impeachment upon the inconsistent testimony, the letter was admissible.

[19] We cannot say the same as to some of the other letters, as for instance letters introduced to impeach her as to the reasons first given by her on the trial for the departure and stay in Europe during the Anselmo litigation. Whether she did this to avoid the scandal or because of fear of incompetency proceedings against deceased was surely a purely collateral matter.

[20] But so far as we have found, it is true, as claimed by counsel for contestant, that no objection other than the one stated was interposed to any of the letters of Mrs. Cebrian, and the precise objection we have just mentioned, viz., that it was an attempted impeachment on a collateral matter, was not suggested. Under the circumstances appearing in the record before us, we are satisfied that the general objection already stated was not sufficiently specific to call to the attention of the trial judge the special objection to such testimony when offered for purposes of impeachment.

But, as we have suggested, it appears to us that the only possible prejudicial effect of any of the statements of Mrs. Cebrian erroneously shown was that they tended to show that she expressed herself at various times substantially as entertaining the opinion that deceased was mentally incompetent. We have read the whole of the examination of this witness, as the same is set forth in the reporter's transcript of his shorthand notes, and it seems to us very clear that, assuming such to be the effect, such statements as may reasonably be claimed to have been erroneously admitted in no substantial degree added to the showing to the same effect that is made by such portions of her testimony as either were given without objection or properly admitted over objection.

B. What we have said in regard to the

matters discussed under the heading "A" is equally applicable to the evidence referred to under this head, letters and acts of Cebrian.

[21] C. This relates, as we have shown, to the admission in evidence of the seventh paragraph of the will of the mother of deceased, dated December 15, 1881, already set forth. The will was avowedly offered in evidence as impeaching evidence. Mrs. Cebrian had testified, in response to questions put by contestant, that she was very sure that the mother had not made in her will any request of the children for the care and protection of deceased. Thereupon the will was offered in evidence by Mr. Pillsbury "upon the ground that I am taken by surprise, because the document contains exactly such a request as the witness has disclaimed." The general objection hereinbefore referred to that the same was incompetent for the reason that the beneficiaries are not bound by the extrajudicial declaration of the mother was made, counsel for contestant replied that he offered it on "the same grounds, the same purposes," and the objection was overruled. After the paper had been received and read in evidence, counsel for proponent made a motion to strike out the will upon "this further ground" that counsel could not "meet a question of surprise when the question upon which that is predicated is itself incompetent," in other words, that the attempted impeachment was upon a collateral matter. The motion was denied. We think that this would have been a good and sufficient objection to the evidence if made prior to the admission of the will in evidence. In line with what we have already said, we think that in view of what was said as to the purpose of the offer, this precise objection should have been called to the attention of the trial court, and that the objection made was not sufficiently specific to do this.

[22] Strictly speaking, the court is not compelled to strike out evidence received without a sufficiently specific objection, where such objection was practically available to the party before the admission of the evidence (see generally *People v. Scalamiero*, 143 Cal. 343, 76 Pac. 1098; *People v. Nelson*, 85 Cal. 421, 425, 24 Pac. 1006), and may refuse to do so in the exercise of a reasonable discretion. In *People v. Nelson*, supra, it was substantially said that a motion to strike out will not be entertained where no objection was taken prior to the answer, and this, of course, means a sufficiently specific objection. Moreover, the record sufficiently shows that the court in making its ruling overruling the objection was not receiving the will as substantive evidence on the issue of competency, but solely for the purpose for which it was offered, viz., the purpose of impeachment of Mrs. Cebrian as a witness, and to meet her previous testimony that there was no such request on the part of the mother. It is further to be noted that with-



out objection Mr. Cebrian gave testimony of his understanding that it was the intention and wishes of the father and mother of deceased that she should be protected more than the other children. It is further to be noticed that the language of the seventh provision of the will does not contain any expression in terms referring to any mental incompetency on the part of deceased, nor is the language of such a nature that it necessarily implies that Mrs. De Laveaga so thought.

[23] D. Contestant's Exhibit 39 was offered and received in connection with Mrs. Cebrian's evidence that Ignacia did not attend to the business of deceased. It is claimed that it was proper impeaching testimony. Independent of this, we are of the opinion that, as suggested by counsel for contestant, it was admissible in evidence as one of very many writings tending to show the actual transaction at all times after her mother's death, by her relatives, of all the business and personal affairs of deceased, without consultation with her at any time, which, taken in connection with her acquiescence therein, constitutes evidence material and competent on the issue of mental competency. It was further expressly shown without objection that deceased took no part in this transaction.

[24] E. Contestant's Exhibit 267, the letter from Jose Vicente De Laveaga to Miguel, of date June 23, 1888, relating to the Cervera compromise. This letter, with other evidence relating to the same matter, was admissible, we think, as tending to show the actual assumption by all the other parties interested, except deceased, of the responsibility of arranging and closing the Cervera compromise, by which her estate was charged with \$40,000, without any consultation whatever with her, and without bringing the matter in any way to her attention. That she was entirely ignored in so far as any attempt to ascertain whether the same was satisfactory to her is undisputed. The evidence is like a great mass of other evidence along the same general lines, viz.: Evidence tending to show a long continued and uniform course of treatment of deceased as to her business and personal affairs by her relatives, under such circumstances as to make her necessarily implied voluntary acquiescence evidence material on the question of mental competency.

[25] F. Contestant's Exhibits 205 and 206, being two letters from Ignacia to Miguel. As in the case of contestant's Exhibit 39, under heading "D," both of these letters were in part admissible as a portion of the line of evidence showing the actual transaction of the business of deceased by her relatives, even that business relating to the receipt and expenditure of moneys for her own personal needs. As to the letter of January 21, 1887, a portion of which was "for you know her, and to go to sign it at the bank or

before a clerk the poor thing suffers," this being the only portion as to which objection may reasonably be made, the objection of incompetency was to the whole letter, and was therefore properly overruled. No motion to strike out such objectionable portion was made, nor was the attention of the court called at any time to any particular portion as being specially objectionable. So there was no error in regard to this exhibit. It is to be noted that Ignacia did not here say anything as to the nature of the infirmity of the deceased. The letter of March 11, 1887, contained an objectionable expression of opinion as to deceased on the part of Ignacia as to the mental competency of deceased, if the word "corta" be taken as meaning "short of intelligence," instead of "timid," and as we gather from the record such was the meaning attributed to it in the proceedings in the court below. As with the letter of January 21, 1887, the formal objection here was to the whole of such portion of the letter as was offered, but after some discussion and before the ruling counsel for proponent said: "Now the portion of this letter here read contains matter which we think is objectionable, and we object to it, and we ask if there be an answer that it go out." The trial judge recognized that a portion of the matter was objectionable, so saying, but said it was so "inextricably interwoven with other matter that you cannot separate one without destroying the whole of it," and overruled the objection. We are of the opinion that the objectionable portion was plainly apparent and could easily have been eliminated without destroying the whole, and that it should be held that a sufficient objection was made to the objectionable portion, "the observation I made was to save her who is short the pain of doing it before people." We see no force in the claim made by learned counsel that this portion of the letter was admissible on the ground that other portions of the letter contained a declaration by Ignacia against her own interest. But conceding all that we have said, we have seen that the learned judge of the trial court expressly recognized that this statement in the letter was objectionable, and was not competent evidence. It is not then to be assumed that he gave this declaration of Ignacia any weight in determining the issue of competency. In fact, in view of his statements, the contrary must be assumed. So that it cannot properly be held that appellants were prejudiced by the ruling. Learned counsel for appellants point out in regard to this, as in regard to other matters claimed to have been improperly shown, that the trial judge referred to this declaration of opinion by Ignacia in his written opinion filed in this case.

[26] This opinion is not a part of the record before us on appeal, and, as has often been held, could not properly be made a part



of such record, or considered by us as indicating what operated upon the judge's mind in coming to a conclusion upon the ultimate facts of this case, even if the same were attempted to be certified to us as a part of the appeal record. So far as the official record on appeal goes, it shows that the trial judge did not receive this incompetent declaration as evidence on the issues made by the pleadings, and warrants the conclusion that he did not consider it in determining these issues. And even if the trial judge in the unofficial paper filed by him, called his "opinion," did refer to this declaration of Ignacia as one of the things tending to show incompetency on the part of deceased, it by no means necessarily follows that he considered such declaration in determining the issue of competency. The "opinion" is incompetent evidence on the matter as to which learned counsel seek here to use it.

[27] G. The testimony of Mr. Le Breton as to the contents of the letter of the father, accompanying his will, in which he recommended deceased to the care of her eldest sister, Ignacia, and to Miguel, "on account of her weak mind," and requested them to always have her under their charge. Sufficient proof of the loss of this instrument was made to authorize oral testimony of its contents, if proof thereof was competent. The testimony came in as part of the conversation at a meeting of the members of the family following the father's death, when the will and the letter were read aloud, and a conversation had by those present as to the course to be followed, especially as to whether this letter need be filed with the will. Deceased was present, and the reading and conversation were in her presence and hearing. She was then over 17 years of age. The testimony tends to show that in this conversation the wish was expressed that it be not filed, as it was desired that it should not thus be publicly expressed that deceased was weak mentally. There was uncontradicted testimony given without objection to the effect that deceased sat absolutely silent throughout this conversation, "not taking part in the discussion at all, apparently accepting what was said, not taking part in the subject at all." The trial court in admitting the evidence expressly declared substantially that it was received as part of the conversation in the presence and hearing of deceased, in connection with her conduct at the time. We cannot doubt that it was legally admissible under the circumstances. The conduct of a person past the age of childhood and within a few months of the age of majority, at a family gathering where in her presence and hearing her mental competency is being discussed, and the claim asserted and apparently accepted by all present that she is so weak-minded as to need the guardianship and care of others through-

out her life, and it is being discussed whether or not a writing expressing the view that she is so affected shall be made a public record, is some evidence on the question of her competency at the time. Naturally such a person if normal in mind would ordinarily show under such circumstances, some interest in the subject-matter, even to the extent of expostulation. That the occurrence was somewhat remote under all the circumstances goes only to the weight to be accorded the evidence, and not to its admissibility.

[28] H. The letter of Encarnacion S. De Pena to contestant, attached to her deposition. We see no good answer to the claim of proponent that this letter was improperly received in evidence. Sufficient objection was made in the trial court. It was admitted by the learned trial judge on the ground of surprise. The only surprise was that the witness had failed to give expected testimony *in favor* of contestant. She had not given any evidence *against* him. It is suggested that on the question whether she was an intimate acquaintance of deceased, she had testified to the effect that she was not, which was opposed to the statements in her letter. But the question of intimacy was material only in the event that she gave testimony on the subject of her opinion as to the competency of deceased, which she did not do. It must be held that the expression of this lady's opinion that deceased "was completely incapable of taking any determination for herself" was improperly received in evidence.

I. Certain correspondence between Mrs. Cebrian and contestant, and Mrs. Cebrian and J. V. De Laveaga, son of contestant, subsequent to the death of deceased and prior to the filing of the alleged will. The correspondence between Mrs. Cebrian and her nephew, J. V. De Laveaga, received in evidence was of such a nature that it cannot be conceived that appellants could be prejudicially affected thereby. Some of the correspondence between Mrs. Cebrian and contestant was admissible and impeaching evidence on the matter of the execution of the will by deceased, as to which she testified fully and specifically. As to such portions as to which objections may reasonably be urged, no prejudicial effect is reasonably conceivable. There was in the correspondence and papers emanating from Mrs. Cebrian, so far as we have been able to find, no admission either of incompetency on the part of deceased or of facts tending to show undue influence. In so far as the letters emanating from contestant are concerned, any assertion bearing on the question of the competency of deceased was in substance the same as his testimony on the subject given under oath upon the trial. We are of the opinion that nothing appears in this connection that warrants the claim of prejudicial error.



Another matter referred to in the briefs merits consideration here.

[29] It is earnestly urged that on the re-direct examination of E. J. Le Breton, his own witness, contestant was allowed to put in evidence much incompetent matter bearing upon the question of mental competency. Much of this matter so complained of was contained in the deposition of Le Breton taken before the trial. The statements in the respective briefs of counsel as to exactly what happened on the trial in regard to this matter are so variant that it has been somewhat difficult for us to ascertain the facts. Le Breton was called as a witness on the trial by contestant. He was a brother-in-law of contestant, his sister, now deceased, having been the wife of contestant, and was at the time of the death of the father of deceased and ever since on very intimate terms with the members of the De Laveaga family. With his opportunities for observation of the deceased from childhood he was an exceedingly important witness on the issue of mental competency, and his testimony was very strong in favor of the theory of incompetency. On his cross-examination on the trial, the fact was referred to that when he was appointed receiver of the California Safe Deposit & Trust Company on January 14, 1908, he tendered for approval, and had approved by Judge Coffey, a bond for \$1,000,000, on which deceased was a surety in the sum of \$500,000. His attention was called by proponent to his deposition, and certain questions and answers contained therein were read to him and he was asked if those questions were then asked of him and if he gave the answers therein set forth. He answered that he so testified. We set forth some of these questions and answers so read by proponent:

"Q. Mr. Le Breton, will you explain to me why it was that you knowingly presented to the judge of the superior court of the city and county of San Francisco, for his approval, in a case where the bond had been fixed at \$2,000,000— A. (Intg.) One million. Q. At \$1,000,000, sureties qualifying here for two million—can you explain to me why you presented for approval to the judge of the superior court of the city and county of San Francisco such a bond, upon which one of the sureties qualifying for half a million dollars, was a woman of unsound mind? Why did you do that thing to the court? A. I did it because in the opinion of my attorney, it was a good bond. Mr. M. A. De Laveaga was business manager of the affairs of his sister, and in my judgment it was a good bond, \* \* \* and because as a matter of fact it was all done in the best of faith. \* \* \* Q. At the time this bond was presented to Judge Coffey for his approval, with your knowledge, did you think that that bond was an enforceable bond against Maria C. De Laveaga? A. I did. \* \* \* Q. Why?

A. On the ground that she had never been legally declared incompetent; that she had in her own name a great deal of property; that it was done upon the advice of her brother and business manager; the whole thing was done in the best of faith, and I felt then, as I do now, that it was an enforceable bond in view of the conditions and circumstances. You have asked me a question which, of course, may be far-reaching, and I will ask for permission to develop it. Q. Certainly. A. Miss Maria C. De Laveaga, as I stated before, was of feeble mind. She was a living human being. For good, she was easily influenced; for evil, easily influenced. It does not follow that the act was wrong since it was done in perfect good faith, and was done by somebody who knew her, was her director in what she did, and she had never been declared incompetent. Much property had been deeded by her attorney in fact, M. A. De Laveaga, and he knew, and his sister knew, Mrs. Cebrian, who was present, and knew of those acts she was about to do, and she acquiesced in them. Q. You speak of director, you mean M. A. De Laveaga? A. Yes, sir. I mean M. A. De Laveaga, and in view of the fact that he acted for her, in her name, directing her affairs, I believe that he had the right and the authority to direct her to sign such a bond. \* \* \* I thought it was better that it should remain in the members of the family, and felt at liberty to call upon the De Laveaga branch, since several members of that family were beneficiaries or derived benefit from the receivership, and from the hard labors which I expected to perform. Q. Mr. Le Breton, did you at the time that this bond was approved think in your own mind that the half million bond of a woman of unsound mind was an enforceable obligation? A. I felt that the bond executed by Miss Maria C. De Laveaga, when I signed that bond, was an enforceable obligation. Q. I would like you to answer my general question, which I think is a proper one, and to answer it categorically, if you can. Did you at the time this bond was approved, to wit, on the 20th day of January, 1908, think in your own mind that the half million dollar bond of a woman of unsound mind was an enforceable obligation? \* \* \* A. I was not called upon to pass upon hypothetical, leading questions, but was called upon to pass upon in my own mind, conscientiously, whether that was an enforceable bond signed by Maria C. De Laveaga, and my conclusion in my mind was that it was. \* \* \* Q. Mr. Le Breton, at the time that you presented this bond to Judge Coffey for his approval, at the time when it was presented to Judge Coffey for his approval with your knowledge, did you think at that time in your own mind, if you had told him you thought she was of unsound mind, he would ever have approved the bond? \* \* \* A. If I had mentioned it



to him, the conditions that surrounded Miss Maria C. De Laveaga, and the conditions surrounding the execution of the bond, I am satisfied he would have approved it. Q. Did you make any such explanation to him? A. I did not feel called upon, because Judge Coffey had so many times every member of the De Laveaga family in his court, for so many years, that he knows all about, or at least I infer he does, and should know all about, the members of the De Laveaga family. He has had them before him in the greatest minuteness many times. Q. Did you ever tell him, or did you ever tell any of the stockholders or creditors of the California Safe Deposit & Trust Company that one of the persons on your bond, and for half a million dollars, was a woman of unsound mind? A. There was no occasion for me to tell them anything about it, because the matter did not concern them. It was a matter for the judge of the superior court."

There appears to have been a claim made by counsel for contestant on the redirect examination of this witness, that by reason of these references to the disposition on cross-examination, they were entitled to put the whole deposition in evidence. In fact, such an offer was made, but the trial court refused to admit it. Of course, there was no force in this claim. No part of the deposition had been put in evidence by proponent. It had simply been used by proponent in cross-examining the witness, to call his attention to certain statements claimed to have been previously made by the witness and to ask him if he had so stated. In so far as the statements thus called to his attention and testified to as having been made by him were incomplete or misleading in themselves, unless considered in connection with other statements by him in the deposition in the same connection, it was open to the contestant to show that in connection with the matters already called to his attention, he had stated the other matters, thus giving his whole statement on the subject, in order that the language first called to his attention might be given the effect intended by the witness in uttering it. We do not understand that the law authorized contestant, under the circumstances appearing here, to use the deposition of this witness for any other purpose. As a matter of fact contestant did read to the witness large portions of the deposition, and generally followed this reading by asking him if he then testified in the manner thus indicated. We think some of the matters thus elicited cannot be held to have been at all necessary to explain or complete the answers elicited by the cross-examination.

Preliminarily it should be stated that as to the matters particularly referred to in appellants' reply brief in this connection, viz., the matters in the deposition set forth between pages 1294 and 1314 of volume 3 of the opening brief, contestant's counsel are

correct in their claim that the only question answered by the witness was, "Now I will ask you at this point if that was the litigation which you referred to as having been before Judge Coffey and with which he was familiar?" (Volume 3, Trans., p. 1166.) The portion already read was in reference to the Anselmo litigation. The answer was: "It was." (Volume 3, Trans., p. 1168.) That portion of the deposition was not put in evidence, and the witness did not testify that he gave that testimony on the taking of his deposition, that is if the official record of the official reporter, certified by the trial judge, is to be here taken as stating the facts. Of course contestant was entitled to show in explanation of the witness' answer on cross-examination as to litigation before Judge Coffey that it was the Anselmo litigation to which he referred.

[30] But in so far as the claim of prejudicial error in this matter is concerned, as well as in other portions of Le Breton's cross-examination, including some relating to the deposition, we are of the opinion that the record furnishes another sufficient answer. The substantial effect of all the matters complained of, so far as any possible claim of prejudice is concerned, was that they tended to show the uniform assumption by all the members of the family that deceased was mentally weak and incapable of managing her affairs; the constant desire on their part to prevent any disclosure of that fact to the public; and the fact that while recognizing her incompetency they nevertheless, for the purpose of protecting her both as to person and property, and preventing a disclosure of her incompetency and a consequent necessity for the appointment of a guardian, adopted and uniformly carried out a policy of having her business transacted in her own name, under their immediate personal supervision and direction, with the understanding that they stood behind and in support of everything that was thus done. Such matters, if known to Le Breton at the time he gave his bond with deceased as a surety thereon, were material in answer to the attempted impeachment of his testimony that deceased was incompetent, by showing that he had presented a bond with her as surety thereon for \$500,000, without intimating to the judge that she was an incompetent person. It goes without saying that such an act on his part, unexplained, would strongly impeach his testimony previously given that she was not competent, and learned counsel for proponent insisted upon showing that fact clearly and in detail on his cross-examination. We have already set forth the questions asked in this regard including "Why did you do that thing to the court?" and "Did you think that that bond was an enforceable bond against Maria C. De Laveaga?" to which the witness answered that he did so think. "Did you at the time that this bond was approved think in your own mind that the half million bond of a



woman of unsound mind was an enforceable obligation?" to which he answered that he thought this bond of deceased was valid, and the concluding questions, "Did you think at that time in your own mind that, if you had told him (Judge Coffey) you thought she was of unsound mind, he would ever have approved the bond?" and "Did you make any such explanation to him?" which he answered by saying, "If I had mentioned to him the conditions that surrounded Miss Maria C. De Laveaga, and the conditions surrounding the execution of the bond, I am satisfied he would have approved it," and "I did not feel called upon, because Judge Coffey had so many times every member of the De Laveaga family in his court, for so many years, that he knows all about, or at least I infer he does, and should know all about, the members of the \* \* \* family." He had also previously been asked on cross-examination whether contestant had not asked his advice in relation to the management of the property of deceased, and whether he did not know that contestant had her general power of attorney, and answered both questions in the affirmative. While the matters already stated as being the general effect of the evidence elicited might not be a justification for the action of the witness in presenting to Judge Coffey a bond with deceased thereon as a surety without explaining to the judge all the facts in regard to her, if he then believed her to be mentally incompetent, they did afford a reasonable explanation of such conduct entirely consistent with his testimony on this trial that he was of the opinion that she was so incompetent, and one that might reasonably be taken as consistent with his answers on cross-examination that he believed the bond to be an obligation in fact enforceable in so far as her part thereof was concerned. If this be so, contestant was entitled to show such matters in reply to the attempted impeachment. If he could show this independently of the deposition, we do not see that it makes any practical difference, so far as the question of prejudice is concerned, that he showed it by reading the questions and answers of the witness contained in the deposition in regard to these matters, and asking the witness if he so testified, as was done in regard to a portion of the examination in this connection. The matters referred to were perhaps gone into with much more of detail than was necessary, but the whole effect of the testimony elicited was substantially as we have stated.

As to such other matters as are specially called to our attention by learned counsel for appellants, we find nothing that we deem a sufficient basis for a conclusion that there was prejudicial error.

Our consideration of the record in this case has brought us to the conclusion that the order of the trial court should be affirmed.

Of course, some errors in rulings on evidence were committed in the trial court. It could not reasonably be expected to be otherwise in view of the great length of this trial, the nature of the questions involved, the mass of testimony presented and the earnestness with which the conflict was waged in the trial court, with counsel on both sides of infinite resource and great ability. But we are of the opinion that there were not technical errors of such a nature and of sufficient importance in their results, taking into consideration all the circumstances shown by the record, to warrant us in requiring a new trial. For instance, it cannot reasonably be conceived, under the circumstances of this case, that the extrajudicial expression of opinion on the part of Encarnacion S. De Pena, improperly admitted in evidence by way of impeachment, on the ground of surprise, hereinbefore set forth, in any degree affected the determination of the issues by the trial court. So far as the merits of the case are concerned, our examination of the record has satisfied us that the evidence properly admitted amply warrants the conclusion of the learned trial judge both that deceased did not have the sound and disposing mind and memory essential to the making of a last will, and that the alleged will was the result of undue influence.

The order appealed from is affirmed.

We concur: SHAW, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.; SLOSS, J.

(22 Cal. App. 75)

LOYALTON ELECTRIC LIGHT CO. v.  
CALIFORNIA PINE BOX & LUM-  
BER CO. (Civ. 1,204.)

(District Court of Appeal, First District, California. May 13, 1913.)

1. CONTRACTS (§ 202\*)—CONSTRUCTION.

Under a contract between plaintiff, an electric light company, and defendant, operating a box factory, whereby plaintiff was to furnish defendant with light for its factory, and defendant was to keep up steam and permit plaintiff to use it, and to use for fuel any refuse of the box factory which defendant might not require for generating steam for its own use, plaintiff to furnish any additional labor or fuel to keep up steam, defendant was not bound to operate its factory in order to produce refuse for plaintiff's use as fuel.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 918-928; Dec. Dig. § 202.\*]

2. CONTRACTS (§ 168\*)—EVIDENCE TO AID CONSTRUCTION—PRESUMPTIONS.

Where parties have entered into written engagements which industriously express the obligations which each is to assume, the courts should be reluctant to enlarge them by implication as to important matters; the presumption being that, having expressed some, they have expressed all, of the conditions by which they intended to be bound.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 751; Dec. Dig. § 168.\*]



Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Loyalton Electric Light Company against the California Pine Box & Lumber Company. Judgment for defendant, and plaintiff appeals. Affirmed.

W. E. F. Deal, of San Francisco, and Curler & Martinson, of Reno, Nev., for appellant. Pillsbury, Madison & Sutro, of San Francisco, for respondent.

HALL, J. This is an appeal from a judgment entered for defendant upon sustaining a demurrer to plaintiff's amended complaint; plaintiff having refused to further amend. The action is for damages for a breach of a contract set forth in the complaint and entered into between defendant and the Plumas Box & Lumber Company, which has assigned its rights under said contract to plaintiff.

[1] The defendant is the owner of a box factory, while plaintiff owns and operates an electric light plant. The contract sued upon in plain language expressly obligates defendant: First, to employ a fireman to keep up steam, and to permit appellant to use such steam; second, to permit appellant to use a portion of the room in respondent's power house; third, to permit appellant to erect and maintain poles and wires over the lands of respondent; and, fourth, to permit appellant "to use for fuel any refuse of the box factory which the first party" (respondent) "may not require for generating steam for its own purpose." It expressly obligates appellant: First, to supply itself with any additional labor or fuel which it may need for the purpose of generating steam; and, second, to furnish respondent with such electric lights as it may require in its factories, etc., not to exceed in all 200 lights, at the price of 10 cents per month for each light. The contract is dated April 20, 1904. The defendant has not operated its box factory since May 6, 1908, but ever since said date the box factory has been shut down, in consequence of which no "refuse of the box factory" has been produced.

The theory of appellant is that under the contract respondent was and is obliged to operate its box factory in order to produce refuse of the box factory, to the end that appellant may use for fuel any such refuse as respondent may not require for generating steam for its own purposes. This theory is entirely untenable. There is in the contract no express obligation to operate the box factory imposed upon respondent. Such obligation, if it exist at all, is imposed by implication only. Even the permission given to use refuse is only to use such as may not be required by respondent for generating steam for its own purposes. It is thus apparent that, in order to give any value to the ob-

ligation claimed to be imposed by implication, we must go a step further and imply an obligation, not only to operate the box factory, but to operate it in such a way or to such an extent as to produce more refuse than would be required by respondent for its own purposes. The question then at once suggests itself: How much more? What amount of excess refuse is required to be produced? The impossibility of answering these questions demonstrates the unsoundness of appellant's theory as to the effect of the contract.

It doubtless was expected by the contracting parties that there might or probably would be an excess of refuse produced, and consequently provision was made permitting appellant to use such excess; but no language can be found in the contract which either expressly or by implication imposes upon respondent the obligation to produce any given amount of excess of refuse, or any excess at all, or any refuse at all.

[2] Where parties have entered into written engagements which industriously express the obligations which each is to assume, the courts should be reluctant to enlarge them by implication as to important matters. The presumption is that, having expressed some, they have expressed all, of the conditions by which they intended to be bound. *Arthur v. Baron De Hirsch Fund*, 121 Fed. 791, 58 C. C. A. 67. See, also, *Maryland v. Railroad Co.*, 22 Wall. 105, 22 L. Ed. 713; *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276, 19 L. Ed. 349; *Green v. American Cotton Co. (C. C.)* 112 Fed. 743; *Nims v. Vaughn*, 40 Mich. 356; *Amalgamated Gum Co. v. Casein Co. of America (C. C.)* 146 Fed. 900, 913.

The learned trial judge correctly interpreted the contract when he sustained the demurrer to the complaint.

The judgment is affirmed.

We concur: LENNON, P. J.; KERBEGAN, J.

(22 Cal. App. 69)

PEOPLE by WEBB, Atty. Gen., v. CALIFORNIA SAFE DEPOSIT & TRUST CO. et al

WICKERSHAM v. SAME.  
(Civ. 1,212.)

(District Court of Appeal, First District, California. May 13, 1913.)

1. BANKS AND BANKING (§ 315\*) — TRUST COMPANIES—DEPOSIT OF MONEY.

Where money is deposited, in accordance with the terms of a will, in the savings department of a deposit and trust company, to be paid with accrued interest to a minor upon his reaching his majority, and the deposit is expressly accepted by the company with knowledge of the terms of the will, the deposit is a trust which is secured by securities deposited with the State Treasurer under the requirements of act April 6, 1891 (St. 1891, p. 490), providing that such security shall be given by

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



a corporation authorized to act as trustee for the benefit of its creditors.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 488, 491; Dec. Dig. § 815.\*]

**2. BANKS AND BANKING (§ 315\*)—TRUST COMPANIES—DEPOSIT OF MONEY—SAVINGS ACCOUNT.**

The fact that the will directed the deposit to be made in the savings department of the deposit and trust company does not change its character, since that was only for the purpose of drawing interest, and the payment of interest is required by section 6 of the act.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 488, 491; Dec. Dig. § 815.\*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Proceedings in insolvency and liquidation by the People of the State of California against the California Safe Deposit & Trust Company and others. Petition in intervention by Frederick Augustus Wickersham. From a judgment against the intervenor, he appeals. Reversed.

J. C. Campbell and David L. Levy, both of San Francisco, for appellant. De Laveaga & Magee, of San Francisco, for respondents.

HALL, J. Appellant, by his general guardian, filed a petition in the proceedings in insolvency and liquidation pending against the California Safe Deposit & Trust Company, a corporation, to obtain a decree determining that he is entitled to share in the proceeds to be realized out of certain mortgages, executed and made by said "trust company to the treasurer of the state of California, under the provisions of the act entitled 'An act authorizing certain corporations to act as executor and in other capacities, and to provide for and regulate the administration of trusts of said corporations,'" approved April 6, 1891 (St. 1891, p. 490), and amended from time to time thereafter. See Appendix to Deering's Code (Ed. of 1909) p. 800.

The "trust" company, the receiver, and the state treasurer were made parties to the petition. The receiver of said "trust" company filed a general demurrer to the appellant's petition, which the court sustained; and, petitioner declining to amend his petition, judgment was thereupon entered against petitioner dismissing his petition. From this judgment petitioner in due time appealed to this court.

The "trust" company ever since its incorporation in 1882 has been authorized by its articles of incorporation to accept and execute trusts of every description. In 1887 it amended its articles so as to also authorize it to act as executor, administrator, guardian, assignee, receiver, depository, and trustee; and in July, 1896, it again amended its articles so as to authorize it to also transact a general commercial and savings bank business.

The demurrer presents the question as to whether or not the facts pleaded are such as establish between appellant and the trust company any such relation of beneficiary and trustee as entitles him to any benefit under the securities deposited with the state treasurer under the act above mentioned.

J. G. Wickersham died June 20, 1899, leaving a will executed November 12, 1896, which among other things contained the following provision: "It is my wish and desire that my grandchildren should be remembered, and therefore request that there be deposited in the Savings Department of the Cal. Safe Deposit and Trust Co., of San Francisco, Cal., in trust for the benefit of my grandson and namesake, son of my son Frank, the sum of one thousand dollars, with the accumulated interest to be paid upon his arriving at the age of twenty-one—and five hundred dollars to each of my grandchildren on same conditions, in case of death of any one that part to go equally to the survivors."

In the decree of distribution, after providing for the disposition of the bequest for the grandson and namesake of testator, it is provided as follows: "There is distributed to the other grandchildren of the said J. G. Wickersham, deceased, severally, the sum of five hundred dollars (\$500.00) to wit: To Jane Elizabeth Wickersham, daughter of Fred A. Wickersham, the sum of five hundred dollars (\$500.00); to Frederick Augustus Wickersham, son of Fred A. Wickersham, the sum of five hundred dollars (\$500.00) \* \* \* which sums respectively shall be deposited in the California Safe Deposit & Trust Company of San Francisco, state of California, to be paid to them severally with the accumulated interest on arriving at the age of majority"—with a direction for the payment of the share of any one dying before majority among the survivors of such grandchildren.

In accordance with such decree, the executrix of said will deposited with the California Safe Deposit & Trust Company the sum of \$500 in gold coin, to be paid to Frederick Augustus Wickersham on his attaining majority, on August 17, 1917; and at the same time a written memorandum of the transaction was made. This was indorsed "Trust Agreement." The first part was signed by the executrix and was directed "To the California Safe Deposit & Trust Company," and recited the will in full, the making of the decree of distribution, and the parts thereof providing for the distribution of the bequests for the benefit of said grandchildren, and a statement that said executrix deposited with said California Safe Deposit & Trust Company the sum of \$500 in United States gold coin "to be paid to Frederick Augustus Wickersham, son of Fred A. Wickersham, deceased, with interest which will accrue thereon at the rate and accord-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ing to the usage and custom of the said California Safe Deposit & Trust Company, said principal sum, with the accumulated interest thereon, to be paid in like gold coin on the 17th day of August, 1917, to the said Frederick Augustus Wickersham, who will on said date reach the age of majority, provided that, if the said Frederick Augustus Wickersham shall die prior to the said 17th day of August, 1917, then the principal sum and interest shall be paid in gold coin in accordance with the terms and conditions of the said last will and testament, and the said decree of distribution of the estate of said J. G. Wickersham, deceased." The second part of the memorandum was signed by the trust company and acknowledges the receipt from said executrix of the sum of \$500 in United States gold coin "for and in behalf of Frederick Augustus Wickersham, son of Fred A. Wickersham, deceased, to be paid in accordance with the terms and conditions hereinbefore set forth." "The terms and conditions hereinbefore set forth" are of course the terms and conditions contained in the first part of the memorandum, signed by the executrix.

From the foregoing it is perfectly clear that the trust company accepted the deposit of \$500 from the executrix of the will of J. G. Wickersham, deceased, to hold and keep the same for Frederick Augustus Wickersham until he shall arrive at majority, at which time the said money, together with the accumulated interest according to the terms of the agreement, was to be paid said Frederick Augustus Wickersham. Until such time no part of the money could be withdrawn either by the depositor or the beneficiary. The money was to be held for the beneficiary by the trust company until his majority, when it was to be paid over to him, with the accumulated interest. Such was clearly the intention of the testator. The same intent is manifested in the decree and fully expressed in the "trust agreement" executed by the executrix and the trust company. There was thus shown an intention to create a trust by the trustor, the subject, purpose, and beneficiary of the trust, and an acceptance of such trust by the trustee. This created a trust. Civ. Code, §§ 2221, 2222; *Booth v. Oakland Bank of Savings*, 122 Cal. 19, 54 Pac. 370; *Elizalde v. Elizalde*, 137 Cal. 634, 66 Pac. 369, 70 Pac. 861; *Sprague v. Walton*, 145 Cal. 228, 78 Pac. 645; *Carr v. Carr*, 15 Cal. App. 480, 115 Pac. 261; *Drinkhouse v. German S. & L. Socy.*, 17 Cal. App. 162, 118 Pac. 953.

[1] While it is quite clear that a trust was created in the money in question, of which Frederick Augustus Wickersham is the beneficiary and the trust company is the trustee, it is still insisted that the trust thus created is not such a trust as is contemplated by the act of 1891 and secured by the securities required under the act to be

deposited with the state treasurer. While the solution of this question is not entirely free from difficulty, we think the trust set forth in the petition is such a trust as is protected by the securities required to be given by the act.

The first section of the act provides that "any corporation which has or shall be incorporated under the general incorporation laws of this state, authorized by its articles of incorporation to act as executor, administrator, guardian, assignee, receiver, depository, or trustee \* \* \* may be appointed to act in such capacity in like manner as individuals." Sections 2 and 3 empower any court, having jurisdiction of any executor, administrator, guardian, assignee, receiver, depository, or trustee, to order money held by such trustee, deposited with such corporation, to be paid out only upon the orders of said court. Section 3 authorizes any public administrator to deposit money in his hands in such capacity with such corporation, to be drawn by his order, countersigned by the judge of the superior court. Under these latter sections (2, 3, and 4) the corporation is made a depository only. It is section 1 that authorizes its appointment in the other enumerated capacities. Section 5 provides that no bond or security shall be required of such corporation "in case of any appointment hereinbefore provided for, except as hereinafter provided." By subsequent sections (7 and 8) provision is made for giving of security to the state treasurer "for the benefit of the creditors of said corporation."

It may be conceded that such creditors are only such as become creditors in respect of some appointment provided for in the act. But the appointment of such corporation to act as trustee of trust funds for a beneficiary is an appointment provided for in the first section of the act. The will in this case, when it directed that the money should be deposited with the trust company "in trust for the benefit of my grandson," to be paid when he should reach majority, in effect appointed the trust company a trustee to hold such money for such beneficiary.

[2] The direction that it be deposited in the savings department is only significant as indicating that the trust company might use the money and pay the usual interest thereon. But this is allowed by the very terms of the act. Section 6 provides: "Such corporations shall pay interest upon all moneys held by them by virtue of this act, at such rate as may be agreed upon at the time of its acceptance of such appointment, or as shall be provided by the order of the court." The payment of interest directly by the corporation for the use of the money does not militate against the theory that the money was held in a trust capacity under the act.

The appointment contained in the will is confirmed by the decree of court, for, while



the decree does not describe the corporation as a trustee or in express words declare that the money is to be held in trust, yet when read as a whole it is clear that under the decree the corporation is to hold the money for the beneficiary until he reaches majority, and in the meantime it cannot be withdrawn either by the beneficiary or the depositor. The money is to be held in trust. By the "trust agreement" the trust company accepted this trust. The provision in the trust agreement for the payment of accumulated interest "at the rate and according to the usage and custom of the said California Safe Deposit & Trust Company" does not convert the deposit into an ordinary savings deposit. This provision is in strict accord with the provision of section 6 of the act in question, which provides for the direct payment of interest on trust money.

The trust company was thus appointed trustee, to take and hold this money until the beneficiary should reach majority. It seems to be just such a trust as the act intended should be protected by the securities required to be deposited with the state treasurer.

It follows that the court erred in sustaining the demurrer, and the judgment is therefore reversed.

We concur: LENNON, P. J.; KERRIGAN, J.

(22 Cal. App. 31)

DAKE ADVERTISING AGENCY v. FIELDING J. STILSON CO. et al. (Civ. 1,298.)

(District Court of Appeal, Second District, California. May 8, 1913.)

1. COURTS (§ 120\*)—JURISDICTION—AMOUNT IN CONTROVERSY.

Where the superior court had no jurisdiction to render a judgment against a stockholder of a corporation for less than \$300, a default judgment entered against him by the clerk for less than that amount will be reversed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 413-436; Dec. Dig. § 120.\*]

2. APPEAL AND ERROR (§ 1151\*)—MODIFICATION—REDUCING AMOUNT OF RECOVERY.

A default judgment, entered by the clerk for a sum greater than that sued for, will be reduced on appeal to the amount claimed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498-4506; Dec. Dig. § 1151.\*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by the Dake Advertising Agency against the Fielding J. Stilson Company and others. Judgment for plaintiff, and defendants appeal. Affirmed as to the defendant corporation, reversed as to defendant Fielding J. Stilson, and modified and affirmed as to defendant Mary E. Stilson.

Anderson & Anderson, of Los Angeles, for appellants. John Beardsley, of Los Angeles, for respondent.

JAMES, J. Plaintiff brought this action to recover from defendant corporation \$608.57. The individual defendants were sued as stockholders of defendant corporation. After demurrer, made on the general ground only, was interposed and overruled, all of the defendants defaulted and judgment was entered by the clerk.

[1] The judgment asked against F. J. Stilson was for \$202.89, and as entered by the clerk was for the sum of \$214.73. This judgment was erroneously entered because of the fact that the superior court was without jurisdiction to entertain the claim as against this defendant for an amount less than \$300.

[2] Defendant Mary E. Stilson was sued for the sum of \$405.68, and the judgment entered against her was for the sum of \$429.34 and \$8 costs. This sum was \$23.66 in excess of the demand of the complaint.

The judgment as to defendant corporation is affirmed; the judgment as to defendant Fielding J. Stilson is reversed; the judgment as to defendant Mary E. Stilson is ordered to be modified by subtracting therefrom the sum of \$25.66, and as so modified it is affirmed, this defendant to recover any costs she may have incurred on this appeal.

We concur: ALLEN, P. J.; SHAW, J.

(22 Cal. App. 32)

FRANCIS v. WESTERN SCREEN CO. (Civ. 1,257.)

(District Court of Appeal, Second District, California. May 8, 1913.)

1. CORPORATIONS (§ 414\*)—OFFICERS—AUTHORITY—MANAGER—RESOLUTION OF DIRECTORS.

The manager of a corporation doing a general commercial business has authority to give its note in settlement of an account for merchandise bought, due, and owing at the time, it having at the time no funds sufficient for satisfying it; the resolution of the directors authorizing his employment setting forth that he was to handle the business in all its details and do all business of every nature.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1640-1646; Dec. Dig. § 414.\*]

2. CORPORATIONS (§ 387\*)—CORPORATE CAPACITY—ESTOPPEL TO DENY.

Defendant in an action on its note, given to its creditors for goods bought, and on its face appearing to run in favor of a corporation, should not be permitted to question the corporate capacity of the payee, plaintiff's assignor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1548-1553; Dec. Dig. § 387.\*]

3. TRIAL (§ 398\*)—INCONSISTENT FINDINGS ON ADMITTED FACT.

A fact admitted in the answer requiring no finding, inconsistent findings thereon, as that the allegations of the complaint are true.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



and those of the answer untrue, should be disregarded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 946, 947; Dec. Dig. § 398.\*]

**4. CONTINUANCE (§ 14\*) — AMENDMENT OF PLEADINGS—DISCRETION.**

Amendment of the complaint may, in the discretion of the court, be allowed on the case coming on for trial, without time being allowed for preparation to meet the new issue, demand before action for payment of the note sued on; the witnesses being present, and the obligation being treated as denied.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 25, 99-112; Dec. Dig. § 14.\*]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by Ira J. Francis against the Western Screen Company and another. Judgment for plaintiff, and said defendant appeals. Affirmed.

Paul W. Schenck, Roland G. Swaffield, and Frederick Gros, all of Los Angeles, for appellant. Alfred Wright, of Los Angeles (Oscar C. Mueller, of Los Angeles, of counsel), for respondent.

**JAMES, J.** Appeal from a judgment entered in favor of plaintiff and an order denying appellant's motion for a new trial. The suit was upon a promissory note made in favor of John A. Roebbling's Sons Company and signed "Western Screen Company, C. P. Dandy, Mgr." At the date of the making of the note, the Western Screen Company was indebted to the payee for merchandise furnished at various times in an amount equal to the principal sum named in the note. The agent of this payee, having failed to secure a settlement of the account, requested that it be placed in some definite condition, in response to which request the note sued upon was executed and given. It appears from the evidence that the board of directors of appellant, in the year 1911, adopted a general resolution authorizing the employment of Dandy as manager, which resolution recited that said Dandy was "to handle the business and all its details, \* \* \* and do all the business of every nature, and employ such assistants as he may deem necessary, and arrange for compensation of all employes." Dandy testified that he acted for appellant in the transactions had with the Roebbling's Company and that he executed the promissory note as before stated.

[1] It is first contended on behalf of appellant that the evidence was insufficient to show authority in Dandy to execute the written obligation of appellant. The resolution authorizing the employment of Dandy as manager set forth that he was to handle the business of the company in all its details and do all business of every nature. It is sufficiently made to appear that appellant was then doing a general commercial business, and it would seem that, as the author-

ity delegated under the resolution authorized the manager to do all business of every nature, as such manager Dandy possessed authority to adjust the accounts of the company, and that, if it became necessary to execute written obligations on that behalf, he had full authority so to do as a part of the transaction of the ordinary business of the corporation. The account, in settlement of which the promissory note was executed, appears to have been due and owing at the time the note was made, and that there were no funds sufficient with which the manager might satisfy the claim by payment. The facts of the case seem to fully warrant the inference that the making of a promissory note under conditions like those which existed at the time Dandy executed the written obligation for his company was one ordinarily incident to the transaction of the business. *Stevens v. Selma Fruit Co.*, 18 Cal. App. 242, 123 Pac. 212; *Siebe v. Hendy Machine Works*, 86 Cal. 392, 25 Pac. 14.

[2] Whether there was any direct evidence to sustain the allegation of plaintiff as to the corporate capacity of his assignor, the Roebbling's Sons Company, need not be considered further than to say that on its face the note appeared to run in favor of a corporation, and the appellant should not be permitted to question the corporate capacity of its debtor under the facts exhibited by this record. *Raphael Weill & Co. v. Crittenden*, 139 Cal. 489, 73 Pac. 238.

[3] The plaintiff alleged in his complaint that the appellant was a corporation and appellant in its answer admitted the fact to be as alleged. The court in making findings found generally that the allegations of plaintiff's complaint were true and that the allegations and denials of defendant's answer were untrue. Of course, it could not be both true, as alleged by plaintiff, that appellant was a corporation and also that the allegation in the answer admitting the truth of that statement was untrue. A fact which is admitted by the pleadings requires no finding, and the inconsistent findings made as to the question referred to should be disregarded.

[4] At the coming on of the trial, plaintiff offered for filing an amendment to his complaint to supply the want of an allegation as to demand having been made upon defendant for payment of the note prior to the commencement of the action. Plaintiff also offered to stipulate that the allegation contained in the amendment might be deemed denied and verification be waived. Counsel for appellant asked for further time within which to prepare to meet the additional issue. The judge upon making inquiry in open court found that the witnesses who might be examined as to the question of demand having been made were all present, and allowed the amendment to be filed, treat-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ing it as being denied under the stipulation of plaintiff, and the trial was proceeded with. This action of the court is assigned as error. The allowance of the amendment was within the discretion of the trial judge reasonably exercised, and nothing is shown by the record whereby any prejudice appears to have resulted to appellant. Appellant had full opportunity to produce any witnesses that it might require, and failed to make any showing to the court of the absence of such witnesses, or that it would be able to show any different state of facts than that testified to by the witnesses at the trial.

Judgment and order affirmed.

We concur: ALLEN, P. J.; SHAW, J.

(22 Cal. App. 66)

NILES STATE BANK v. JENNINGS et al.  
(Civ. 1,245.)

(District Court of Appeal, First District, California. May 10, 1913.)

CORPORATIONS (§ 252\*)—LIABILITY OF STOCKHOLDER.

Though a mortgagor is only liable to a personal judgment in case of a deficiency, the liability of a corporate stockholder is original and primary, so that the fact that a corporation, at the time of incurring the debt, for which a stockholder is sought to be held on his individual liability, gave a mortgage to secure it, a proceeding to foreclose which is pending, was no defense to the action by the creditor against the stockholder on his individual liability for the corporate debt.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1016-1023; Dec. Dig. § 252.\*]

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the Niles State Bank against C. B. Jennings and others. From a judgment against defendant named and another, they appeal. Affirmed.

Ira S. Lillick, of San Francisco, for appellants. Oliver Ellsworth, of San Francisco, for respondent.

HALL, J. This is an appeal from a judgment against appellants upon a stockholder's liability for a debt of a corporation, the Metropolitan Meat Company, of which appellants were stockholders at the time of the incurring of the indebtedness.

Appellants as an affirmative defense pleaded that the Metropolitan Meat Company, at the time of incurring the indebtedness sued on, had given to plaintiff a mortgage upon certain land to secure the same, and also pleaded the pendency of an action brought by plaintiff against the said mortgagor to foreclose the same. To this defense the court sustained a demurrer; and it is as to the correctness of this ruling that the only question for solution upon this appeal is presented.

Appellants argue that in a case where a debt is secured by a mortgage the only debt for which the mortgagor is personally liable is the deficiency arising from a foreclosure and sale of the mortgaged property, and that under section 726 of the Code of Civil Procedure only one action may be maintained upon a debt secured by a mortgage. From these premises he argues that the only liability of a stockholder of a mortgagor corporation is to pay his proportion of the debt for which the corporation is personally liable, to wit, the deficiency arising from a foreclosure and sale of the mortgaged premises.

[1] The conclusion so earnestly urged does not follow from the premises. Though the mortgagor is only liable to a personal judgment for such deficiency, the liability of a stockholder in a corporation is original and primary. *Mokelumne Hill Canal Co. v. Woodbury*, 14 Cal. 265; *Davidson v. Rankin*, 34 Cal. 503; *Young v. Rosenbaum*, 39 Cal. 646; *Morrow v. Superior Court*, 64 Cal. 383, 1 Pac. 354; *Hyman v. Coleman*, 82 Cal. 650, 23 Pac. 62, 16 Am. St. Rep. 178.

The stockholders are not affected by the fact that because of the mortgage only an action to foreclose can be brought against the mortgagor corporation. "The mortgage only affects the remedy against the mortgagor, the corporation. The liability of the stockholder \* \* \* is primary in the sense that he is not a surety. He is not injured nor is he benefited by the fact that the corporation has given security." *Knowles v. Sandercock*, 107 Cal. 829, 40 Pac. 1047. This latter case is decisive of the point involved in this appeal.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(22 Cal. App. 63)

ALTPETER et al. v. POSTAL TELEGRAPH-CABLE CO. (Civ. 1,085.)

(District Court of Appeal, Third District, California. May 9, 1913.)

1. APPEAL AND ERROR (§ 144\*) — RIGHT TO APPEAL.

Where, though the action was originally instituted against appellant a New York corporation, the complaint was amended so as to substitute a California corporation of the same name as party defendant, and the action went to judgment against the latter corporation, the New York corporation could not appeal from the judgment for plaintiff, even though the court had no jurisdiction to permit the amendment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 923; Dec. Dig. § 144.\*]

2. APPEAL AND ERROR (§ 148\*)—PARTIES APPELLANT—PARTY OF RECORD.

Only a party to the record can appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 925-932; Dec. Dig. § 148.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.**

**Action by Catherine Altpeter and another against the Postal Telegraph-Cable Company, in which defendant appealed. Appeal dismissed.**

See, also, 132 Pac. 79.

L. T. Hatfield, of Sacramento, for appellant. E. E. Gaddis, of Woodland, for respondents.

**HART, J.** This is an action for damages in the sum of \$500 alleged to have been incurred by the plaintiffs through the act of the defendant in cutting down and thus destroying four walnut trees standing and growing immediately in front of the land and houses of the plaintiffs, situated on Court street, in the town of Woodland. The cause was tried before a jury, and a verdict returned in favor of plaintiffs for the amount sued for. The court thereupon entered judgment for treble the sum assessed by the jury (section 3346, Civ. Code, and section 733, Code Civ. Proc.), and this appeal is from said judgment by Postal Telegraph-Cable Company, a corporation, organized under the laws of the state of New York.

Counsel for the respondents has moved a dismissal of this appeal on the ground that the appellant is not a party to this action, and therefore not a "party aggrieved," within the meaning of section 938 of the Code of Civil Procedure. There is in our opinion no escape from the conclusion that the position of the respondents on the motion to dismiss is well taken. It appears that there are two separate and distinct corporations named and known as "Postal Telegraph-Cable Company," one of which was organized and existing under and by virtue of the laws of the state of New York, and the other organized and existing under and by virtue of the laws of the state of California.

The record discloses that the corporation originally sued by the plaintiffs was the New York corporation, the complaint alleging that the defendant Postal Telegraph-Cable Company was a corporation organized, existing, and doing business under and by authority of the laws of the state of New York. When the trial of the case was proceeded with, it was in the outset thereof discovered that, if the plaintiffs suffered the damage as set out in the complaint, such damage was caused by the California corporation named and known as Postal Telegraph-Cable Company and not by the New York corporation of that name, whereupon counsel for the plaintiffs applied to the court for leave to amend the complaint so as to substitute the California corporation for the New York corporation as party defendant. After an extended discussion between counsel, in the course of which the attorney for the appellant declared that the two corporations were distinct entities, and that he was in court for the sole purpose

of representing the New York corporation and that the California corporation was without a legal adviser or representative in the action, the court allowed the amendment. Although interposing an objection to the allowance of the amendment on the ground that the court was without jurisdiction to do so, and although reserving an exception to the order of the court permitting the amendment, counsel for the appellant, after the order granting the plaintiffs leave to amend was made and entered, retired from further participation in the trial of the action, declaring that, "if the California corporation is the defendant in this case, we have no appearance for it and no authority to appear." The trial of the cause was thereupon proceeded with in the absence of a legal representative of the defendant, with the result as hitherto stated.

[1] After the court made its order allowing the substitution of the California corporation for the New York corporation, the attorney for the appellant moved for a formal order dismissing the action as to the latter; but the court refused to grant the motion or to make the order, and it is largely upon the action of the court as to said motion that counsel insist here that the New York corporation remained and is still a party to the action. We are, however, unable to coincide with that view. The effect of the order of substitution was to entirely eliminate the New York corporation from any connection whatsoever with the case as effectually as if the action had been formally dismissed as to it. In other words, the moment the California corporation was substituted as party defendant in the place and stead of the New York corporation the latter was no longer interested in or concerned with the action or the trial thereof, and obviously could not be injuriously or otherwise affected or bound by any verdict or judgment obtained in the action. This proposition was virtually conceded by the attorney for the appellant when, after the order of substitution, he retired from the case, saying, in effect, that he appeared for the sole purpose of representing the New York corporation, and was not concerned with or interested in the substituted defendant, having no authority to represent it in the action as counsel. Nor is the question whether this appeal should be dismissed affected in any measure by the fact, if it be a fact, and as counsel for appellant contend is true, that the court transcended its authority or jurisdiction in making the order granting the motion of the plaintiffs to amend their complaint in the respect referred to. Whether the order of substitution was erroneous or not is a matter of vital interest to the substituted defendant, but cannot be of any concern to the appellant; it having thus been wholly removed from the record as a party thereto and thereby rendered immune from any possible prejudice or



detriment by reason of any verdict or judgment returned and entered in the action against another and a distinctly different person.

[2] "It has been settled as a rule of practice by a long series of decisions that only a party to the record can appeal, and other rules of practice equally well settled have remedied any inconvenience that might have resulted from this construction of section 938, so that there is no reason now to depart from it, if ever there was." *Elliott v. Superior Court*, 144 Cal. 501, 507, 77 Pac. 1109, 1111 (103 Am. St. Rep. 102).

Our conclusion is that the appellant cannot, by any possibility, any more than can any other stranger to the action, be affected in the slightest by the verdict or judgment herein, and that it cannot, therefore, be held to be a "party aggrieved" or authorized to maintain and prosecute this appeal.

The motion to dismiss this appeal is accordingly granted.

We concur: CHIPMAN, P. J.; BURNETT, J.

(22 Cal. App. 38)

LEWIS v. BROWN. (Civ. 1,056.)

(District Court of Appeal, Third District, California. May 8, 1913.)

1. FRAUDS, STATUTE OF (§ 56\*)—REAL PROPERTY—CREATION OF ESTATE OR INTEREST.

A grantor cannot by oral agreement reserve a life estate; Code Civ. Proc. § 1971, declaring no estate or interest in real estate, other than a lease for not over a year, can be created or declared except by operation of law, otherwise than by instrument in writing subscribed by the party creating or declaring it.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 83-89, 136-138; Dec. Dig. § 56.\*]

2. DEEDS (§ 60\*)—DELIVERY—CONDITIONS.

Under Civ. Code, § 1056, providing that a grant cannot be delivered to the grantee conditionally, but delivery to him is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made, the oral understanding on which a deed is delivered, that it shall not be recorded till after the grantor's death, is ineffectual.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 124; Dec. Dig. § 60.\*]

3. DEEDS (§ 60\*)—DELIVERY—REQUEST NOT TO RECORD—EFFECT.

Even if in writing, the mere request of the grantor to the grantee, on delivering the deed, absolute on its face, not to cause it to be recorded till after the grantor's death, could not create in the grantor a life estate or any interest.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 124; Dec. Dig. § 60.\*]

Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by George L. Lewis against May Brown. Judgment for plaintiff. Defendant appeals. Reversed.

Thompson & Thompson, of Santa Rosa, for appellant. W. F. Cowan, of Santa Rosa, for respondent.

HART, J. This is an action to quiet title to certain real property, consisting of a lot and improvements, situated at Camp Meeker, in Sonoma county. The suit was originally brought by one Clara Cook, daughter of George L. Lewis, the respondent; but the latter, for reasons which will subsequently be made to appear, was substituted as plaintiff in the place of said Clara Cook. The complaint alleges that the plaintiff is, and for a long time prior to the institution of this action has been, in possession of the premises described therein and "claims title in fee to the said premises, and that said defendants claim an estate or interest therein adverse to the plaintiff; that the claim of said defendants is without any right whatever and that said defendants have no estate, right, title, or interest whatever in said lands and premises, or any part thereof." The answer of the defendant, May Brown, denies that the plaintiff "is now, or ever has been, the owner or in the possession of the land and premises described in the complaint," and admits that the defendant, May Brown, claims an estate and interest in said property. The answer further avers that the plaintiff, George L. Lewis, on the 31st day of October, 1908, being the owner in fee of the property in controversy, for a valuable consideration, conveyed by deed said property to the defendant, and that said deed was duly recorded in the office of the county recorder of Sonoma County on the 8th day of October, 1909; that on September 27, 1909, the plaintiff, "for some reason unknown to defendant, and without her knowledge or consent, made a deed by which he pretended to convey the said lands to plaintiff," referring to the original plaintiff; that "the said deed was made without any money or valuable consideration and with the knowledge of all parties thereto that this defendant was the owner in fee of said lands, and held said deed previously made and delivered to her by said George L. Lewis," etc. The defendant, May Brown, also filed a cross-complaint in which, after the manner of her answer, she sets out her title to the land in dispute and the circumstances under which she acquired title thereto, and prays for a decree quieting her title to said land. The answer to the cross-complaint denies the averments of the last-mentioned pleading, and further alleges that the plaintiff, Lewis, is the father of the original plaintiff, Clara Cook, and that, because of the infirmities of old age, and therefore of the uncertainty of the duration of his life, "and in order to avoid the expense of probate and to expedite matters concerning his said real estate," he, on the 27th day of September, 1909, being "the absolute owner

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



in fee of the lands described in the pleadings herein," executed and delivered to his said daughter, Clara Cook, "for and in consideration of love and affection, a good and sufficient deed to the said lands, \* \* \* reserving to himself a life estate therein."

The court found that on the 31st day of October, 1908, George L. Lewis was the owner in fee of the property in controversy, and that, on said day, "for a valuable consideration, he made, signed, acknowledged an instrument in due form of a grant, bargain, and sale deed, wherein and whereby it was purported to convey the said premises, above described, and which were in said deed so described, to the defendant, May Brown"; that Lewis, upon said day, handed and delivered said deed to the said May Brown, but that such delivery was with the understanding and agreement that Lewis should have the rents, income, and profits of said premises during his lifetime, and that "he should retain and reserve a life estate unto himself in said premises, and that the remainder in fee after said life estate was to be vested in the said May Brown, and upon the further express understanding and agreement between the said George L. Lewis and the said May Brown that the said deed was not to be recorded until after the death of said George L. Lewis." The judgment, following the findings, adjudges the fee in the property to be in the defendant, with a life estate therein to George L. Lewis and enjoins the defendant and all persons "claiming or to claim under or through her" from asserting any right, title, interest, or claim in or to the said life estate or "from interfering with the possession of plaintiff therein." This appeal is prosecuted by the defendant from so much of the judgment as adjudges that Lewis has a life estate in the property and enjoining the defendant and all persons from asserting or claiming any interest in or title to such life estate and from interfering with Lewis' enjoyment of the possession thereof.

[1] It is very clear from an examination of the record, that the finding that Lewis reserved to himself a life estate in the property in controversy is entirely without support from the evidence, and that therefore that portion of the judgment from which this appeal is submitted cannot be upheld.

There is nowhere in the pleadings any averment nor any language even remotely indicating that Lewis reserved or intended to reserve to himself a life estate in the property, so far as the conveyance thereof to the defendant is concerned. The deed to May Brown is absolute upon its face, and therefore purports to convey to May Brown, without qualification, condition, or limitation of any nature whatsoever, the absolute fee in the property. Nor does the record disclose any competent evidence affording any reason or ground for the slightest inference that

Lewis reserved to himself, out of the fee conveyed to May Brown, a life or any estate or interest in the property. Indeed, at the trial the important question of fact which seems to have constituted the single and only bone of contention between the parties and as to which there appeared to have been any disagreement between Lewis and Brown as to the transaction involving the former's conveyance of the property to the latter was whether he ever delivered the deed to her. That this was regarded as, and, indeed, virtually conceded to be, the single issue of fact before the court by plaintiff's attorney, is plainly shown by a certain statement made by him at the trial. Answering an objection to certain questions propounded by him to Lewis and whose purpose was to bring out an oral understanding which it was claimed was had between the parties contemporaneously with the execution and delivery of the deed that Lewis was to have the rents and income from the property during his life, counsel said: "I wish to state that the deed is not denied; the point we raise is that there was never any delivery of the deed."

It appears, however, that, over objection by counsel for the defendant, Lewis was permitted to testify that, when he executed the deed and apprised the defendant of its execution, he declared to her that it was his desire that she should not record the instrument until after her death, and in effect further said that an interest in the property should remain in him during the remainder of his life. It was undoubtedly upon this testimony that the court based its finding that Lewis reserved to himself, out of the fee of the property granted by him to May Brown, a life estate therein. But, from the remark of counsel for the plaintiff, above quoted, in replying to the objections to this line of inquiry into the transaction, it is plainly evident that, when made, the court's rulings allowing that testimony proceeded entirely from the theory that it was addressed entirely and solely to the question of delivery. And, obviously, that was the only purpose for which it could legally have been allowed and received; for it is plainly manifest that an estate or interest in real property, other than a lease thereof for a period not to exceed one year, cannot be created by parol, and that to sustain the finding, educed, as most certainly it was, from parol testimony of the alleged fact, that Lewis reserved to himself a life estate from the fee granted by him to the defendant, would, of course, be to sanction a direct violation of every rule governing the transfer and creation of estates or interests in real property.

The trial court found, upon sufficient evidence, that the deed, which, as seen, is absolute upon its face, was executed by Lewis and by him delivered to the grantee, May Brown. Indeed, the very claim of the plain-



tiff of a reservation of a life estate in the property necessarily concedes or presupposes a delivery or the due transfer of the fee to the defendant.

Section 1971 of the Code of Civil Procedure declares that "no estate or interest in real property, other than for leases for a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto can be *created*, granted, assigned, surrendered, or *declared*, otherwise than by operation of law, or a conveyance or *other instrument in writing*, subscribed by the party *creating*, granting, assigning, surrendering, or *declaring* the same, or by his lawful agent thereunto authorized by writing."

Apart from any consideration of the elementary rule, which has been adopted into our Codes, interdicting the modification or varying of the vital terms of a writing by parol, it is obvious that any attempt either to restrict or enlarge the scope or effect of an indenture transferring real property by an oral agreement is expressly prohibited by the foregoing section. In other words, oral testimony cannot be considered as against the written terms of a deed for the purpose of limiting or qualifying the estate thereby granted or created.

[2] Nor is it important, even if it be true, that Lewis delivered the deed to the grantee with an oral understanding that the instrument should not be filed for recordation until after his death. Section 1056 of the Civil Code provides that a "grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made." "If," as is well said, in *Richmond v. Morford*, 4 Wash. 337, 30 Pac. 241, "the grantor does not intend that his deed shall not take effect until some (oral) condition is performed or the happening of some future event, he should either keep it himself, or leave it with some third person as an escrow, to be delivered at the proper time. If he deliver it as his deed to the grantee, it will operate immediately, without any reference to the performance of the condition, although such a result may be contrary to the express stipulation of the parties at the time of the delivery." Or, as Mr. Devlin, in his excellent treatise on Deeds (section 314), thus states the rule: "Whether a deed has been delivered or not is a question of fact upon which, from the very nature of the case, parol evidence is admissible. But whether a deed, when delivered, shall take effect absolutely or only upon the performance of some condition not expressed therein, cannot be determined by parol evidence. The deed in this case being absolute upon its face, and having been delivered to the grantee himself, took effect at once. It could not have been delivered to take effect

upon the happening of a future contingency, for this would be inconsistent with the terms of the instrument itself. Without regard, therefore, to any understanding which may have existed at the time the deed was delivered, it must be held to be an absolute conveyance, operative from that time." See *Lawton v. Sager*, 11 Barb. [N. Y.] 349, 351; *Fairbanks v. Metcalf*, 8 Mass. 230; *Alexander v. Wilkes*, 79 Tenn. (11 Lea) 221; *Jordan v. Pollock*, 14 Ga. 145; *Mowry v. Heney*, 86 Cal. 471, 25 Pac. 17; *Riley v. North Star Min. Co.*, 152 Cal. 549, 93 Pac. 194; *Hammond v. McCullough*, 159 Cal. 639, 115 Pac. 218; *Whitney v. Dewey*, 10 Idaho, 63, 80 Pac. 1117, 69 L. R. A. 572.

[3] Even if the testimony upon which the court based its findings and the judgment with reference to the reservation of a life interest by Lewis were legal or competent, it would be wholly insufficient to support the findings and judgment in that particular. The mere request to the grantee not to cause the grant to be recorded until after the death of the grantor could not, even if in writing, have the effect of creating in the grantor a life estate or any interest in the property granted, where the deed is absolute upon its face and has been delivered to the grantee, and, as seen, it was almost entirely upon the mere alleged verbal request by Lewis to the defendant not to record the deed that the court predicated the findings and that portion of the judgment to which objection is made on this appeal.

Counsel for the appellant have requested that this court direct a modification of the judgment in accordance with their theory of the case and with which theory the views herein expressed harmonize. We can see no reason why it should not be within the power of an appellate court, in a case where the finding complained of is distinctly severable from the rest, and is not supported by any evidence whatever, and that the case is such as not to be susceptible of improvement in the particular as to which complaint is made, to direct the court below to strike out such unsupported finding and modify the judgment accordingly. Hayne on New Trial and Appeal, § 296, subd. 2. But, while it appears clear to us that there can be no competent evidence available to the plaintiff to support the finding as to the reservation of a life estate from the fee granted to May Brown, we feel some reluctance about complying with the request of appellant, since it is well settled that an appellate court cannot make a finding and that such an order as is asked of this court might seem to impinge upon that rule and thus cause confusion as to the correct practice in such a case. However, it is manifest that, unless there is in existence and procurable competent proof of the fact involved in the finding to which objection is here made, the court below should avoid the trouble and expense



of a new trial by striking out the unsupported finding and so modifying the judgment as that it will conform to the rest of the findings and to the views and conclusion of this court.

The judgment is reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(22 Cal. App. 45)

PEOPLE v. GREEN. (Cr. 411.)

(District Court of Appeal, First District, California. May 9, 1913. Rehearing Denied by Supreme Court July 8, 1913.)

**1. FALSE PRETENSES (§ 7\*) — ELEMENTS OF OFFENSES.**

To constitute a false pretense, the misrepresentation must be of an existing or past fact, and cannot relate to the future, or be a mere promise to pay.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 5-12, 25; Dec. Dig. § 7.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2662-2668; vol. 8, p. 7661.]

**2. FALSE PRETENSES (§ 7\*) — ELEMENTS OF OFFENSES.**

A representation by accused to a poultry association that eggs supplied by the members thereof were to be "processed" and stored, while the eggs supplied were sold as received, cannot be made the basis of a prosecution for false pretenses on the theory that the members of the association believed that the eggs supplied could be recovered, if not paid for, since the representation relates to an act to be performed in the future.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 5-12, 25; Dec. Dig. § 7.\*]

**3. FALSE PRETENSES (§ 5\*)—ELEMENTS OF OFFENSES.**

A private letter written by accused to an agent cannot form the basis of a prosecution for false pretenses merely because the agent communicated the contents to third persons, in the absence of anything to show that it was the intention of accused that the letter should be exhibited to any one, and that any one relied on the representations communicated.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 3; Dec. Dig. § 5.\*]

**4. CRIMINAL LAW (§ 62\*) — PARTIES TO OFFENSES—PRINCIPAL AND AGENT.**

The civil doctrine that a principal is bound by the acts of his agent within the scope of the agent's authority does not apply to criminal law, and a principal, if liable criminally for the acts of his agent, is liable only for acts authorized.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 75; Dec. Dig. § 62.\*]

**5. CRIMINAL LAW (§ 62\*)—PARTIES LIABLE—ACTS OF AGENT.**

Though false pretenses may be made to an agent of the one defrauded, yet, when made by an agent, they must be directly authorized, or consented to, to hold the principal for false pretenses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 75; Dec. Dig. § 62.\*]

**6. FALSE PRETENSES (§ 7\*)—ELEMENTS OF OFFENSES—PROMISES.**

A promise by accused to furnish a bond to secure his customers, accompanied by negotiations with a surety company for a bond, cannot be made the basis of a prosecution for

false pretenses, since the representation concerns a future event.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 5-12, 25; Dec. Dig. § 7.\*]

**7. FALSE PRETENSES (§ 7\*)—ELEMENTS OF OFFENSES—PROMISES.**

A sight draft drawn by accused on himself in payment of goods bought amounts only to a representation of future ability to pay, though it carries with it the implied representation of ability to pay, and a seller parting with his goods on the strength thereof does not rely on a false representation constituting a false pretense.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 5-12, 25; Dec. Dig. § 7.\*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

James R. Green was convicted of obtaining money by false pretenses, and he appeals. Reversed.

Anderson & Anderson, of Los Angeles, for appellant. John Beardsley, of Los Angeles, for the People.

KERRIGAN, J. The defendant was indicted, tried, and convicted of the crime of obtaining money by false pretenses, and sentenced to serve a term of seven years in the state prison. This is an appeal from the judgment and from an order denying defendant's motion for a new trial.

The indictment and conviction were had under section 532 of the Penal Code, defining the offense of obtaining the property of another by false pretenses, and providing for the punishment thereof.

For a clear understanding of the case a narrative of the transactions leading up to the commission of the alleged offense is necessary.

One Victor H. Clairmont invented an egg-preserving process, whereby it was claimed that eggs might be preserved for an indefinite period. About March 1, 1911, he successfully demonstrated his patent in Santa Cruz to the poultrymen in that vicinity. He then left that place, but returned again on January 27th of the following year as the representative of Green, Foster & Lehmann, a copartnership doing business in San Francisco in eggs and other produce. The defendant was a member of said firm. On the return of Clairmont to Santa Cruz in January, 1912, Green accompanied him, and there met and talked with many of the members of the Santa Cruz Poultry Association. David O. Berry, the party who is claimed to have been defrauded, was a member of this association. As a result of this meeting an "egg exchange" was established in Santa Cruz by Green, Foster & Lehmann, with Clairmont temporarily in charge thereof. After a few days Clairmont was succeeded by George Damkroeger as the local representative of the firm, and Clairmont returned to San Francisco, but continued in the employ of the partnership. Arrangements were com-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



pleted between Green and the poultrymen's association whereby the exchange received the eggs from the producers, and a tag, setting forth the number of cases of eggs delivered and the date of delivery, was given to the poultrymen. The tag was executed in triplicate, one being given to the producer, one forwarded to the firm in San Francisco, and the third retained at the exchange. Upon receipt of this tag by the firm in San Francisco an instrument, referred to in the case as a "sight draft," was mailed to the poultryman for the amount shown to be due on the tag. This sight draft, drawn by the firm upon itself and in favor of the poultryman, was then usually cashed by him at one of the Santa Cruz banks, which thereafter presented it to Green, Foster & Lehmann for payment. This practice continued until about April 10, 1912. On or about that date the Santa Cruz banks refused to cash any more of these drafts, for the reason that some previously cashed had been dishonored. Thereupon one McIsaacs, who was interested in the success of the poultry association, went to San Francisco to ascertain the difficulty. He met Green, and discussed the matter with him and Clairmont. In explanation of the default in payment of the drafts, Green told McIsaacs that the trouble was caused by his banks over a lease, and assured him that everything would be all right in the future; but McIsaacs informed Green that the poultry raisers of Santa Cruz would have to be satisfied, or no more eggs would be delivered. Green then informed McIsaacs that the firm would immediately put up an indemnifying bond for \$2,000 to protect the poultrymen against loss. The bond was also to cover back drafts. McIsaacs then informed Green that he would return to Santa Cruz, call a meeting of the poultrymen's association the next day, and asked that Green be present personally at the meeting to explain the situation. Green being busy, Clairmont went to Santa Cruz as his representative, and at the meeting called by McIsaacs detailed everything that Green had told him. In his statement he asserted that the firm of Green, Foster & Lehmann was solvent, explained the trouble it had had with the bank, the cause of the nonpayment of the drafts, and communicated the promise to give the bond. Being thus assured the poultrymen's association, including Berry, the prosecuting witness, recommenced delivering eggs to the "exchange." Shortly thereafter on April 22, 1912, the firm went into the hands of a receiver through the action of Lehmann, one of its members, demanding an accounting. A draft in the amount of \$51.90 in favor of said Berry, theretofore issued in the manner above described, was presented for payment, and not paid, with the result of this prosecution of Green for obtaining the goods, to wit, eggs, of Berry by false pretenses. There is testimony to show that but for this action upon

the part of Lehmann the draft would have been paid.

There are a number of fraudulent representations alleged in the indictment to have been made, to wit: (1) That the firm of Green, Foster & Lehmann was solvent; (2) that said firm was able to pay for all the property it purchased; (3) that Berry would be paid by a sight draft; (4) that said sight draft upon presentation was a good and sufficient order for the payment of money; (5) that said firm was able to pay said draft; (6) that an indemnifying bond for \$2,000 would be given; and (7) that said bond had actually been executed. The points relied upon for a reversal are insufficiency of the evidence to sustain the verdict, errors in the admission and rejection of evidence, and errors in giving and refusing instructions. As before stated, the indictment and conviction were had under section 532 of the Penal Code, defining the crime of obtaining money or goods under false pretenses.

[1] Statutes of this character have been the subject of judicial construction throughout this country in a great many cases; and the decisions of the courts of last resort are in accord to the effect that in order to constitute a false pretense in law the misrepresentation must be of an existing or past fact, and cannot relate to the future, or be a mere promise to pay. *People v. Jordan*, 66 Cal. 10, 4 Pac. 773, 56 Am. Rep. 73; *People v. Wasservogle*, 77 Cal. 173, 174, 19 Pac. 270; 2 Wharton's Crim. Law (11th Ed.) § 1437; 19 Cyc. 394, 395. Judged by this standard, do the facts in this case bring the defendant within the operation of the statute?

[2] The prosecution urges that certain false representations were made prior to the meeting of April 13th. Thus the Attorney General claims that, when defendant first instituted the "egg exchange," he represented that all eggs were to be "processed" and stored, thereby creating the mistaken belief that the eggs could be recovered in the event of the firm's failure to pay therefor; whereas, in fact, the eggs were sold each day as received in San Francisco. In answer to this claim, it is sufficient to point out, first, that such representation manifestly related to an act to be performed in the future; and, secondly, that by the subsequent arrangement of the parties the eggs were to be paid for in the manner heretofore stated, and no reliance was placed by the members of the association upon the inference that the "processed" eggs could be recovered if not paid for.

[3] It is further claimed that a certain letter written by the defendant to Clairmont some time in February or March, 1912, and exhibited by Clairmont to one Hynes, and by Hynes communicated to Berry, is the subject of a false pretense. That letter spoke of procuring certain funds to pay for eggs. The letter was a private communication from the defendant to Clairmont, written



at a time prior to any question as to the firm's insolvency. It does not appear that it was the intention that this letter should be exhibited to any one, and Berry certainly placed no reliance upon its contents, at least if we may judge by his testimony, for he testified that the sole inducement that caused him to part with his eggs was the promise that a bond would be furnished. In addition to this, one Mrs. Damkroeger testified to a conversation with the defendant concerning his firm's solvency, but she was unable to fix the date more definitely than that it was some time after January, 1912; and she was not positive that she ever communicated this conversation to the prosecuting witness. These in brief constitute the representations occurring prior to the meeting of April 13th, and relied upon by the prosecution as constituting false pretenses. For the reasons indicated, it is manifest that these statements could not form the basis of a prosecution for obtaining property by false pretenses.

The only other statements testified to which might form such basis were those made at the meeting of the poultrymen's association on April 13, 1912, when Clairmont and McIsaacs represented to the members that the firm of Green, Foster & Lehmann was solvent, and that a bond would be given by the partnership to insure payment for the eggs. At this meeting the only authorized representation was that the firm would give a bond.

[4, 5] The evidence in relation to the representation of the solvency of the firm is as follows: Clairmont testified that he was authorized by Green to say that a bond would be furnished; but that he was not authorized by Green or any one else to make any statement as to the solvency of the firm; and that what he stated at the meeting of April 13th as to the firm's solvency was his individual opinion. McIsaacs testified that, on the occasion of his visit to San Francisco to investigate the cause of the failure of Green, Foster & Lehmann to pay the drafts, the defendant represented to him that the firm was solvent. The evidence, however, fails to show that McIsaacs had any authority from the defendant to make any statement as to the firm's solvency, or that McIsaacs made this visit to San Francisco as the representative of the poultry association, or of the prosecuting witness; but, on the contrary, it appears that he went on his own behalf, the inducement being the personal interest he had in the egg exchange and in promoting the egg industry in Santa Cruz.

Beyond the negotiations leading up to the formation of the "egg exchange" on the occasion of the defendant's visit to Santa Cruz in January, no statements were made by him personally. What statements were made were through his agents. So far as the evi-

dence shows, the defendant was never in Santa Cruz concerning the egg business except on that occasion, and he never had any personal communication with Berry. Before one can be convicted of a crime by reason of the acts of his agent, a clear case must be shown. The civil doctrine that a principal is bound by the acts of his agent within the scope of the agent's authority has no application to criminal law. 1 McLain, Crim. Law, § 188. While false pretenses may be made to an agent of the person defrauded, yet, when made by an agent, they must be directly authorized or consented to in order to hold the principal, for authority to do a criminal act will not be presumed. 1 McLain, Crim. Law, § 683. If a principal is liable at all criminally for the acts of another, such liability must be founded, as just stated, upon authorized acts. There is no evidence in this case that defendant authorized any person to make statements relative to the solvency of Green, Foster & Lehmann.

[6] As to the question of the promise made April 13th to furnish a bond being the subject of a false pretense, assuming, for the sake of argument, that the eggs were furnished after that date and on the strength of the promise to furnish the bond—the one pretense which the prosecuting witness testified induced him to deliver the eggs—the fact still remains that what Clairmont said as to furnishing the bond related to an event to happen in the future. But, as before stated, the false pretense mentioned in the statute must be of a fact existing or past; and a representation concerning a future event, though the event fail to happen, will not support a charge of obtaining money by false pretenses. Moreover, the evidence negatives the theory that the defendant never intended to keep the promise, and shows that the defendant did enter into negotiations with a surety company for a bond, but the matter was not concluded when the firm went into the hands of a receiver.

Considerable argument is indulged in by counsel as to what deliveries were covered by the draft for \$51.90, and whether such deliveries were made before or after the meeting of April 13th. The amount, of the draft does not correspond with any of the deliveries made subsequently to April 13th except that of the 22d; and it could not have referred to this delivery (which by an odd coincidence amounted in value to the sum due for the deliveries of April 4th and 8th) for it was drawn before that delivery was made. Furthermore, Berry testified that he never received a draft for the delivery of the 22d, or for any of the deliveries after the 13th, and in fact none was ever issued. While on his direct examination Berry testified that the draft was given for deliveries made after the 13th, on cross-examination, and after consulting his books,



he was compelled to admit that the draft was given for the deliveries of the 4th and 8th of April. In this admission he is corroborated by the secretary of Green, Foster & Lehmann, who signed the draft. The evidence establishes, therefore, beyond all question of doubt that the draft for \$51.90 covered the deliveries of April 4th and 8th, a time before the alleged pretenses of solvency or furnishing a bond were made, and it follows that those deliveries were not made upon those promises.

Defendant also complains of the admission by the court of hearsay evidence; but, as the case must be reversed upon the ground of the insufficiency of the evidence to support the charge, a discussion of the admission of such incompetent evidence is not necessary.

The instructions of the court assigned as error by the defendant refer principally to the effect of pretenses relating to future events, and the law in that regard has already been sufficiently discussed.

[7] Respondent, referring to the sight drafts given by Green, Foster & Lehmann in payment of the goods obtained, requests that the character of these so-called sight drafts be determined. The instrument as set out in the indictment is in the following form: "San Francisco, Cal., April 17, 1912. Green, Foster & Lehmann. Creameries: Lakeside, Oregon. Bandon, Oregon. Main office: San Francisco. At sight at our San Francisco office, we will pay to the order of D. C. Berry, \$51.90. Fifty-one 90/100 dollars. Green, Foster & Lehmann, by D. P. Eger, Secretary. To Green, Foster & Lehmann, Clay & Front Streets, San Francisco, Cal." It is, we think, apparent that this instrument purports to be nothing more than an order drawn by Green, Foster & Lehmann upon themselves for the payment of money, and cannot by any process of reasoning whatever constitute anything more than a promise by the maker to pay the sum therein named upon presentation. True it carries with it the implied representation of the ability of the drawer to do so; but what does that implied representation amount to? It amounts to a representation of future ability, for clearly some time was to elapse between the issuing of the draft and its presentation and payment, and thus comes within the class of representations as to future events which will not, according to the authorities, sustain a charge of the making of false pretenses.

It is urged that the prosecuting witness parted with his property on the strength of the issuance to him of this sight draft. If so, he parted with it upon the strength of a promise to pay, in which respect the transaction does not differ from the ordinary sale of goods on credit, and the issuing of the drafts, as shown by all the circumstances of the case, was an arrangement adopted for the payment for the goods as purchased.

The case of *People v. Wasservogle*, 77 Cal. 173, 19 Pac. 270, is not at variance with the views here expressed. In that case the passing of the draft was accompanied by the statement that the drawer had funds in the hands of the drawee with which it would be paid. The conviction was upheld upon this statement, which amounted to a representation of an existing fact. The court, however, expressly recognized the rule that a promise must be of a past or existing fact.

While it is unfortunate that the members of the poultry association should fail to receive the price of their products, it must be remembered that the defendant cannot be punished unless his acts bring him within the scope and intent of the statute under which he was prosecuted.

The judgment and order denying a new trial are reversed.

We concur: LENNON, P. J.; CHIPMAN, J.

(22 Cal. App. 91)

# CITIZENS' BANK v. STEWART.

(Civ. 1,045.)

(District Court of Appeal, Third District, California. May 13, 1913.)

## 1. BILLS AND NOTES (§ 497\*)—PRESUMPTION AND BURDEN OF PROOF—GOOD FAITH.

A bank purchasing or discounting a note, before maturity, in the regular course of business, and thereby, under Civ. Code, §§ 3123, 3124, becoming the owner of the legal title, was invested with the presumptions incidental to the ordinary transfer of property, to overcome which it was incumbent upon the maker to offer proof impeaching the good faith of the purchase.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1448, 1675-1681, 1683-1687; Dec. Dig. § 497.\*]

## 2. BILLS AND NOTES (§ 337\*)—BONA FIDE PURCHASER—DUTY OF INQUIRY.

Where there is nothing about a negotiable instrument or its negotiation to excite suspicion, a purchaser, to avoid the imputation of bad faith, need not inquire concerning the execution thereof or the consideration for which it was given, nor need he inquire whether the indorser has performed, or will be able to perform, his undertaking.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 818, 856-863; Dec. Dig. § 337.\*]

## 3. BILLS AND NOTES (§ 354\*)—BONA FIDE PURCHASER—ADEQUACY OF CONSIDERATION.

A note is property which may be sold at any price, and the amount paid therefor rarely, if ever, ought of itself to impeach the purchaser's title as a matter of law, although inadequacy of consideration is always a fact to be considered as evidence of bad faith, and may, with suspicious circumstances, authorize a finding of bad faith; and Code Civ. Proc. § 1963, subd. 21, expressly requires the presumption that a note or bill was given or indorsed for a sufficient consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 904, 905, Dec. Dig. § 354.\*]



4. **BILLS AND NOTES (§ 525\*)—ACTIONS—SUFFICIENCY OF EVIDENCE—BAD FAITH.**

In a bank's action against the drawer of a check which it had acquired by transfer before maturity and in the regular course of business, evidence held sufficient to show that it had been acquired in good faith and for value.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1832-1839; Dec. Dig. § 525.\*]

5. **BANKS AND BANKING (§ 116\*)—NOTICE TO BANK OFFICER -- NOTES — BONA FIDE PURCHASER.**

The bank officer to whom notice, if any, of equities against negotiable instruments should be given is the one authorized to represent the bank in the purchase of the note, and the president's statement that he represented the bank in acquiring a note, and had no notice of any equity, was sufficient evidence of good faith.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 282-287; Dec. Dig. § 116.\*]

Appeal from Superior Court, Sonoma County; M. S. Sayre, Judge.

Action by the Citizens' Bank against Wm. McK. Stewart. Judgment for plaintiff, and defendant appeals. Affirmed.

T. J. Butts, of Santa Rosa, for appellant.  
J. T. Coffman, of Healdsburg, for respondent.

**BURNETT, J.** The action is upon a promissory note, which appears, by admissions and evidence to have been signed, executed, and delivered by appellant to the American Manufacturing Company and by the payee sold and assigned on July 3, 1911, before maturity, and for a valuable consideration, to the respondent. The note was dated June 8, 1911, and was in the following form: "For value received I promise to pay to the order of American Manufacturing Company fifteen hundred dollars at Lexington, Tennessee, in ten installments as below: \* \* \* Default in the payment of any installment shall, at the option of the payee herein, render the unpaid balance immediately due and payable."

It is not disputed that appellant was in default according to the terms of said note, but he seeks to justify upon the ground of fraud on the part of the payee and of failure of consideration as between the original parties to the instrument. Respondent's position is that any such defense cannot be considered for the reason that the case is clearly brought within the contemplation of sections 3123 and 3124 of the Civil Code, providing as follows: "An indorsee in due course is one who, in good faith, in the ordinary course of business, and for value, before its apparent maturity or presumptive dishonor, and without knowledge of its actual dishonor, acquires a negotiable instrument duly indorsed to him, or indorsed generally, or payable to the bearer;" and "an indorsee of a negotiable instrument, in due course, acquires an absolute title thereto, so that it is valid in his hands, notwithstanding any

provision of law making it generally void or voidable, and notwithstanding any defect in the title of the person from whom he acquired it."

[1] It is not denied that the note was transferred before maturity and in the regular course of business, but the principal question of dispute relates to the burden of proof as to the consideration and notice of appellant's equities.

It is contended by him that it was incumbent upon respondent to show that it paid full value for the note and that it had no notice of any defense that might have been urged by the maker against the payee. In this appellant is clearly in error.

Respondent, having purchased the note before maturity in the regular course of business, became thereby the owner of the legal title. Invested with the presumptions that are incidental to the ordinary transfer of property ownership, and to overcome the effect of these presumptions it was incumbent upon appellant to offer proof to impeach the good faith of respondent's purchase.

In *Eames v. Croster*, 101 Cal. 260, 35 Pac. 873, it is held that, "upon proof by the defendant of fraud or illegality in the inception of the note, the burden is cast upon the indorsee to show that he is an innocent holder," which he "may do by showing that he purchased the notes before maturity, or from an innocent indorsee for value, in the usual course of business", and when he had done this, "*unless the evidence shows that the note was taken by the plaintiff under circumstances creating the presumption that he knew the facts impeaching its validity, the burden is cast upon the defendant to show, \* \* \* that the plaintiff took the instrument with notice of the defendant's equities.*"

To the same effect is *Bell v. Pleasant*, 145 Cal. 410, 78 Pac. 957, 104 Am. St. Rep. 61, wherein it is said: "The indorsement carries the legal title to the note and vests it in the indorsee, and, if it is shown by him that he bought for a valuable consideration before maturity, his legal title cannot be divested nor his right to recover defeated, without the proof which shows his purchase to have been fraudulent, namely, that he had notice of the lack of consideration or of the fraud, or other defense of the maker. \* \* \* It follows that, in the absence of any evidence on the subject, the finding should have been in favor of plaintiff on this point." See, also, *Meyer v. Loydal*, 6 Cal. App. 369, 92 Pac. 322, where the cases are reviewed and the same doctrine announced.

[2] In 7 Cyc. p. 941, it is declared that: "Where there is nothing about the paper itself or the circumstances attending its negotiation to excite suspicion, a purchaser is

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



not called upon to make inquiries concerning the execution thereof or the consideration for which it was given to avert the imputation of bad faith. Nor in the absence of suspicious circumstances is he bound to inquire whether the indorser has performed, or will be able to perform, the agreement into which he has entered."

[3] As to the adequacy of the consideration for the purchase, it is stated, on page 330 of the same volume, that no precise rule can be laid down, "but it is clear that payment of the full face value of the paper is not required. In fact, a note is property which may be sold at any price, and the amount paid therefor rarely, if ever, ought of itself to impeach the purchaser's title as a matter of law, although inadequacy is always a fact to be considered by the jury as evidence of bad faith and may, with suspicious circumstances, authorize a finding of mala fides." The presumption "that a promissory note or bill of exchange was given or indorsed for a sufficient consideration" is required, indeed, by subdivision 21, section 1863, of the Code of Civil Procedure. In the last analysis the question is really whether we are to presume that the indorsee acted in good faith. To state the proposition is to answer it.

When it is shown that an indorsee has purchased before maturity a note regular upon its face, to impute to him notice of the equities of the maker is equivalent to the charge that he would be guilty of wrongdoing; that he would be a voluntary participant in the fruits of a fraudulent transaction. We must assume, rather, in the absence of evidence to the contrary, that he was free from moral obliquity and influenced only by the motives of fair and honorable conduct.

[4] But, aside from the foregoing, the only rational inference that can be drawn from the evidence in the record supports the findings in favor of respondent. H. E. Graper, the president of respondent bank, testified as follows: "The Citizens' Bank is a corporation chartered under the laws of Tennessee in the year 1905 for the purpose of doing a general banking business of deposit and discount. The paper you hand me is a note purporting to be executed by Wm. McK. Stewart, payable to the American Manufacturing Company at Lexington, Tenn. \* \* \* The Citizens' Bank is the owner and holder of that note at this time. The Citizens' Bank purchased the note from the American Manufacturing Company on July 3, 1911. Mr. R. W. Hall, the treasurer of the American Manufacturing Company, transferred the note to the Citizens' Bank. I acted for the bank in the purchase of the note. The purchase of the note made by the Citizens' Bank was before the maturity of any installments thereon. \* \* \* At the time of the purchase I did not know of any defects in the

making of the note. The note herein spoken of was delivered at the time it was sold to the bank. There was no kind or character of written instrument or printed one attached to the note when I purchased the same for the bank. In the purchase of this note I gave a valuable consideration for the same."

R. W. Hall, the treasurer of the said American Manufacturing Company, testified: "The American Manufacturing Company has no interest in the note at this time; has had no interest since the sale of the note. The note was sold to the Citizens' Bank July 3, 1911. This note was discounted to them on that day, and the American Manufacturing Company received the proceeds therefor."

As to the consideration, it is clear from the foregoing that the note was "acquired for value" in the ordinary course of business, as demanded by the statute. Indeed, it is not an unfair deduction that the face value of the note, less the usual discount at the legal rate, was paid by the bank to the manufacturing company.

[5] In reference to the want of notice, it is the contention of appellant that the showing is that the president and not the bank had no notice. Of course the bank could have no notice except through some of its officers. As to this two observations seem appropriate. The officer to whom such notice should and would probably be given is the one authorized to represent the bank in the purchase of the note. Or, if any other officer had notice of any equity of the maker of the note, it is reasonable to infer that he would immediately communicate it to the president. It is therefore fair to say that the president's statement is sufficient evidence that the bank had no notice of any infirmity in the note.

We can see no legal ground upon which appellant's contention can be maintained, and the judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(22 Cal. App. 68)

KELLY v. HAMPTON et al. (Civ. 1,239.)  
(District Court of Appeal, First District, California. May 10, 1913.)

ASSIGNMENTS (§ 121\*)—OPERATION AND EFFECT—ASSIGNMENT FOR COLLECTION.

An assignment of a debt for purposes of collection, without any consideration being paid by the assignee, vests the legal title in him sufficient to enable him to recover thereon, although the assignor retains an equitable interest in the thing assigned, and hence, in an action on an assigned claim, the judgment was not unsupported by the findings because of a finding that the assignment was for collection only.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 200-205; Dec. Dig. § 121.\*]

Appeal from Superior Court, City and County of San Francisco; J. D. Murphey, Judge.



Action by J. L. Kelly against E. J. Hampton and another. From a judgment for plaintiff, the defendant named appeals. Affirmed.

H. S. Craig, of Oakland, for appellant. H. W. Hutton, of San Francisco, for respondent.

HALL, J. This is an appeal from a judgment rendered against appellant and comes to this court upon the judgment roll alone. The action is in the usual and ordinary form brought by the plaintiff upon an assigned claim for goods sold and delivered at an agreed price by plaintiff's assignor to defendants. The court found all the issues against appellant, but found in favor of his codefendant.

Besides finding in strict accordance with the allegations of the complaint that the claim was assigned to plaintiff, the court further found that such assignment was for collection only. It is upon this finding that appellant bases an argument that the judgment in favor of plaintiff is not supported by the findings. But an assignment for collection, without any consideration being paid by the assignee, vests the legal title in the assignee, which is sufficient to enable him to recover, though the assignor retains an equitable interest in the thing assigned. This is of no concern to the debtor. *Greig v. Riordan*, 99 Cal. 316, 33 Pac. 913.

No other point is presented by the record or urged for a reversal, and the judgment is therefore affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(66 Or. 199)

#### BENSON v. MURTON.†

(Supreme Court of Oregon. July 8, 1913.)

#### 1. FRAUD (§ 57\*)—ACTIONS—EVIDENCE—ADMISSIBILITY.

Where the parties have settled by agreement a transaction as to which certain false representations were made by the defendant, evidence of those misrepresentations is not admissible as a basis for punitive damages in an action for other misrepresentations.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 54; Dec. Dig. § 57.\*]

#### 2. TRUSTS (§ 232\*)—MISREPRESENTATIONS—PERSONS LIABLE.

In an action for fraudulent misrepresentations against one who took title to real estate in trust for the plaintiff and others, the defendant is not liable for fraud committed by two of the beneficiaries of the trust against the others in receiving a rebate from the seller of the property after the trust had been terminated by the trustee's conveyance of the property to the corporation designated, and he had no further connection with the transaction.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 337, 338; Dec. Dig. § 232.\*]

#### 3. TRUSTS (§ 262\*)—FRAUD—EVIDENCE—ADMISSIBILITY.

Evidence of the acts and declarations of the beneficiaries in relation to their receiving

a rebate is not admissible in such an action against the trustee for fraudulent misrepresentations.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 372; Dec. Dig. § 262.\*]

#### 4. TRUSTS (§ 262\*)—MISREPRESENTATIONS—EVIDENCE—ADMISSIBILITY.

In such an action, evidence that the transactions of the trustee had been settled by agreement should have been admitted.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 372; Dec. Dig. § 262.\*]

Department 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Charles G. Benson against C. C. Murton. Judgment for the plaintiff, and defendant appeals. Reversed, with directions to dismiss.

This is an action to recover damages for false representations; the circumstances being as follows: McNair & Mossman, a real estate firm of Portland, had negotiated with W. W. Fawk for the purchase of a farm of 322 acres, in Polk county, for and on behalf of J. Syd McNair, C. C. Page, Chas. G. Benson, and E. P. Dosch, which they desired to place in the hands of the Title & Trust Company to subdivide and sell for them. The title to the land was to be taken in the name of defendant C. C. Murton, who became the nominal purchaser, signed the contract with Fawk, and gave his notes for the unpaid balance of the purchase price with the understanding that, when arrangements were completed for handling it, he was to deed it to the Title & Trust Company. On July 20, 1910, the land was conveyed by deed directly from Fawk and wife to the Title & Trust Company, McNair, Dosch, Page, and Benson financed it and were to share in the profits equally. Negotiations therefor were commenced on the 15th day of April, 1910, and the contract was signed by Murton. The other arrangements in regard thereto rested in parol until about the 5th day of September, when the agreements were reduced to writing and antedated as of April 26th, in which it was recited that the cash portion of the purchase price, \$4,000, was paid in equal proportions by McNair, Dosch, Benson, and Page, called the beneficiaries. C. C. Murton on August 2, 1910, for the alleged consideration of \$5,650, assigned to the beneficiaries all of his right, title, and interest therein and to the money to be derived therefrom. The unpaid balance of the purchase price was \$14,500, evidenced by the notes of Murton, one for \$4,500 and one for \$10,000, dated May 21st; further reciting the terms of the trust in the Title & Trust Company and the manner of the disposition of the land. As a part of the agreement the Title & Trust Company signed a statement of the trust and accepted its terms. It is also stated that the beneficiaries assumed to pay the said purchase-price notes; that the purchase price of the land was \$18,500, of which \$4,000 had been paid. The purchase and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† For opinion on petition for rehearing, see 133 Pac. 1189.



its financing was planned and consummated by McNair and Mossman. Dosch and Benson became parties thereto, signed the agreement, and made payments upon the representations of McNair. On August 2, 1910, pursuant to an agreement between Fawk and Murton and the Title & Trust Company, said agreement being dated July 25, 1910, Murton formally assigned and transferred all his interest in the land and transaction to the beneficiaries; and at the same date executed another assignment to the same effect reciting that it was executed in consideration of \$5,650 paid to him by McNair, Dosch, Benson, and Page. At the trial it was conceded that the defendant did not receive the \$5,650, nor any part thereof, as a consideration for the assignment; that of the alleged purchase price of \$18,500 it is conceded that \$1,500, although evidenced by notes and payments, was returned to McNair and Mossman as a bonus or rebate on the price, without the knowledge or consent of Benson or of Dosch, and that the sum of \$5,650, certified by Murton to have been paid to him for the assignment, was added to the purchase price, making \$23,250, the price for which Benson and Dosch were liable; that the \$4,000 recited in the contract to have been paid to Fawk was the money paid by Benson and Dosch, and that McNair and Page paid nothing. In the trial of the case the court, after instructing the jury as to their consideration of compensatory damages, instructed them further as follows: "In addition to that if you should find that these people had an understanding or agreement by which they were to defraud people, of which this plaintiff was one, in addition to compensatory damages, you would have the right, if Murton was a party to a conspiracy of the kind I have indicated to you, to award the plaintiff such a sum as exemplary as would warn the defendant and all other people from doing things of this kind in the future." Verdict was rendered for the plaintiff for \$500 actual damages and \$750 exemplary damages. From a judgment thereon, the defendant appeals.

Geo. S. Shepherd and Edward J. Clark, both of Portland, for appellant. C. M. Idleman and B. M. Benson, both of Portland, for respondent.

EAKIN, J. (after stating the facts as above.) There are four principal exceptions relied upon on this appeal: (1) Error in refusal of the court to admit evidence of the settlement of December 5, 1910; (2) an exception to the instruction of the court that the jury might find against the defendant for exemplary damages; (3) the exception to the admission of the evidence of the conspiracy of McNair and Page; and (4) the refusal of the court to grant him nonsuit at the close of plaintiff's testimony or to instruct for a verdict in favor of the defendant at the close of the case.

[1, 2] Plaintiff claims that he was defrauded to the amount of one-fourth of the \$5,650 mentioned in Murton's receipt, alleged to have been paid to Murton for the assignment, and also by the fact that McNair and Page did not pay any of the first payments on the land. He says he discovered this on December 1st, and that he had a settlement on December 5, 1910, with McNair in regard to these two items, in which the \$5,650 item was entirely eliminated, and on that date as Benson and Dosch had already paid \$4,000, and as McNair and Page had not paid a corresponding amount, they paid the \$4,500 Murton note, which was due January 1, 1911, amounting to \$4,935; and thus these two items of damages were fully and satisfactorily adjusted. Plaintiff is not complaining because there was to be \$5,650 paid to Murton, increasing the price of the land that much. He is complaining only that McNair and Page, by means of that representation, were to get a profit equal to half of that amount from plaintiff and Dosch. If that scheme had been carried out, that would have been the amount of their damage; but that item has been adjusted and the price to which plaintiff was consenting has been reduced accordingly. He is not damaged in any amount on account of said transaction, and it has no place in this trial. His contention that it was an element inducing him to enter into the transaction, and that he should recover on that account, might be evidence and argument why he should be allowed to rescind the agreement, but he is not complaining that the investment will be a loss to him. His remedy might have been clear for a rescission if taken in time. What he is seeking now as to this transaction of Murton's is not compensation, as plaintiff obtained satisfaction in the settlement of December 5th, but to use the evidence of it as the basis of punitive damages; and it is incompetent for that purpose unless he were to recover compensatory damages for that item, with proof of malice. Later plaintiff found out that Fawk had returned to McNair \$1,500 of the amount paid by McNair on the \$4,500 note as a bonus to him. This is the principal damage of which he complains now, and it seems to be the only item of real damage suffered; but there is not any evidence that defendant here had any connection with that transaction.

It is conceded that the plaintiff did not see Murton nor have any direct communication with him until long after this transaction other than that he saw his receipt for the \$5,650. Murton testifies that he was a merchant in McMinnville; that Mossman asked him if he would take the title to the Fawk land at \$58 an acre and hold it for them until they could form a syndicate, he to be paid \$250 for his services; and that he agreed to do so. This was for the convenience of holding the title in a trustee rather than in several persons. He at no



time had any individual interest in the purchase in the syndicate, or profits to be realized therefrom, nor was he to put any money into the land. The papers were sent to him and he signed them and the notes for the unpaid price of \$14,500. Four thousand dollars had already been paid. The only act reflecting on Murton's motives was in signing the receipt. The beneficiaries are mentioned in that receipt, and it was shown to them. Whether he knew that plaintiff and Dosch were ignorant of the fact that that amount was not to be paid does not appear, but the fact is they were ignorant of it, and McNair used the receipt fraudulently against plaintiff and Dosch. However, it is not shown that the defendant knew or participated in that fraud other than in signing the receipt. Neither is it shown that he signed the receipt for any fraudulent purpose, nor that he knew that it was to be used for such a purpose against the plaintiff or any one; but, if such an inference could be drawn, it was purged by the settlement of December 5th, and plaintiff has no remedy thereon now.

It is not shown that defendant had any knowledge that the actual price of the land was to be less than \$18,500, as mentioned in the contract of sale with Fawk, and the payment of \$4,000 prior to the execution of the notes for \$14,500 is recited in the agreement. Therefore, there is not a word in the evidence to connect Murton with the rebate on the purchase price, which occurred only in December, long after Murton had been released from the payment of the notes, the trust had been transferred by him, and his connection with the venture had ceased. It is shown by plaintiff that the rebate on the price was made out of the payment of the \$4,500 note signed by Murton, so that the \$4,000 cash payment recited in the agreement must have been actually made before the deed was executed. Possibly as against McNair plaintiff might have been entitled to damages in the amount of one-fourth of the \$1,500 rebate. If this were a suit to rescind the contract, plaintiff might be entitled to be refunded the money paid as interest, expenses of the survey, taxes, or improvements made by him, but these items counted on in the complaint are the legitimate expenses of the venture, and were not occasioned by any fraud. From the evidence plaintiff seems to consider that the investment is a good one, and is not seeking to rescind. He is only seeking to put himself on an equal footing with the other investors, with punitive damages against the guilty ones.

There is no evidence that Murton was a party to a conspiracy with McNair and Page to obtain a rebate on the price of the land without the knowledge of plaintiff, nor did anything in aid thereof, nor had knowledge of it, but was entirely eliminated from the

transaction in August, long before the repayment was made.

[3, 4] Evidence of what McNair did or said in relation thereto did not involve Murton, and was incompetent, and evidence of the settlement of December 5th relating to the items of the \$5,850 and McNair and Page's failure to make their first payment of \$2,000 each, which were the burden of plaintiff's evidence to show fraud, was properly admitted as disposing of those items.

As plaintiff has suffered no loss by reason of any act of defendant, the motion for a directed verdict should have been allowed. The judgment of the circuit court is reversed, and the cause will be remanded, with directions to dismiss the action.

McBRIDE, C. J., and BEAN and McNARY, JJ., concur.

(65 Or. 588)

#### HAGERMANN v. CHAPMAN TIMBER CO.

(Supreme Court of Oregon. July 8, 1913.)

##### 1. MASTER AND SERVANT (§ 291\*)—PERSONAL INJURIES—INSTRUCTIONS—NEGLIGENCE.

In a servant's action for injuries, alleging three elements of negligence, requested instructions, requiring the plaintiff to prove "negligence in the respects charged in the complaint," were properly refused, since proof of only some of the allegations of negligence might have been sufficient to charge the defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1133, 1134, 1136-1146; Dec. Dig. § 291.\*]

##### 2. MASTER AND SERVANT (§ 293\*)—PERSONAL INJURIES—INSTRUCTIONS—ISSUES.

In a servant's action for injuries, alleging negligence in attaching the pulley of a trip line to a tree not of sufficient strength for that purpose and afterwards removing it, leaving the tree in a tottering condition, defendant was entitled to an instruction that if the trip line was not at any time attached to the tree, the charge of negligence in attaching it to the tree, subjecting it to a severe strain and leaving it in a tottering condition, should not be considered in determining defendant's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. § 293.\*]

##### 3. MASTER AND SERVANT (§ 293\*)—PERSONAL INJURIES—INSTRUCTIONS—ORDINARY CARE AND NEGLIGENCE.

In a servant's action for injuries from defendant's alleged negligence in attaching the pulley of a trip line to a tree not sufficiently strong for that purpose because weakened and burned at the root, where the court in general terms defined ordinary care and negligence, defendant was entitled to an instruction that, although the tree was left standing in a weakened and tottering condition after removing the trip line, plaintiff must prove by a preponderance of the evidence that defendant actually knew that it was dangerous, or that the condition of peril existed for such length of time that by ordinary care he should have been aware of the dangerous condition of the tree; such instruction giving a concrete application of the principles to the testimony of the case.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. § 293.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



#### 4. TRIAL (§ 212\*)—INSTRUCTIONS—PREPONDERANCE OF EVIDENCE.

Under the express provision of L. O. L. § 868, subd. 5, the jury are to be instructed, on all proper occasions, that in civil cases the affirmative of the issue shall be proved, and that when the evidence is contradictory, the finding shall be according to the preponderance of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 501, 502; Dec. Dig. § 212.\*]

#### 5. MASTER AND SERVANT (§ 295\*)—PERSONAL INJURIES—INSTRUCTIONS—ASSUMPTION OF RISK.

In a servant's action for injuries from the falling of a tree in logging operations, where nothing was said in the general charge about the effect assumption of risk would have upon the verdict, the defendant was entitled to a charge correctly stating the law of assumption of risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1168-1179; Dec. Dig. § 295.\*]

#### 6. MASTER AND SERVANT (§ 217\*)—MASTER'S LIABILITY—ASSUMPTION OF RISK.

Where a servant was as well aware of the danger of doing work under existing conditions as the master was, and such danger was open and discoverable by ordinary care, the servant continuing to work in the dangerous place assumed the risk of the employment, and could not recover for injury from such danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

Department 1. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Ary Hagermann against the Chapman Timber Company. Judgment for plaintiff, and defendant appeals. Reversed.

This is an action by an employé to recover compensation for injuries received while in the service of his employer, and alleged to be due to the negligence of the latter. By the complaint it appears, in substance, that when the alleged injuries happened the defendant was engaged in logging in the forests of Columbia county, using for that purpose a donkey engine and the accompanying appliances. On the engine were two drums revolving in opposite directions, upon one of which was wound a large steel cable some 2,500 feet long, about 1½ inches in diameter, and weighing approximately two tons. To the other drum was attached a smaller cable called a "trip line." These two cables were united at the outer ends and roved through a pulley denominated by the plaintiff a "head block," made fast in the woods about the length of the large cable from the engine. When the machine was operated so as to pay out the cable from its drum, the other drum would wind up the trip line, in which process the cable would be drawn out to the head block. In this position a log would be attached to the cable by means of a short cable called a "choker." Then, the engine being reversed so as to pay out the trip line and wind up the cable, it would snake the log from the woods to the log dump along a way previously cleared

for that purpose. In order to prevent the line from becoming entangled in the woods, it was necessary to suspend it by pulleys to trees and stumps along the line, so that it would work freely in its function of drawing out the cable to the head block. Necessarily, in that process, the great weight of the cable made considerable strain on these pulleys and the trees or stumps to which they were attached. The plaintiff was employed in this work as a "rigging slinger." His duties were to attach the choker to the log and follow it some distance in its course to the dump, to see that the log was not stopped, nor the rigging fouled.

The complaint avers three elements of negligence. The first was that the defendant, acting through its foreman, attached one of the pulleys of the trip line to a cedar tree, which was not of sufficient strength for that purpose, and which was loosened and weakened by the logging operations, and left in a tottering and unsafe condition near the pathway where the plaintiff was required to work, and that without plaintiff's knowledge the foreman removed the support of the trip line from that tree, leaving it in an unsafe condition; second, that the tree had been rendered dangerous and unsafe by having its roots burned by a fire in the timber, so as to greatly weaken the tree, and that the defendant knew, or by the exercise of ordinary care should have known, the dangerous condition of the tree on account of the fire, while the plaintiff had no knowledge or information on the subject until after the happening of the injury; third, that the defendant, acting by its agents and servants, over whom the plaintiff had no control, operated the trip line in a careless, dangerous, and reckless manner so that one of the pulleys supporting it broke loose, the result being that it dragged on logs lying in the woods, catching one of them and throwing it with great force against the cedar tree before mentioned. The complaint groups these three elements, and declares, in substance, that by reason of all of them the place in which the plaintiff was required to work was dangerous and unsafe, and that on July 11, 1910, on account of all the foregoing ingredients of negligence, combined with the wind blowing through the woods, the tree was thrown down upon the plaintiff, causing the injuries for which he seeks to recover compensation. The answer traversed the complaint in all particulars charging negligence or liability upon the defendant, and alleged that no rigging or tackle had ever been attached by the defendant to the tree in question; that the same fell or was blown down through natural causes, so that the injury happening to the plaintiff was an unavoidable accident, and could not have been obviated by the defendant by the exercise of ordinary care. For a second affirmative de-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



fense the defendant averred that the plaintiff was an experienced rigging man, and from long experience in logging operations knew the hazard and danger of work in the woods under the conditions prevalent at the time and place of the accident, and with such knowledge assumed the risk, and continued to work in the vicinity of the tree without remonstrance or complaint, having had an equal opportunity with the defendant to ascertain the true conditions of the situation. The new matter in the answer was traversed by the reply. A jury trial resulted in a verdict and judgment for the plaintiff, from which the defendant appeals.

R. A. Leiter, of Portland (Griffith, Leiter & Allen and F. J. Lonergan, all of Portland, on the brief), for appellant. I. N. Smith, of Portland (John F. Logan, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). [1] The errors relied upon at the hearing were predicated solely upon the refusal of the trial court to charge the jury as requested by the defendant in certain particulars. Three of these requests, viz., those about the mere happening of an accident, the burden of proof, and the negligence of the defendant being the proximate cause of the injury, are connected with the proposition that the plaintiff is required to prove "negligence in the respects charged in the complaint." These requests in the form proposed were properly refused by the trial court because they all apparently require the plaintiff to prove all the allegations of the complaint about negligence, whereas proof of only some of them might have been sufficient to charge the defendant. For instance, it might have been true that the defendant was not responsible for the weak condition of the cedar tree, and could not possibly have discovered it by the exercise of reasonable diligence, and yet it might have been also true that it was negligent in allowing the trip line to drag upon and throw the log against the tree, knocking it down upon the plaintiff. In effect, the complaint contains three counts of negligence, so that it was not absolutely necessary for the plaintiff to prove all of them, as contemplated by the wording of the instructions mentioned. Instructions to the effect that the mere happening of an injurious accident alone would not of itself impute liability to the defendant, that the negligence of the defendant in the respects charged, or some one or more of them, must be shown to be the proximate cause of the injury, coupled with some such definition of proximate cause, as defendant requested, and that the plaintiff must prove the negligence charged by a preponderance of the evidence in the respects charged in the complaint, or some of them, would have been quite apropos, but the instructions re-

quested on these points were all affected by the vice of requiring the plaintiff to prove all the counts of negligence when one might have been sufficient.

[2] On the other hand, the defendant requested the court to instruct the jury as follows: "If you find from a fair preponderance of the evidence that said trip line or said trip line block, was not at any time by defendant ever attached or fastened to the tree which fell upon the plaintiff, then I instruct you that the charge of negligence in attaching said trip line to said tree, subjecting said tree to a severe strain, and in thereafter removing said trip line from said tree, leaving the same in a tottering condition, should be wholly ignored by you and not considered in determining whether or not defendant was negligent." The plaintiff chose to make this one of the separate elements or counts of negligence with which he charged the defendant. It became by his election an issuable fact to be determined by the jury, and the defendant was entitled to have this instruction on that point.

[3, 4] Another request was to the effect that, although the tree was left standing in a weak and tottering condition after removing the trip line and its support, plaintiff must prove by a preponderance of the evidence that defendant actually knew that the tree was dangerous, or that the condition of peril existed for such a length of time that the defendant, in the exercise of ordinary care under the circumstances, should have known of the hazardous condition of such tree. There was also a similar request based on the testimony about the tree being burned at its roots. These requests were likewise refused. The court in very general terms in its charge to the jury defined ordinary care and negligence, but gave no concrete application of the principle to the testimony in the case, and was utterly silent about the requirement of the statute that the finding of the jury shall be according to the preponderance of evidence. L. O. L. § 868, subd. 5. These instructions would have more clearly pointed out the application of the principle to the issue involved, and should have been given. Within reasonable limits, parties are entitled to have their theory of the evidence presented to the jury by proper instructions applicable to the case in hand, for jurors are not always enlightened by mere generalities.

[5, 6] Lastly, the circuit court refused to give to the jury this instruction: "If you find from the evidence that at the time plaintiff was hurt, he was just as well aware of the danger of doing said work under the conditions existing at said time as his employer was, and that such danger was open and obvious, and could have been discovered by the plaintiff by the use of ordinary care, then I instruct you that Hagermann assumed the risk and cannot recover, and your



verdict should be for the defendant." Considerable was said in the charge about assumption of risk, but nothing about the effect it should have upon the verdict. The request last quoted covered this point, and, if given, would have cured the defect of the general charge in that respect. This request to charge is a correct statement of the law of assumed risk, as the same existed prior to the initiative act of November, 1910, requiring that "all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb. \* \* \*." It is founded upon the principles that both employer and employe are bound by the rule of taking ordinary care to avoid accidents, and that if the danger is apparent to and is understood by the plaintiff, and he continues to work in the dangerous situation, he assumes the risk of the employment, and cannot complain if he is injured in the prosecution of the work. Under all the precedents of the law as it stood at the time, the defendant was entitled to the instruction. *Roth v. N. P. Lumbering Co.*, 18 Or. 205, 22 Pac. 842; *Blust v. Pacific Telephone Co.*, 48 Or. 34, 84 Pac. 847; *Westman v. Wind River Lumber Co.*, 50 Or. 137, 91 Pac. 478.

In the matters indicated the court was in error, and the judgment is reversed.

McBRIDE, C. J., and MOORE and RAMSEY, JJ., concur.

(69 Or. 52)

**CLOUGH et ux. v. DAWSON et al.**

(Supreme Court of Oregon. July 8, 1913.)

**1. APPEAL AND ERROR (§ 635\*)—RECORD—JURISDICTION OF SUPREME COURT.**

A record including certified copies of the notice of appeal, the undertaking therefor, and the decree confers jurisdiction of the cause upon this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2285, 2776-2782, 2829; Dec. Dig. § 635.\*]

**2. APPEAL AND ERROR (§ 801\*)—MOTION FOR DISMISSAL—SUFFICIENCY OF TESTIMONY INCLUDED IN TRANSCRIPT.**

Whether or not sufficient testimony has been included in the transcript to authorize a review of the decree cannot be determined upon a motion to dismiss the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3161-3164; Dec. Dig. § 801.\*]

Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Action by Charles Clough and Addie Clough, his wife, against V. J. Dawson, Rose Dawson, his wife, Hugh McGovern, and another. Judgment for plaintiffs, and defendants appeal. Motion to dismiss appeal denied.

Joseph E. Hedges and Gilbert L. Hedges, both of Oregon City, for appellants. Oliver M. Hickey and Frank Swope, both of Portland, for respondents.

MOORE, J. This is a motion to dismiss an appeal based on the ground that the transcript does not contain all the testimony given at the trial.

[1, 2] The record before us includes certified copies of the notice of appeal, the undertaking therefor, and the decree that was given, thereby conferring upon this court jurisdiction of the cause. Whether or not sufficient testimony has been included in the transcript to authorize a review of the decree cannot be determined in this primary proceeding.

The motion is therefore denied.

(66 Or. 335)

**DURKIN v. WARD.**

(Supreme Court of Oregon. July 8, 1913.)

**1. QUIETING TITLE (§ 44\*)—OWNERSHIP OF PROPERTY—BURDEN OF PROOF.**

Where, in a suit to quiet title, each party claims to be the owner, the burden is on each to establish by evidence his affirmative averments touching his own title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 89-92; Dec. Dig. § 44.\*]

**2. QUIETING TITLE (§ 44\*)—OWNERSHIP OF PROPERTY—BURDEN OF PROOF.**

Where plaintiff, in a suit to quiet title, attacked a deed by her to defendant as a forgery, the burden was on defendant, admitting that plaintiff was the owner except for the deed, to prove the facts necessary to make it a valid conveyance.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 89-92; Dec. Dig. § 44.\*]

**3. QUIETING TITLE (§ 44\*)—OWNERSHIP OF PROPERTY—BURDEN OF PROOF.**

In a suit to quiet title, evidence held to show the forgery of a deed from plaintiff to defendant, under which the latter claimed, and to overcome the prima facie title created under L. O. L. § 7132, by the transcript of the record of the deed.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 89-92; Dec. Dig. § 44.\*]

Department 2. Appeal from Circuit Court, Lincoln County; Lawrence T. Harris, Judge.

Suit by K. A. Durkin against Eugene S. Ward. From a decree for defendant, plaintiff appeals. Reversed and decree entered for plaintiff.

This is a suit to quiet title to a quarter section of timber land. Plaintiff appeals from a decree in favor of defendant. Plaintiff alleges that she is the owner in fee simple and entitled to the possession of certain real estate situated in Lincoln county, Or. Defendant denies the allegations of the complaint, and alleges that he is the owner in fee simple of the land.

James McCain and J. E. Burdett, both of McMinnville (McCain, Vinton & Galloway, on the brief), for appellant. Lester W. Humphreys, of Portland, for respondent.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



BEAN, J. Plaintiff and defendant commenced to live together as husband and wife in 1903, and so resided, without being married, until February, 1910. On the 25th day of April, 1906, defendant by warranty deed conveyed the premises in question to plaintiff, the deed being duly recorded in Lincoln county May 2, 1906. This deed recites a consideration of "one (\$1.00) and other valuable consideration." The plaintiff claims title by virtue of this deed. A certified copy of the record of a deed of the land from plaintiff to defendant, purporting to have been executed on the 23d day of December, 1907, to have been witnessed by W. S. King and D. M. Donough, and acknowledged before the latter on that date, was offered in evidence by plaintiff. This deed was recorded in Lincoln county March 15, 1910. Plaintiff asserts that it is a forgery and void. She states that she signed a deed of the land to defendant on September 17, 1906, in the presence of S. W. King and D. M. Donough, and acknowledged the same before Mr. Donough; that the deed was signed for the purpose of aiding defendant's financial standing in connection with a certain logging contract which he had; that soon after signing this deed she went East for a time and left the same for the defendant to make use of in case of necessity, but that the logging contract was abandoned and the deed never used nor delivered to the defendant; that she destroyed it about 1908. The defendant's version of the matter is that he executed the deed of April, 1906, as security for a loan to him of about \$500, in order to pay a demand upon which action against him was instituted and an attachment levied upon the land by Roebeling & Son; that in December, 1907, he paid plaintiff the loan, and that she reconveyed the land by the deed in question; that after taking this deed he placed it in his trunk, to which plaintiff had access, where it remained until he sent it to Lincoln county for record. Upon the return of the deed defendant states that he erased the certificate of the recording officer and replaced the deed in his trunk, from which it disappeared, and that it cannot be produced. S. W. King, a prominent business man of Portland, who is supposed to be the witness named upon the copy of the deed as "W. S. King," testified that he had no recollection of witnessing a deed either of that date or of September, 1906. Mr. D. M. Donough, an attorney of Portland, was also called as a witness. He, too, had no recollection of the transaction; therefore their testimony sheds no light upon the matter. The error in name of S. W. King remains a mystery.

The plaintiff asserts that she loaned various sums to the defendant and paid sundry accounts for him; that in 1909 they went to California for the benefit of her health, where the defendant left her and returned to Oregon a short time before the deed in question was recorded; that they have not

lived together since then. The deed of April 25, 1906, conveyed the title to the land to the plaintiff. While it is mentioned incidentally that this was given as security for a loan, there is no issue of that kind in this case. This is not a suit to declare the deed of April, 1906, a mortgage. *Stuart v. Lowry*, 49 Minn. 91, 51 N. W. 662; *Merrill v. Dearing*, 47 Minn. 137, 49 N. W. 693. The testimony shows that the plaintiff is the owner in fee of the disputed real estate, unless the testimony of the defendant establishes that there was a reconveyance of the land from the plaintiff to the defendant. Before the estrangement between the parties they were very friendly, and transacted their business in a lax manner. Evidently they expected to marry. Since that time their attitude towards each other has been the reverse.

[1] We have for consideration as to the deed from plaintiff to defendant of December 23, 1907, the statement of the latter, together with a certified copy of the record of the deed, and the testimony of one A. B. Cropp that he saw a deed in the possession of the defendant the day after it appears to have been executed. On the other hand, the record of the deed offered by the defendant, which the plaintiff swears she never executed, comes to us clouded by the following circumstances: (1) That the name of one of the witnesses appears thereon as "W. S. King," while Mr. King testifies that he always signs his name Samuel W. King; and (2) that the defendant stated that he had the deed recorded, and thereafter erased the certificate of the recording officer, which indicates that he obtained the deed surreptitiously, and was unwilling that plaintiff should know that the same had been recorded. It also crops out in the testimony that at the time of the signing and acknowledging of the deed of September 17, 1906, Mr. King advised the plaintiff that he would not execute a deed with blanks therein like that one. The testimony does not show that the deed offered in evidence by the defendant was ever delivered. The burden of showing this is upon the defendant. In an action to quiet title where each party claims to be the owner of the property, the burden is on each to make good by evidence his affirmative averments touching his own title to it. 12 Enc. Evid. 608.

[2, 3] Defendant admits that it was understood that if he died, plaintiff was to have the title to the land. He claims that it was unnecessary to bolster up his credit, as the logging contract had been executed before September 17, 1906. This, however, does not show that he did not state to plaintiff that such was the case, as a reason for obtaining her signature to the deed. The defendant asserted no claim or right to the land until the beginning of this suit. There is an atmosphere of unnaturalness and mystery surrounding the whole transaction pertaining to the deed offered by the defendant. The possession by the plaintiff of the United States



patent and old deeds of the land, and the tax receipts for the taxes paid thereon after the conveyance claimed by the defendant, are consistent with her ownership of the land. The defendant appears to have considered that a record of the deed was all that was necessary for him to establish title without regard to how the deed was obtained. His erasure of the certificate of the recording officer indicates that the plaintiff then had the custody and control of the deed. The matter of the defendant's deed is left largely to speculation. As a matter of conjecture, it may be that the deed which the plaintiff thinks was executed September 17, 1906, for the purpose of enhancing the defendant's credit, and which was never delivered, is the one on record with the blanks filled; but it is not shown by the evidence that this deed, however it came into form, was an effective, binding instrument such as would convey the title to the land, or that it was ever delivered to the defendant. Plaintiff and defendant had separated and ceased their illicit cohabitation, as they both claimed, before the defendant had the deed recorded. Why should he carefully return the deed to the place where it had been kept with the evidence of recording obliterated? He states that he suspected that some one had been stealing papers from his trunk, but he took no steps to follow up the matter, in order to detect the taker, either to the disadvantage of such person or otherwise.

The deed being assailed by the plaintiff as a forgery, the burden is on the defendant to prove all the facts necessary to make it a valid and binding instrument conveying the land to him. 4 Enc. Evid. 145; Butts v. Purdy, 125 Pac. 313; 13 Cyc. 727. This the defendant has failed to do. We think the prima facie title shown by the transcript of the record of the deed is overcome by the evidence of the plaintiff, taken in connection with the circumstances referred to. Section 7132, L. O. L.

The decree of the lower court will therefore be reversed, and one entered here declaring the plaintiff to be the owner of and entitled to the possession of the land.

McBRIDE, C. J., and EAKIN and McNARY, JJ., concur.

(65 Or. 595)

LINN & LANE TIMBER CO. v. LINN COUNTY et al.

(Supreme Court of Oregon. July 8, 1913.)

HIGHWAYS (§ 127\*)—ROAD TAX—STATUTES.

L. O. L. § 6321, provides that the taxpayers of any road district may vote an additional tax for road purposes, providing at least 10 per cent. of the taxpayers shall give notice by posting in three public places, etc., and shall publish one notice in a weekly newspaper, giving the time, place, and object of said meeting, which meeting shall be held in December, and

that said meeting shall be organized as provided, and at such meeting the taxpayers may levy such additional tax as they may deem advisable, and if a tax be levied it shall be the duty of the chairman and secretary to certify to the county clerk the levy so made, who shall extend it on the assessment roll, and the tax collector shall collect the taxes the same as other taxes, and turn the amount over to the county treasurer. *Held*, that the statute was so indefinite as to be invalid, in that it did not direct further notice to be given before or after the meeting, or expressly authorize the taxpayers to call the meeting, or require that the persons participating therein be taxpayers, or specify the length of time notice should be given, or prescribe a method of proving notice.

[Ed. Note.—For other cases, see Highways. Cent. Dig. § 384; Dec. Dig. § 127.\*]

Department 1. Appeal from Circuit Court. Linn County; William Galloway, Judge.

Suit by the Linn & Lane Timber Company against the County of Linn and another. From a decree dismissing the complaint, plaintiff appeals. Reversed and rendered.

A. C. Shaw, of Portland, for appellant. Gale S. Hill, of Albany, and John H. McNary, of Salem, for respondents.

BURNETT, J. This is a suit to restrain the defendant county and its sheriff from any attempt to enforce collection of a special road tax, the levy of which is said to have been attempted by some of the taxpayers of road district 23, in Linn county, upon plaintiff's real property situated therein, and to procure a cancellation of the attempted levy and the extension thereof on the county tax rolls, on ground that the same constitute a cloud upon plaintiff's title to the realty involved.

The proceedings in question appear to have been conducted under section 6321, L. O. L. reading thus: "The taxpayers of any road district in any county of this state may vote an additional tax for road purposes, providing at least ten per cent. of the taxpayers of said district shall give notice by posting notices in three public places in said road district, and one in courthouse, and publish one notice three weeks in one weekly newspaper of general circulation, signed by at least ten per cent. of the taxpayers of said road district, giving the time, place, and object of said meeting, which meeting shall be held in the month of December, and at the time of said meeting it shall be organized by the election of a chairman and secretary, and at such meeting they may, by a majority vote of such taxpayers, levy such additional tax as they may deem advisable to improve the roads of said district, and if a tax be levied it shall be the duty of said chairman and secretary to certify to the county clerk of such county, prior to January 1st, the levy so made by the taxpayers of said district, and that the county clerk shall compute and extend said levy on the assessment roll for that year the same as other taxes are extended, and it

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



shall be the duty of the tax collector to proceed to collect said taxes in money the same as any other taxes are collected, and turn the same over to the county treasurer in the same manner and at the same time he pays over other taxes collected by him, and shall be credited and kept by the treasurer to the account of the road district making such levy."

The present litigation is controlled by the rule laid down by this court in *Leffingwell v. Lane County*, 129 Pac. 538, construing this section of the Code, and holding that it is so indefinite as to be invalid, in that it does not direct whether notice is to be given before or after the meeting, does not expressly authorize the taxpayers to call such a meeting, does not specify the length of time notice shall be given, and does not prescribe a method of proving that notice was given, or that the persons participating in the meeting were taxpayers.

The decree of the circuit court, dismissing the suit, is reversed, and one here entered granting the plaintiff relief according to the prayer of its amended complaint.

McBRIDE, C. J., and MOORE and RAMSEY, JJ., concur.

(69 Or. 242)

#### LANE v. WENTWORTH et al.

(Supreme Court of Oregon. July 8, 1913.)

##### 1. APPEAL AND ERROR (§ 415\*) — NOTICE OF APPEAL—SERVICE OF NOTICE.

Under L. O. L. § 550, subd. 1, requiring a notice of appeal to be served on all adverse parties, and the original notice, with proof of service thereon, to be filed with the clerk of the court from which the appeal is taken, a notice of appeal by the defendant, which is served upon the plaintiffs, gives no jurisdiction as to a codefendant.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2139; Dec. Dig. § 415.\*]

##### 2. APPEAL AND ERROR (§ 427\*) — NOTICE OF APPEAL—ADMISSION OF SERVICE.

An admission of service of notice of appeal is not indorsed upon or attached to the notice as required by L. O. L. § 550, subd. 1.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2165; Dec. Dig. § 427.\*]

##### 3. APPEAL AND ERROR (§ 415\*)—NOTICE OF APPEAL—NECESSITY—COPARTIES.

Where a decree required one defendant to account to the plaintiff for corporate stock received by him from a codefendant who had held it in trust for the plaintiff, and expressly provided that the codefendant should be liable only if recovery could not be had from the holder of the stock, the codefendant was not an adverse party upon whom notice of appeal from the decree must be served as required by L. O. L. § 550, subd. 1.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2139; Dec. Dig. § 415.\*]

Department 1. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge. Action by I. W. Lane against G. K. Wentworth and another. Judgment for the plaintiff, and defendant Wentworth appeals. Mo-

tion of the plaintiff to dismiss the appeal overruled.

Lane began this suit in the first instance against Mahon, claiming that, in the organization of a corporation by these two and others, it was agreed that for the purpose of financing the institution all the stock should be subscribed by and in the name of Mahon, with authority to hypothecate the same, but always subject to the condition and trust that the plaintiff should have 6,500 shares par value of the stock, which should be transferred to him by Mahon on demand. The stock was pledged to the First National Bank of Eugene to secure money advanced for the business of the corporation. This, however, had been paid, and about that time it was determined to reorganize the corporation, and to that end what was known as the Coast Range Lumber Company was formed and took over the holdings of the original corporation. The capital stock was increased, and the plaintiff alleged that in the new concern, as in the old, all the shares were subscribed by and in the name of Mahon, subject to the same trust and agreement as before mentioned. Issues were formed on this complaint, and at the trial it was discovered that, instead of Mahon holding the stock at the time, he had transferred it all to the defendant Wentworth, who was not at that time a party to the suit. The hearing was suspended and on leave granted; an amended complaint was filed, making both Mahon and Wentworth defendants, in which the history of the transaction, as before indicated, was given; and it was alleged that Mahon had transferred all the stock of the corporation standing in his name to Wentworth, who took the same with knowledge of and subject to the agreement before described. The prayer was that the defendants be required to account to plaintiff for 6,500 shares of the capital stock of the new corporation; that the defendant Wentworth be ordered to transfer the same to plaintiff, failing in which that the plaintiff have judgment against both defendants for the value of the stock and for further relief.

Wentworth answered this complaint traversing it in material particulars, and the trial was completed, resulting in a decree to the effect that Wentworth, within ten days from the date of the decree, transfer to the plaintiff 6,500 shares of the capital stock of the new company, and upon his failure to do so that the plaintiff recover from Wentworth the sum of \$65,000, the reasonable value of the shares, together with costs; and further that in case Wentworth failed to comply with the decree and the plaintiff could not enforce the collection of his judgment against him, either wholly or in part, Mahon should perform what was required of Wentworth, and finally that no execution should issue upon the property of Mahon

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



until an execution had first been issued against the property of Wentworth and a return made thereon that it was unsatisfied. From this decree Wentworth appealed, serving his notice upon Lane, filing it some time in the month of December, 1912, having indorsed thereon proof of service upon Lane, together with an undertaking on appeal. Afterwards, in January, 1913, there was filed in the circuit court a paper containing title of cause, after which follows this language: "Copy of notice of appeal and undertaking on appeal in the above-entitled matter on the part of defendant G. K. Wentworth is hereby acknowledged and service thereof admitted at Portland, Oregon, this 13th day of January, 1913. George A. Pipes, Attorney for H. C. Mahon." The plaintiff now moves to dismiss the appeal of Wentworth "for the reason that this court has not acquired jurisdiction because no valid or legal service of notice of appeal was ever made or filed with respect to the defendant H. C. Mahon."

Coovert & Mannix and Stapleton & Sleight, all of Portland, for appellant. A. E. Clark and Fred L. Everson, all of Portland, for respondent.

BURNETT, J. (after stating the facts as above). [1] It is essential to the validity of an appeal that the notice be served on all adverse parties and the original be filed with proof of service indorsed thereon with the clerk of the court in which the judgment, appeal, or order from which the appeal is taken is entered. Section 550, L. O. L., subd. 1. It has often been decided by this court that compliance with this section is jurisdictional. It follows that no jurisdiction was obtained over Mahon by the service of the notice of appeal on Lane, and filing the same in the circuit court, having indorsed thereon only the proof of service on Lane.

[2] This is not cured by the subsequent filing of a separate paper indicating admission of service; the same not being indorsed upon or attached to the notice of appeal. It is essential, then, to determine whether Mahon is an adverse party. It has constantly been determined by this court that, although parties are both plaintiffs or both defendants, yet if an appeal would unfavorably affect the rights of one of them, as determined by the decree appealed from, he is an adverse party as respects his complainant or codefendant, and that the jurisdiction of this court depends upon service of the notice upon all such parties. *The Victorian*, 24 Or. 121, 32 Pac. 1040, 41 Am. St. Rep. 838; *Moody v. Miller*, 24 Or. 179, 33 Pac. 402; *Osborn v. Logus*, 28 Or. 302, 37 Pac. 456, 38 Pac. 190, 42 Pac. 997; *Stuller v. Baker County*, 30 Or. 294, 47 Pac. 705; *Conrad v. Pacific Packing Co.*, 34 Or. 341-343, 49 Pac. 659, 52 Pac. 1134, 57 Pac. 1021; *Cooper Mfg. Co. v. Delahunt*, 36 Or. 403-404, 51 Pac.

649, 60 Pac. 1; *Hafer v. Railroad Co.*, 60 Or. 356, 117 Pac. 1122, 119 Pac. 337.

[3] We note, however, that, by the terms of the decree appealed from, Wentworth is made liable to the plaintiff antecedently to Mahon; that by the terms of the decision the liability of Mahon is secondary to that of Wentworth; and that only in event of Wentworth's failure to comply with the judicial settlement is the plaintiff entitled to look to Mahon for satisfaction. Under such conditions the liability of Mahon cannot rise above or be greater than that of Wentworth. If the accountability of Wentworth is extinguished, that of Mahon, as defined by this decree, will also be obliterated. If on the appeal the decree were reversed as to Wentworth, the situation resulting would not be one in which Wentworth would have failed to comply with the decree against him, and it is only in the event of such a lapse on the part of Wentworth that the plaintiff is entitled to look to Mahon by virtue of the decree.

It having been alleged in the complaint that Mahon had transferred all the shares of stock to Wentworth, the court could not rightly direct Mahon to perform the impossible act of transferring the same shares to the plaintiff. Under the allegations of the complaint, if any transfer of stock is to be made it must be made by Wentworth. Without intending this to be a decision of the principal questions involved, it is sufficient for the purposes of this motion to say that in no event can the situation be made worse for Mahon than it already is, and a possible modification or reversal of the decree could not but operate in his favor. Consequently, as between himself and Wentworth, Mahon is not an adverse party, and it was not necessary to serve upon him the notice of appeal.

The motion to dismiss the appeal is overruled.

McBRIDE, C. J., and MOORE and RAMSEY, JJ., concur.

(65 Or. 511)

#### CLAYPOOL et al. v. O'NEILL

(Supreme Court of Oregon. July 1, 1913.)

#### 1. WATERS AND WATER COURSES (§ 152\*)—WATER RIGHTS—JUDGMENTS—EFFECT.

Under L. O. L. §§ 756, 6595, respectively providing that a judgment or decree is, as to the matter determined, conclusive between the parties and their successors in interest, and that the State Board of Control cannot impair relative priorities to the use of water among parties to any decree rendered prior to the taking effect of the Water Code, a decree fixing the priority of the parties to waters for irrigation, entered prior to the taking effect of the Water Code, is conclusive, not only on the parties, but on the successors in interest.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes



## 2. JUDGMENT (§ 470\*)—ATTACK—COLLATERAL ATTACK.

A decree of a court of general jurisdiction is unimpeachable in a collateral proceeding.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 907; Dec. Dig. § 470.\*]

## 3. WATERS AND WATER COURSES (§ 136\*)—APPROPRIATIONS—RIGHTS.

A prior appropriation does not confer upon the appropriator an absolute right to the body of water diverted from the stream and he cannot allow it to run to waste, and prevent others from using it, when it is not necessary for the purposes of his appropriation.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 148; Dec. Dig. § 136.\*]

## 4. WATERS AND WATER COURSES (§ 152\*)—APPROPRIATION—DECREE—EFFECT.

A decree adjudging contestee entitled to so many inches of water under his appropriation for irrigation purposes will not be construed as entitling him absolutely to that amount of water, but only permits the taking of the amount necessary for the purposes of his appropriation, and he cannot, if it is unnecessary for the irrigation of his own land, divert it to irrigate the land of another.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.\*]

## 5. WATERS AND WATER COURSES (§ 152\*)—APPROPRIATION—DECREE—EFFECT.

A personal decree, enjoining one of the contestants and the other's grantor from interfering with contestee's appropriation of water for irrigation, is conclusive only as to contestee's right to appropriate a sufficient amount of water to irrigate his land, but is not a final adjudication as to the priorities between contestee's lands and those of the lands of the defendants in that proceeding.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.\*]

Appeal from Circuit Court, Malheur County; Dalton Biggs, Judge.

Proceedings by R. F. Claypool and another against Francis O'Neill, for the adjudication of the rights and priorities to the waters of a certain creek, brought into the circuit court on appeal from the adjudication by the Board of Control. From a decree for contestee, contestants appeal. Decree of circuit court reversed, and adjudication of Board of Control modified.

This is a proceeding brought into the circuit court by an appeal from the adjudication made by the Board of Control of the state of Oregon of the rights and priorities to the waters of Cottonwood creek, a tributary of Bully creek, in Malheur county, Or., in which Francis O'Neill sets up the fact that his rights to the waters of said creek had been adjudicated against Corder, the predecessor in interest of Claypool, in the S.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$ , and the N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$ , of section 9, and against Arthur Sevey, by the circuit court of the state of Oregon for Malheur county, on the 6th day of October, 1899. In its determination of the relative rights to the use of the waters of said creek the Board of Control appears to have ignored the decree of the circuit

court; and the circuit court in this case reversed the determination of the Board of Control, adjudging Francis O'Neill's rights as decreed in the former suit, namely, to the use of 100 miner's inches of water. From the decree of the circuit court, Claypool and Sevey appeal to this court.

Hayes & Crandall, of Vale, for appellants. John L. Rand, A. A. Smith, and Wm. H. Packwood, Jr., all of Baker, for respondent.

EAKIN, J. (after stating the facts as above). [1, 2] The important question for consideration is whether the decree in O'Neill v. Corder et al. is final and conclusive against Claypool and Sevey in this proceeding to the extent that O'Neill must be considered the owner of 100 miner's inches of water in the flow of the creek; defendant contending that the said decree gives Francis O'Neill absolute title to the 100 miner's inches of water regardless of his needs, while plaintiffs contest his right to more water than necessary for the irrigation of his land. The Board of Control evidently disregarded that decree in determining defendant's rights. It is provided in section 6595, L. O. L., that the Board of Control cannot impair relative priorities to the use of water, among parties to any decree of the courts rendered in causes determined prior to the taking effect of the Water Code of 1909. The rule is that the decree of a court of general jurisdiction is unimpeachable in a collateral proceeding. Section 756, L. O. L. It is conclusive of every fact necessary to uphold it as to all matters actually determined, or that might have been determined, upon the issues made. *White v. Ladd*, 41 Or. 324, 68 Pac. 739, 93 Am. St. Rep. 732. The suit of O'Neill v. Corder et al. was commenced for the purpose of establishing the rights of plaintiff, and to enjoin the defendants from interfering therewith. Defendants were served with summons and appeared by demurrer, which was overruled; and, the defendants having failed to answer, and Corder consenting in writing, a decree was rendered which is conclusive against the defendants therein of the matters decided.

[3] However, the decree gives to O'Neill the continuous and exclusive use of 100 miner's inches of water without reference to his needs, and he contends that he owns the title to the water absolutely, diverting it also for use on the lands of his wife, to the evident detriment of the plaintiffs in this proceeding, as the right of the wife's land to the use of said water is not next in priority. The rule is that when a party has a prior right to a certain quantity of water for irrigation, he is entitled to it only to the extent needed for the use for which it is appropriated. Thereafter the next person in right and priority, to the extent of that right, is entitled to the water when not so

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



required by the prior claimant. *Gardner v. Wright*, 49 Or. 609, 91 Pac. 286.

[4] In the case of *Mann v. Parker*, 48 Or. 321, 86 Pac. 598, it is said that an appropriation does not confer such an absolute right to the body of the water diverted from a stream. The appropriator cannot allow it to run to waste nor prevent others from using it when it is not necessary for the purposes of his appropriation. See, also, *Mattis v. Hosmer*, 37 Or. 523, 62 Pac. 17, 632; *Hough v. Porter*, 51 Or. 318, 95 Pac. 732, 93 Pac. 1083, 102 Pac. 728; *Ison v. Sturgill*, 57 Or. 109, 109 Pac. 579, 110 Pac. 535; *Little Walla Irr. Union et al. v. Finis Irr. Co. et al.*, 62 Or. 348, 124 Pac. 666. And no doubt the court in this case intended to decree to O'Neill no greater right.

[5] In *Gardner v. Wright*, supra, the opinion limits the defendant to the need, namely: "As between the parties, plaintiffs and defendant herein, at all times that the water is not required by one of them, it should be at the disposal of the other." And this is the intent in all cases. It was beyond the province of the court to decree the water to plaintiff for a greater period than actually needed. Otherwise the effect of the decree in *O'Neill v. Corder et al.* as to Sevey cannot be questioned in this proceeding. Sevey had his day in court as to the amount of water needed for the irrigation of O'Neill's land, and cannot be heard to complain now; but Claypool was not a party to that suit, and neither he nor his land is bound by the decree. If Corder had answered in that case and claimed a prior appropriation for that land, the decree would be final as to priorities between the O'Neill lands and the Corder lands, but the only issue tendered was as to O'Neill's right to water for his land, and was against Corder to enjoin him from interfering with O'Neill's use. It was adjudged that O'Neill was entitled to 100 miner's inches, and Corder and Sevey were enjoined from interfering with his use of the same. The decree was personal as against them, but there was no adjudication as to the rights of the land then occupied by Corder. See *Davis v. Chamberlain*, 51 Or. 304, 98 Pac. 154.

This covers the only question raised by O'Neill's objections to the findings of the Board of Control, and necessitates a reversal of the decree of the circuit court by which it is adjudged that the decree in *O'Neill v. Corder et al.* is conclusive against Claypool, as successor in interest to Corder, in the land claimed by him for the exclusive and continuous prior right to 100 miner's inches of the waters of the creek; and the findings of the board as to their relative rights will be modified to the extent following: As against Arthur J. Sevey, Francis O'Neill is entitled to a prior right of 2.5 second feet of the water when actually needed upon his

lands, described as the S.  $\frac{1}{2}$  of the N. W.  $\frac{1}{4}$  and the N. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$ , of section 9, and when not so needed and used thereon shall, to the extent of their interests as determined by the Board of Control, be at the disposal of the other parties hereto in the order of their priorities.

The decree of the circuit court is reversed, and the adjudication of the Board of Control is modified. The interests of the parties as herein determined shall be observed by the water master of the district. Neither party shall recover costs on this appeal.

(65 Or. 516)

## DORN v. CLARKE-WOODWARD DRUG CO.

(Supreme Court of Oregon. July 1, 1913.)

### 1. MASTER AND SERVANT (§ 204\*)—INJURIES TO SERVANT—SAFE APPLIANCES—DUTY TO FURNISH—ASSUMED RISK.

Initiative Act November, 1910, provides that all owners having charge of any work involving a danger to employes shall use every practicable device for the protection of life and limb, limited only by the necessity for preserving the efficiency of the structure, etc., and without regard to the additional cost. *Held*, that such provision imposed an absolute duty on the employer; and, where a servant was injured by a master's failure to provide proper and safe appliances, the servant did not assume the risk.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 544-546; Dec. Dig. § 204.\*]

### 2. DAMAGES (§§ 33, 149½\*) — INJURIES TO SERVANT—AGGRAVATION OF PRIOR DISABILITY—PLEADING.

Where a servant who had previously suffered from appendicitis sustained an injury which aggravated the condition, he was entitled to recover for the direct effect of the injury arising from the defendant's negligence notwithstanding, as an incident thereto, the former complaint was aggravated; but he could not recover for the aggravation itself unless pleaded as an element of damage.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 42; Dec. Dig. §§ 33, 149½.\*]

### 3. TRIAL (§ 207\*)—EVIDENCE—APPLICATION—DUTY TO LIMIT.

Where, in an action for injuries to a servant, the fact that the injury aggravated a prior predisposition to appendicitis was not pleaded as an element of damage, but evidence of that fact was admissible as bearing on the direct effect of the injury arising from defendant's negligence, it was the court's duty to limit the effect of such evidence by instructing the jury against allowing anything for aggravation of plaintiff's prior diseased condition, and that they could only consider the evidence as bearing on the direct effects of the injury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 498, 499, 501; Dec. Dig. § 207.\*]

### 4. MASTER AND SERVANT (§ 291\*)—INJURIES TO SERVANT — ACTION — TRIAL — INSTRUCTIONS.

L. O. L. § 868, provides that the jury, subject to the control of the court, are the judges of the effect of the evidence, except when it is declared to be conclusive; but they are to be instructed on all proper occasions, and in civil cases the affirmative of the issue shall be proved, and, when the evidence is contradictory, the findings shall be according to the preponderance of the evidence. Section 799 also declares



that a person shall be presumed innocent of crime or wrong. *Held*, that such presumption is a piece of evidence in an action for injuries to a servant resulting from the defendant's alleged negligence, and it was error for the court to omit to charge that plaintiff was required to prove his case by the preponderance of the evidence, and that the mere happening of the accident was not alone sufficient to establish defendant's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1133, 1134, 1136-1146; Dec. Dig. § 291.\*]

##### 5. EVIDENCE (§ 506\*)—OPINION—EXPERTS.

Where a servant while making certain alterations in the office of a wholesale drug firm was injured by the slipping of a ladder on the oiled floor, it was improper to permit a foundryman familiar with the use of ladders only in his own establishment to testify as an expert on the ultimate question of whether the ladder in question was a suitable appliance for the task at hand.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2309; Dec. Dig. § 506.\*]

Department 1. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Fred Dorn against the Clarke-Woodward Drug Company, a corporation. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

This is an action instituted under the statute providing for the protection and safety of persons engaged in the construction, repairing, alteration, or other work, upon buildings, etc., enacted by the initiative process at the November election of 1910. The complaint alleges, in substance, that the defendant on July 13, 1911, directed the plaintiff, as its employé, to make certain alterations in the building owned and occupied by the defendant. The changes in question consisted in installing a transom in the wall of an office in the building, the work connected with which required the use of a ladder. While standing upon this ladder in the prosecution of this employment, the ladder slipped, precipitating the plaintiff upon the floor, whereby he received the injuries of which he complains. The plaintiff avers that the defendant was negligent in setting him to work at employment which involved risk and danger to him, and in failing to provide him with a safe place in which to work, and with suitable and proper equipment, in that the floor was oiled and the ladder was likely to slip upon the surface thereof, all of which the defendant knew, and which was unknown to the plaintiff. All the allegations of the complaint are denied by the answer, except the corporate character of the defendant, its occupation and ownership of the building, and the fact that the plaintiff was its employé at the time mentioned. The substance of the affirmative defense is that the plaintiff was skilled in the employment in which he was engaged at the time, and assumed the risks of the same, and that the injury he received was due to his own contributory negligence. The reply traversed the answer in material

particulars. The trial resulted in a judgment for the plaintiff, from which the defendant appeals.

Ralph W. Wilbur, of Portland (Wilbur, Spencer & Dibble, of Portland, on the brief), for appellant. Homer D. Angell, of Portland (Angell & Fisher, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). In the statute referred to it is provided that: " \* \* \* Generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employes or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

[1] The statute is analogous to what is known as the factory act. L. O. L. § 5040 et seq. An absolute duty is imputed to the employer for the violation of which he is penally, as well as civilly, liable. Under such circumstances, the servant does not assume the risk of injury, as decided in *Hill v. Saugested*, 53 Or. 178, 185, 98 Pac. 524, 22 L. R. A. (N. S.) 634. Within the rule laid down by Mr. Justice Bean in that well-considered case, and followed by Mr. Chief Justice McBride in *Love v. Chambers Lumber Co.*, 129 Pac. 492, the court was not in error in the case at bar in refusing three instructions on the subject of assumed risk.

[2] There was some testimony before the jury to the effect that the injuries received by the plaintiff in the fall aggravated an old complaint of appendicitis from which he had previously suffered. The defendant asked the court to instruct the jury that they could not take the aggravation of the former complaint into consideration, because the same had not been pleaded in the complaint, but the court refused to give the instruction, and failed to give anything to enlighten the jury on that point. While, as stated in *Guild v. Portland Ry., L. & P. Co.*, 131 Pac. 310, 312, "the negligent injury of one who is weak and incapacitated in person is as culpable as any other ill usage," still, if the plaintiff would recover for an aggravation of a former persistent injury, he must plead the same. *Maynard v. Oregon R. R. Co.*, 46 Or. 15, 78 Pac. 983, 68 L. R. A. 477. Under a pleading like the present complaint, all mere aggravation of former injury must be laid aside. The plaintiff can, of course, recover for the direct effect of the injury arising from the negligence of the defendant, notwithstanding, as an incident thereto, the former complaint may be aggravated; but

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



nothing can be recovered for the aggravation itself, unless the same is averred.

[3] The evidence on this subject could not be stricken out because it is intimately connected with the direct effect of the injury complained of; but it was the duty of the court to caution the jury against allowing anything for aggravation, the narration of which incidentally crept into the testimony.

[4] The defendant requested, and the court neglected to give, instructions to the effect that the plaintiff must establish the negligence of the defendant by the preponderance of the evidence; that negligence cannot be presumed from the mere happening of an accident; that the defendant is presumed to be innocent of the negligence; that the mere happening of the injury or accident is not alone sufficient to charge the defendant, but that there must be some evidence attributing it to the negligence of the defendant. It is provided in section 868, L. O. L., that "the jury, subject to the control of the court, in the cases specified in this Code, are the judges of the effect or value of evidence addressed to them, except when it is thereby declared to be conclusive. They are, however, to be instructed by the court on all proper occasions.

\* \* \* 5. That in civil cases the affirmative of the issue shall be proved, and when the evidence is contradictory, the finding shall be according to the preponderance of evidence. \* \* \* " It is mandatory, therefore, upon the court in a case where the allegations of the complaint are traversed, to instruct the jury that the plaintiff must prove his case by the preponderance of the testimony. Again, if the complaint is true, the defendant is guilty of a tort or wrong. It is laid down as a presumption by section 790, L. O. L., "that a person is innocent of crime or wrong." This presumption is a piece of evidence that the defendant was entitled to have submitted to the jury. Its refusal was error. It is, indeed, true that the statute under which this action was instituted greatly enlarges the duties of an employer, the violation of which constitutes culpable negligence in case an injury ensues; but the general rules for proving or combating a charge of such negligence have not been changed by the statute under considera-

tion. The court was in error in not observing the directions of the Code on the subjects indicated.

[5] The injury complained of happened in the office of a wholesale drug firm. A foundry man, shown to be familiar with the use of ladders only in his establishment, was called as an expert, and was allowed to testify over the objection of the defendant to the effect that in his opinion the plaintiff, having the ladder only for that purpose, was not supplied with suitable appliances for making the alterations in the building of the defendant in the place where the accident occurred. As a rule, expert testimony and opinion evidence are to be considered only to illustrate and explain to the jury a complicated situation not ordinarily comprehended by men of common intelligence, and involving some difficult subject of art or science. Usually it is not sufficient alone to decide any question independent of other testimony about the facts involved. It is receivable for the ancillary purpose of making more comprehensible intricate facts detailed by other witnesses who testified directly to those facts. Whether or not the ladder was a suitable appliance for the work in hand with which the plaintiff was charged was peculiarly a question for the jury, and the authorities are unanimous that no witness can invade the province of the jury and undertake to decide by his opinion the issue committed to the twelve men. Conceding, without deciding, that so simple an appliance as an ordinary ladder could be made the subject of expert testimony, and that a man shown to be familiar only with conditions in a foundry was competent to give an opinion on conditions in the office of a drug company, yet it was clearly error to permit him to give his opinion on the ultimate question to be decided by the jury, namely, whether or not the ladder in question was a suitable appliance for the task at hand.

The judgment of the circuit court is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

McBRIDE, C. J., and MOORE and RAMSEY, JJ., concur.



(65 Or. 328)

**JONES v. TELLER.**

(Supreme Court of Oregon. June 10, 1913.)

**1. DEDICATION (§§ 1, 16\*) — STREETS — MEANS OF DEDICATION.**

A street may be dedicated by parol or by any acts of the owner of land through which it extends, amounting to an estoppel in pais.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 8, 10-12, 15-49; Dec. Dig. §§ 1, 16.\*]

**2. DEDICATION (§ 19\*) — STREETS — CONVEYANCE OF LOTS.**

A dedication of a street indicated by a map may be made by the sale of lots bounded upon the street so as to imply a covenant to the purchaser that the street shall remain open to the public use.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 37-47; Dec. Dig. § 19.\*]

**3. DEDICATION (§ 44\*)—EVIDENCE.**

Evidence to establish a parol dedication of a street must unequivocally show a dedicatory intent by the owner by conduct leading purchasers from him to believe that he intended to dedicate the land as a street.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 85-87; Dec. Dig. § 44.\*]

**4. EVIDENCE (§ 183\*)—BEST EVIDENCE—COPY OF MAP.**

Under L. O. L. § 712, subsec. 1, permitting a copy of a document to be offered in evidence when the original is in possession of the adverse party and he withholds it, and subdivision 2 permitting a copy to be introduced when the original cannot be produced with proper diligence without fault of the offering party, a copy of a plat was not admissible in evidence for plaintiff where he made no effort to produce the original, though testifying that he believed it could yet be found at a certain place.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 605-637; Dec. Dig. § 183.\*]

**5. DEDICATION (§ 19\*) — STREETS — CONVEYANCE OF LOTS.**

A deed conveying a plat 200 feet square to plaintiff described it as "commencing at the southeast corner of B. street and Twenty-Eighth street, \* \* \* thence northerly 200 feet to B. street, thence westerly along the line of B. street," and the grantor's will referred to the same property as "200 feet square at the corner of B. and Twenty-Eighth streets." Held, that the description in the deed, considered with that in the will, did not show an intention by plaintiff's grantor to dedicate land lying in the line of B. street, if extended so as to abut the property conveyed as a public street, being merely descriptive of the tract conveyed.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 37-47; Dec. Dig. § 19.\*]

Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Suit by Thomas Jones against Anton Teller. From a decree for defendant, plaintiff appeals. Affirmed.

This is a suit to enjoin the defendant from erecting a dwelling house on ground which the plaintiff claims has been dedicated to the use of the public as a street.

The facts relied upon by plaintiff as constituting such dedication may be summarized briefly as follows: During the month of April, 1907, one Charles Cardinell, now deceased, was the owner of a piece of land 200 feet square, located in the north half of

subdivision 5, Bowering tract, in the city of Portland, Or., and in addition owned a strip of land 47.5 feet wide immediately north of and contiguous thereto, which was dedicated by said Charles Cardinell as a street to the public use and to the use of the owners of lands in the Bowering tract, which strip would be in Brazee street if the same were extended east of Twenty-Eighth street. It is alleged that during the month of April, 1907, Charles Cardinell, for a valuable consideration, conveyed the first-described tract to plaintiff, and represented that said strip of 47.5 feet of land was a public street, and at said time exhibited to plaintiff a blueprint map or plat upon which said tract was included within the lines of a street, the north and south boundaries of which were extensions of the north and south boundaries of Brazee street easterly through said Bowering tract; and by the terms of said conveyance described said premises as follows: "A piece of ground in tract 5 of the Bowering tract, measuring 200 feet square, commencing at the southeast corner of Brazee street and Twenty-Eighth street; thence running southerly along the east line of East Twenty-Eighth street 200 feet; thence easterly at right angles 200 feet; thence northerly 200 feet to Brazee street; thence westerly along the line of Brazee street 200 feet to Twenty-Eighth street, the place of beginning."

The usual allegations of reliance on said representations and their causative effect of inducements of purchase follow, as well as the allegation that defendant intends to erect a dwelling house on said tract so dedicated as a street, and which, if permitted, will work irreparable injury to plaintiff, and that he will suffer a pecuniary damage by reason thereof on account of the fact that the property will be less suitable for division and sale in lots in that the most easterly lots would have no outlet upon any public street. Continuing, plaintiff alleges that after the execution of the deed said Charles Cardinell died leaving a will, whereby the north half of said subdivision of tract 5 in the Bowering tract was devised to Charles B. Cardinell, except the premises sold to plaintiff; and in said will express reference is made to the deed in favor of plaintiff in the following words: "Excepting therefrom that part thereof 200 feet square conveyed by me to Thomas Jones"—and elsewhere in said will the testator recites the alienation of said land to plaintiff and employs this description: "200 feet square at the corner of Brazee and Twenty-Eighth streets, in the city of Portland." It is claimed by the defendant in his answer that he acquired title to the strip of land which plaintiff seeks to have decreed a street, being approximately 47.5 feet in width by 200 feet in length, by mesne conveyances from Charles B. Cardinell, to whom the property had been devised

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



by Charles Cardinell, under the description of the north half of subdivision of tract 5 in Bowering tract, except that portion theretofore conveyed to plaintiff, and that the premises were not dedicated as a public street and have not been used as such. The issues were concluded by a reply, which denied each allegation in defendant's answer. The trial court entered a decree dismissing the suit of plaintiff, from which decree this appeal is taken.

Flegel & Reynolds, of Portland, for appellant. H. H. Riddell, of Portland, for respondent.

MENARY, J. (after stating the facts as above). Accurately to comprehend the legal principle involved, we deem it necessary to state that Brazee street is a thoroughfare running east and west through Brazee street addition, in Portland, Or., having its eastern termination at East Twenty-Seventh street. That part of subdivision of lot 5 of Bowering tract here concerned lies immediately west of East Twenty-Eighth street and a little distant from the terminus of Brazee street. The land in question, being 47.5 feet in width by 200 feet in length, lies in the pathway of Brazee street if Brazee street were extended easterly, abuts the north line of the premises owned by plaintiff, and if opened to travel would furnish an outlet upon East Twenty-Eighth street. The plaintiff rests his claim for relief upon the proposition that the tract of land under consideration is a dedicated street, and in support thereof relies upon the deed he received from Charles Cardinell, the reference made to the property and manner of description contained in the latter's will, a blueprint exhibited to plaintiff at the time of the purchase of the property, and declaration made by the grantor, Charles Cardinell, to his grandson that he had platted the property and caused it to be staked off in lots, and one of similar import made to plaintiff.

[1] An unbroken line of cases decided by this court decisively establishes the doctrine that a street may be dedicated by parol or by acts of the owner of the land through which the street extends, amounting to an estoppel in pais. *Huck v. Wakefield*, 58 Or. 549, 115 Pac. 428; *Oregon City v. Oregon & California R. Co.*, 44 Or. 165, 74 Pac. 924; *Morse v. Whitcomb*, 54 Or. 412, 102 Pac. 788, 103 Pac. 775, 135 Am. St. Rep. 832; *Carter v. City of Portland*, 4 Or. 339.

[2] In such a case the sale and conveyance of lots so bounded upon a street imply a grant or a covenant to the purchaser that the street indicated shall be and remain open to the use of the public and to the purchaser of the property thereby served.

[3] However, the evidence offered to establish a dedication in parol must unequivocally show the dedicatory intent of the owner as expressed in his visible conduct and in

such outward manifestations as are sufficient to inculcate the belief in those concerned that the owner intended to dedicate his land to the particular use alleged. *Morse v. Whitcomb*, supra, 54 Or. at page 418, 102 Pac. 788, 103 Pac. 775, 135 Am. St. Rep. 832; *Lankin v. Terwilliger*, 22 Or. 97, 29 Pac. 268; *Parrott v. Stewart et al.*, 132 Pac. 523, decided by this court May 27, 1913.

Entering upon an analysis of the evidence offered by plaintiff to establish a dedication of the street, we are compelled at the outset to dismiss from a consideration of this case all reference to the map or blueprint introduced in evidence other than the simple evidentiary fact which arises from the statement of the witness that a map or blueprint of the premises had been made by Charles Cardinell. Plaintiff in his own behalf gave voice to the only testimony adduced concerning the map in answer to the question whether Charles Cardinell had a map or blueprint of the ground at the time of its acquirement by plaintiff: "Yes, he had a blueprint map, something like that; and he said, 'Eva, bring out those maps.' He had quite a lot of them in the drawer there. He says, 'Bring out those maps, and we will point out to Mr. Jones where Brazee street runs along, and he can go out and measure the place off himself; so the map was produced, and I believe it is in his residence now. I don't think they have ever taken any of those effects away. I believe the map could be found there yet; but, however, it was shown distinctly on that map, Brazee street, passing through the Bowering tract to Fernwood tract."

[4] Objection was made by counsel for the defendant to the admission of the testimony, but it was overruled by the court. Subdivisions 1 and 2 of section 712, L. O. L., provide: "(1) When the original is in the possession of the party against whom the evidence is offered, and he withholds it under the circumstances mentioned in section 782; (2) when the original cannot be produced by the party by whom the evidence is offered, in a reasonable time, with proper diligence, and its absence is not owing to his neglect or default."

Unless a legally sufficient reason is shown for not so doing, proof of the contents of a document must be made by producing the document itself. The record disclosed by this case indicates no effort was made to produce the original map or plat, although the plaintiff testified he believed "the map could be found there yet," meaning the home of the decedent grantor, Charles Cardinell. This court has repeatedly held, in response to section 712, L. O. L., that, before a party can give secondary evidence of the contents of a writing, he must show that he cannot produce the original in a reasonable time by the exercise of reasonable diligence. *Wise-man v. N. P. R. R. Co.*, 20 Or. 425, 26 Pac.



272, 23 Am. St. Rep. 135; *Bowick et al. v. Miller*, 21 Or. 25, 26 Pac. 861; *Krewson v. Purdom*, 15 Or. 589, 16 Pac. 480; *Harmon v. Decker*, 41 Or. 598, 68 Pac. 11, 1111, 93 Am. St. Rep. 748; *Price v. Wolfer*, 33 Or. 15, 52 Pac. 759; *Hicklin v. McClear*, 18 Or. 137, 22 Pac. 1057; *Reimers v. Pierson*, 58 Or. 86, 113 Pac. 436.

[5] Counsel for plaintiff contend with much force that the intent to dedicate the strip of land in controversy is found in the language contained in the deed from Charles Cardinell to plaintiff and in the words employed in the last will of said Cardinell. We shall treat the two instruments together as they invoke the same character of reasoning. In the deed conveying the plot of ground 200 feet square to plaintiff, the property is described as: "Commencing at the southeast corner of Brazee street and Twenty-Eighth street; \* \* \* thence northerly 200 feet to Brazee street; thence westerly along the line of Brazee street. \* \* \* " The will refers to the same property as: "200 feet square at the corner of Brazee and Twenty-Eighth streets." In fact, each deed, forming the link in the title held by defendant, repeats the description of plaintiff's land with its reference to Brazee street as a descriptive point. It is to be noted that nowhere in the deed nor in the will can be found a specific covenant or statement as to the existence of the street. The only reference to the street is for the purpose of the description, with no intention upon the part of the grantor, Charles Cardinell, of conferring upon plaintiff, as appurtenant to the premises, the right to the use of the land as a street. In *Lankin v. Terwilliger*, supra, a case of much analogy, Mr. Justice Bean stated: "The question in all such cases is whether the road or way is intended as the boundary of the granted premises. Where the land is conveyed by a certain and definite description, as by metes and bounds, the fact that the boundary as described in the conveyance may be coincident with the line

of the way does not of itself raise the implication that such way was intended as the actual boundary or confer upon the grantee the right to use such way as appurtenant to the granted premises, but it must appear from the conveyance, either directly or by fair inference, that it was intended to bound the land by the road or way." *King v. Mayor*, 102 N. Y. 171, 6 N. E. 395; *Atwood v. O'Brien*, 80 Me. 447, 15 Atl. 44; *Parsons v. Johnson*, 68 N. Y. 62, 23 Am. Rep. 149. The evident intention of Charles Cardinell, as revealed by the documentary evidence, was to convey to plaintiff a tract of land 200 feet square without reference to Brazee street as an easement appurtenant to the land transferred to plaintiff, as the land is definitely described by metes and bounds, and Brazee street is made mention of only as a means of description; that is, to make certain the beginning point, and then to describe the northerly and westerly courses of the land conveyed.

In negating an intention upon the part of Charles Cardinell to dedicate a street, we deem it worthy to recall that, in the will devising the north half of subdivision of tract 5 of the Bowering tract to Charles B. Cardinell, which includes the strip desired to be decreed a thoroughfare, no mention is made of Brazee street other than as a matter of description in the clause referring to plaintiff's property. This we believe significant as an outward manifestation on the part of the testator that he referred to Brazee street as a convenient descriptive monument rather than as an actual boundary of the land purchased by plaintiff. Nowhere does the record disclose that any one has ever treated the land as a street. On the contrary, it has been fenced and made to serve the private uses of plaintiff continuously since the execution of the deed to him.

In view of the facts and the record presented by plaintiff, we feel the testimony insufficient to disturb the decree of the lower court, and therefore affirm the same.



(47 Mont. 501)

WALTERS v. CHICAGO, M. & P. S. R.  
CO. et al.

(Supreme Court of Montana. June 14, 1913.)

**1. RAILROADS (§ 350\*)—CROSSING ACCIDENT—ACTIONS—QUESTIONS FOR JURY.**

The testimony of a witness, who was listening for the approach of a train, that the whistle was not sounded nor the bell rung for a crossing, and that of two other witnesses, whose hearing was good, and who were near the crossing, that they did not hear any whistle or bell, raised a question for the jury as to the failure to sound the whistle or ring the bell, notwithstanding the positive testimony of those in charge of the train that the whistle was sounded and the bell rung.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.\*]

**2. RAILROADS (§ 350\*)—CROSSING ACCIDENTS — CONTRIBUTORY NEGLIGENCE — DUTY TO STOP, LOOK, AND LISTEN.**

The driver of an automobile approaching a railway crossing was not negligent, as a matter of law, in looking and listening for approaching trains without stopping; it being a question for the jury whether, under the circumstances, ordinary prudence required him to stop.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.\*]

**3. RAILROADS (§ 301\*)—CROSSING ACCIDENTS — MUTUAL RIGHTS AT PUBLIC CROSSING.**

The rights of a railway company at a highway crossing and those of a citizen using the highway are equal.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 856; Dec. Dig. § 301.\*]

**4. RAILROADS (§ 350\*)—CROSSING ACCIDENT—ACTIONS—QUESTIONS FOR JURY.**

A railroad approached a crossing at which an accident occurred in a cut from 8 to 12 feet deep and extending eastward from the crossing about 1,000 feet. The highway, until about 125 feet from the crossing, was on a level with the top of the cut, but descended from that point to the level of the track in another cut. Trains approaching the railroad cut were visible to travelers on the highway from where the approach to the crossing began back to a point one-eighth to one-quarter of a mile distant, but after travelers entered the cut they could not see a train whether in or out of the railroad cut. A train in the cut was visible to those on a level with the top if their attention was drawn to it, but it would not be obtrusive without some warning. There was a curve in the railroad track just east of the cut. Plaintiff driving an automobile, when within one-eighth to one-quarter of a mile of the highway cut looked to the east for a train but saw nothing, and then to the west, and then descended slowly into the cut, alert for any warning or sound of a train, but watching another approaching automobile, which he saw cross the track safely. He testified that after entering the cut, in order to see a train approaching he would have had to proceed to a point where his front wheels would be on the track, and that to stop his car, walk forward to the crossing, return to the car, and make the crossing would require from two to five minutes. The train by which he was struck was running 45 to 55 miles an hour, and there was evidence that no whistle was sounded or bell rung. *Held*, that it was a question for the jury whether he was negligent.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.\*]

**5. DAMAGES (§ 134\*) — EXCESSIVENESS — PERSONAL INJURIES.**

Plaintiff, 23 years old, a stereotyper by trade, who had spent several years in learning such trade, and was earning \$125 a month, was struck by a railroad train and thrown 75 feet. His hip socket was fractured; his skull slightly fractured; and he sustained other severe external bruises, and suffered internal hemorrhages. He was unconscious for six or eight hours, confined five weeks to his bed, compelled to use crutches for five or six months, and a cane for three or four months thereafter. His pain for several weeks was severe, his nervous system sustained a serious shock, and he had a displacement of the pelvic bone and lower spinal processes, causing atrophy, shortening and partial paralysis of one leg, and an increased susceptibility to tubercular infection, and other difficulties. He suffered a total loss of earning capacity for about a year, and at the time of the trial was earning only \$80 a month running a moving picture machine, his injuries preventing him from again pursuing the trade of stereotyper. *Held*, that a verdict for \$15,000 was not so excessive as to evince passion or prejudice, especially as an annuity, equal to the proved loss of earning capacity, would cost approximately \$11,000.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 368, 386-394; Dec. Dig. § 134.\*]

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

Action by Charles Walters against the Chicago, Milwaukee & Puget Sound Railway Company and another. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

George F. Shelton, Fred J. Furman, and A. J. Verheyen, all of Butte, for appellants. Maury, Templeman & Davies, of Butte, for respondent.

SANNER, J. At about 6:12 p. m. on July 28, 1910, the respondent, while driving a Ford runabout, was struck on a public road crossing between Butte and Anaconda by one of appellant company's trains. His companion was instantly killed and he seriously injured. To recover for such injuries he brought this action, alleging as negligence on the part of appellants that they were running the train at excessive speed, and that they failed to blow the whistle, ring the bell, or give any alarm of its approach. Respondent had a verdict for \$15,000, upon which judgment was entered. This appeal is from that judgment, and from an order overruling a motion for new trial.

[1] 1. It is claimed that the evidence of appellants' failure to sound the whistle or ring the bell was insufficient to take the case to the jury, and that, in the face of positive testimony that the whistle was sounded and the bell rung, the jury was not authorized to find for the respondent. It is quite true that the testimony of the engineer, and other employes of the appellant company is positive, and that of one other witness rather ambiguous, to the effect that the bell was rung and the whistle sounded in the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



regular way at from 50 to 80 rods from the crossing. The respondent, however, testified that, as he approached the crossing and for some time before reaching it, he was alert for any warning, having both looked and listened for the approach of a train, and that the whistle was not sounded nor the bell rung. D. M. Canty, who, with his brother and niece, had made the crossing a very few seconds before, and who were only 20 or 30 feet away, whose hearing was good, and who heard the sound of the train as it struck the respondent's machine, testified that he heard no whistle, nor bell, nor other warning of the train's approach; and James A. Canty also testified that he heard no whistle nor bell, though he hears all sounds plainly and distinctly. The niece, Miss Dugan, testified to similar effect.

The sufficiency of the foregoing to raise an issue, and the present contention of appellants against it, are alike settled in *Riley v. Northern Pac. Ry. Co.*, 36 Mont. 545, 93 Pac. 948. At page 559 of that decision (93 Pac. 952), Mr. Justice Smith, speaking for this court, said: "Appellant affirms that it was proven by the uncontradicted evidence that the bell was ringing, and that there was a headlight upon the rear of the switch engine. On the part of the defendant there was positive testimony that the bell was ringing and the light burning. The plaintiff's witnesses simply testified that they did not hear any bell or see any light. Appellant argues that this negative testimony is of no weight, in view of the positive testimony opposed to it. Ordinarily, when one witness testifies positively that a certain thing existed or happened, and another witness, with equal means of knowing, testifies that the thing did not exist or happen, the so-called negative testimony is so far positive in its character that a court could not say that it was entitled to less weight than the affirmative testimony."

[2, 3] 2. The testimony of respondent tended to show that, while he looked and listened as he approached the crossing, he did not "stop, look, and listen," and the question is presented by appellants whether the driver of an automobile, approaching a railway crossing, is not charged with the absolute duty to "stop, look, and listen." The appellants, conceding that as to other vehicles using a public highway the general rule upon approaching a railway crossing is to exercise such care and caution as might be expected of an ordinarily prudent person under the circumstances, insist that "the duty of an automobile driver, approaching tracks where there is restricted vision, to stop, look, and listen, and to do so at a time and place where stopping, and where looking, and where listening will be effective, is a positive duty." *New York Central & H. R. Co. v. Maldment*, 168 Fed. 21, 93 C. C. A. 413, 21 L. R. A. (N. S.) 794; *Brommer v. Pennsylvania R. Co.*, 179

Fed. 577, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924.

Both of the decisions just cited emanated from the Circuit Court of Appeals for the Third District speaking through Judge Buffington, and they proceed upon the mistaken ideas that a railroad has some sort of a paramount right to the use of a public highway crossing, and that whether a citizen using the highway on approaching such crossing must stop, look, and listen depends upon the motive power he is using and its amenability to control; whereas the true rule, as we understand it, is that the citizen has an equal right with the railway company to use the crossing, and the amenability to control of the motive power he is using bears more properly upon how near he may come to the place of danger before taking the precautions that common prudence generally requires. Of these cases nothing further need be said than this: If they are to be taken to hold, in the absence of express statute, that it is contributory negligence, as a matter of law, for the driver of an automobile not to stop, look, and listen before using a highway crossing, without regard to whether ordinary prudence would require such a course, they are contrary in spirit to the rule announced by the superior authority of the Supreme Court of the United States (*Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485), are against the weight of general decision (*Texas, etc., Ry. Co. v. Hilgartner* [Tex. Civ. App.] 149 S. W. 1091; *Pendroy v. Great Northern Ry. Co.*, 17 N. D. 433, 117 N. W. 531; *Spencer v. New York Central & H. R. Co.*, 123 App. Div. 789, 108 N. Y. Supp. 245; *Bonert v. Long Island R. Co.*, 145 App. Div. 552, 130 N. Y. Supp. 271; *Hartman v. Chicago, etc., Ry. Co.*, 132 Iowa, 582, 110 N. W. 10; *Louisville, etc., R. Co. v. Lucas* [Ky.] 99 S. W. 959; *Vance v. Atchison, etc., Ry. Co.*, 9 Cal. App. 20, 98 Pac. 41; *Missouri, etc., Ry. Co. v. James*, 55 Tex. Civ. App. 588, 120 S. W. 269; *Chesapeake & O. R. Co. v. Hawkins* [Ky.] 124 S. W. 836), and are in conflict with the settled rule in this state. *Mason v. Northern Pac. Ry. Co.*, 45 Mont. 474, 124 Pac. 271; *Sprague v. Northern Pac. Ry. Co.*, 40 Mont. 481, 107 Pac. 412; *Hunter v. Montana Central Ry. Co.*, 22 Mont. 525, 57 Pac. 140.

In the *Sprague* Case appears the following: "Whether, in selecting the point which they did select to stop and listen for approaching trains, Nelson and Chappel exercised ordinary care to make their listening effective, and whether, in doing what they did from that point until the injury occurred, they exercised such care and prudence as reasonable men under like circumstances would have exercised, were questions of fact for the jury to determine;" and in the *Mason* Case this court, disapproving of certain instructions, said: "Neither of these instructions correctly states the law. They imposed too great a burden upon the plaintiff. If such were the



law a person approaching a railroad track would either be obliged to keep a constant lookout in both directions, or it would be incumbent upon him, in order to avoid the imputation of contributory negligence, to stop, if necessary, and look for a train at the last available point, and at the last moment of time, before crossing the track. The law is that one desiring to cross a railroad track must exercise reasonable care for his own safety." We see no reason to change these rules either for or against any class of vehicles in lawful use.

[4] 3. The passages just quoted are decisive also of the third contention of appellants, viz.: that the particular circumstances required respondent to stop, look, and listen, and that, as he did not stop at all, nor look and listen, where such looking and listening would have revealed the approach of the train, he is ipso facto convicted of contributory negligence. The argument, although not so expressed, seems to be that if the respondent's view as he neared the crossing was restricted so that he could not see whether a train was coming, he should have proceeded, with his machine under such control that he could instantly stop, to a point between the walls of the cut and the track where he could see, and there look and govern himself accordingly; or that he should have stopped his machine, gone forward into the cut afoot, and ascertained whether the coast was clear; or, if a train coming from Butte towards the cut was visible, then failure to see it was due to failure to look at the right time and place, and in either case there can be no recovery under the Sprague and Hunter decisions.

A short review of the salient features of the case will disclose that the matter is not so easily settled. The respondent was struck by a passenger train which had left Butte shortly before, and was running at not less than 45 nor more than 55 miles an hour. The crossing is in a cut variously estimated at from 8 to 12 feet deep at that point, which cut extends from the crossing eastward about 1,000 feet. The county road east of the crossing follows the general contour, which is about the same as the top of the cut, to a point about 125 feet from the crossing; there the approach to the crossing begins, and it consists of another cut (at a right angle to the railway cut) through which the county road gradually descends from the general level to the level of the track. According to respondent, a train approaching the cut from Butte is visible to the traveler on the county road from where the approach to the crossing begins back to a point one-eighth to one-fourth of a mile distant; after proceeding into the approach a little distance, such a train could not be seen whether in or out of the cut; nor could such a train coming into the cut be seen before the traveler on the county road reached

the point above mentioned, one-eighth to one-fourth of a mile from the cut; when he reached this space he took "a reasonably long look" to the east for a train and saw nothing; he then looked westward with the like result; he then looked forward and, being at the approach to the cut, saw the Cauty machine coming towards him; alert then for any warning or sound of a train, anxious also to avoid meeting the Cauty machine on the crossing, he checked his speed, descended slowly and quietly towards the track, saw the other machine pass safely over the track, passed the other machine about 20 or 30 feet from the crossing, and, still listening for a train, reached the track where the accident occurred. He also testified that to see a train, after once entering the approach to the crossing, he would have to proceed to a point where his front wheels would be on the track; that there is a curve in the track where it enters the east end of the cut; and that to stop his car, walk forward to the crossing to view the track, return to the car, and make the crossing would require from two to five minutes.

By way of maps, profiles, and photographs, there is evidence on behalf of appellants to show that when a passenger train is in the cut, about six feet of it projects above the top of the cut. East of the crossing, between the county road and the cut, are a pole fence and the right of way fence, built of posts and wire; these to some extent obstruct the view, and while we think that a train drifting downgrade through the cut is visible to one on a level with the top of the cut whose attention was drawn to it, it would not be obtrusive without some warning. The witness Nick testified that he could stand in the county road at a point 80 feet from the track and still see a passenger train coming from the east; but how much above or below his eyes would be the eyes of the respondent sitting in a Ford runabout does not appear. There was also testimony that the curve in the track just east of the cut is a three degree curve; that from the east end of the ties at the crossing to the wall of the cut is 11 feet; that the distance from the front edge of the front wheel to the seat of a Ford runabout is 5 feet, 6 inches, and that the width of a passenger coach is 10 feet, so that it extends over either side about one foot beyond the end of the ties.

Doubtless the case made by appellants was sufficient to defeat a recovery; but it must be remembered that, if any substantial conflict existed in the evidence, this court will not substitute its views for those of the jury, who were the judges of the weight and credibility of respondent's showing. If they believed that the curve to the east of the cut prevented a view from the crossing much beyond the end of the cut (1,000 feet away),



and that it would take the respondent not less than two minutes to stop his machine, go to the track, take his view, return to the machine, and cross, it is quite clear that such a proceeding, unless the train was in the cut, would induce a false rather than a real security, because a train approaching the entire visible distance in not to exceed 13 seconds. If the jury believed that it was not feasible for the respondent—either from lack of knowledge or because of the narrow margin of safety as disclosed by the appellants' own measurements—to stop his machine at a point within the cut where he could have a view without getting off, then he could not be convicted of negligence for failure to do that; and if the jury believed that the respondent did, before descending into the cut, take a reasonably long look from a point where he says a view was of any value, the facts that he took that look before, instead of after, his look in the other direction—which, in due care, he was also bound to take—and that thereafter, though still listening for the possible approach of a train, he gave some attention to the Canty machine—which it was also his duty to avoid, and which he saw pass the track in safety—would certainly not necessitate the conclusion that he was guilty of contributory negligence in attempting to cross the track.

Crediting the testimony of the engineer and others that the crossing of the Canty machine elicited two blasts from the whistle of the train, it might well be said that the respondent, hearing them and nevertheless proceeding, was chargeable with negligence, as a matter of law; but if it be true that the whistle was not sounded then or at all, nor the bell rung, as the respondent and the occupants of the Canty machine say, then the very passage of Canty, unchallenged, in the absence of information to the contrary, was some assurance to the respondent that the crossing was safe.

From the views above expressed it follows that no error was committed by the trial court in overruling the motion for nonsuit, or in modifying appellants' offered instructions 2a and 4a, or in refusing appellants' offered instructions 5a and X. The instructions given were undoubtedly correct so far as they went; and if there was any error in

failing to more specifically define the care required of the respondent, it is unavailing to the appellants, since no proper instruction on this subject was offered by them. We see nothing in the other rulings complained of to warrant a reversal of this case.

[5] 4. We are then brought to the verdict which appellants assert is unreasonable and excessive. At the time of the accident the respondent was 23 years of age, was a stereotyper by trade, having spent several years in learning that business, and was earning \$125 per month. By the injuries received in the accident he is forever barred from again pursuing his trade, and at the time of the trial was earning \$80 per month running a moving picture machine. We have here an established loss of \$45 per month, or \$540 per year, and to purchase an annuity equal to this amount would require approximately \$11,000. In addition to this, the respondent suffered a total loss of earning capacity for about a year. When struck by the train he was thrown 75 feet; his hip socket was fractured; his skull slightly fractured; he sustained other severe external bruises, and suffered internal hemorrhages from the intestines and kidneys; he was unconscious for six or eight hours, confined five weeks to his bed, compelled to use crutches for five or six months, and a cane for three or four months thereafter. It was a year before he walked without help. His pain for several weeks was severe; his nervous system sustained serious shock; he has a displacement of the pelvic bone and of the lower spinal processes, causing atrophy, shortening and partial paralysis of one of his legs, an increased susceptibility to tubercular infection, and other difficulties. For all this he receives the difference between the amount of the verdict and the proved loss of earning capacity. While the amount awarded may, apart from the circumstances, seem to have been generous, we do not feel authorized to say that it is so excessive as to evince passion and prejudice, or to warrant any action by this court. The judgment and order appealed from are affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.



(47 Mont. 479)

**STEPHENS v. NACEY.**

(Supreme Court of Montana. June 14, 1913.)

**1. ELECTIONS (§ 276\*)—CONTEST—PROCEDURE—SPECIAL TERM—TIME—"THEREUPON."**

Rev. Codes, § 7238, limits the right of an election contestant by requiring him to file his contest within 20 days after the canvassers make their return. Section 7241 provides that on the statement of an election contest being filed, the clerk shall inform the judge, who shall thereupon order a special session or term of court to be held at the courtroom on some day to be named by him, not less than 10 nor more than 20 days from the date of the order, to hear and determine the contest. Section 7244 declares that the court must meet at the time and place designated to determine such contested election, and shall have all the powers necessary to the determination thereof. *Held*, that though the word "thereupon," as used in section 7241, means "immediately" or "at once," the failure of the judge to call a special term of court either immediately or within the time specified did not oust the court of jurisdiction so as to require a dismissal of the contest.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 304; Dec. Dig. § 276.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 6953-6955.]

**2. ELECTIONS (§ 296\*)—CONTEST—PROCEEDINGS—PENALTY ON CONTESTANT.**

While the operation of the Codes dealing with election contests defines the duty of the contestant, the clerk, judge, and court in the trial thereof, it does not impose any penalty on the contestant for the failure of the others to perform the duties required of them.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 300, 302; Dec. Dig. § 296.\*]

**3. ELECTIONS (§ 276\*)—CONTEST—JURISDICTION.**

The jurisdiction of the court to hear and determine an election contest does not depend on the action or nonaction of the contestant, after he has filed his statement of contest and while the proceeding is pending.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 304; Dec. Dig. § 276.\*]

**4. MANDAMUS (§ 30\*)—CONTEST—SPECIAL TERM OF COURT—FAILURE OF JUDGE TO CALL—MANDAMUS.**

Where, after the filing of a statement of election contest, the judge repeatedly assured contestant's counsel that he would call a special term of court to hear the contest, as required by Rev. Codes, § 7241, the failure of the judge to do so within 20 days after the filing of the statement was not such a dereliction as to reasonably require contestant to institute mandamus proceedings to compel the judge to act, on pain of having the contest dismissed.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 63; Dec. Dig. § 30.\*]

**5. ELECTIONS (§ 271\*)—CONTEST—GROUNDS.**

An objection that a contestee's name was not rightfully on the official ballot, not being a ground of contest specified by Rev. Codes, § 7234, was unavailable for that purpose.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 248; Dec. Dig. § 271.\*]

**6. ELECTIONS (§ 285\*)—CONTEST—GROUNDS.**

Where a statement of election contest charged misconduct of the judges in a particular precinct in failing to certify the returns, as required by Rev. Codes, § 519, but no facts were pleaded from which it could be inferred that the judges' failure worked any prejudice

to contestant, such irregularity was not sufficient to warrant the rejection of the vote in such precinct.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 266-277; Dec. Dig. § 285.\*]

**7. ELECTIONS (§ 285\*)—CONTEST—GROUNDS.**

A statement of election contest charged that the board of election judges of a precinct were guilty of misconduct in that they pretended and returned to the board of canvassers the fact that 97 votes had been cast and voted at an election for contestee, whereas in fact no votes were cast at that polling place for him. *Held*, that such allegation was subject to the construction that contestee received no votes at all in such polling place, but received credit for 97 votes which were not cast for him, and therefore state a valid ground of contest.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 266-277; Dec. Dig. § 285.\*]

**8. ELECTIONS (§ 271\*)—CONTEST—GROUNDS.**

An allegation in a statement of election contest that 45 votes received by contestee at P. were voted by persons who at the time were not residents of the state, but resided on the Ft. Peck Indian reservation, and were not qualified electors, stated a proper ground of contest.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 248; Dec. Dig. § 271.\*]

Appeal from District Court, Valley County; J. Miller Smith, Presiding Judge.

Election contest by James R. Stephens against Patrick Nacey. From a judgment of dismissal, contestant appeals. Reversed and remanded.

Norris, Hurd & Lewis, of Glasgow, for appellant. John L. Slattery, of Glasgow and Purcell & Horsky, of Helena, for respondent.

**HOLLOWAY, J.** At the general election of 1912 Jas. R. Stephens was the Republican nominee for the office of sheriff in Valley county. The county canvassing board declared Patrick Nacey elected sheriff, and on December 2d Stephens filed his statement of contest. The clerk of the court immediately notified Hon. Frank N. Utter, one of the judges of the Twelfth judicial district, but nothing whatever was done by Judge Utter, and on December 24th Stephens disqualified him. On January 2d Judge Utter made an order transferring the cause to that department of the district court of Valley county presided over by Hon. J. W. Tattan. On January 3d Judge Tattan made an order calling a special term of court for January 18th, and citation was issued and served. On January 17th the contestee appeared by demurrer, and also filed an affidavit disqualifying Judge Tattan. Judge Tattan thereupon made an order calling in Judge Ewing, of Great Falls, and continuing the cause to January 27th. On January 25th contestee filed his affidavit disqualifying Judge Ewing, and on the same day Judge Utter made an order calling in Judge Clements, of Helena. On January 26th Judge Clements, by telegram sent from Helena, directed the clerk to enter an order continuing the cause to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



February 6th, and this direction was obeyed. On February 1st contestant disqualified Judge Clements, and on the same day Judge Utter made an order continuing the cause to February 11th and calling in Judge J. Miller Smith, of Helena. On February 11th Judge Smith opened court and called this proceeding. Contestee thereupon withdrew his demurrer and filed a motion to dismiss, upon the ground that a special term was not called by Judge Utter, and upon the further ground that Judge Tattan at chambers continued the cause from January 18th to January 27th—a date more than 20 days from January 3d, the day upon which the order calling the special term was made. In support of this motion certain evidence was received and certain evidence offered by contestant was rejected; contestee's motion was sustained, and the proceedings dismissed. From the judgment of dismissal contestant appealed.

[1] 1. Section 7241, Revised Codes, provides that upon the statement of contest being filed the clerk shall inform the judge, who "shall thereupon order a special session or term of such court to be held at the court-room, on some day to be named by it (him), not less than ten nor more than twenty days from the date of such order, to hear and determine such contested election."

Section 7244 provides: "The court must meet at the time and place designated, to determine such contested election, and shall have all the powers necessary to the determination thereof. \* \* \*"

In *Curry v. McCaffery*, 47 Mont. —, 131 Pac. 673, we held that it was not intended to limit the special term of court to 20 days and that adjournments for more than 20 days did not oust the court of its jurisdiction. We further recognized the rule, for which counsel for respondent now contend, that "the principal object, sought to be attained by the enactment of statutes for contesting elections, is to secure a speedy trial and determination of all such contests." We may agree with counsel, also, that the word "thereupon," as used in section 7241 above, means "immediately" or "at once," and that the legislative command was intended to be obeyed. The failure or refusal of Judge Utter to act is unexplained. The duty imposed by section 7241 is so plain that failure or refusal to comply with the requirements imposed would seem to be inexcusable. But, conceding that error was committed in the failure of Judge Utter to call a special term of court immediately upon receiving notice that the statement of contest was filed, and that error was committed again in the failure of the court to convene in special term "at the time and place designated" in the order which Judge Tattan made calling the special term, the question arises, Did such errors operate to oust the court of jurisdiction? To answer

this inquiry in the affirmative would result in clothing a district judge with plenary power by his own wrongful conduct to deny to a litigant the right to be heard in a court constituted for the purpose of administering judicial remedies—a power which we refuse to recognize as being lodged in any judicial officer. Since the days of *Magna Charta* it has been the proud boast of the English people that their courts are open to every one to afford a speedy remedy for every injury to person, property, or character, and to administer right and justice without sale, denial, or delay. That charter of liberty, deemed essential to the very existence of free government, was a part of the inheritance of the original American colonies, has been adopted in the later states, and finds expression in section 6, article 3, of the Constitution of Montana.

[2] Section 7238 limits the right of the contestant in permitting him but 20 days, after the canvassers make their return, within which to institute his contest; but the district court has jurisdiction of the subject-matter—election contests—and when a statement of contest has been filed within the limited time allowed, the court has jurisdiction of the subject-matter of that particular contest. To deny to a contestant the right to be heard because the trial judge failed or refused to discharge his duty would set a premium upon official misconduct, impose a penalty upon the litigant for the judge's wrongful acts, and in its ultimate result would reach the very acme of injustice and oppression. Without stopping to consider whether it is within the power of the Legislature, in view of the guaranty of our Constitution above, to enact a statute which could be construed to warrant such absurd result, it is sufficient to say that our Legislature has not undertaken the task. The portion of the Codes dealing with election contests defines the duty of the contestant, the clerk, judge, and court, but it does not impose any penalty upon the litigant for the derelictions of others.

In *Hagerty v. Conlon*, 15 Cal. App. 643, 115 Pac. 762, it was held that the provisions of section 1118, California Code of Civil Procedure, which are the same as those in our section 7241 above, are directory only. In *Busick v. Superior Court*, 16 Cal. App. 490, 118 Pac. 481, the same rule was applied to the provisions of section 1121, California Code of Civil Procedure, which are the same as those found in our section 7244 above; and in *Moore v. Superior Court* (Cal. App.) 128 Pac. 946, the doctrine of the *Busick* Case was reaffirmed. With that conclusion we agree. In view of section 6315, Revised Codes, giving to each party to a proceeding the right to disqualify judges by filing disqualifying affidavits, to hold the provisions of sections 7241 and 7244 mandatory would be to defeat the very purpose of the statute;



for in practically every instance the contestee, by disqualifying the presiding judge on the eve of the day set for the hearing, could prevent a trial "at the time and place designated" in the order calling the special term, and thereby oust the court of jurisdiction, if the terms of section 7214 are to be carried out strictly according to the language employed and not otherwise.

Our conclusion upon this branch of the case is that the district court of Valley county had jurisdiction of the subject-matter and of the parties; that such jurisdiction was not ousted by any errors committed by the court or judges, and that in dismissing the proceeding the court erred.

[3] Neither can the jurisdiction of the court be made to depend upon the action or nonaction of the contestant after he has filed his statement of contest and while the proceeding is pending. His proceeding might be dismissed for want of prosecution; but, if the evidence offered by contestant upon the hearing to dismiss be true—and for the purposes of this appeal it is taken to be true—he cannot be charged with having abandoned his contest or with responsibility for Judge Utter's failure to act.

[4] Contestant might have applied to this court for a writ of mandate; but to secure such writ it is the general rule that the applicant must allege that he has made demand for the performance of the duty, and that such demand was refused. By his offered evidence contestant sought to prove that Judge Utter did not refuse to call a special term of court, but repeatedly assured counsel for contestant that he would call such special term. Of course a time would come when counsel would not be justified in relying upon such assurances further, and would be called upon to take appropriate steps to compel the performance of the duty by the judge; but we think there was not such delay on contestant's part in this instance as would justify the application of such an extreme remedy as dismissal for want of prosecution. We do not think the proceeding was dismissed for that reason; but, if it was, there was exhibited a very clear case of abuse of discretion.

[5] 2. But it is insisted that, even though the reason for the ruling may have been erroneous, the right result was reached, since, it is contended, the statement of contest does not state a cause of action. The statement sets forth at length the facts concerning the division of Valley county into election precincts and the subdivision of certain of the precincts into "polling places." It gives the vote received by contestant and contestee at each polling place, except polling place No. 1, Saco precinct and Poplar precinct.

The first alleged ground of contest is that the contestee's name was not rightfully on the official ballot. This is not a ground of contest (Rev. Codes, § 7234); and, even

if it were, the statement does not contain any facts, but the bald conclusion.

[6] The second ground of contest is not couched in very terse or explicit language, and we are unable to agree with counsel for contestee as to its meaning. It charges "malconduct and misconduct" on the part of the election judges at polling place No. 1, Saco precinct, in failing to certify the returns, as required by section 519, Revised Codes. No facts are stated from which it can possibly be inferred that the failure of the judges of election to certify to the number and names of the persons voting, and the names of candidates and the number of votes received by each, worked any prejudice to contestant, and such irregularity is not sufficient to warrant rejection of the vote of that polling place. The statute itself so declares. Sections 520, 591, 606, and 7235, Rev. Codes.

[7] But the foregoing is not all of the statement of the second ground of contest. It is further alleged that "said board of judges of election and said judges of election of said polling place were guilty of malconduct and misconduct in the discharge of their duties in that they pretended and represented and returned to the board of canvassers of said Valley county, Mont., the fact that 97 votes had been cast and voted at said election for said defendant, Patrick Nacey, whereas in truth and in fact no votes were cast in said polling place of said precinct for said defendant, Patrick Nacey." If by this allegation it is intended to charge fraud on the part of the election judges and to assert that contestee did not receive any votes at all in polling place No. 1 of Saco precinct, but that he received credit for 97 votes which were not cast, and that these 97 votes are necessary to justify the canvassers in their return, then this statement states a cause of action. If, however, it was intended to charge that Nacey received 97 votes in polling place No. 1, Saco precinct, but that such votes should not be counted for him because of the failure of the election judges to certify the returns, then this count does not state facts sufficient to constitute a cause of action. This count of the statement may be open to a special demurrer, but we are not prepared to say that the pleader did not mean what the language employed fairly expresses.

[8] 3. The third ground of contest relates to votes cast at Poplar precinct upon the Ft. Peck Indian reservation. Contestant alleges that the 45 votes received by contestee at Poplar "were voted and cast by persons who, at the time of voting and casting said votes, were not residents of the state of Montana, but each and all of said persons so casting and voting said votes lived upon and within the Ft. Peck Indian reservation, in said county, and were not in any respect qualified electors." If it be true that votes were cast for contestee by persons who were not res-



dents of Montana, and "not in any respect qualified electors," then of course such votes should be deducted from the total vote credited to contestee. The canvassers' returns show that Stephens received 1,084 votes, and Nacey 1,110 votes. Contestant alleges that he received 1,034 legal votes, and that contestee received 988 legal votes, aside from the votes received by contestee from polling place No. 1, Saco precinct, and from Poplar precinct, so that, to affect the result, it is incumbent upon contestant, under section 7237, Revised Codes, to show that from these two voting places his opponent Nacey received credit for more than 76 votes to which he was not entitled. Under the liberal rules of pleading in force in this state, we think the contestant has stated facts sufficient, if true, to show that Nacey was credited with 97 votes received at polling place No. 1, Saco precinct, and 45 votes at Poplar precinct, to which he was not entitled, and therefore that a different result will follow, if he is able to prove these allegations.

The judgment is reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

BRANTLY, C. J., and SANNER, J., concur.

(47 Mont. 424)

#### STATE v. WHITWORTH.

(Supreme Court of Montana. May 21, 1913.)

#### 1. WITNESSES (§ 269\*)—CROSS-EXAMINATION—SCOPE.

In a prosecution for homicide, where the defendant had testified as to threats by the deceased, and a brother of the deceased had contradicted his testimony, it was proper cross-examination to ask the brother if he had not stated to another, two days after the alleged threats were made that the deceased and himself would kill any one driving away their horses, and if defendant did not bring them back, as he had promised, it would not be healthy for him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949-954; Dec. Dig. § 269.\*]

#### 2. HOMICIDE (§ 190\*)—EVIDENCE—SELF-DEFENSE—UNCOMMUNICATED THREATS BY DECEASED.

Where there is some evidence that the deceased was the aggressor in the affray in which he was killed, evidence of threats made by him against defendant, even though not communicated, are admissible, as tending to show who was the aggressor.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 399-413; Dec. Dig. § 190.\*]

#### 3. HOMICIDE (§ 190\*)—EVIDENCE—SELF-DEFENSE—INDEFINITE THREATS OF DECEASED.

Even though the threats made by the deceased against the defendant are indefinite and conditional, they nevertheless tend to show a hostile and aggressive state of mind, and are admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 399-413; Dec. Dig. § 190.\*]

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

Walter Whitworth was convicted of mur-

der in the second degree, and he appeals. Reversed and remanded.

Edward Horsky, of Helena, for appellant. D. M. Kelly, Atty. Gen., and Louis P. Donovan, Asst. Atty. Gen., for the State.

SANNER, J. The appellant, Walter Whitworth, was convicted of the crime of murder in the second degree and sentenced to imprisonment for life. From the judgment of conviction, and from an order denying his motion for new trial, he appeals. Reliance is placed in 25 specifications of alleged error, involving some fifty-odd rulings by the trial court. We have considered them all. Many were manifestly correct; others were of no apparent consequence; still others, for lack of proper record, are not reviewable here. Under the rule established in this state that this court will be controlled in the disposition of appeals by considerations of substance and not mere technicality, we shall advert only to those rulings, properly presented, by which some substantial right of the appellant appears to have been erroneously and prejudicially affected.

[1] 1. The appellant sought to justify the homicide upon a plea of self-defense. Besides giving his version of the homicide and his reasons therefor, he also testified: That on the day of the homicide he was, and for many months had been, a ranch foreman in the employ of the Gillette Company. That on the morning of April 26, 1911, five days before the homicide, while he, unarmed, was driving his employer's wagon near one of the gates in the neighborhood, the deceased, armed with a rifle, overtook him, "threw down" on him, saying, "You are the son of a bitch I am looking for this morning," cocked the rifle, pointed it at him, menaced him with it, several times threatening to kill him, on account of some horses belonging to Levin Bros. that had been turned out of one of the Gillette Company fields. On Whitworth suggesting that there were laws in the country available to the deceased, if wrong had been done, deceased replied that his gun was law on Flat creek, and Whitworth would have to abide by that. That at the point of the rifle deceased compelled Whitworth to promise to return the horses, and to notify deceased of their return, and also compelled Whitworth to promise that he would resign his place with the company and leave the country. That at the close of the interview deceased said: "Now remember, this Winchester is with me all the time, and it is for you especially, and if you don't bring them horses back I am going to kill you. If I don't have this Winchester, I will have this"—reaching into his hip pocket and drawing out a revolver.

To rebut this narrative the state called Andy Levin, who was a brother of deceased, and with him made up the firm of Levin

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Bros. Andy Levin testified that he knew his brother intended that morning to see Whitworth about the horses that had been driven away, and, being anxious, followed deceased away from the house some time after; that he saw the entire encounter from a distance of about 300 yards; that the deceased did not at any time point his rifle towards Whitworth, but kept it at all times in the hollow of his arm; that they talked for 10 or 15 minutes, finally clasped and held hands "for more than a minute," and separated without any visible demonstration of hostility having been made. Whereupon, after some cross-examination along other lines, appellant's counsel asked leave to and offered to cross-examine the witness Andy Levin for the purpose of eliciting that on April 28th, two days after the encounter referred to, the witness met Frank Adams, another employé of the Gillette Company, with one Robard, and engaged Adams in conversation about the horses that had been driven out of the Gillette Company field, demanding that in the future he be notified of any horses or cattle the Gillette employés might see in his fields, and he would come and get them; that on Adams replying, "Our men would drive them out," the witness became abusive, and said they (referring to deceased and himself) would "kill any son of a bitch they found driving horses out of the company's field, and that Whitworth had promised Adolph to bring back those horses, and if he did not do so it would not be healthy for him." This offer was objected to by the state and refused by the court. We think that cross-examination along the lines suggested should have been allowed, and that its refusal was substantial error. "The purpose of trials of issues of fact is to bring out the whole truth, and to that end the right of cross-examination must be liberally interpreted and freely exercised. \* \* \* Properly understood, the right extends not only to all facts stated by the witness in his original examination, but to all other facts connected with them, whether directly or indirectly, which tend to enlighten a jury on a question in controversy." *Cobban v. Hecklen*, 27 Mont. 245, 263, 70 Pac. 805, 811. Necessarily included in this broad statement is the credibility of the witnesses; and in view of its character it was important for the jury to know just what weight should be given to the testimony of Andy Levin. If the conversation referred to in the offer occurred, it was relevant and material evidence touching the verity of his account of the meeting between deceased and Whitworth on April 28th, touching the attitude of himself and the deceased as one of hostility towards the appellant prior to and at the time of the homicide, and touching his own animus as a witness at the trial. If the witness admitted the conversation, such inferences therefrom as are valid would have at once obtained; if he denied it, the way would

have been opened for contradictory evidence by the persons who heard his statements. *State v. Hanlon*, 38 Mont. 557, 100 Pac. 1035.

[2] 2. The appellant Whitworth, at the time of the homicide, was 34 years old, 5 feet and 6 inches in stature, and weighed about 157 pounds. The deceased was younger, 6 feet and 3 or 4 inches tall, weighed from 200 to 220 pounds, without superfluous flesh, broad shouldered, well proportioned, well muscled, "apparently a very strong, muscular, robust man." He had been shot four times—in the thigh, in the left hand and wrist, in the left arm, and in the left breast. The last-mentioned shot entered just above the nipple, pierced the lung and base of the heart, and caused almost, if not quite, instantaneous death. On behalf of the state there was evidence which tended to show that on the morning of the homicide the deceased was plowing with a sulky plow and four horses; that Whitworth rode up and commenced to shoot while the deceased was still upon the plow, engaged in managing the horses attached thereto, and without any demonstration or manifestation of hostility having been made by the deceased; that the deceased quit the plow, was followed by Whitworth, who kept on shooting; and that Whitworth fired one shot after the deceased had fallen to the ground. The defendant testified, in effect: That while pursuing his way along the road upon his employer's business he saw deceased plowing and rode up to him for the purpose of explaining that he (Whitworth) could not keep the promises exacted of him by deceased on April 26th, and to request the deceased to take up the matter with Mr. Reeder. That when he got within speaking distance the following occurred: "I says, 'as usual, 'Good morning, Adolph.' He didn't say 'Good morning.' I said, 'Adolph, I would like to speak to you in regard to the trouble we had last Wednesday, and it is a matter that we cannot settle within ourselves.' I says: 'I want you to go to Mr. Reeder and settle it with Mr. Reeder. I am acting under his instructions.' And I says: 'Furthermore, I cannot do what I promised you I would do; I cannot bring them horses back.' He said, 'You haven't brought them horses back?' and I said: 'No. Furthermore,' I says, 'I don't intend to.' He says, 'You and I will settle it.' He says, 'I will kill you.' When he was off the plow, he threw his hand behind him and started toward me. I got my gun as quick as I could and fired twice as quick as I could; my horse reared and swung to the left with my back to Levin. I looked around over my shoulder, and he was still coming. I fired twice more, and the last shot that was fired I thought that I had wounded the man. I couldn't tell from any action that he made before that whether I had touched him at all or not. I did not fire at him after he got past me. \* \* \* Q. Mr. Whitworth, as Levin started towards



you, having put his hand toward his hip pocket, why did you shoot? A. I was sure the man was going to kill me there and then. \* \* \* I saw Mr. Levin fall to the plowed ground. After I fired the last shot, he went 25 or 30 paces."

Alvin Johnston, a witness for the state, also testified: "I saw Whitworth riding up, and he rode up to where Levin was plowing, and Levin stopped, and they talked probably a minute, and Levin got off the plow and threw his right hand behind him, and Whitworth drew his gun and commenced firing."

Whatever may be one's personal impression of Whitworth's story, it is clear from the above that a controversy existed as to who was the aggressor, as to whether there was on the part of the deceased an overt act or demonstration sufficient to induce a reasonable fear in the defendant for his personal safety, and as to whether the defendant did, in fact, kill the deceased under the influence of such fear alone. To throw such light as he might upon this controversy, the defendant sought in divers ways, generally unsuccessful, to show threats by the deceased directed toward the defendant, but made out of his presence. It is unnecessary to recite all of these. The following illustration will suffice: Stephen Dagan, a witness for the defendant, was asked whether, on April 8, 1911, he overheard any conversation between Adolph and Andy Levin with reference to any threats or difficulty with Whitworth. Objection by the state was sustained, and thereupon the following offer of proof was made and refused: "The defendant now offers to prove by the witness Stephen Dagan testifying on the stand, and another witness, that they overheard a conversation on the evening of April 8, 1911, between the deceased, Adolph Levin, and his brother, Andy Levin; that said conversation occurred in the evening of said day; and that Andy told Adolph about a piece of land, and said that he had some talk with Reeder that afternoon at the Coulee Ranch—the land referred to being that of a Mr. Hansen's. Reeder had stated to Andy Levin that he thought he had the lease, and Andy Levin thought that he had the lease. Thereupon Mr. Reeder called Andy Levin back from Reeder's house (Andy Levin was leaving), and said, 'I have here the man who will tell you who has the lease on that land,' and thereupon Whitworth came forward and showed Andy Levin the lease which he (Whitworth) had obtained from Hansen. Thereafter Andy Levin discussed with Adolph Levin the matter of horses and cattle being driven away from the Levin Bros. ranch. Andy said: 'The first man of Gillette's that he ever caught herding cattle or horses off his land he would kill him.' And Adolph said: 'That it wouldn't make any difference who it was, we will fix him, and if I do catch one of them I will

see that he don't do it again.' Adolph further said, referring to one of the Gillette Company employes, or Gillette's foreman: 'If I ever catch that fellow again, I will make him dance.'"

As we infer from the record, the views of the learned trial judge were: That communicated threats are admissible only "as a moving influence in the apprehension of the defendant"; that uncommunicated threats are inadmissible, or, if admissible at all, then not until there has been sufficient evidence, independent of them, to create the inference of self-defense, for which purpose something more than the defendant's statement should be required; and that threats, communicated or not, have no value in determining whether the deceased was the aggressor in the fatal affray. The law has been settled otherwise in this state. Over 11 years ago this court, discussing an instruction in a similar case, said: "It told the jury, in effect, that the threats were not pertinent to the consideration of the question whether or not the defendant was actually assailed, or as a reasonable man believed himself in danger of great bodily injury or in peril of life at the hands of the decedent; in other words, that the prior threats of the decedent were not to be considered, unless and until the evidence disclosed that the homicide was committed in necessary self-defense. \* \* \*

Such is not the law. Evidence of threats made by the decedent against the defendant, and communicated to him, was admissible in the latter's favor, as tending to characterize the acts and conduct of the decedent and of the defendant at the time of the killing. \* \* \* Evidence of the prior threats should be considered with, not apart from, the conduct and acts of the decedent (as well as of the defendant). \* \* \* Threats of the decedent against the defendant, which had not been communicated to the latter, were admissible for the purpose of indicating or tending to show that the decedent brought on the conflict, or was the aggressor or assailant, and that the defendant acted in necessary self-defense. \* \* \* While prior threats of the decedent against the defendant, whether communicated or not, are inadmissible in justification, unless at the time of the killing the decedent indicated by his conduct an intention to carry them into execution, \* \* \* evidence that they were made is relevant and material wherever there is any evidence tending to show such conduct, or to prove that the decedent was the assailant at the time of the homicide." State v. Shadwell, 28 Mont. 52, 66 Pac. 508.

In State v. Felker, 27 Mont. 451, 461, 71 Pac. 668, 671, the above principles were restated with this comment: "The controversy as to who was in the wrong can be correctly determined only by revealing to the jury, so far as may be, the exact relations, actions, and intentions of the parties to the



affray, so that the jury may give due weight to every fact which influenced the mind of the defendant."

[3] It is suggested by the Attorney General that the particular offer above quoted was inadmissible, because the threats referred to were not specifically directed towards the defendant, and because they were conditional upon catching the person in the act of herding cattle off the land—a condition which does not appear to have happened. We think this evinces a misapprehension of the scope and probative value of such threats if made. The fact that they are vague, indefinite, and conditional is no bar to their admission. *State v. Sloan*, 22 Mont. 293, 300, 56 Pac. 364. The evidence offered, if true, manifests a hostile and aggressive state of mind in each of the Levin brothers, not only towards the employes of the Gillette Company, of whom the defendant was one, but towards the defendant as an individual. If its existence was known to him, it would amount to a constant threat communicated to him; if not, its existence would reflect the attitude of mind entertained by the deceased and throw light on the question as to who was the aggressor at the time of the homicide. *State v. Hanlon*, supra.

3. Complaint is made of the giving of certain instructions and of the refusal of certain others proposed by the defendant. It is contended here that the instructions, so far as they make any reference to the matter of previous threats, reflect the views of the trial judge as disclosed in the taking of the testimony. Instruction 20, which deals especially with the evidentiary scope and value of prior difficulty and threats, does apparently fall short of announcing the rule as above stated. Whether this be more apparent than real, the trial court will doubtless be more explicit at another time. In any event, neither as to this nor the other instructions complained of were specific objections of the right kind made in the trial court, so that matter needs no further attention.

We see no error in the refusal of defendant's proposed instruction No. 25.

The judgment and order appealed from are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

BRANTLY, C. J., concurs. HOLLOWAY, J., did not hear the argument, and takes no part in the foregoing decision.

(47 Mont. 332)

# AMERICAN BONDING CO. OF BALTIMORE v. STATE SAVINGS BANK.

(Supreme Court of Montana. May 7, 1913.)

## 1. SUBROGATION (§ 7\*)—RIGHT TO RELIEF—PAYMENT OF PECULATIONS BY OFFICERS—RIGHTS OF SURETY.

A deputy district court clerk having issued fictitious juror's certificates, they came into the

possession of a savings bank, a bona fide purchaser for value taken without notice and in the ordinary course of business. The bank presented them to the county treasurer who paid them. Thereafter, the fraud having been discovered and the county having recovered judgment against the plaintiff as surety on the clerk's bond, it paid the same and then sought to recover from the bank. Held that, though the county might have recovered against the bank, the clerk's surety was not entitled to subrogation to such right, since it did not appear that as between the surety and the bank the latter in equity and in good conscience should sustain the loss resulting from the deputy clerk's speculations.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 17, 18, 21-29, 58, 77, 83, 92; Dec. Dig. § 7.\*]

## 2. MONEY RECEIVED (§ 6\*)—DUTY TO PAY—EQUITIES.

Defendant bank having received payment of fictitious jury certificates issued by a deputy district clerk, but taken by the bank in good faith and in the ordinary course of business, the amount was repaid to the county by the clerk's surety. Held that since the bank held the legal title to the money received from the county and the equities between it and the surety were at least equal, the latter could not recover on the theory that the bank had money in its possession which in equity and in good conscience it ought not to keep.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. §§ 15, 21-27; Dec. Dig. § 6.\*]

## 3. CLERKS OF COURTS (§ 75\*)—MISCONDUCT OF DEPUTY—ACTION AGAINST SURETY—RIGHT TO SUE.

Rev. Codes, § 384, provides that the surety of a district court clerk shall be liable for the clerk's official misconduct to any party injured thereby who is authorized to maintain an action for his damages by section 398. Held that, where a deputy clerk issued spurious certificates to which the county seal was not attached, which came into the hands of a bank as a bona fide purchaser for value, the clerk's surety would be liable to the bank thereon in case of the refusal of the county treasurer to pay the certificates on presentation.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. §§ 135-142; Dec. Dig. § 75.\*]

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

Action by the American Bonding Company of Baltimore against the State Savings Bank. Judgment for defendant, and plaintiff appeals. Affirmed.

C. M. Parr, of Hamilton, and Walsh, Nolan & Scallon, of Helena, for appellant. W. D. Kyle, Frank C. Walker, and Charles R. Leonard, all of Butte, for respondent.

HOLLOWAY, J. From the first Monday of January, 1905, to the first Monday in January, 1909, W. E. Davies was the duly elected, qualified, and acting clerk of the district court of Silver Bow county. During a portion of that period W. P. Farrell was his chief deputy. The American Bonding Company of Baltimore was the surety on Davies' official bond. During the time Farrell was acting as deputy clerk he issued false and fictitious juror's certificates, none of which

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



bore the imprint of the official seal, and these certificates to the amount of \$2,076 came into the possession of the State Savings Bank of Butte and were by it presented to the county treasurer and paid. The fraudulent character of the certificates having been discovered, the county made demand upon the clerk of the district court and the bonding company, his surety, to repay the amounts which the county had paid out on such certificates, and, this demand having been refused, action was commenced by the county and prosecuted to favorable judgment, which judgment was affirmed on appeal by this court. *County of Silver Bow v. Davies et al.*, 40 Mont. 418, 107 Pac. 81. The bonding company having paid the judgment, which included the amount received by the State Savings Bank, took an assignment of any right of action which the county may have had against the bank, and thereupon commenced this action to recover from the bank the \$2,076 which the bank had received from the county upon the fictitious certificates held by it. The complaint sets forth the foregoing facts somewhat more in detail and concludes by alleging that the bank has not repaid or returned to the county or to the bonding company the \$2,076 or any part thereof. To this complaint a demurrer was interposed and sustained, and plaintiff, electing to stand upon its complaint, suffered judgment to be entered against it and appealed. The only question presented for our determination is: Does the complaint state a cause of action in favor of the bonding company and against the bank?

The facts concerning Farrell's speculations and the character of the instruments which he issued will be found detailed at length in *Re Farrell*, 36 Mont. 254, 92 Pac. 785, and in *County of Silver Bow v. Davies et al.*, referred to in the statement above. Appellant insists that the certificates held by the bank were void, citing in *re Farrell*, above, and therefore the bank had no just claim against the county for their payment; that, having paid the bank the face value of the certificates, the county could have recovered back the money so paid in an action for money paid by mistake. To this extent appellant's contention may be conceded for the purposes of this appeal. It is further insisted that, since the county chose to proceed against the district clerk and the surety company, the surety on his official bond, to compel them to make good the county's loss, the surety company, upon paying the amount which the bank had received from the county, thereby became subrogated to the right which the county had to compel the bank to repay the amount which it had received. With this contention we do not agree. Furthermore, it must be conceded that, if the bank would have had a cause of action against the bonding company in case the county had refused to pay the fictitious certificates, then the

bonding company cannot have a cause of action against the bank in this instance.

[1] 1. Assuming that the county of Silver Bow had a cause of action against the bank to recover back the money it paid out on the spurious certificates, it does not follow that by paying the county's loss the surety on the clerk's official bond became subrogated to the county's right. The doctrine of subrogation had its origin in the civil law. It has been adopted and invoked by courts of equity in order that justice may be done as nearly as possible. The application of the doctrine must therefore depend upon the circumstances of each particular case. When, therefore, this surety company seeks to be subrogated to the right which the county may have had against the State Savings Bank, it is necessary that something more be made to appear than that the bank could have been made to repay to the county the amount which it received upon the spurious certificates which it held. The surety company must show that as between it and the State Savings Bank, if either must suffer loss because of Farrell's speculations, in equity and good conscience the bank should be the one to lose. This is the rule recognized with practical unanimity. *American Bonding Co. v. Welts*, 193 Fed. 978, 113 C. C. A. 598; *United States Fidelity & G. Co. v. Title Guaranty & Surety Co.* (D. C.) 200 Fed. 443. Does this complaint show such a state of facts? We think not. There is not any charge of negligence or wrongdoing on the part of the bank in purchasing the certificates. So far as the complaint discloses, the bank acted in perfect good faith and was following a common custom in dealing in these certificates without their bearing the impress of the official seal. Some one must suffer now for Farrell's official misconduct. Shall it be the bank, which acted in good faith and parted with its money for the spurious certificates issued by Farrell, or shall it be the surety company which for a compensation undertook to be responsible for Farrell's official delinquencies, not only to the state and to Silver Bow county, but to this bank as well? To such an inquiry a court of conscience can make but one answer. Upon the showing made in its complaint, the surety company has failed to show itself entitled to be subrogated to the right which the county may have had. *Stewart v. Commonwealth*, 104 Ky. 489, 47 S. W. 332. For this reason the complaint does not state a cause of action.

[2] 2. According to the allegations of this complaint, the State Savings Bank is in possession of and holds the legal title to the money which it secured from the county upon the fictitious certificates. At law this surety company would not have any right of action against the bank; but, to state a cause of action at all, it must allege such facts as will appeal to the conscience of a court of equity. If the equities of the re-



spective parties are equally balanced, the position of the defendant, the possessor of the thing in controversy, is the better; in other words, the legal title added to its equity prevails over an equal equity which has no legal title to support it. 2 Pomeroy's Equity Jurisprudence (3d Ed.) §§ 727, 768; Fidelity Mut. Life Ins. Co. v. Clark, 203 U. S. 64, 27 Sup. Ct. 19, 51 L. Ed. 91.

[3] 3. If the county had refused to pay the certificates held by the bank, would the bank have had a cause of action against the surety company for its loss? The surety company was responsible for Farrell's official misconduct (Rev. Codes, § 384) to any party injured thereby, and such party could maintain an action for his damages (section 398). That it was Farrell's official misconduct which caused the county's loss has been judicially determined. County of Silver Bow v. Davies et al., above; Board of County Com'rs v. Sullivan, 89 Minn. 68, 93 N. W. 1056. If the county had refused to pay the certificates, the resulting loss to the bank would have been occasioned by the same acts of official misconduct (Stewart v. Commonwealth, above), and it is not any defense that, by omitting to stamp the impress of the seal upon the certificates, Farrell avoided punishment or set afloat securities which were invalid. County of Silver Bow v. Davies, above. It would seem to follow, as of course, that the bank's right of action against the surety company under such circumstances would be absolute.

To sustain their contentions, counsel for appellant rely upon the decision in National Surety Co. v. State Savings Bank, 156 Fed. 21, 84 C. C. A. 187, 14 L. R. A. (N. S.) 155, 13 Ann. Cas. 421. Bourne, the deputy auditor of Ramsey county, Minn., fraudulently issued spurious refunding orders on the county treasurer, procured the chairman of the board of county commissioners to authenticate them, indorsed the names of the fictitious payees, and then sold the orders to the State Savings Bank. The bank presented them for payment and received from the county their face value, with accrued interest. The fraud having been discovered, the county brought action against the auditor and the surety company, the surety on his official bond, and recovered. The surety company, having paid the county, commenced an action against the bank to recover the amount which the bank had collected from the county. A general demurrer to the bill was sustained. The surety company appealed to the Circuit Court of Appeals for the Eighth circuit. The majority of the court held that Bourne's personal, as distinguished from his official, misconduct would have been the proximate cause of the bank's loss had the county refused to pay the orders, and therefore the surety on the auditor's official bond could not be held responsible for such personal misconduct. But it was Bourne's

official misconduct which called the spurious orders into existence. Board of County Com'rs v. Sullivan, above. If he had issued them to real persons, but to persons not entitled to them, and such persons had negotiated them to the bank, there is not any question that the bonding company would have been liable to the bank for the injury sustained. Now by just what species of legal legerdemain Bourne's forgeries of the indorsements of fictitious payees, added to his wrongful act in issuing the spurious orders, could operate to relieve the surety company is beyond our comprehension. It was further held that, since the orders were nonnegotiable—made so by statute for the very purpose of preventing misuse of them—the bank was guilty of gross negligence in purchasing them without inquiry, and for that reason it could not have recovered from the surety company if the county had refused payment. But, as pointed out in the dissenting opinion of Judge Hook, there was not anything before the court to justify it in assuming the existence of such a state of facts. It was further decided that, since the bank had procured from the county upon these fictitious certificates money to which it was not entitled as against the county, the county might have recovered it back, and, since the county proceeded against the surety on the auditor's official bond and enforced payment, the surety company became thereby subrogated to the right which the county might have exercised, to proceed against the bank, and this, too, without any apparent consideration of the relative equities of the respective parties. Upon each of the questions decided Judge Hook dissented, and in our opinion his position upon each question is unassailable. It is also worthy of note that this case was remanded to the district court for further proceedings; that answer was filed, issues joined, the cause tried, and judgment rendered in favor of the bank on the merits. The surety company again appealed; but this time the same Circuit Court of Appeals (two of the judges being different persons) affirmed the judgment (National Surety Co. v. Arosin et al., 198 Fed. 605, 117 C. C. A. 313) and held that the bank was not guilty of negligence in purchasing the orders, and that it was Bourne's official misconduct in manufacturing the orders which was the primary cause of the loss. Nothing is said upon the question of subrogation. In our opinion there is not any substantial difference in the facts disclosed upon the trial and those appearing upon the face of the bill in the first appeal, and that the decision upon the second appeal ought to be treated as overruling the decision of the majority upon the first appeal. But, whether it be so considered or not, we decline to follow the majority opinion upon the first appeal as un-



sound and as opposed to the decided weight of authority.

The complaint does not state a cause of action, and the judgment of the district court is affirmed.

Affirmed.

BRANTLY, C. J., and SANNER, J., concur.

(42 Utah, 586)

**BRITTAIN v. GORMAN.**

(Supreme Court of Utah. May 8, 1913.)

**1. APPEAL AND ERROR (§ 962\*)—DISMISSAL AND NONSUIT (§ 81\*)—REVIEW—DISCRETION OF TRIAL COURT—VACATING JUDGMENT OF NONSUIT BEFORE TRIAL.**

The question whether plaintiff made a showing sufficient to entitle him to an order setting aside the judgment of dismissal, entered pursuant to a nonsuit, before trial, was a matter within the sound discretion of the trial court with which the Supreme Court cannot interfere unless an abuse of such discretion clearly appears from the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3838; Dec. Dig. § 962;\* Dismissal and Nonsuit, Cent. Dig. §§ 182-192; Dec. Dig. § 81.\*]

**2. APPEAL AND ERROR (§ 1043\*)—REVIEW—HARMLESS ERROR—VACATING JUDGMENT OF NONSUIT BEFORE TRIAL.**

Error, if any, in vacating a judgment of nonsuit and dismissal obtained by plaintiff before trial was not prejudicial to defendant, in view of the practice permitting the commencement of a new action upon the same cause of action at any time within a year after the nonsuit was entered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4115-4121; Dec. Dig. § 1043.\*]

**3. TRIAL (§ 396\*)—FINDINGS OF FACT—CONFORMITY TO PLEADINGS.**

Upon a complaint alleging that plaintiff had furnished material and labor and rendered services to defendant in the execution of a contract whereby plaintiff was to erect certain cottages for an agreed contract price, and that, after payment of a part, the parties stated an account showing that defendant was indebted to plaintiff in the balance of \$1,200, which defendant agreed to pay with interest, and his failure to pay any of the principal, findings that, after the cottages were completed and after certain payments thereon, there had been an agreement that defendant pay the balance, with interest, amounting to \$1,200, with interest to judgment, were in conformity to the pleadings.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 935-938; Dec. Dig. § 396.\*]

**4. APPEAL AND ERROR (§ 193\*)—NECESSITY OF OBJECTION—DEFECTIVE PLEADING.**

Defendant, who made no objection before trial to the form in which the facts were stated in the complaint, could not for the first time on appeal object to any prolixity of statement or mingling of causes of action, if any.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226-1238, 1240; Dec. Dig. § 193.\*]

**5. APPEAL AND ERROR (§ 1010\*)—QUESTIONS OF FACT—CONCLUSIVENESS.**

The Supreme Court is bound by findings of facts in cases where there is any substantial evidence to sustain them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.\*]

**6. JUDGMENT (§ 256\*)—TRIAL OF ISSUES—CONFORMITY TO FINDINGS.**

Findings that defendant and plaintiff agreed upon the balance that was owing to the plaintiff for the erection of cottages at a specified contract price, and that the defendant had agreed to pay such amount to plaintiff, were sufficient to support a judgment in favor of the plaintiff.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 448-454; Dec. Dig. § 256.\*]

Appeal from District Court, Salt Lake County; T. D. Lewis, Judge.

Action by J. H. Brittain against P. W. Gorman. Judgment for plaintiff, and defendant appeals. Affirmed.

Goodwin & Van Pelt, of Salt Lake City, for appellant. James Ingebretsen, of Salt Lake City, for respondent.

FRICK, J. This action was brought by plaintiff, respondent here, to recover from the defendant, appellant in this court, a balance of \$1,200 which it was alleged was due from appellant to respondent for the erection of several small houses or cottages by the latter for the former during the year 1907. The respondent in his complaint, in substance, alleged that between the 1st day of January, 1907, and the 1st day of October of that year he had "furnished material and labor and rendered services to the said defendant in the performance and execution of a contract entered into by and between the plaintiff and defendant whereby the plaintiff agreed to and did erect certain cottages for said defendant \* \* \* for the agreed contract price of \$2,325.75." It is further alleged that by reason of the premises appellant became indebted to respondent for the sum aforesaid, and that the former had paid to the latter the sum of \$1,125.75 to be, and which was, credited on said principal sum, leaving a balance due thereon amounting to \$1,200. It is then alleged "that on or about the 24th day of December, 1907, an account was stated by and between the plaintiff and defendant by which it was ascertained and agreed that said defendant was indebted to the plaintiff as of the said 24th day of December, A. D. 1907, in said sum of \$1,200, which the said defendant then and there agreed to pay the plaintiff upon demand, with interest at the rate of 10 per cent. per annum from date until paid." It is further alleged that appellant failed to pay the principal sum, but had paid the interest thereon in monthly installments up to a certain time, and that said sum of \$1,200 is owing from appellant to respondent, for which, with interest from the date named, judgment was demanded.

Appellant interposed a general demurrer to the complaint, which was overruled; and the defendant filed an answer in which he in effect denied all of the allegations of the complaint, except, stating it in the language of the answer, he admitted "that plaintiff



has received or retained moneys due defendant, as alleged in plaintiff's complaint, in paragraph 2 thereof, but alleges that said sums are not correctly stated, and that plaintiff has received or retained a much larger sum of defendant's money." Here, therefore, is a specific admission that respondent has more of appellant's money than he claimed was paid him upon the contract mentioned in the complaint.

Upon the foregoing issues a trial was entered upon before the district court of Salt Lake county without a jury, and, after respondent had rested and appellant had produced all of his evidence, respondent's counsel, as he alleged, was surprised by some of the testimony given by appellant, and, not being prepared to meet it, counsel asked for and was granted a voluntary nonsuit. Within a few days thereafter, upon making a further investigation, counsel discovered that appellant's testimony was not true and that counsel had been misled thereby, and he immediately made an application to the court to set aside the judgment of dismissal which had been entered pursuant to the nonsuit and to reinstate the case. The application was supported by affidavits in which the facts were set forth in detail. Appellant resisted the application by filing counter affidavits, but the court, after considering the evidence for and against the same, granted the application, set aside the judgment of dismissal, and reinstated the case. A second trial of the cause, to another judge of the same court, resulted in findings and judgment in favor of respondent; hence this appeal.

[1] The first error assigned relates to the court's ruling in granting the application to set aside the judgment of dismissal and to reinstate the case. The question of whether respondent had made a sufficient showing to entitle him to the order setting aside the judgment of dismissal was a matter which was within the sound discretion of the trial court. If that court was convinced, from the evidence produced in support of the application to set aside the judgment of dismissal and to reinstate the case, that the respondent was misled by appellant's testimony and that it was in furtherance of justice that the order of dismissal be set aside and the case reinstated, we cannot interfere, unless it clearly appears from the record that the trial court abused the discretion vested in it in matters of that character. We can see no reason for holding that the trial court abused the discretion vested in it. Indeed, if we were passing upon the evidence produced in support of and against the application, we should arrive at the same conclusion that the trial court arrived at.

[2] Moreover, under the practice prevailing in this state, the respondent, at any time within a year after the nonsuit was entered, could have commenced a new action upon the same cause of action and prosecuted it

to judgment precisely the same as he has this one. In view of this, we cannot see how the appellant was or could have been prejudiced in any legal right by the court's ruling in reinstating the action.

[3] Appellant, however, also insists that the findings of the court are not supported by the evidence and that the conclusions of law and judgment are contrary to law. We have already called attention to the manner in which the facts were stated in the complaint in relation to the alleged agreement entered into between the parties relating to the building of the cottages, and that the respondent had also declared upon an account stated between the parties after the cottages were completed and a part of the alleged contract price had been paid. The court, in making its findings of fact, practically followed the allegations of the complaint and specifically found that, after the cottages had been completed and after certain payments had been made, the parties had agreed upon a balance due from the appellant to the respondent which the former agreed to pay, and that appellant had, by way of credits which he was entitled to for the use of a barn, paid the interest on the balance found due to the 1st of September, 1910, and the court found the amount due as agreed on in the account stated, with interest from said 1st day of September, 1910, to the date of judgment. Appellant's counsel, however, insist that the pleader in drawing the complaint, had not proceeded upon the theory of an account stated but had declared upon an express contract, which, they insist, was not proved at the trial, and that therefore the judgment does not conform to the pleadings. There was, however, no objection to the complaint as drawn, either by motion to strike or by special demurrer that the complaint was uncertain or ambiguous. The only objection to the complaint was by way of a general demurrer, to which it was not vulnerable. If it were conceded, however, that respondent had either omitted or failed to prove a specific contract, yet if he proved an account stated, as alleged in the complaint and as found by the court, the conclusions of law and judgment in his favor would still be supported by the pleadings. As we view it, both the findings of fact and judgment in this case conform to the pleadings, and the only complaint that can be made is that more was stated in the complaint than was necessary to state a cause of action, and more is found in the findings than is necessary to sustain the conclusions of law and judgment.

[4] In view that counsel made no objection to the form in which the facts were stated in the complaint before trial, they cannot now object to any prolixity of statement or mingling of causes of action, if such be the case. There are, therefore, only two questions for us to determine, namely: Are the findings of fact sustained by sufficient evi-



dence? And do the conclusions of law conform to the findings?

[8, 9] In our minds there certainly is no doubt that the conclusions of law are supported by the findings, and we feel very confident that there is at least some substantial evidence in support of the latter. This is a law case, and the rule has become elementary in this court that we are bound by the findings of facts in such cases, if there is any substantial evidence to sustain them. It could subserve no good purpose for us to set forth the evidence in support of the findings. Nor is it necessary for us to discuss the question of upon whom rested the burden of proof with respect to appellant's claim that he acted merely as agent of a corporation and was not personally liable. It is immaterial what view the district court entertained upon that question if the finding that the appellant and the respondent agreed upon the balance that was owing from the former to the latter for the erection of the cottages in question and that the former had agreed to pay the same to the latter is correct. That finding is amply supported by the evidence, and that alone would support both the conclusions of law and the judgment. But we think that the finding that the appellant and the respondent entered into a specific contract with respect to the erection of the cottages and the amount to be paid therefor is also sustained by some substantial evidence.

We are of the opinion that the judgment should be affirmed. Such is the order. Costs to respondent.

MCCARTY, C. J., concurs.

STRAUP, J. In concurring I wish to add that what principally divides the parties on the merits is this: The defendant contends that the evidence is insufficient to show essential terms of a contract between him and the plaintiff, or that the cottages were erected by the plaintiff at the instance and request of the defendant, and that the evidence shows that the cottages were erected by the plaintiff for the use and benefit of a corporation (the Sunshine Coal Company), of which the defendant was an agent, and that the plaintiff's dealings with him were in such representative capacity. There is no substantial conflict in the evidence that the plaintiff built the cottages in accordance with an agreement between him and the defendant and for a price agreed upon between them. The controversy principally turns on the question of whether the cottages were built for the defendant or for the corporation. As to this the evidence is in conflict. The court, however, found that issue in favor of the plaintiff, and found that the defendant in letting the contract acted on his own behalf, and not as agent for any one, and that the obligation was his personal obligation, and that he did not disclose to the plaintiff that he was in

any particular acting as an agent, and that the plaintiff had no knowledge that the defendant was acting as the agent or representative of any corporation, and in the making of the contract and in the doing of the work relied wholly upon the personal obligation and responsibility of the defendant. I think there is sufficient evidence to support this.

(21 Wyo. 435)

#### POOL v. POOL.

(Supreme Court of Wyoming. June 30, 1913.)

##### 1. EXECUTORS AND ADMINISTRATORS (§ 221\*)—CLAIMS AGAINST ESTATE—EVIDENCE—SUFFICIENCY.

In an action against an administrator for compensation for services rendered by plaintiff to decedent, his father, evidence held to show that there was an agreement to pay therefor.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 901-903½, 1858, 1861-1863, 1865, 1866, 1871-1874, 1876; Dec. Dig. § 221.\*]

##### 2. EXECUTORS AND ADMINISTRATORS (§ 206\*)—SERVICES RENDERED DECEDENT—QUANTUM MERUIT.

Where a father agreed to compensate his son by leaving his property to him if the son would take care of the father during his declining years, the son may maintain an action on the quantum meruit, even though the father made a will devising the property, it appearing that the will was lost or destroyed, and could not be found after the father's death.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 733; Dec. Dig. § 206.\*]

##### 3. EXECUTORS AND ADMINISTRATORS (§ 206\*)—SERVICES RENDERED DECEDENT—QUANTUM MERUIT.

Where a father agreed that, if his son would take care of him during his declining years, he would compensate the son by leaving the son his property, and the father failed to devise his property to the son, the son may maintain an action on the quantum meruit for the value of the services rendered, although there was no promise to pay the value.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 733; Dec. Dig. § 206.\*]

Error to District Court, Johnson County; Carroll H. Parmelee, Judge.

Action by W. B. Pool against George H. Pool, as administrator of the estate of Daniel J. Pool, deceased. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Metz & Sackett, of Sheridan, for plaintiff in error. Enterline & La Fleiche, of Sheridan, for defendant in error.

SCOTT, C. J. It is alleged in the petition filed in the court below, and the evidence adduced upon the trial tends to show, that Daniel J. Pool died intestate on October 3, 1911, and that during his lifetime he owned and resided on a farm in Johnson county, Wyo., which he sold in August, 1910, receiving therefor \$6,000, and removed to California. He had raised a family of children,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



all of whom were adults and all of whom had departed from the parental roof, and were in business for themselves. Becoming old and by reason of the infirmity of age, he solicited his son, W. B. Pool, the defendant in error, to give up his business in Sheridan county in 1903 and come and work for him on the farm, and relieve his father and mother, both of whom are now deceased, the wife and mother having died first on or about January 7, 1910, of the duties and cares of conducting the farm in pursuance of a contract between them that, if his son would come and work upon the place and take care of the father and mother during their lifetime, the father would pay him by giving him all the property he had at his death. Such offer had been made to other members of his family, but had been refused. The defendant in error gave up his business, returned and brought with him some money of his own which he expended in improvements on the farm, and worked upon the farm and continued to do so up to one year prior to the time of the decease of his father when the farm was sold, appropriating, as it is alleged, the proceeds of the farm or the rent received therefrom during the last few years prior to his father's death, and caring for his father and mother during that time, and up to the time his father died. The father made a will devising all of his property to the defendant in error, with the exception of \$25 to each of his other children, and reciting therein the reason why he so disposed of his property. This will was either lost or destroyed, but the scrivener who wrote it testified to its contents as above, and the reasons given by testator, in conversation at the time of writing the will, for the manner of his disposition of the property. Upon the decease of the father, George H. Pool procured himself to be appointed administrator of the estate, and his brother, the plaintiff filed his claim duly verified for the sum of \$3,579.27 for work and labor performed at the request of and during his father's lifetime at the rate of \$40 per month, and for items of expenditure which claim was disallowed by the administrator, whereupon this action was commenced upon a quantum meruit. The case was tried to a jury, and a verdict was rendered for the sum of \$2,000 in favor of W. B. Pool, plaintiff below, and defendant in error here, and judgment rendered thereon for said sum and costs. The administrator brings error.

[1] It is assigned as error that the petition does not state facts sufficient to constitute a cause of action, and that the proof is insufficient to warrant a recovery. It is contended by the administrator that the case upon the facts falls within the rule announced by this court in *Hay v. Peterson*, 6 Wyo. at page 423, 45 Pac. at page 1073, 34 L. R. A. 581, and which is as follows: "If the person performing such service lives

in and is one of the family of the other for whom the services are performed, being provided with food, clothing, lodging, and care as one of the family, and doing labor and work for such other person, and as a matter of fact there is no contract between them relating to, or providing for, any compensation to be paid for such work and labor, then no action can be maintained." The inapplicability of the rule to the facts here is apparent. Here an express contract was proven; that is to say, if the son would return to the parental roof, and work for his father and mother during their lifetime, then the father would give him all of his property at the time of his death. Upon this question the scrivener who wrote the will at the request of decedent testified to a conversation had with him at the time he made the will as follows: "Q. You may state to the jury whether or not at that time you had any conversation with Daniel James Pool relative to any work, labor, or moneys that the plaintiff had advanced in relation to work or labor performed on the deceased's ranch and improvements made thereon? A. I had such a conversation with him. Q. What did he say to you about that? A. He said that some five or six years previous to this conversation his son W. B. Pool had come to work for him upon his place. That his coming had been in pursuance of a contract between them, to the effect that if the son would come and work upon the place for the father and mother during their lifetime that he would pay him by giving him all he had at his death. He said that he had made this offer to the other members of the family, and that the offer had been refused. He said that in pursuance of this offer the boy had left his business in Sheridan county, and had come to live with him on the place, and had at that time worked for him about four, or five, or six, years. That, in addition to the work of caring for the place, the boy had put some of his own money into certain improvements upon the place, that he was growing old, and that certain troubles in the family had emphasized the necessity of concentrating the understanding and contract between himself and his son, and that he desired to make a will whereby his son would inherit his real and personal property at his death. He said with reference to his other children that it was his understanding of the law that they should be left some portion of his estate else the will would be illegal. I told him I knew of no law that would render the will illegal for that reason, but he insisted that the will should be so drawn that the children should be mentioned individually, and that the sum of \$25 should be left to each of them and that the remainder of the estate, both real and personal, of every kind and nature, should go to his son William B. Pool. He further requested that an explanation should be entered in the will of



why he did this, explaining at the same time that he had had an understanding with the other children that this should be the manner of the disposition of his property. I made the will in conformity with this request. He read it over and signed it, expressing an earnest desire that there should be no trouble about it. He asked me if it would stick: I told him I thought it would. I then explained to him that it had to be witnessed by some one, and he went out and was gone some few minutes, and came back with Richard M. Kennedy and J. M. Sonnamaker, and they signed as witnesses to the will. After the signing of the will, I put it in an ordinary envelope, and he said, 'What must I do with this?' I said, 'Do whatever you please. We have a place here to keep it, or you can take it anywhere you want to.' 'Well,' he says, 'now I have a little package down at the bank with Mr. Thom, will that be all right?' I said, 'I think so,' so he took it away. He didn't speak to me about this matter after that until some time during February—March—or possibly April of 1910; he then spoke to me again in the store of Mr. Adams and Young, and in that conversation he said, 'Do you remember making a will for me?' 'Yes, I do.' 'Do you remember in that will that my wife was spoken of—that the boy should keep her upon the ranch and maintain her in the manner in which she has been maintained in case I preceded her to the grave?' I said, 'Yes, I remember that,' and he said, 'Is there any change necessary in that now she has gone? She has passed away;' and I said, 'Yes; I understand she is dead, Mr. Pool, but I don't think any change is necessary on that account;' and that's about all I now recollect in regard to the matter."

There is other evidence in the record showing the intention of the father to compensate his son, the defendant in error, for his services. On March 20, 1907, the son married and took his wife to live on the farm where they lived until August 10, 1910, with the exception of from December 17, 1907, until May 1, 1908, during which time they were in California on account of the wife's health. They then returned to the farm in response to a telegram from the young wife's father, saying that both Daniel J. and his wife were ill. Helen Pool, the son's wife, testified that she had several conversations with her husband's father as to how her husband was to be compensated for his work; that the father had said her husband had left his interests, his own work, and came there to take care of him and his mother, to run the ranch, and he did not have any way of paying him, and he was going to pay him when he was gone by giving him his property; that afterward there was trouble in the family and she wanted to leave, and he said: "No; that we must stay there and take care of him, that that was our home. Q. Did he at that time or

any time later say anything about payment? A. He often spoke about paying my husband by leaving him his property. Q. Did he in course of the conversation, Mrs. Pool, ever tell you when it was—or how long your husband had worked for him? A. He didn't tell me the year. He said that when he left Prairie Dog he came there to live." A week after the ranch was sold in August, 1910, the plaintiff, his wife, and Daniel J. Pool removed to California, where they resided until the death of the latter on October 3, 1911. Charles A. Buel who was sworn, testified as a witness in behalf of W. B. Pool that his daughter was the wife of the plaintiff, that she came over to his home one day during 1908, and he went over to Mr. Pool's; and also as follows: "Q. Go on and state what conversation you had with Mr. Pool at the time after your daughter came home and you went to see him. A. He said they couldn't agree in the house, and, 'It is hard for me to live here alone without her. I didn't want her to go away.' He said, 'I have a hard time.' I will express it just as he said it. He always called his wife, to me, the old woman. I don't like to use the expression, but that is the words he used. He said, 'I had a hard time to get the old woman to live in the building, but,' he says, 'we finally prevailed upon her to live there.' 'Now,' he says, 'Willie has got married and they don't agree to living here. Now, if you will get them to come back and stay here, I will build them another house to live in.' Q. Go on and state the conversation. A. He said: 'I owe all I have got to Willie. He has taken care of me. He has come here and took care of me, and done what I asked him to do without compensation; I owe it to him. I owe it to him, and the only way that I have got to pay him is to keep him here. If he will stay here and take care of me and the old woman as long as we live, he shall have this property. That is the only way I can pay him.' \* \* \* Q. I omitted to ask you also, Mr. Buel—I don't know whether you had any conversation with the old man—did he give you any reason at the time you had the conversation with him why he wanted to compensate Will and give him his property? A. For staying there and taking care of him and working the place he said. He said he owed it to him. Q. Did he say anything about the others? A. He said there didn't any of the rest of them want to live with him. Q. And meaning the other relatives? A. I suppose that is what he meant. That is the words he used."

Mr. Ed Kelle was sworn, and testified as a witness on behalf of the plaintiff that in the fall or early winter of 1909 he had a conversation with the deceased relative to his paying the plaintiff, and as to when the plaintiff came from Sheridan county to work on the ranch, and further testified as follows: "Q. Now, tell the jury just what the old



gentlemen said to you about these matters? A. Mr. Daniel Pool and I were very much attached to one another and visited quite often together: That is, when we were alone and he often told me about his affairs there, and asked me not to speak to anybody about them, because he didn't care to have them public, and I would also tell him about a case I had, and we would speak about our cases amongst one another, and he told me that he didn't know what he would do if it wasn't for his son helping him on the place. He said his son lived on Prairie Dog, and he didn't have anybody there, and it was hard to have any hired man come and take care of the place the way it should be, and he had asked his son to come and help him, and his son gave up his place and came and helped him, and he also said he expected to pay his son very well for helping him on the ranch. Q. Now did he say, Mr. Kelle, he expected to pay his son? A. Well, he said he expected, the way that Willie had worked there, that he expected to pay him by letting him have the place, and that was the only way that he could pay him for what he had done for him. Q. When you speak of the old gentleman speaking about his son, to which one did he refer? A. He referred to Willie Pool. Q. The plaintiff in this suit? A. Yes, sir. Q. In the course of your conversations with him, Mr. Kelle, did he state anything about the other children, that he could, or could not get along with them and why he wanted to pay Willie? A. He said that Willie was the only one that would come and take care of him, and he was his favorite in that way; that he would sooner have Willie come and take care of him than any of the rest, as he had asked the rest, and they had refused, and he had asked Willie to come and he had quit his place and had come and took care of him, and had took care of the place for him. \* \* \* Q. What did he say in reference to having made his will, if anything, and concerning the payment, and how it was to be made to the plaintiff for his work and labor? A. Well, he said he had made out a will and that he had made it out mostly to his boy Will, as Will had worked there on the place, and that he had put his money into the place, and he wanted to repay him by the will. Q. That is, give his property to him? A. Yes, sir. \* \* \* Q. I want you to give his language. Give what he said? A. That is what he said. Q. Give his words, now, just as though it was Mr. Pool speaking? A. He said, 'I have made out a will,' and he said, 'I have made it out mostly to the boy for the work he has done here on the place, to repay him for the money he had put into the place.'"

This evidence clearly shows an intention upon the part of the deceased and an understanding between him and his son William B, the plaintiff, that the latter should be

compensated for his services, and that the services were rendered in pursuance of such understanding, and we are of the opinion that there was sufficient evidence to support the verdict.

[2] It is, however, urged that no recovery could be had upon quantum meruit, but should if at all be by and through the will. The evidence tends to show that the will upon being executed was deposited in the bank by deceased where he kept his private papers, and that during his lifetime the will was known to exist until a short time before he sold the farm and departed for California, when it disappeared. The inference is that the decedent upon the sale of the land destroyed the will. Conceding that to be the fact, there was then no will to probate, but that did not relieve the father from the duty of compensating his son as he had agreed to do. The fact was amply proven that the defendant in error did abandon his private interests at the request of his father and returned to the family homestead for the purpose of managing his father's farm and working for his aged parents, and he was the only one of the children who would do so. In *Hay, Executor, v. Peterson*, supra, there was no blood relation between the testator and Peterson who sued the executor for services rendered to Strohm, the testator, during his lifetime. There was a claim that Peterson was a member of Strohm's family, clothed and subsisted as such without any promise to pay for his services. This claim was not sustained by the evidence. Upon the facts here the right to recover upon a quantum meruit is supported by authority. In *Norton's Estate v. McAlister*, 22 Colo. App. 293, 123 Pac. 963, the deceased hired his niece to care for him during his declining years, and agreed to compensate her at his death by giving her certain named real estate which he failed to do, and it was held that she was entitled to maintain an action on the quantum meruit for the value of her services. So in the case at bar the deceased agreed to give his son practically all of his property at the time of his death in consideration for his services, and, having failed to do so, the value of such services so rendered under the contract could be recovered upon the quantum meruit under the rule announced by the court in *Norton's Estate*, supra. It would indeed be a harsh rule to hold that after defendant in error had performed his part of the contract and nothing was left but to pay him in property that because of the failure of the decedent to make provision for his payment as he had agreed the defendant should be barred from recovery. The case was tried upon the theory that the services were rendered in pursuance of an express contract, and there was evidence sufficient to go to the jury as to the existence of such contract, and having found that such contract existed, but was unperformed by the



father, the son was entitled to maintain this action as upon quantum meruit.

[3] Of course the father did not agree to pay his son at the rate of \$40 per month for his services, but the law in such case, the decedent having failed to carry out his part of the agreement during his lifetime, permits a recovery for the value of the services rendered. Norton's Estate, *supra*. The allegations of the petition were sufficient to permit of such proof, and for that reason stated facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant. The jury were instructed in accordance with the theory upon which the case was tried. We discover no error in the record, and the judgment will be affirmed.

Affirmed.

POTTER and BEARD, JJ., concur.

(21 Wyo. 460)

J. J. CRABLE & SON et al. v. O'CONNOR.  
(Supreme Court of Wyoming. June 30, 1913.)

1. PARTNERSHIP (§ 217\*)—ACTION AGAINST FIRM—EVIDENCE—SUFFICIENCY.

In an action against a partnership to recover the rent of horses, evidence held sufficient to justify a finding that the contract for the renting of the horses, which was made in the individual name of one partner, was made for the benefit of the partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 419-425; Dec. Dig. § 217.\*]

2. EVIDENCE (§ 459\*)—PAROL EVIDENCE—PARTIES TO CONTRACT.

It is competent to show by parol evidence that a party who is named in a contract and has signed the contract as one of the parties was acting as the agent of another in making the contract so as to give his principal the benefit of, or charge him with liability under, the contract, whether the unnamed principal was known or unknown to the other party to the contract, and the same rule applies to a contract made by a partner in his own name when acting for the firm and within the scope of the partnership business.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1722, 1906-1910, 2100-2114; Dec. Dig. § 459.\*]

3. EVIDENCE (§ 249\*)—ADMISSIONS BY PARTNER.

While the authority of an agent cannot be proved by his declarations, it is competent, where the existence of a partnership is otherwise established, to show the declarations of a partner at the time of making a contract as tending to show that it was made for the benefit of the firm and not for his individual benefit.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 965-975; Dec. Dig. § 249.\*]

4. ATTACHMENT (§ 125\*)—AFFIDAVITS—MOTION TO STRIKE

Where the property of a partnership is attached as such, it is improper to strike from the affidavit for attachment a statement that one of the partners was a nonresident on the ground that it is immaterial and discloses no ground of attachment, since the affidavit must be considered as a whole.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 344-350; Dec. Dig. § 125.\*]

5. APPEAL AND ERROR (§§ 884, 937\*)—ESTOPPEL—PRESUMPTIONS—SUSPENDING ATTACHMENT—BOND.

Where a bond is given under the statute relating to appeals (Comp. St. 1910, §§ 5116, 5117), as required by the court, to stay execution on a judgment in attachment proceedings pending a writ of error, and thereupon the attached property is released, it will be assumed that the bond given was not a forthcoming bond conditioned upon return of the property if the attachment should be sustained, as provided by Comp. St. 1910, § 4855, but was conditioned upon the payment of the judgment if affirmed, and after the giving of such a bond and the release of the property the judgment debtor cannot complain of error in sustaining an attachment, which was not necessary to give the court jurisdiction of his person.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3612-3616, 3788-3794; Dec. Dig. §§ 884, 937.\*]

Error to District Court, Big Horn County; C. H. Parmelee, Judge.

Action by Pat O'Connor against J. J. Crable & Son and others. Judgment for plaintiff, and defendants bring error. Affirmed.

William C. Snow, of Basin, and James M. Workman, of Lovell, for plaintiffs in error. C. A. Zaring and Thomas M. Hyde, both of Basin, for defendant in error.

POTTER, J. The defendant in error was plaintiff in the court below and brought this action against J. J. Crable, E. I. Crable, and J. J. Crable & Son, plaintiffs in error here, to recover a sum of money alleged to be due as rent for certain teams delivered to J. J. Crable & Son by the plaintiff pursuant to a written contract set out in the petition as follows: "This agreement made this 5th day of September, 1910, between Pat O'Connor, of Thermopolis, Wyoming, party of the first part, and E. I. Crable of Thermopolis, Wyoming, party of the second part, witnesseth: That the said party of the first part, for and in consideration of the agreements hereinafter contained, to be kept and performed by the party of the second part, does hereby lease unto the party of the second part eleven two-horse teams composed of horses and mules, for and during three months from date hereof. And the party of the second part, for and in consideration of the agreements herein contained by the party of the first part, does hereby agree that he will pay the said party of the first part for the use of said property, the sum of \$330 per month, same being \$3.00 per team; that he will keep the said mules and horses well fed and well cared for and in a first class and healthy condition, and that he will exercise every care and diligence in the proper care of the same; that he will pay the value of all animals lost, destroyed or injured in any way by reason of his negligence or the negligence of his employes; and that at the termination of this lease he will redeliver the said property to the party of the first part at Thermopolis, Wyoming, in as good



condition as when received by him. It is further understood and agreed that the said rental shall be due and payable by the second party to the first party on the 25th day of each month hereafter. In witness whereof the parties hereto have hereunto set their hands and seals this 5th day of September, 1910. Pat O'Connor. E. I. Crable."

The petition alleges that J. J. Crable & Son is a partnership composed of J. J. Crable and E. I. Crable; that the defendant E. I. Crable, while acting as a member of said firm, entered into the said contract with the plaintiff for and in behalf and for the use and benefit of said partnership; that pursuant to the contract the plaintiff delivered to said firm of J. J. Crable & Son 11 teams, "which were thereupon taken to a certain railroad grade between Scribner and Fromberg, Mont., and there used for a period of about three months by said J. J. Crable & Son in working upon their contract in the construction of a certain grade between the places above mentioned"; that subsequent to the execution of the contract it was adopted and ratified and the proceeds and benefits thereof were taken and enjoyed by said firm. The petition contains an itemized statement of the amount claimed to be due for the rental of said teams, showing that amount to be \$1,136.25, and also a statement of additional items amounting to \$79.35, including charges for rent of three carts and certain property claimed in the testimony of the plaintiff to have been delivered with the teams and not returned, making a total alleged indebtedness of \$1,215.60, on which a credit of \$212.75 is allowed by the petition for hay furnished the teams, explained in plaintiff's testimony to be for hay furnished after defendants had ceased to use the teams; the net amount alleged to be due, and for which judgment is prayed, being \$1,002.85.

An answer was filed by E. I. Crable admitting the execution of the written contract and that he is indebted to the plaintiff under the same in the sum of \$990, and denying each and every other material allegation in the petition. He alleged by way of set-off that the plaintiff was indebted to him in the sum of \$80.30 for the care and feed of the teams after the written contract had expired. J. J. Crable filed an answer denying each and every material allegation in the petition. J. J. Crable & Son filed a separate answer alleging that at the time the contract was entered into between the plaintiff and E. I. Crable, the partnership existing between the latter and J. J. Crable had been dissolved by mutual consent, and denying each and every other material allegation of the petition. Replies were filed denying the new matter contained in the separate answers. The case was tried to the court, without the intervention of a jury, whereupon the court found that the plaintiff should have and recover of the defendants and each of them the sum of

\$1,073.90, and entered judgment for that amount, together with costs. It appears that an order of attachment had been issued in the cause and that certain horses and mules were attached as the property of J. J. Crable & Son. Motions to dissolve the attachment were filed, and they were heard at the same time the cause was tried upon its merits, and the judgment entry embraced an order that the motions to dissolve the attachment be overruled, and that the attached property be sold by the sheriff as under execution. It was further ordered by the judgment that the sheriff exhaust the property in his hands belonging to the partnership before proceeding against the individual property of the defendants. A motion for a new trial was filed and overruled, and the case is here upon a petition in error, assigning error in overruling the motions to dissolve the attachment and the motion for a new trial.

Parol evidence was admitted, over the objection of the defendants, to sustain the averments of the petition to the effect that, in making the contract with the plaintiff for the lease of the teams, E. I. Crable acted as a member of and for the firm of J. J. Crable & Son, and that it was in fact a partnership contract. It is contended that this ruling was error for the reason that it violated the principle that parol evidence is inadmissible to vary or contradict the terms of a written instrument.

[1] It is unnecessary to rehearse all the testimony on that subject, which to some extent is conflicting. The plaintiff testified, in substance, concerning the making of the contract, that he knew the firm of J. J. Crable & Son and the business conducted by the firm; that E. I. Crable was a member thereof, and that the other member was his father J. J. Crable, and that the firm had a contract for construction work on the railroad grade mentioned in the petition; that he had done business with the firm prior to the making of this contract, having loaned them some money when they were engaged in other construction work; that he rented the teams for E. I. Crable and his father to work on the contract they had on the Franke-Fromberg cut-off; that J. J. Crable was not at the time in Thermopolis, where the contract was made, but that he was up on the construction work, and Ed came down to get the teams "to make arrangements to get them." He testified specifically with reference to renting the teams, after referring to the contract of J. J. Crable & Son on the said railroad grade: "I was renting them to the Crables for that contract. I knew he and his father had a contract up on the cut-off. And I rented them for that work." He also testified, as well as the attorney who drew the contract, concerning the directions given respecting it and the parties to it; the effect of their testimony being that the teams were to be leased to J. J. Crable &



Son. The matter was explained by said attorneys as follows: "Mr. O'Connor and Mr. E. I. Crable met me one morning in front of my office, and Mr. O'Connor said they wanted me to draw up a little memorandum for them, and the conversation was to this effect; That Mr. O'Connor wished to rent certain horses and mules to the firm of Crable & Son. I cannot state the initials or the name of the other Crable. \* \* \* I informed them that the best way for them to execute this contract was to have all the parties involved sign the contract; that is, all the members of the partnership. They explained to me there was a partnership. \* \* \* That the other member of the firm was absent and could not sign at that time. That they wanted this deal closed at once, or they wanted it fixed up, so I understood. I told them if it suited them that way it was all right with me, and therefore I drew the contract." He further testified that he thought it was not drawn on that day, but probably the next day, and that he drew it in accordance with the conversation the parties had with him.

It was shown that the teams were taken to the railroad grade referred to and that some of them were used on the firm's construction contract, with the knowledge of J. J. Crable, who also seems to have known of the contract with plaintiff, and that others were hired out to brothers of E. I. Crable mostly for use on other portions of the grade. E. I. Crable, maintaining that he alone made the contract with plaintiff, testified that he rented the teams which he did not use to his brothers. It may be said here that, if the teams were rented by him for the firm, his act in subletting them may also have been for the firm. It is not disputed that, as to the construction work in which E. I. Crable was then interested, a partnership existed between him and his father, J. J. Crable, under the firm name and style of J. J. Crable & Son. Indeed, they testified that the partnership continued as to that work, but that prior to the making of this contract with plaintiff the partnership had been dissolved so far as the partnership property was concerned; E. I. Crable having surrendered his interest in that property to his father. There was no proof of any other work or business conducted by either J. J. Crable or E. I. Crable during the time they worked on this grade or the time for which the teams in question were rented or used. Counsel for defendants contend not only that plaintiff's evidence on the subject of the parties to the contract was inadmissible but that "the effect of this testimony is not to show that Crable acted as agent for the firm when he signed, but to show that the parties at the time of ordering the contract drawn intended to have it run to the partnership," and that "what the parties did, however, was to make a contract running to the individu-

al." And counsel contend that there is nothing in the testimony to contradict the presumption that the contract correctly represents the intention of the parties when it was signed. The court must have found that the teams were leased for the partnership and for its benefit; and, there being a conflict in the evidence, we cannot, under the familiar rule, disturb the court's finding, for we are satisfied that the testimony above recited, with the other evidence in the case relating to the matter, is sufficient to justify the finding.

[2] The law is well settled, both in England and this country, that it is competent to show by parol evidence that a party who is named in and has signed a contract as one of the parties thereto was an agent for another, and acted as such agent in making the contract, so as to give the benefit of the contract to, and charge with liability, the unnamed principal; and this is so whether the unnamed principal was disclosed or known to the other party to the contract at the time it was made or not, although there is an occasional opinion to the contrary where the unnamed principal was known to the other party at the time. *Higgins v. Senior*, 8 M. & W. 834; *Jones on Ev.* (2d Ed.) § 452; 9 *Ency. of Ev.* 404, 405; *Story on Agency* (7th Ed.) § 270; 4 *Wigmore on Ev.* § 2438; *Curran v. Holland*, 141 Cal. 437, 75 Pac. 46; *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617; *Byington v. Simpson*, 134 Mass. 169, 45 Am. Rep. 314. It is said in *Story on Agency*: "There is no doubt that parol evidence is admissible, on behalf of one of the contracting parties, to show that the other was an agent only in the sale, although contracting in his own name, so as to fix the real principal. It has been well observed that in cases of this sort the liability of the principal depends upon the act done, and not merely upon the form in which it is executed. If the agent is clothed with the proper authority, his acts bind the principal, although executed in his own name. The only difference is that, where the agent contracts in his own name, he adds his own personal responsibility to that of the principal, who has employed him."

In the section in *Wigmore on Evidence*, above cited, the general state of the law on the subject is said to be sufficiently outlined in the following passage quoted from the decision of *Wolverton, J.*, in *Barbre v. Goodale*, 28 Or. 465, 38 Pac. 67, 43 Pac. 378: "The question is here presented whether it is competent to show by parol testimony that a contract executed by and in the name of an agent is the contract of the principal, where the principal was known to the other contracting party at the date of its execution. There are two opinions touching the question among American authorities, the one affirming and the other denying; but the case is one of first impression here, and we feel con-



strained to adopt the rule which may seem the more compatible with the promotion of justice and the execution of honest and candid transactions between individuals. The English authorities are agreed that parol evidence is admissible to show that a written contract executed in the name of an agent is the contract of the principal, whether he was known or unknown; and the American authorities are a unit so far as the rule is applied to an unknown principal, but disagree where he was known at the time the contract was executed or entered into by the parties. All the authorities, both English and American, concur in holding that, as applied to such contracts executed when the principal was unknown, parol evidence, which shows that the agent who made the contract in his own name was acting for the principal, does not contradict the writing but simply explains the transaction, for the effect is not to show that the person appearing to be bound is not bound but to show that some other person is bound also. And those authorities which deny the application of the rule where the principal was known do not assert or maintain that such parol testimony tends to vary or contradict the written contract but find support upon the doctrine of estoppel; it being maintained that a party thus dealing with an agent of a known principal elects to rely solely upon the agent's responsibility and is therefore estopped to proceed against the principal. The underlying principle, therefore, upon which the authorities seem to diverge, is the presumption created by the execution of the contract in the name of the agent, and the acceptance thereof by a party, where the principal is known. Is this presumption conclusive or is it disputable? Without attempting to reconcile the decisions, we believe the better rule to be that the presumption thus created is a disputable one and that the intention of the party must be gathered from his words and the various circumstances, which surround the transaction, as its practical effect is to promote justice and fair dealing. The principal may have recourse to the same doctrine to bind the party thus entering into contract with his agent. Parol evidence, however, is not admissible to discharge the agent, as the party with whom he has dealt has his election as to whether he will hold him or the principal responsible."

Where it was known at the time that a party contracted as the agent of another, the rule was applied in *Byington v. Simpson*, supra. We quote from the opinion of the court delivered by Holmes, J., for it is particularly applicable to the facts in this case and answers some of the arguments made here: "The argument is that inasmuch as the plaintiffs knew of the existence of a principal before the contract was made, and then were contented to accept a written agreement which on its face bound the agent,

they must be taken to have dealt with, and to have given credit to, the agent alone, just as, upon a subsequent discovery of the undisclosed principal, they might have determined their right to charge him by a sufficient election to rely upon the credit of the agent. We are of opinion that the plaintiffs' knowledge does not make their case any weaker than it would have been without it. Whatever the original merits of the rule that a party not mentioned in a simple contract in writing may be charged as a principal upon oral evidence, even where the writing gives no indication of an intent to bind any other person than the signer, we cannot reopen it, for it is as well settled as any part of the law of agency (citing cases). And it is evident that words which are sufficient on their face, by established law, to bind a principal, if one exists, cannot be deprived of their force by the circumstance that the other party relied upon their sufficiency for that purpose. Yet that is what the defendant's argument comes to. For the same parol evidence that shows the plaintiffs' knowledge of the agency may warrant the inference that the plaintiffs meant to have the benefit of it and to bind the principal. The only reasons which have been offered for the admissibility of oral evidence to charge the alleged principal confirm this conclusion. \* \* \* The most that could fairly be argued in any case would be that, under some circumstances, proof that the other party knew of the agency, and yet accepted a writing which did not refer to it, and which in its natural sense bound the agent alone, might tend to show that the contract was not made with any one but the party whose name was signed; that the agent did not sign as agent, and was not understood to do so, but was himself the principal. But these are questions of fact, and, as a matter of fact, it is obvious, and it is found, that the defendant was the principal, and that the contract was made with her. The objection that two persons cannot be bound by the same signature to a contract, if sound, would be equally fatal when the principal was not known. There is a double obligation, although there can be but one satisfaction. Our decision is in accordance with a thoroughly discussed case which went to the Exchequer Chamber and with the statement of the law by Mr. Justice Story there cited. *Calder v. Dobell*, L. R. 6 C. P. 486; *Story, Agency*, § 160a."

That the rule applies to a contract made and executed by one partner, when acting for the firm and within the scope of the partnership business, is equally well settled. 30 Cyc. 485; 9 Ency. of Ev. 473; *Brewing Co. v. Hawke*, 24 Utah, 199, 66 Pac. 1058; *Dreyfus & Co. v. Union Nat. Bank*, 164 Ill. 83, 45 N. E. 408; *Carson et al. v. Byers et al.*, 67 Iowa, 606, 25 N. W. 826; *Kitner v. Whitlock*, 88 Ill. 513; *White Mountain Bank*



v. West et al., 46 Me. 15; Beckwith v. Mace, 140 Mich. 157, 103 N. W. 559; Berkshire Woolen Mills v. Juillard, 75 N. Y. 535, 31 Am. Rep. 488; Stillman v. Harvey, 47 Conn. 26; 22 Ency. Law (2d Ed.) 161-164.

[3] It is contended that the conversations at the time the contract was made were inadmissible on the ground that agency on the authority of an agent cannot be proved by the declarations of the alleged agent. But it was competent to prove the transaction to ascertain whether E. I. Crable acted for the firm or on his own behalf. Whether there was a firm, and whether E. I. Crable had authority to act for it, "would, perhaps," as said in the Michigan case of Beckwith v. Mace, supra, "affect the validity of his attempt to bind others but the evidence offered was admissible to show the nature of the contract actually agreed upon." In that case the evidence had been excluded, and for that reason the judgment was reversed. Here the evidence was admitted and properly so, for it explained the transaction and tended to show that the contract was made for the partnership. The fact of the partnership was shown by other evidence, and this contract was such as to come clearly within the partner's authority.

As above indicated, we think the evidence sufficient to justify the trial court in finding that E. I. Crable, in making the contract for the use of the teams, was acting for the firm of which he was a member; that it was a partnership contract and created a firm obligation. The amount of the judgment indicates that the plaintiff was only allowed the rent of the teams, with interest, after deducting the credit given for the hay.

The only other question in the case relates to the attachment proceedings. As grounds for attachment it was stated in the affidavit "that the defendants are about to remove their property out of the jurisdiction of the court, with intent to defraud their creditors; that defendants are about to dispose of their property, with the intent to defraud their creditors; that defendants fraudulently contracted the obligation for which suit is about to be brought; and that defendant J. J. Crable is a nonresident of the state of Wyoming."

[4] E. I. Crable and J. J. Crable filed separate motions to quash the writ of attachment, supported by their respective affidavits, denying the truth of the grounds mentioned in the affidavit for attachment, except the nonresidence of J. J. Crable. As to that ground it was moved that the allegation of nonresidence be stricken from the affidavit as immaterial. It would certainly be an unusual proceeding to strike from a party's affidavit any matter therein contained. An entire affidavit might, perhaps, be stricken from the files, good and sufficient reasons appearing therefor, and it is proper to move for the discharge of an attachment on the

ground that the affidavit is insufficient. But we do not understand it to be proper to strike out the statements contained in the affidavit, or any of them, for the reason that they are immaterial or disclose no ground for attachment.

[5] It is probable, however, that the question was presented upon the motions to discharge the attachment, whether the nonresidence of one of the partners, the other being a resident, constituted a ground for attachment of the property of the partnership or the individual property of the nonresident partner. Counsel for plaintiffs in error state in their brief that the question was presented.

The evidence shows that J. J. Crable was a nonresident of the state, and it is not contended that the evidence sustains either of the other alleged grounds for attachment. It is contended for defendants, plaintiffs in error here, that the nonresidence of J. J. Crable was not a sufficient ground for attaching either his individual property or the property of the partnership, since he was only liable, if at all, as a member of the partnership. We think it unnecessary to decide that question, for it appears that after the judgment was rendered an order was entered upon the application of the defendants J. J. Crable & Son and J. J. Crable that upon their giving a bond as provided by law for stay of execution, in the sum of \$2,700, to be approved by the clerk of the court, execution on said judgment be stayed for 90 days as to the parties giving the bond, and that the property attached be released; the order providing that such bond should be given under the statute relating to appeals. It is stated in the brief of counsel for plaintiffs in error that after the judgment had been entered the attached property was released upon bond being given. If the bond was given as provided in the order authorizing it, it would bind the parties to pay the amount of the judgment and costs, if the judgment be affirmed in whole or in part, or if the proceedings in error be dismissed. Comp. Stat. 1910, §§ 5116, 5117.

It would not be a forthcoming bond provided for in section 4855, Compiled Statutes. That section requires the sheriff to deliver the property attached to the person from whose possession it was taken, upon his execution, with sufficient surety, of an undertaking to the plaintiff, to the effect that the parties to the same are bound in double the appraised value of the property; that the property or its appraised value in money shall be forthcoming to answer the judgment of the court in the action. The statute relating to stay of execution in case of appeal provides that no proceeding to reverse, vacate, or modify a judgment of the district court shall operate to stay execution until the party against whom the judgment was made shall file a written undertaking with sureties to be approved by the court, or



judge, or the clerk of the court; that, when the judgment directs the payment of money, the undertaking shall be in such sum as fixed by the court or judge to the effect that the plaintiff in error will pay the condemnation money and costs, if the judgment be affirmed in whole or in part, or if the proceedings in error be dismissed. Comp. Stat. § 5116. And it is further provided that such undertaking shall operate as a stay of execution for the period of 90 days from the date it is filed in the clerk's office, whether any proceedings to reverse, vacate, or modify the judgment shall have been taken or not, and, if within said period the party shall have commenced his proceedings in error, then the undertaking shall operate as a stay of execution until the cause is finally determined by the Supreme Court. Id. § 5117. To give a mere forthcoming bond under section 4855, no order of the court is necessary, nor is it necessary in such case for the court to fix the amount thereof; that is fixed by reference to the amount of the appraised value of the attached property. It appearing that a bond to stay execution under the statute relating to appeals was authorized by the order of the court on the application of certain of the defendants, and that when given the attached property was ordered released, and, by admission of counsel, that a bond was given and the property released, without anything to show that it was merely a forthcoming bond, we are at liberty to assume, and must do so, we think, that the bond so given was that authorized by the court's order, viz., a bond to stay execution pending proceedings in error, obligating the parties to pay the judgment, if affirmed. This seems to take every question as to the attachment out of the case. The attachment is not needed to confer jurisdiction of the person of J. J. Crable, for he entered his personal appearance in the cause by pleading to the merits and participating in the trial. The discharge of the attachment is not necessary, for the property has been released upon the giving of the bond aforesaid; and to hold that the court erred in denying the motions to dissolve would not relieve the parties from the payment of the judgment, which we think must be affirmed, or their liability to pay the same under the bond given to stay execution. E. I. Crable disclaimed, upon the trial, any interest in the attached property, testifying that it all belonged to his father, J. J. Crable. So far as he is individually concerned, therefore, he is not interested at this time in the result of the attachment. There is nothing to show that the firm is not a party to the bond, and we have a right to assume that it is, since the court's order provided that, upon the bond being given by the firm and J. J. Crable, execution should be stayed and the attached property released, and it is admitted that upon giving bond the property was released.

The plaintiffs in error are not in a position, therefore, at this time, to demand a consideration of the alleged error in refusing to dissolve the attachment.

For the reasons stated, the judgment will be affirmed.

SCOTT, C. J., and BEARD, J., concur.

(24 Idaho, 169)

#### WELCH v. BIGGER et al.

(Supreme Court of Idaho. June 2, 1913. On Petition for Rehearing, July 3, 1913.)

##### 1. ACTION TO QUIET TITLE—COMPLAINT.

*Held*, that the complaint states a cause of action, and that the court did not err in overruling the demurrers thereto.

##### 2. FRAUDS, STATUTE OF (§ 129\*)—PART PERFORMANCE—SUFFICIENCY.

*Held*, that the answers did not put in issue any of the allegations of the complaint, and that the court did not err in sustaining the demurrers thereto.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 287-292, 303, 306-308, 311, 314, 318-320, 322, 325, 326; Dec. Dig. § 129.\*]

##### 3. SUFFICIENCY OF CROSS-COMPLAINT—ON REHEARING.

*Held*, that the cross-complaints did not state a cause of action, and that the court did not err in sustaining demurrers thereto.

##### 4. FRAUDS, STATUTE OF (§ 109\*)—REDUCTION OF ORAL CONTRACT TO WRITING—SUFFICIENCY OF WRITING.

Where W. and B. enter into an oral contract to exchange real estate, and T. undertakes to prepare a written contract embodying such oral contract, and he prepares two contracts, and it is admitted that the contracts so prepared do not contain the main features of the oral contract, such written contracts are not sufficient to take the oral contract out of the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 222-224; Dec. Dig. § 109.\*]

##### 5. PLEADING (§ 126\*)—ANSWER—NEGATIVE PREGNANT.

*Held*, that the denials in the answers were not sufficient to make an issue of fact.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 261-263; Dec. Dig. § 126.\*]

##### 6. PLEADING (§ 126\*)—ANSWER—ADMISSION.

*Held*, that where the plaintiff sues for \$1,000 damages, and the answer denies "that the plaintiff has been damaged in the sum of \$1,000 by reason of the acts of this defendant," such denial is an admission that the plaintiff has sustained damages in a sum less than \$1,000.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 261-263; Dec. Dig. § 126.\*]

#### On Petition for Rehearing.

##### 7. JUDGMENT (§ 126\*)—ASSESSMENT—INSUFFICIENT ANSWER.

In an action for unliquidated damages, judgment cannot be entered on motion, even though no defense is disclosed by the answer, and unliquidated damages must be proved before judgment can be legally entered therefor.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 223, 224, 228-230; Dec. Dig. § 126.\*]



Appeal from District Court, Twin Falls County; C. O. Stockslager, Judge.

Action by J. J. Welch against F. E. Bigger and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded on rehearing.

James H. Wise, of Twin Falls, for appellants. Geo. E. Herriott, of Twin Falls, for respondent.

SULLIVAN, J. This action was brought to remove a cloud from the title to lots 6 and 7, in block 3, of Turner's addition to Kimberly, Twin Falls county, and for \$1,000 damages.

It appears from the record that on or about January 30, 1912, plaintiff Welch, who is respondent here, and appellant Bigger, entered into a verbal contract for the exchange of the lots above described, owned by Welch, and certain real estate owned by Bigger in the town of Payette, Canyon county; that appellant Turner, who was cashier of a bank in Kimberly, was called upon to draw up a contract between Welch and Bigger for the exchange of said lots in accordance with the oral agreement, and he drew up two separate contracts in regard to the matter, neither of which contains the oral agreement entered into by Welch and Bigger; that it is admitted by both Welch and Bigger that said written contracts which were prepared upon printed forms do not contain the essential features of the oral contract. It is claimed by Welch that Bigger was to procure an abstract of title of the Payette property and execute all of the papers necessary for the transfer of the same to the plaintiff during the week following January 30th, and pay him \$700 in cash, and assign to him a certain insurance policy and water stock in addition to a clear title to the Payette property.

[4] It appears that the appellant Bigger failed to comply with the terms of said oral contract, and had filed for record in the county recorder's office of Twin Falls county the contract which was delivered to him by appellant Turner on March 13, 1912. The allegations of the complaint show that said contract was procured to be signed by Welch through deceit and conspiracy of Bigger and Turner, and that Welch had confidence in Turner, and took his word for what said contract contained, and that he did not read it before signing. A short time after respondent learned that said written agreement had been filed for record, he brought this suit to remove the cloud from the title to said lots in Kimberly. The court overruled demurrers to the complaint. Thereafter the appellants each filed separate answers to the complaint in which they admit that the written contract so executed did not contain the essential features of the oral contract, to which answers demurrers were filed. After hearing the matter, the

court sustained the demurrers, and the appellants refused to answer further, whereupon the court granted respondent's motion for judgment on the pleadings and entered judgment and decree quieting the title to said lots in the plaintiff, and gave him a judgment for damages in the sum of \$999. This appeal is from that judgment.

[1] The appellants assigned as error the overruling of their demurrers to the complaint. The grounds of said demurrers were, first, that the complaint did not state facts sufficient to constitute a cause of action; second, that there was a misjoinder of parties defendant; and, third, that there was a misjoinder of causes of action. There is no merit in this assignment of error, as the complaint states a cause of action, there is not a misjoinder of parties defendant, nor a misjoinder of causes of action.

[2, 3] The second assignment is that the court erred in sustaining plaintiff's demurrer to the answers and cross-complaints of defendants. It is conceded that the contract, which was the basis of this action, was oral, and was for the exchange of real property. This would place that contract within the statute of frauds, and make it such a contract as could not be enforced. But it is contended by counsel for appellants that appellant Bigger proceeded to perform his part of said contract by paying off the mortgage on his own property and getting an abstract of title. The acts which it is contended Bigger did in regard to this matter are not such acts as would take the contract out of the statute of frauds. Therefore, since no action could be maintained for the enforcement of said oral contract, the court did not err in sustaining said demurrers to the cross-complaints.

[5] The answer denies by way of negative pregnant certain allegations of the complaint; but since it clearly appears from the record that the contract for the exchange of said real estate came within the statute of frauds, and could not be enforced, the cloud cast upon plaintiff's two lots by the recording of a purported contract that never was entered into was no defense whatever to this action. The denials in the answer were not sufficient to make an issue of fact.

[6] And the denial in the answers in regard to the amount of damages alleged to have been sustained by reason of appellant's filing for record a purported contract that had never been entered into was simply a denial that the plaintiff had sustained "damages in the sum of one thousand dollars." The answer does not deny that the plaintiff had sustained damages in the sum of \$999. It simply denies that plaintiff sustained damages in the sum of \$1,000. The denial in Bigger's answer is as follows: "And denies that, by reason thereof, the plaintiff has been damaged in the sum of \$1,000." And in appellant Turner's answer the denial is as



follows: "The defendant further denies that the plaintiff has been damaged in the sum of \$1,000 by reason of the acts of this defendant." Such denials would be an admission that the plaintiff had sustained damages in any sum less than \$1,000, or an admission that plaintiff had sustained damages in the sum of \$999. That, no doubt, was the view the trial court took of these denials.

From the whole record we are unable to find any reversible error in it, and for that reason the judgment must be affirmed, and it is so ordered, with costs in favor of respondent.

AILSHIE, C. J., and STEWART, J., concur.

#### On Petition for Rehearing.

SULLIVAN, J. A petition for rehearing has been filed in this case, and upon an examination of it the court is fully satisfied that it made an error in its former ruling in the original opinion in holding that there was no reversible error in the record.

[7] The plaintiff claimed \$1,000 as damages, which damages were unliquidated, and the trial court, without taking any evidence whatever in regard to the damages sustained by the plaintiff, entered judgment in his favor for the sum of \$999, evidently holding that a denial in the answer to the effect that the plaintiff had been damaged in the sum of \$1,000 was not sufficient to put the plaintiff upon his proof as to the amount of his damages, and that the court was authorized to assess the damages at anything less than \$1,000, without taking any evidence.

It is held in 1 Black on Judgments, § 139, that it is erroneous for the court in an action on an unliquidated claim to proceed to render final judgment for a specific sum without preliminary assessment of damages. 2 Sutherland on Damages, §§ 427, 429, 430. The case of Shattuc v. McArthur (C. C.) 25 Fed. 133, was based on a claim of \$50,000 damages for libel, and it was insisted in that case that the answer contained no defense, and the court there held, that if an action is on a contract where the damages are liquidated and certain and no defense is set up, judgment might be entered for the amount due as disclosed by the complaint, but where damages are unliquidated and uncertain, and no defense is disclosed by the answer, the damages being unliquidated must be proved, and, until they are determined by proof, no judgment can be legally entered.

On a claim for unliquidated damages, it is error for the court on default to enter judgment for the damages claimed without requiring the plaintiff to prove the amount of damages he has sustained. See Parke v. Wardner, 2 Idaho (Hash.) 285, 13 Pac. 172;

Idaho Placer Min. Co. v. Green, 14 Idaho, 294, 94 Pac. 161.

We have therefore concluded to modify the original opinion in this case and remand the case for a new trial on the question of damages, and direct the trial court to permit the defendant to amend his answer, if he desires to do so, and to try the issue of damages as provided by law. In all other respects the judgment of the trial court is affirmed.

Costs of this appeal are awarded to the appellants.

AILSHIE, C. J., and STEWART, J., concur.

(24 Idaho, 234)

#### MILLER v. BLUNCK.

(Supreme Court of Idaho. June 13, 1913.)

#### 1. APPEAL AND ERROR (§ 1002\*)—REVIEW—CONFLICTING EVIDENCE.

Where there is a conflict in the evidence, and substantial evidence supports the findings and judgment, this court will not reverse the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

#### 2. SALES (§ 52\*)—ACTION FOR PRICE—EVIDENCE.

Held, in this case, that there is substantial evidence to support the findings and judgment.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 118-144, 1045; Dec. Dig. § 52.\*]

Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.

Action by L. L. Miller against L. A. Blunck. Judgment for defendant, and plaintiff appeals. Affirmed.

G. W. Lamson, of Nampa, for appellant. Geo. H. Vande Steeg, of Nampa, for respondent.

STEWART, J. [1,2] This action was instituted by the appellant to collect a balance due in the sum of \$462.80 upon the purchase price of 630 boxes of apples alleged to have been sold by appellant to the respondent. The defendant denied the sale and denied the payment of \$250 as part payment on the purchase price of the apples, but admits that \$250 of his money was so applied and paid to plaintiff by one Sid Barteau, and the defendant alleges that Barteau wrongfully and without warrant or authority from him, and without his knowledge, did so pay and apply the funds of the defendant as payment upon said sale, and denies that the respondent is indebted to plaintiff in the sum of \$462.80 or any sum. The cause was tried by the court, and findings of fact were made as follows: (1) That the plaintiff did not sell and deliver on the 18th day of October, or at any time, the apples described in the complaint, and defendant did not promise to pay the sum of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



\$712.80 for such apples; (2) that the defendant did not pay plaintiff the sum of \$250, or any sum at all, to apply as part of the purchase price of said apples, and that the same was paid without any warrant or authority from the defendant; (3) that the defendant is not indebted to the plaintiff in the sum of \$402.80, or any sum at all, on account of apples purchased by him from the plaintiff or sold and delivered to the plaintiff. As a conclusion of law the trial court finds that the plaintiff is not entitled to judgment against the defendant for the sum prayed for, and that plaintiff take nothing by the action, and that the defendant recover judgment. Judgment was rendered accordingly.

The facts, as shown by the evidence, are about as follows: That prior to the transaction involved the defendant and one Sid Barteau had a conversation at Nampa which resulted in the purchase by Blunck of Barteau's crop of fancy and extra fancy apples at the agreed price of \$1.35 per box; that said parties estimated that Barteau's crop would amount to about three cars; that Barteau should ship the apples to Blunck at New York for the New York market. It was also agreed that Blunck would make arrangement at a bank in Nampa whereby the bank would advance to Barteau the sum of \$250 on each car of Barteau's crop of apples purchased by Blunck upon presentation to the bank of the bill of lading. This arrangement applied to Barteau's crop of apples and not to any other apples that Barteau might ship to Blunck, and this is shown clearly by the evidence.

The agreement between Barteau and Blunck was entered into at Nampa and was made before Blunck and Barteau discussed or made reference to any other apples purchased from anybody else other than the crop of Barteau. Another conversation was had between Blunck and Barteau, relative to the shipment of apples, on the day Blunck left Nampa for New York, wherein Barteau told Blunck that he might be able to pick up apples and ship them to him. This was with reference to apples other than the Barteau crop; in this conversation Blunck agreed to keep Barteau posted as to market conditions and to notify him when to ship the apples in case Barteau picked up any others. Blunck in this conversation in no way authorized Barteau to buy any apples for him but simply agreed with Barteau that he would look after the apples that Barteau picked up after they arrived at the market, if Barteau cared to pick up same and ship them to him at New York, and it was then agreed that Barteau have for his services in picking up and shipping the apples one-half of the profits realized upon the sales made by Blunck in New York. After the arrangement had been made with Barteau, Blunck left for New York, and from New York Blunck wrote Barteau a letter of explanation and infor-

mation so that Barteau could decide whether or not he cared to ship any apples that he might pick up, and in that letter Blunck tells Barteau that he does not want to take any chances himself, tells Barteau how the apples are sold, and that they will bring just what they are worth.

At this time L. L. Miller, the appellant, and George B. Bradley were partners under the firm name of Nampa Grain & Elevator Company and were engaged in buying and selling fruit, grain, and other farm produce as wholesalers. On the 18th of October the appellant and Bradley had a car of apples packed and loaded ready for shipment to Texas. Barteau had witnessed the packing of all or a portion and opened negotiations with Blunck with the view to Blunck's purchasing the car, and Barteau testifies that he had a transaction with Bradley, the partner of appellant: "He said he had a car load of apples loaded, and I said, 'Mr. Blunck wants apples very badly; he thinks he can do well with them; what will you take for them?' They told me, and I wired Blunck there was a car of apples on the track loaded. \* \* \* I got a telegram back, a night letter, next day, to ship the apples to a certain commission house. \* \* \* I wired Blunck first."

"Nampa, Idaho, Oct. 17, 1911. L. A. Blunck, 307 West 98th St., New York: Car loaded can buy one fifteen two fifty Delaware Red hundred Black Twig hundred fifty Seek no Farther fifty Baldwin all fancy and extra fancy packed together eighty choice at dollar. Bolden bot Nonce apples answer quick. Barteau."

"New York, N. Y., Oct. 18, 11. Sid B. Barteau, Nampa, Idaho: I wired this a. m. from Rae and Hatfield office to send car to them meaning Delaware Red Black Twig Baldwin which you wired me about will get about two twenty five for them here the other apples sent to Fanning wire size of this lot for Rae and Hatfield. H. Blunck."

This latter wire, dated October 18th and signed by H. Blunck, was evidently in answer to the telegram of October 17th signed by Barteau and sent to Blunck.

On October 18th Blunck sent to Barteau the following telegram: "New York, October 18th, 1911. Sid B. Barteau, Nampa, Idaho: Bill car to Rae and Hatfield wire car number soon as shipped route Erie at Chicago mail manifest. L. A. Blunck."

On September 28th Barteau wired Blunck as follows: "L. A. Blunck, 307 W. 98 Street, New York: Jonathans one fourth each one hundred twelve twenty five thirty eight and fifty Winesap one third hundred twenty five thirty eight and fifty Rome beauties and Newtown all hundred twenty five and larger wire at once if you want them. S. B. Barteau."

On September 29th Blunck sent a telegram to Barteau, Nampa, Idaho: "S. B. Barteau, Nampa, Idaho: Forward car as soon as pos-



sible to James M. Fanning 291 Washington St., bill car over Erie Railroad be sure and make this shipment extra good so to make name if this is a success can handle twenty cars wire when to expect car. S. A. Blunck."

On October 7th Blunck sent a telegram to Barteau as follows: "Sid B. Barteau, Nampa, Idaho: Make up car Jonathans Rome ship Winesap Newtowns later buy these three cars can handle two a week, so get all you can Jonathans sold two fifty yesterday get a car off at once, bill over Erie to New York, J. M. Fanning, 391 Washington St. wire. S. A. Blunck."

The evidence shows that the appellant testified that Mr. Bradley told him about the telegram and that he told Barteau, "One of you fellows has to pay for them;" that he held Blunck just as good as Barteau; that the account on the books was in the name of Blunck.

This is practically all the evidence in the case, and the trial court found: (1) That the appellant did not sell or deliver on the 18th day of October, 1911, 630 boxes of apples, and that the respondent did not promise to pay the plaintiff the sum of \$712.80 for the same; (2) that the defendant did not pay the plaintiff the sum of \$250 or any sum as part payment on the purchase price for the 630 boxes of apples; (3) that the respondent is not indebted to the plaintiff in the sum of \$462.80, or any sum.

The principal and only contention upon this appeal is whether the evidence supports the findings of the court. An examination of the evidence shows no particular issue of fact except as to whom the appellant sold the apples, whether to Blunck or to Barteau. An examination of the evidence to our minds shows clearly that the respondent and Barteau had two separate conversations with reference to the purchase of apples. The first related to the purchase of Barteau's crop of apples, and for which the respondent agreed to pay the sum of \$1.35 per box, and to advance through the Citizens' State Bank the sum of \$250 per car on each car of said Barteau's crop. There is some contention as to whether the \$250 to be advanced by respondent was applicable only upon the crop of apples purchased by respondent from Barteau, or whether such advance was to be made upon any apples that Barteau might ship to Blunck. The agreement, however, made between Blunck and Barteau had reference solely and only to the Barteau crop. There was nothing said between the parties with reference to this advancement, except that it was to be applied upon the Barteau crop. The cashier of the bank testified, and his testimony was corroborated by other testimony, that Blunck instructed the bank before leaving for New York that he had bought Mr. Barteau's crop, and he wanted the bank to advance \$250 on each car of apples of Barteau's crop, and this was the arrange-

ment made and in pursuance of which the \$250 advanced to Barteau was paid to the appellant on the car purchased by Barteau from the appellant, and was clearly without authority from Blunck, and the trial court did not err in so finding. The second conversation was a conversation which related to the acts of Blunck in New York; that if Blunck found the market right, and it seemed probable that it would pay to ship additional cars of apples, he would inform Barteau; and, if Barteau saw fit to pick up other apples and ship them, the respondent would handle them on the market for one-half of the profit; but in that conversation nothing was said by the parties with reference to advancing \$250 on the apples picked up and shipped by Barteau, or any other sum.

At the time the appellant made the contract with Barteau to sell him the car of apples in controversy, Blunck knew nothing about Barteau's representations to appellant, and, when Barteau wired him that he could buy a car of apples already loaded at a certain price, Blunck went to Rae & Hatfield, commission men, and ascertained that the market conditions were right, and the commission firm would take the apples, and then Blunck wired Barteau to ship the car. Now at that time Blunck did not know that Barteau had bought the apples for him or that he had drawn \$250 against the respondent's bank account, or that the appellant did not know that the respondent was interested in any way in the transaction, and did not know the deal Barteau was entering into with appellant, but after receiving the letter he took steps to protect himself, and after correspondence with the appellant the appellant wrote respondent and said: "We beg to inclose you herewith statement of your account on apples showing a balance of \$462.80. We are surprised that we have not received this money before this time, as when we sold this car to Mr. Barteau to be shipped to you, we were to receive \$250 down, which he paid us, and the balance within ten days after car arrived in New York."

The agreement apparently between the respondent and Barteau as to the purchase of apples other than the Barteau crop was that Barteau was to pick up apples and send them to New York, and that Blunck should sell the same, and that the two parties would divide the profits made upon the sale, and this is the relationship that arose between Blunck and Barteau; and, although partnership was not alleged in the answer, yet that was the agreement as to the method of handling the apples picked up and shipped by Barteau, and we have no doubt whatever that the intention of the parties was that a partnership was provided for in the profits realized from the sales, and that, while Barteau was the purchaser, he was to be jointly entitled to one-half the profits and Blunck to the oth-



er half, and Blunck was to be the agent of Barteau to make the sale. We have no doubt whatever but that Barteau made the purchase from the appellant of the apples in controversy in this case, and that he in no way was the agent of Blunck. We have examined errors assigned as to the admission of evidence, and we find no error.

The judgment is affirmed. Costs awarded to respondent.

AILSHIE, C. J., and SULLIVAN, J., concur.

(74 Wash. 208)

STATE ex rel. ABRASHIN v. TERRY et al.  
(Supreme Court of Washington. July 1, 1913.)

1. TAXATION (§ 699\*)—TAX TITLES—TAX DEEDS.

Under Rem. & Bal. Code, § 7808, providing that every piece of property sold for an assessment shall be subject to redemption at any time within two years after sale, and, if no redemption be made within that period, the treasurer shall execute to the purchaser a deed, but that no deed shall be executed until the purchaser of the certificate shall have notified the owner that he will demand a deed and 60 days have expired from the date of the service of the first publication of the notice, no redemption can be had after the expiration of the 2-year period and the 60 days after notice, even though the deed has not been actually issued; the state having the power to sell land for taxes absolutely, and the privilege of redemption being a matter of grace.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1402-1405; Dec. Dig. § 699.\*]

2. PARTIES (§ 80\*)—DEFECTS OF PARTIES—WAIVER OF DEFECTS.

Where not raised by demurrer or answer, the objection that a married man cannot maintain mandamus to compel the treasurer to issue a deed to land sold him for taxes is waived; Rem. & Bal. Code, §§ 261, 263, providing that objections as to defects of parties may be raised by demurrer or answer, and, if not so raised, are waived.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 123-131, 170; Dec. Dig. § 80.\*]

Department 1. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Mandamus by the State, on the relation of David Abrashin, against Ed. L. Terry and others. From a judgment for relator, respondents appeal. Affirmed.

Chas. E. Patterson, James M. Gephart, Jas. E. Bradford, and Wm. B. Allison, all of Seattle, for appellants. Wm. E. Froude, Higgins & Hughes, and Hyman Zettler, all of Seattle, for respondent.

MOUNT, J. This appeal is from an order of the superior court for King county requiring Ed. L. Terry, as treasurer of the city of Seattle, to execute and deliver to the plaintiff a deed for lot 8, block 7, Latona First addition to the city of Seattle.

There is no dispute upon the facts, which are as follows: On January 21, 1910, the

city treasurer of Seattle duly sold to M. Abrashin the lot in question to satisfy unpaid delinquent assessments against said lot duly levied in an eminent domain proceeding by the city of Seattle. On said date the city treasurer issued to M. Abrashin a certificate of purchase for this lot. All the proceedings leading up to the issuance of that certificate were regular and in compliance with law. On November 23, 1910, M. Abrashin sold and assigned the certificate of purchase to David Abrashin, and he is now the owner and holder thereof. On March 2, 1912, and for three consecutive weeks thereafter, the relator herein published notice that he was the holder of the above-mentioned certificate; that unless redemption was made within 60 days from the date of the first publication relator would demand a deed for said property from the city treasurer of Seattle. This notice was directed to the owner of said property and was regularly published in a weekly newspaper published in the city of Seattle. The owner of the property, Mr. George C. McKee, was a nonresident of the state of Washington. He resided in Chicago, state of Illinois. The relator paid all taxes and special assessments on said property and all interest, penalties, and charges thereon levied prior to and subsequent to the said sale, and on May 11, 1912, after having published the notice above referred to, he filed the same with the city treasurer, together with proof of publication thereof and an affidavit showing that service of said notice had been made by publication, that all taxes and assessments on said property had been paid, and that he had demanded of the treasurer a deed for the property above described. No redemption was made prior to the date of the first publication of the notice nor for 60 days thereafter. On May 11, 1912, after the demand had been made as aforesaid, after the treasurer had ascertained that all proceedings relating thereto were regular, and after he had prepared a deed, but prior to signing the same, the defendant George C. McKee tendered to the city treasurer the sum of \$245.43, being the total amount due for the redemption of said certificate of purchase, and attempted to redeem the property from the sale. The treasurer thereupon issued a purported certificate of redemption for said property. This action was then brought to require the city treasurer to deliver to the relator a deed for the property.

[1] Appellants present two questions: First, where property has been sold by a city treasurer for delinquent local assessments, can a redemption be made by the owner after two years from the date of the sale and after the holder of the certificate of purchase has given 60 days' notice by publication of his intention to apply for a deed and has fully complied with the law and demanded a deed; and, second, can the relator, being a mar-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ried man, maintain this action without joining his wife as relator?

Upon the first question the statute provides as follows: "Every piece of property sold for an assessment shall be subject to redemption by the former owner, or his grantee, mortgagee, heir or other representative at any time within two years from the date of the sale upon payment to the treasurer for the purchaser of the amount for which the same was sold, with interest at the rate of fifteen per cent. per annum, together with all taxes and special assessments, interest, penalties and charges thereon paid by the purchaser of such piece of property since such sale, with like interest thereon. Unless written notice of taxes and assessments subsequently paid, and the amount thereof shall be deposited with the treasurer, redemption may be made without including the same. On any such redemption being made, the treasurer shall give to the redemptioner a certificate of redemption therefor, and pay over the amount received from such redemption to the purchaser or his assigns. Should no redemption be made within said period of two years, the treasurer shall, on demand of the purchaser or his assigns, and the surrender to him of the certificate of purchase, execute to such purchaser or his assigns, a deed for the piece of property therein described: Provided, that no such deed shall be executed until the holder of such certificate of purchase shall have notified the owner of such piece of property that he holds such certificate, and that he will demand a deed therefor; and if, notwithstanding such notice, no redemption is made within sixty days from the date of the service or first publication of such notice, said holder shall be entitled to said deed. \* \* \*" Section 7808, Rem. & Bal. Code.

It is argued by the appellants, in substance, that the purchaser at the tax sale acquires a mere lien upon the property, and that he does not acquire title to the property until the delivery of the deed, and that if redemption is made at any time before the deed is executed and delivered such redemption is within time. The statute, however, is clear to the effect that the redemption must be made within two years, and, if no redemption shall be made within said period of two years, the treasurer shall, on demand of the purchaser, execute to said purchaser or his assigns a deed for the property therein described; provided, that no such deed shall be executed until the holder of such certificate of purchase shall have notified the owner of such piece of property that he holds such certificate and that he will demand a deed therefor, and if, notwithstanding such notice, no redemption is made within 60 days from the date of the first publication of such notice, said holder shall be entitled to said deed. In other words, the owner's right to redeem is cut off

when 2 years have expired and when 60 days' notice has been given and a demand for a deed has been made and the certificate has been surrendered and when the taxes and assessments have been paid. In this case the 2-year period had expired before the notice was published. The owner thereby had 60 days additional time within which to make redemption. After this notice was given to the owner, and after no redemption had been made within the time provided therefor, and after the treasurer was satisfied that all the requirements of the law had been complied with, it was his duty to execute and deliver the deed. In short, in this case it was shown conclusively, and is not disputed, that the 2 years' limitation had expired and that the 60 days' limitation had expired and that the deed had been issued but had not been signed and delivered when the attempted redemption was made. The holder of the certificate, therefore, had done all that he was required to do, and he thereby became the owner of the title and was entitled to his deed. We see no escape from this conclusion. The law as stated by Jaggard on the Law of Taxation, pp. 488-490, is as follows: "The state has power to sell land for taxes absolutely. Whatever privilege of redeeming it may grant is of grace; it is not a right the delinquent taxpayer is entitled to demand. Accordingly, redemption must, in all essential respects, conform to the statute which permits it. \* \* \* The time for redemption is fixed by statute. 'The person having a right to redeem must avail himself of the right during the time fixed by statute.' The time as so fixed is absolute. It does not depend on the discretion of the law courts within the limits so determined or the conduct of any public official, or a misrecital in a deed."

In Black on Tax Titles (2d Ed.) § 350, the rule is stated as follows: "At the same time it is very necessary to remember that the right of redemption from tax sales is a purely statutory right. It is an act of grace, a privilege, not founded upon any principles of inherent justice or of the common law. Hence the construction of the statutes can never be strained so far as to excuse an actual failure of compliance with the positive directions of the law. Whatever steps the law marks out for the party seeking to redeem, these he must scrupulously follow. \* \* \*"

To the same effect, see *Pearson v. Robinson*, 44 Iowa, 413; *Stewart v. White*, 19 Idaho, 60, 112 Pac. 677; *Pollen v. Milling Co.*, 40 Colo. 89, 90 Pac. 639.

It is apparent, therefore, that the attempted redemption came too late, and it was the duty of the city treasurer to sign and deliver the deed which had been issued.

[2] It is next argued that the relator is not authorized to maintain this action because he was a married man and his wife did not join in this action. This point was not



raised until the evidence was closed and upon the final argument at the trial below. The point, not having been raised in time to be met by the respondent, must be taken as waived. The point was neither raised by demurrer nor by answer. It was therefore not raised in time. Sections 261-263, Rem. & Bal. Code.

The judgment of the trial court was right and is therefore affirmed.

CHADWICK, GOSE, and PARKER, JJ.,  
concur.

(74 Wash. 323)

**WILKIE v. BAILEY et al.**

(Supreme Court of Washington. July 8, 1913.)  
**EXECUTORS AND ADMINISTRATORS (§ 20\*)—APPOINTMENT—JURISDICTION.**

Where a petition by a niece asking for the appointment of a nephew of deceased as administrator recited that deceased left her surviving certain nephews and nieces, and contained all the jurisdictional facts necessary to be set forth under the statute, and the nephew failed to qualify, the jurisdiction obtained by the court under the petition authorized the appointment of any person whom the court deemed suitable, without any formal application by the person so appointed or formal renunciation by the nephew.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 83-105; Dec. Dig. § 20.\*]

Department 2. Appeal from Superior Court, King County; A. W. Frater, Judge.

Petition by George A. Wilkie for appointment as administrator of the estate of Clarissa Adams Hamblet, deceased, opposed by Clarissa A. Bailey, Clarence L. Gere, as administrator of the estate, and another. Petition denied, and petitioner appeals. Affirmed.

E. T. Trimble, of Seattle, for appellant.

MORRIS, J. Clarissa A. Hamblet, a resident of King county, died intestate December 4, 1911, leaving an estate consisting of both real and personal property. On December 15th Clarissa A. Bailey, a niece of deceased, filed a petition asking for the appointment of Alonzo Hamblet, a nephew of deceased, as administrator, the petition touching the fact of heirship reciting that the deceased left her surviving certain nephews and nieces. Citation was issued, and on January 4, 1912, the petition came on for hearing, when the court appointed Alonzo Hamblet as such administrator and fixed the amount of his bond. Alonzo Hamblet failed to qualify as such administrator, and on January 28, 1912, this fact being brought to the attention of the lower court, Clarence L. Gere was appointed administrator of this estate, and he thereupon qualified and proceeded to administer upon the estate. On October 25, 1912, George A. Wilkie filed his petition requesting his appointment as ad-

ministrator of the estate. Citations issued and were served upon the administrator and others, and upon the hearing the lower court denied the application of Wilkie, and he appeals.

The claim of error is that the lower court in all proceedings prior to the filing of the petition by appellant was acting without jurisdiction. The application of Clarissa A. Bailey was sufficient. It contains all the jurisdictional facts referred to in *McLean v. Roller*, 33 Wash. 166, 73 Pac. 1123, as necessary to be set forth under our statute. Appellant seems to interpret the statute as requiring the person to whom letters of administration were issued to make the application. We find no such requirement. When Alonzo Hamblet failed to qualify, the jurisdiction obtained by the court under the petition of Clarissa A. Bailey was sufficient to authorize the appointment of any person whom the court deemed competent and suitable, without any formal application by the person so appointed or formal renunciation by the person failing to qualify as contended by appellant. This being the only question in the case submitted by the appeal, nothing more need be said.

The judgment is affirmed.

ELLIS, FULLERTON, and MAIN, JJ.,  
concur.

(74 Wash. 241)

**MAGGS et al. v. CITY OF SEATTLE et al.**  
(Supreme Court of Washington. July 14, 1913.)

1. **DEDICATION (§ 44\*)—REQUISITES—PAROL DEDICATION.**

Evidence held not sufficient to show that the north 20 feet of a lot had become a public highway by parol dedication.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 85-87; Dec. Dig. § 44.\*]

2. **MUNICIPAL CORPORATIONS (§ 654\*)—EXISTENCE OF STREET—EVIDENCE—PRESCRIPTION.**

Evidence held sufficient to sustain a finding that a 20-foot strip of a certain lot was not a public highway by prescription or otherwise.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1428; Dec. Dig. § 654.\*]

3. **MUNICIPAL CORPORATIONS (§ 321\*)—IMPROVEMENT OF STREETS—POWER OF COURT.**

In view of Rem. & Bal. Code, § 7057, enumerating the powers of cities of the first class, including the power to improve streets, the method of improvement, where the structure is not unlawful, is a political question with which the courts may not interfere.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 837-840; Dec. Dig. § 321.\*]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by John Marshall Maggs and others against the City of Seattle and others. Judgment for plaintiffs, and defendants appeal. Modified and remanded.



Jas. E. Bradford and Wm. B. Allison, both of Seattle, for appellants. John E. Ryan and Grover E. Desmond, both of Seattle, for respondents.

GOSE, J. The principal question presented by this appeal is whether the north 20 feet of lot 5, block 7, supplemental plat of Union Lake addition to the city of Seattle, is a public highway.

The city asserts that it is a part of a public highway established: (a) By the board of county commissioners in 1879, (b) by parol dedication, (c) by prescription. The city makes little contention as to the first proposition, and it finds no substantial support in the record.

[1] The second contention is equally wanting in merit. It is based on alleged statements made by the owner (now deceased) some 20 years before the trial. One witness said that the owner stated in his presence that "it was an old county road;" another witness, that he said, "I have taken 20 feet here for a street," indicating the strip in controversy. The third witness said that the statement was that, "he laid out 20 feet for a driveway." The plat shows it to be a part of a lot, and the owner expressed no intention to dedicate to any member of his family.

Union Lake addition was platted in 1883. The supplemental plat was filed in 1888. In 1879, a road was laid out extending from the city proper along the easterly slope of Queen Anne hill to what was then Fremont. In 1889 or 1890 Westlake avenue was opened for travel. In 1890 Dexter avenue was graded. Thereafter these streets were the principal thoroughfares between Seattle and Fremont, and other points to the north. Block 7, in which this lot is situated, is on the easterly side of Queen Anne hill, and is bounded on the east by Dexter avenue, a street running north and south, and on the south by Garfield street, which runs east and west. Block 8, which lies immediately west of this block, touches Seventh avenue north on the west. There is an alley between blocks 7 and 8, extending from Garfield street on the south to an unplatted tract on the north.

[2] The court found that the strip of land in controversy was not a public highway by prescription or otherwise. The view of the trial court may best be had by a reference to his opinion. He said: "The satisfactory testimony to my mind shows that this strip of 20 feet was not within the limits of the old road as originally laid out. \* \* \* It is well known to everybody who has lived in Seattle a long time that the land which was in the city unplatted, and even a great deal of it after it was platted, was crossed by people living in the vicinity where it was convenient for them to go, and by license of the owner. A great deal of land has been

platted after these old roads were used, and if the city were to undertake to claim and establish as a highway all of these trails and roads that had been used, the whole plat of the city of Seattle would be out of harmony. It would be a confiscation of private property without any advantage, because the use subserved originally by those old roads has now been supplied by the streets and alleys that have been laid out over the platted property. \* \* \* It would be impossible for the court, under the testimony, to locate exactly where this road did run with reference to this lot 5, if it ran over lot 5 at all. I am inclined to think it did touch lot 5, or a part of it, but where, it would be impossible to say under this evidence, and in my opinion, this road is not an old county road, but one of those licensed roads that the people around there followed without any objection. \* \* \*

This view is abundantly supported by the evidence. The record shows numerous roads and temporarily traveled ways running promiscuously through blocks 7 and 8. Some of the city's witnesses said that there was a "plain wagon road" along the north 20 feet of lot 5. Others said it was "a well-defined road." Some of the defendant's witnesses said, "I would call it a trail." Others referred to it as a "dog trail." The foreman in charge of the work for the contractors who regarded Dexter avenue testified that at that time (1911), "there had been a road there apparently," "just room for a wagon," that it had not been traveled to any extent, and that "it looked like a trail." The writer is convinced from a reading of the entire record that this road, wherever it ran, was little used after the opening of Westlake avenue in 1889 or 1890, and the opening of Dexter avenue in 1890. Its use was confined to a few people living in blocks 7 and 8. It was a mere convenience road, used by the sufferance of the owners of the legal title. Nor can we say that there is a preponderance of evidence to the effect that it ran along the north 20 feet of lot 5 at any time. As the trial court observed, it may have touched the northeast corner of lot 5. It is needless, however, to pursue the question further. The evidence is in hopeless conflict as to where the road ran in lot 5, if it touched it at all. We are convinced that no right was gained by prescription. The observation of the trial court that these trails and convenience ways were used by the people of Seattle by the sufferance of the owners on platted and unplatted tracts, while unoccupied, is in harmony with the practice in other communities in the state. Many such roads may be seen on unoccupied platted tracts in other towns, and yet it would not occur to any one that these trails or ways of convenience were intended as streets or alleys. In 1879, when the Fremont road was laid out, Queen Anne hill was a wilder-



ness, and Fremont was a logging camp. The hill was logged off between that date and 1890. During that period the people in that vicinity followed the lines of least resistance when traveling. After 1890 practically all the travel in that locality was upon Dexter and Westlake avenues.

[8] Before the commencement of the action the city had provided a crossing and rounded the curb in front of the property in controversy. The decree directs that these be removed. The method of improving streets where the structure is not unlawful is a political question, with which the courts may not interfere. Rem. & Bal. § 7507; Spokane Street Railway Co. v. Spokane, 5 Wash. 634, 32 Pac. 456.

The decree will be modified to this extent. The cause will be remanded with instructions to eliminate from the decree the following: "The city of Seattle and its board of public works are hereby ordered and directed to remove the curbs placed in the gutter in front of the north 20 feet of the above described property, and to place therein a continuous gutter within 60 days from the date hereof." Neither party shall recover costs in this court.

CHADWICK, MOUNT, and PARKER, JJ.,  
concur.

(36 Nev. 76)

**PROSKEY v. COLONIAL HOTEL CO.**  
(No. 2,007.)

(Supreme Court of Nevada. June 16, 1913.)

**1. LANDLORD AND TENANT (§ 115\*)—TENANCY FROM MONTH TO MONTH—CREATION.**

A tenancy from month to month may be created by a special agreement to that effect, or it may be implied from the manner in which the rent is paid, as a lease for an indefinite term, with reservation of a monthly rental.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 391-394; Dec. Dig. § 115.\*]

**2. LANDLORD AND TENANT (§ 115\*)—TENANCY FROM MONTH TO MONTH.**

A lease for a definite term less than a year, the limits of which are specifically stated in the agreement, does not constitute a tenancy from month to month, though the rent is payable monthly.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 391-394; Dec. Dig. § 115.\*]

**3. LANDLORD AND TENANT (§ 213\*)—LETTING—BREACH OF CONTRACT—FAILURE OF CONSIDERATION.**

Plaintiff having occupied an apartment in defendant's hotel, and having numerous effects that he desired to have kept safely, contracted for the exclusive occupancy of the apartment during an expected absence, agreeing to pay \$40 a month for May, June, July, August, and September and \$70 a month for October, November, and December. Plaintiff was absent from April to November, when he returned. On ascertaining that defendant without plaintiff's knowledge or consent had rented the apartment during his absence, plaintiff sued to recover the rent paid, alleging that he had been deprived of

the security of his personal effects for which he had contracted, and that the consideration for the agreement had wholly failed. There was no allegation that his personal effects had been interfered with or that any one had seen his papers, nor was there any allegation of actual damages. Held, that such facts did not show a total failure of consideration, and hence the complaint did not justify a recovery of the rent paid.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 846-848, 850, 852, 854, 856, 857-860; Dec. Dig. § 213.\*]

Appeal from District Court, Washoe County; John S. Orr, Judge.

Action by William S. Proskey against the Colonial Hotel Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Dodge & Barry, of Reno, for appellant.  
Parker & Frame, of Reno, for respondent.

MCCARRAN, J. In this action the appellant, W. S. Proskey, appeals from the judgment of the Second judicial district court sustaining the demurrer to the complaint of the appellant, filed in said court against the Colonial Hotel Company, a corporation. The principal part of his complaint is as follows:

"(3) That in the month of April, 1910, plaintiff was occupying an apartment in said hotel or apartment house of the said defendant, and at said time plaintiff desired to leave the state of Nevada to be absent for some months; that plaintiff at that time had numerous personal effects and valuable papers in his possession and in the apartment which he was then occupying in said hotel or apartment house of defendant; that, for the purpose of procuring a secure and safe place for said personal effects and said valuable papers, the plaintiff at said time made an agreement with said Colonial Hotel Company by, through, and with its duly authorized agent and manager, George T. Crosby, by the terms of which said agreement it was agreed between plaintiff and defendant that the plaintiff should have the sole and exclusive occupancy of said apartment for the safe-keeping of his said personal effects and said papers until the return of the plaintiff to the state of Nevada in the month of November or December, 1910; that, in consideration of the plaintiff so having the exclusive use, occupancy, and control of said apartment for and during the time and for the purpose aforesaid, the plaintiff paid to said defendant the sum of \$40 per month for the months of May, commencing May 6th, June, July, August, and September, 1910, and at the rate of \$70 per month for the months of October and November down to the 6th day of December, 1910, the same being the price fixed upon and agreed to by said defendant and plaintiff; that said price so fixed and paid was the regular price charged by defendant for said rooms during said months if actually occupied; that defendant had offered to keep said personal effects and pa-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



pers of plaintiff in the basement of said hotel, free of charge, but plaintiff desired to have his said personal effects and papers kept secure and safe from inspection beyond any question, and was willing to pay the price hereinabove set forth for the purpose of securing such security and safety for his said personal effects and papers, and that such security and safety of his said personal effects and papers was the sole inducement and consideration for making said agreement and paying said price, and that plaintiff never would have made said agreement or paid said price, except for the belief that he would secure such security and safety for his said personal effects and papers.

"(4) That plaintiff was absent from the city of Reno and said hotel or apartment house from the month of April, 1910, until the first part of November, 1910; that, during the said absence of plaintiff, plaintiff did not have the sole and exclusive occupancy of said apartment in said hotel or apartment house, but that during the absence of the plaintiff the said defendant, without the knowledge or consent of plaintiff, rented said apartment to divers and sundry persons and permitted such persons to use and occupy the same, and thus have access to plaintiff's said papers and effects if such persons so desired; that by reason of the defendant leasing said apartment during the absence of plaintiff and permitting said divers and sundry persons to occupy the same, as aforesaid, plaintiff did not have the exclusive control, use, or occupancy of said apartment, and was thus deprived of the safety and security of his said personal effects and papers, which he desired, contracted, and paid for, and by reason thereof the consideration for the said agreement between plaintiff and defendant as to plaintiff entirely failed, and the object and purpose for which said agreement was made by the plaintiff was thus destroyed and rendered of no effect, and plaintiff was thus deprived of any consideration whatever for the money so paid to defendant, as aforesaid."

To this complaint a demurrer was interposed principally on the grounds that the complaint did not state facts sufficient to constitute a cause of action; and the demurrer more specifically is as follows:

"That said amended complaint does not state facts sufficient to constitute a total failure of the consideration, and that the facts therein stated, if true, would only constitute a breach of the covenant of quiet enjoyment, and consequently in that regard only a breach of the rental contract, and not a total failure thereof. That the same does not state facts sufficient to constitute a substantial breach of the contract of rental, but on the contrary thereof shows that the same was substantially performed and that the

alleged breach of the contract attempted to be pleaded, as set forth in the amended complaint, would only constitute a technical and unsubstantial violation thereof. That the amended complaint does not state facts sufficient to show and does not allege that any damage in fact resulted to the plaintiff by reason of the alleged violation by the defendant of the rental contract, whereby the plaintiff would not have the exclusive possession of the apartments for all of the time mentioned in the said amended complaint, and that at most said allegation would only amount to a trespass upon the defendant's right of possession, for which his only remedy would be for damages, if any had been sustained."

From the allegations of the complaint it will be observed that no claim is made by the plaintiff that his personal effects and papers were not restored to him in their original condition and position, nor is it directly averred that any person did in fact view or observe, or in anywise disturb or molest, his papers or effects, nor is it alleged that any person or persons gained any knowledge or information from the personal effects or papers.

As set forth in the complaint there was a rental agreement of \$40 per month for certain months and a rental agreement of \$70 per month for certain other months, to wit, October, November, December, etc. As appears from the face of the complaint the plaintiff returned during the first part of November and occupied the apartment, paying rental therefor as before agreed until the first part of December, and it must be inferred from the allegations of the complaint that the plaintiff did not have knowledge that any person had been permitted to enter the apartment during his absence or, having knowledge, made no complaint. In any event, the rental agreement of \$40 a month for certain months and \$70 a month for certain other months was duly paid by the plaintiff, and he seeks to recover by his complaint the return of the total amount paid, amounting in all to \$340.

[1] To constitute a tenancy from month to month a special agreement to that effect may be made, or the tenancy may be implied from the manner in which the rental is paid. A lease for an indefinite term, with monthly rental reserved, creates a tenancy from month to month.

[2] However general this principle of law may be, it is unquestionably true that a lease for a definite term less than a year, the limits of which are specifically stated in the agreement, would not come under this rule, even though the rental was paid monthly. It is immaterial in this case as to whether the agreement alleged in the complaint created a tenancy from month to month, as contended by counsel for respondent, or created a tenancy for a definite period or term of



months, with monthly rental reserved, as contended by appellant.

[3] The appellant bases his right to recover upon the theory of a total failure of consideration, and he cites authorities supporting his contention. A careful reading of the authorities cited by appellant, however, discloses that in those cases there was an entire or total absence of consideration. The most that can be said in the case under consideration is that there was but a partial breach of an alleged contract. Appellant's personal effects and belongings were safely kept in the apartment during all of the time of his absence as well as after his return. The complaint fails to state either inferentially or otherwise that the papers or personal effects were actually molested, viewed, or observed by any person, or that any information contained in the papers or personal effects was ever gained or obtained by any one. It is manifest that the consideration did not fail in this case between the time the plaintiff is alleged to have returned, to wit, the first part of November, and the 6th day of December, the date on which it is alleged that he discontinued his tenancy and between which dates he was personally present and occupying the apartment. According to the complaint the alleged special or extraordinary agreement was only to continue during the absence of the appellant, but in his complaint appellant prays for judgment not only for the return of the rent paid for the time during which he was absent but also for the return of the rent paid for the time after his return. The amount of rental covering the time of his absence was less than \$300, and if he had sued for that alone he could not have brought his action in the district court. Whether a prayer for the recovery of an additional month's rent not within the alleged special contract ought to be considered as stating a cause of action within the jurisdiction of the district court so far as the amount in controversy is concerned, is a doubtful proposition. Conceding, however, for the purposes of this case, that it may be done, even then we are confronted with an additional allegation which clearly shows that there was not a total failure of consideration; there being no averment of interferences with appellant's possessions after his return. Appellant is not entitled to recover the rent paid under the allegations of the complaint, because the facts alleged do not show an entire failure of consideration, but at most only a partial breach of the contract, for which no actual damage is alleged.

As was well said in the case of *Bishop v. Stewart*, 13 Nev. 41, no principle is better settled than that a party cannot rescind a contract and at the same time retain possession of the consideration, in whole or in part, which he has received under it; he must rescind in toto or not at all. It has been held in a degree almost to a uniformity that

courts will refuse to decree a right of rescission in favor of a party to a contract, because such contract was only partially executed, or because of only a partial failure of consideration. In order for a litigant to prevail under such a state of affairs the parties to the agreement or contract must be replaced in their previous condition.

Even should this special agreement be construed as constituting a tenancy for a definite period, the alleged fact that divers and sundry persons were permitted to have access to appellant's leased apartment would not constitute a total absence of consideration, in view of the fact that during all of that time appellant's personal effects were being safely kept, and in view of the further fact that appellant had personal occupancy of the apartment during a portion of the time for which he seeks to recover the rental paid. In the allegations of the complaint there is no hint of actual damages, much less a positive averment of such.

The respondent in this action moved to dismiss the appeal upon the ground that appellant failed to cause the sureties on the appeal bond to justify when an exception was filed to the sufficiency thereof; but, as the case must be decided in favor of the respondent, it is not necessary for us to go into that matter at this time.

It follows that the order of the lower court sustaining the demurrer to the complaint should be affirmed. It is so ordered.

NORCROSS, J., concurs.

TALBOT, C. J. I concur in the order for judgment as written by Justice McCARRAN. Although it has been held that where a lease is taken on property for an indefinite period, with the rent payable monthly, it will be construed as a lease from month to month, I think, under the facts alleged in the complaint, the agreement for the rental of the room for the keeping of plaintiff's papers and things, without other persons to have access to the room, for some months until plaintiff returned was a lease for the time he was absent and one which the parties had a right to make, and consequently it was legal and binding, and as much so as if the lease had been made for four or five months or for a definitely specified period of five months, with the rent payable monthly. *Harty v. Harris*, 120 N. C. 408, 27 S. E. 90. If the hotel company had attempted to cancel the lease one or two months after the plaintiff had gone and before he returned, and had put his things out, it ought to be liable for any damages resulting. A lease for some months until the tenant returns implies that it is to run until he returns at some time not less than a few months and less than a year. No good reason appears why persons going on an extended trip should not be allowed to rent apartments for the stor-



age and keeping of their property during their absence; and, if the landlord agrees that the lease shall run for some months until the tenant returns, the law ought to require the landlord to keep his agreement during that time.

If, as alleged, the plaintiff leased the room and paid the rent, and the defendant breached the lease by allowing persons to occupy the room during the plaintiff's absence, it becomes necessary to consider what damages, if any, the plaintiff sustained, for he cannot recover without alleging and showing the injury suffered or the amount he has been damaged. For counsel to argue that the allowing of other persons to occupy the room and have access to plaintiff's papers contrary to the agreement might have injured plaintiff many thousands of dollars if the occupants of the room, by obtaining information from the papers, prevented the consummation of important mining or other deals by the plaintiff is not sufficient to show that there was any actual damage to the plaintiff in this regard for which he can recover from the defendant. Aside from the money paid for rent, there is no indication that the plaintiff sustained any damage. If, because the agreement was breached by the defendant, the plaintiff, as claimed, is entitled to recover all the rent he paid for the exclusive use of the room for the safe and undisturbed keeping of his things during his absence, regardless of whether defendant could offset a reasonable sum for the keeping of the property during plaintiff's absence, the amount, as shown by the allegations, is only \$270, and consequently the complaint fails to state a cause of action within the original jurisdiction of the district court, and under the facts alleged the case is one which could be brought only in the justice's court, and of which the district court would have jurisdiction only on appeal. Const. art. 6, § 6; Rev. Laws, §§ 321, 4840; Moore v. Orr, 30 Nev. 461, 98 Pac. 398.

The complaint does not allege the particular month or months that the contract was breached; and whether it be treated as a lease from month to month with one or more months breached, or be treated as a lease for the period the plaintiff was absent, with monthly payments, and as being breached for the entire time he was away, the jurisdiction would fall in the justice's court whether plaintiff is entitled to recover for the breach the rent he paid or only the rent less a reasonable amount for the keeping of his papers and property when other persons were allowed access to his room.

The allegation that plaintiff occupied the room for a month after he returned and paid \$70 for that month, being beyond the agreement for the keeping of his things during his absence which is alleged to have been breached, does not indicate any cause of action;

it falls as much to show any liability as would an allegation that the plaintiff had bought a horse from defendant and paid him \$100 for it, or had borrowed some amount or given a note and had repaid it.

(36 Nev. 94)

Ex parte DICKSON. (No. 2,069.)

(Supreme Court of Nevada. June 20, 1913.)

1. LARCENY (§ 23\*)—STATUTES—SELLING ANIMALS—DEGREES OF LARCENY—"GRAND LARCENY."

Crimes and Punishments Acts (Rev. Laws, § 6640) § 375, provides that every person who shall feloniously steal, take, and carry, lead, drive, or entice away any horse or other animal specified, not his own property, but belonging to some other person, and every person who shall mark or brand, or cause to be marked or branded, or shall alter or deface, or cause to be altered or defaced, any mark or brand on any horse, or other specified animal not his own property, but belonging to another, with intent thereby to steal the same, etc., shall be deemed guilty of grand larceny, and on conviction shall be punished by imprisonment for not less than one year or more than 14 years. *Held*, that the theft of animals specified in such section is grand larceny without reference to the value thereof, and that the offense of grand larceny under such section does not include petit larceny.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 50-52; Dec. Dig. § 23.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3149-3150.]

2. CRIMINAL LAW (§ 273\*)—PLEA OF GUILTY—EFFECT.

While a plea of guilty is a record admission of whatever is well charged in the indictment, yet, if the indictment is insufficient, either from the standpoint of failing to confer jurisdiction, or to allege facts sufficient to constitute a public offense, the plea of guilty confesses nothing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 631, 632, 634; Dec. Dig. § 273.\*]

3. INDICTMENT AND INFORMATION (§ 196\*)—JURISDICTIONAL DEFECTS—PLEA OF GUILTY.

A plea of guilty does not cure jurisdictional defects in an indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 628-635; Dec. Dig. § 196.\*]

4. CRIMINAL LAW (§ 980\*)—PLEA OF GUILTY—NONINCLUDED CRIME.

Petitioner having been indicted for grand larceny under Crimes and Punishments Act (Rev. Laws, § 6640) § 375, prohibiting larceny of animals, which does not include petit larceny, he pleaded guilty to petit larceny, and was sentenced to confinement under the plea. *Held*, that since under the indictment he could only be convicted of grand larceny or acquitted, the judgment was invalid.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2493-2496; Dec. Dig. § 980.\*]

5. HABEAS CORPUS (§ 27\*)—JURISDICTIONAL OBJECTIONS—RIGHT TO RAISE.

Where petitioner, having pleaded guilty to petit larceny, under an indictment charging grand larceny found under a statute which did not embrace petit larceny as an included offense, was sentenced to imprisonment, the fact that he did not except to the court's jurisdiction or raise, by demurrer or otherwise, defects in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the indictment, and that he voluntarily pleaded guilty to petit larceny, did not preclude him from interposing an objection to the court's jurisdiction to sentence him for that offense by habeas corpus at any time during his imprisonment.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 22; Dec. Dig. § 27.\*]

Application of Alexander Dickson for a writ of habeas corpus. Writ granted, and petitioner discharged.

W. H. Dial and R. Gilray, both of Winnemucca, for petitioner. George B. Thatcher, Atty. Gen., E. T. Patrick, Deputy Atty. Gen., and J. A. Callahan, Dist. Atty., of Winnemucca, for the State.

MCCARRAN, J. This is an original proceeding in habeas corpus. The writ in this case was heretofore issued upon a duly verified petition alleging that petitioner was unlawfully confined and restrained of his liberty by the sheriff of Humboldt county. The petitioner, Alexander Dickson, as appears from his petition, was indicted by the grand jury of Humboldt county, and in said indictment was charged with grand larceny. The indictment is as follows: "The defendant, Alexander Dickson, above is accused by the grand jury of the county of Humboldt, state of Nevada, of a felony committed as follows, to wit: That said defendant, Alexander Dickson, on the 6th day of February, A. D. 1913, or thereabouts, and before the finding of this indictment, at the said county of Humboldt, state of Nevada, did then and there willfully, unlawfully, and feloniously steal, take, and carry, lead, drive, and entice away one hog, the personal property of one S. A. Dedman. All of which is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nevada." Upon being arraigned under the foregoing indictment, the defendant at first entered a plea of not guilty. Later, as appears from the record, the defendant with his attorney appeared in court and was permitted to withdraw his plea of not guilty and enter a plea of guilty of petit larceny. At a later date, to wit, March 14, 1913, the following proceedings took place, as appears from the record: "This being the time heretofore designated by the court for pronouncing judgment and sentence upon defendant herein, the said defendant, Alexander Dickson, being present in court and represented by his counsel W. S. Bonnifield, Jr., Esq., who was also present, the said defendant was informed by the court of the nature of the indictment against him, charging him with having committed the crime of grand larceny, in said county and state on or about the 6th day of February, A. D. 1913, also of the nature of his plea of not guilty thereto, of the fact that on the 13th day of March, A. D. 1913, in open court, he was by permission of the court permitted to with-

draw his said plea of not guilty, which plea he did then and there withdraw; of the fact that he was therefore at said last-mentioned time and place permitted to plead guilty of petit larceny, an offense necessarily included within the offense charged in the indictment, which said plea of guilty he did then and there enter; of the nature of said plea of guilty, and to the effect thereof—whereupon the said defendant was asked whether he had any legal cause to show why judgment should not now be pronounced by the court. And no legal cause appearing to the court why judgment should not be pronounced at this time, it is therefore ordered and adjudged, and it is the judgment of this court, that you are guilty of the offense of petit larceny, an offense the commission of which is necessarily included within the offense charged in the indictment, to wit, grand larceny, and it is the sentence of the law pronounced upon you by the court that for that offense, to wit, petit larceny, you be confined in the county jail of Humboldt county, Nev., at Winnemucca, Nev., for the term of five months. The said defendant, Alexander Dickson, was thereupon remanded to the custody of the sheriff of Humboldt county, state of Nevada, for the serving of said sentence." The petitioner, after serving the greater part of the time for which he was sentenced, comes to this court on petition for a writ of habeas corpus to restore him to his liberty.

Counsel for petitioner contend that the judgment and commitment in this case are void for the reason that the court was without jurisdiction to receive the plea of guilty of petit larceny, under the indictment, or to pass judgment upon the petitioner, by reason of such plea. In general, they contend that the crime of petit larceny is not included within the crime of grand larceny, as set forth in this indictment.

At common law the only subjects of larceny were tangible, movable chattels, something which could be taken into possession and carried away, and which had some, although trifling, intrinsic value.

Section 373 of the Crimes and Punishments Acts of Nevada, is as follows: "Every person who shall feloniously steal, take, and carry away, lead or drive away, the personal goods or property of another, of the value of fifty dollars or more, shall be deemed guilty of grand larceny, and upon conviction thereof, shall be punished by imprisonment in the state prison for any term not less than one year nor more than fourteen years."

Section 374 of the same act is as follows: "Every person who shall steal, take, and carry, lead, or drive away, the personal goods or property of another, under the value of fifty dollars, shall be deemed guilty of petit larceny, and upon conviction thereof, shall be punished by imprisonment in the county jail

\*For other cases see same topic and section-NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



not more than six months, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment." Rev. Laws, §§ 6638, 6639.

The general distinction between grand and petit larceny depends upon the value of the goods stolen, and it was undoubtedly the intention of the Legislature to fix the degree of crime, and the punishment as well, upon the value of the property stolen, and therefore the felonious stealing or taking, or carrying away property of the value of \$50 or more is by this act designated "grand larceny," while petit larceny, punishable only by jail imprisonment, or a limited fine, is feloniously taking the property of another of the value of less than \$50.

But an aggravated form of larceny was declared, by the Legislature, punishable without reference to the value of the goods stolen; hence section 375 of the Crimes and Punishments Acts is as follows: "Every person who shall feloniously steal, take and carry, lead, drive or entice away any horse, mare, gelding, colt, cow, bull, steer, calf, mule, jack, jenny, or any one or more head of cattle or horses or any sheep, goat, hog, shoat or pig, not his own property but belonging to some other person; and every person who shall mark or brand, or cause to be marked or branded, or shall alter or deface, or cause to be altered or defaced, a mark or brand upon any horse, mare, gelding, colt, cow, bull, steer, calf, mule, jack, jenny, or any one or more head of cattle or horses, or any sheep, goat, hog, shoat or pig, not his own property but belonging to some other person, with intent thereby to steal the same or to prevent the identification thereof by the true owner or to defraud; and every person who, with intent to defraud, or to appropriate to his own use, shall willfully kill any animal running at large, not his own, whether branded, marked or not; and every person who shall sell or purchase, with intent to defraud, the hide or carcass of any animal the brand or mark on which has been cut out or obliterated, shall be deemed guilty of grand larceny, and upon conviction shall be punished by imprisonment in the state prison for any term not less than one year nor more than fourteen years." Rev. Laws, § 6640.

As will be observed, the asportation of any of the animals named in the last statute quoted constitutes grand larceny, without reference or regard to the value of the animal. The only difference between the crime of stealing an animal under section 375 and larceny at common law is that the statute abolishes the degree of the crime, and makes the stealing of any of these animals a felony, without regard to the amount of their value. By the statute quoted above, the crime of stealing, taking, carrying, leading, driving, or enticing away any of the animals mentioned therein is grand larceny and not divisible into degrees.

It is admitted in this case, by attorneys for the state, that the petitioner was indicted under section 375, and they contend that the crime of petit larceny is necessarily included within the statutory crime of grand larceny as set forth in that section. In fact counsel for the state in this case assumes two positions as against the perpetuation of the writ: First, that petit larceny is necessarily included within this statutory crime of grand larceny; and, second, that, the petitioner having pleaded guilty to the crime of petit larceny, he is estopped from questioning the jurisdiction of the court, or the validity of the indictment.

[1] As to the first contention it is our opinion that, this being a crime expressly created by statute, without regard to value, it is not divisible into degrees, and hence the lesser crime of petit larceny is not included. Under indictments for statutory larceny, such as the one under consideration, a conviction of petit larceny cannot be had, when under the statute no petit larceny could be committed under the circumstances charged.

Under the Revised Code of Alabama several articles and chattels are enumerated, the larceny of which is made a felony without reference to their value, and among which enumerated chattels is "part of an outstanding crop of corn." In the case of *Gregg v. State*, 55 Ala. 116, it appears that the indictment charged that the defendant "feloniously took and carried away 50 ears of corn, a part of an outstanding crop of corn, the property of," etc. The jury returned a verdict of guilty of petit larceny. The Supreme Court of Alabama in reviewing the case said: "The statute which created this offense defined its grade and declared the punishment therefor. There is no statute or principle of the common law which declares that it is a public offense to take or carry away growing or ungathered corn, under any circumstances other than those which, under the act of Feb. 20, 1875, make it a felony and punish it as such. It follows from this that while an outstanding crop of corn or cotton may be the subject of felonious larceny, it cannot be the subject of petit larceny." The final determination of the court in that case was that the stealing of any of the enumerated articles was made grand larceny per se no matter what may have been the value of the article stolen, and the defendant, having been charged in the indictment with statutory grand larceny, could not be found guilty of petit larceny.

In the case of *State v. Davidson*, 73 Mo. 428, the defendant, having been indicted for "larceny committed in a dwelling house," was found guilty of "petit larceny." The Supreme Court of Missouri in passing upon the case said: "But the judgment cannot be affirmed on the merits. On examination of the record, of which the verdict forms part,



we find that the defendant, though indicted for 'larceny committed in a dwelling house,' was found guilty, not as charged in the indictment, but merely guilty of 'petit larceny,' a totally distinct offense, one which the indictment does not charge. This case does not fall within the purview of section 14, p. 513, 1 Wagner's Statutes, whereby a party indicted for an offense 'consisting of different degrees' may be found 'not guilty of the offense charged in the indictment,' but 'guilty of any degree of such offense inferior to that charged in the indictment, or of any attempt,' etc., because there are no degrees of the offense of 'larceny committed in a dwelling house.' The party accused of such offense is either guilty as charged, or not at all, so far as concerns that particular charge. He is brought before the court to answer to a specific and statutory charge of 'larceny committed in a dwelling house,' and not for that offense committed otherwise or elsewhere. In short, petit larceny committed outside of the dwelling house is not an offense inferior in degree to larceny committed inside of a dwelling house."

By the provisions of our statute the taking of any of the animals enumerated, with intent to deprive the owner, constitutes grand larceny per se. The value of the animal cuts no figure; it is not divisible into degrees. Petit larceny is not included either necessarily or otherwise.

[2] The petitioner having raised no objection either to the sufficiency of the indictment or to the jurisdiction of the court, and having entered a plea of guilty of petit larceny, can he now question either? The effect of the plea of guilty, generally speaking, is a record admission of whatever is well charged in an indictment, but if the latter be insufficient, either from a standpoint of failing to confer jurisdiction or to set forth facts sufficient to constitute a public offense, the plea of guilty confesses nothing. Bishop's New Criminal Procedure, vol. 1, 795.

[3] In a case of this kind the indictment is the basis of the court's jurisdiction, to either pass judgment or impose punishment, and a plea of guilty does not cure the jurisdictional defects in an indictment. A plea of guilty amounts to nothing more than an acknowledgment of the facts charged in the indictment, but whether such facts constitute an offense at law is left open to be decided by the court. *Crow v. State*, 6 Tex. 334.

In the case of *State v. Levy et al.*, 119 Mo. 436, 24 S. W. 1026, the attorney for the people admitted that the indictment in the case was bad, but contended that the defendants, having pleaded guilty, waived any exceptions to the validity or invalidity of the judgment, and, having invited the sentence of the court, the judgment and all other proceedings were regular, and the defendants had no right to complain, or be heard to com-

plain, of the judgment rendered at their instance. The court, speaking through Sherwood, J. said: "The effect of such a plea only amounts to an admission by record of the truth of whatever is sufficiently alleged in the indictment, and no confession, however large and explicit will prevent a defendant from taking advantage of faults apparent of record. If no crime is charged in the indictment, then none is confessed by pleading guilty thereto."

In the case of *Fletcher et al. v. State*, 12 Ark. (7 Eng.) 169, it was the contention of the Attorney General that, inasmuch as the defendants pleaded guilty in the circuit court below, they thereby waived all defects in the indictment. The Supreme Court in passing upon the case said: "The law has been long settled otherwise. No confession, however large and explicit, can have any such effect. \* \* \* The defendants here but confessed themselves guilty in manner and form as charged against them in the indictment; and, if no offense against the law is charged, they have not confessed themselves guilty of any. But if the confession was still broader and embraced a crime, when the indictment fell short of it, and punishment followed, it would be the punishment of a crime not proceeded for by indictment."

[4] In the case under consideration the petitioner was permitted to plead guilty, and was adjudged guilty of a crime not included in the crime sought to be charged in the indictment. He was before the court on an indictment for statutory grand larceny, and could be adjudged guilty only of the crime of which he was accused. The crime of petit larceny, of which he was adjudged guilty, was a separate and distinct offense not included in the indictment, and hence the judgment imposed punishment for a crime not proceeded for by indictment.

This court, in the case of *Ex parte Webb*, 24 Nev. 242, 51 Pac. 1027, speaking through Mr. Justice Bonfield said: "There are three essential elements necessary to render convictions valid. These are, that the court must have jurisdiction over the subject-matter, the person of the defendant, and authority to render the particular judgment. If either of these elements is lacking, the judgment is fatally defective, and the prisoner held under such judgment may be released in habeas corpus."

[5] The indictment in this case charged the petitioner with the crime of grand larceny. He was indicted under section 375 of the Crimes and Punishment Act. Under that indictment he could be convicted of the crime of grand larceny or nothing. Had the petitioner gone to trial, and the facts disclosed by the prosecution failed to bear out the allegations of the indictment, the jury could not have found the petitioner guilty of petit larceny. No set of facts, no mitigating statements or conditions, could warrant the court



in passing judgment upon the petitioner for a crime not included within the crime for which he was indicted. His failure to except to the jurisdiction of the court or to raise, by demurrer or otherwise, defects in the indictment, and his voluntary act in pleading guilty of the crime of petit larceny does not, in our opinion, preclude the petitioner from raising these defects or interposing these objections at this time. The crime of petit larceny not being included in the statutory crime of grand larceny where, by statutory enactment, the taking of any one of certain enumerated animals constitutes grand larceny, the court had no power, and hence no jurisdiction, to accept the plea of the petitioner to petit larceny, and hence no power or jurisdiction to pass judgment or impose sentence upon the petitioner.

In releasing the petitioner from the commitment by reason of which he is now held it does not follow that he is released from the indictment which is still pending in the district court of Humboldt county, and in which indictment the petitioner is charged with the crime of grand larceny.

It therefore follows that the commitment under which, and by reason of which, petitioner is now detained is invalid and void, and petitioner is legally entitled to be discharged therefrom.

It is so ordered.

TALBOT, C. J., and NORCROSS, J., concur.

(36 Nev. 53)

BOYCE v. GOLDFIELD THIRD CHANCE MINING CO. (BAILEY et al., Interveners). (No. 1,947.)

(Supreme Court of Nevada. May 31, 1913.)

1. APPEAL AND ERROR (§ 801\*)—DISMISSAL—WANT OF PROSECUTION.

Where respondent moved to dismiss the appeal for want of prosecution, which was opposed by affidavits that the delay was due to an oral agreement between counsel that the case was to be taken up and disposed of at some time mutually agreeable to them, in the absence of evidence controverting the alleged excuse, the motion to dismiss the appeal would be denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3161-3164; Dec. Dig. § 801.\*]

2. JUDGMENT (§ 167\*) — VACATING DEFAULT JUDGMENT—CONDITIONS.

Plaintiff obtained a default judgment against defendant mining company on November 1, 1909, after intervener had obtained a judgment against defendant and had levied an execution under which sale was made to intervener's son, the redemption period for which expired January 31, 1910. A few days before that time plaintiff assigned his judgment to parties who notified intervener of their intention to redeem, and paid the amount and assessments necessary thereto. Held, on motion by intervener in behalf of himself and other stockholders to set aside the default judgment, that the court was justified in imposing, as a condi-

tion to further proceedings on the motion, that the property be redeemed in favor of the defendant company, as otherwise a vacation of the default judgment would be of no benefit to the stockholders and would vest the property absolutely in the son of the intervener.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 326, 330, 333, 334; Dec. Dig. § 167.\*]

3. TRIAL (§ 367\*)—TRIAL BY COURT—ARGUMENT OF COUNSEL.

When an indisputable fact appears upon a hearing in any case that makes necessary or proper the making of a certain order or the imposing of a certain condition, the court has the discretion to make the order or condition at once without waiting for counsel to conclude.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 879, 886; Dec. Dig. § 367.\*]

4. JUDGMENT (§ 141\*) — EQUITY — GROUNDS FOR RELIEF — FRAUD IN OBTAINING JUDGMENT.

A court of equity may set aside a default judgment against a mining company for fraud of its president in obtaining the judgment, since it would not allow him to take advantage of his position to gain a private benefit, and it might also decree his redemption from a prior execution sale as accruing to the corporation or its stockholders.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 141.\*]

Appeal from District Court, Esmeralda County; Theron Stevens, Judge.

Action by A. E. Boyce against the Goldfield Third Chance Mining Company, Jessie F. Bailey and others, interveners. From an order overruling a motion of the interveners to vacate and set aside the default judgment therein, they appeal. Affirmed.

James K. Redington, of Goldfield, for appellants. John F. Kunz, of Goldfield, and R. G. Withers, of Reno, for respondent.

NORCROSS, J. [1] This is an appeal from a default judgment entered on the 1st day of November, 1909, and from an order made on the 31st day of January, 1910, overruling motion of interveners to vacate and set aside the default and default judgment. Notice of appeal was filed March 30, 1910. The transcript was filed in this court January 2, 1911. Nothing further appears to have been done in the case until March 15, 1912, when counsel for respondent filed a motion to dismiss for want of prosecution; that the appeal was without merit and taken for delay merely. Affidavits were filed April 1st following upon the part of appellants to the effect that the delay was due to an oral agreement between counsel that the case was to be taken up and disposed of at some time mutually agreeable to respective counsel. Together with the affidavits, the brief on the part of appellants was filed. Conforming to the general practice in this court, the motion to dismiss was heard with the argument upon the merits. While the delay is not accounted for with entire satisfaction, the excuse for the delay, set out in the affidavits filed upon

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the part of appellants, is not controverted. We are not inclined to dismiss appeals regularly taken unless it clearly appears the appeal was taken merely for delay or the apparent want of prosecution is not accounted for. The motion to dismiss is denied.

The only questions discussed in the briefs and oral argument relate to the order refusing to set aside the default judgment. Upon an ex parte order made after the entry of judgment, based upon a petition verified by Marvin Arnold, the appellants were permitted to intervene upon behalf of themselves and other stockholders of the defendant company, who may elect to appear and become parties thereto, for the purpose of moving to set aside the judgment and permit a defense to be interposed to the action. Subsequently the motion to set aside was made and by the court denied.

It appears from the statement on appeal that, prior to the commencement of the action by the plaintiff Boyce, an action had been commenced in the lower court by the said Marvin Arnold against the above-named defendant, Goldfield Third Chance Company, and judgment obtained and entered on March 11, 1909; that on the 1st day of July, 1909, an execution issued on said judgment, and pursuant thereto a levy was made upon all the property of the said defendant, consisting of two mining claims in the Goldfield mining district, and on July 31, 1909, all right, title, and interest of the defendant was sold to Emery Arnold, the son of the plaintiff in said action, and the period for redemption of said real property by the said defendant under said sale expired on January 31, 1910; that on or about the 11th day of January, 1910, the plaintiff, A. E. Boyce, sold, transferred, and assigned for a valuable consideration all his right, title, and interest in and to his judgment obtained on November 1, 1909, to Carl G. Johnson and Frank E. Johnson; that on or about the 13th day of January, 1910, the said Carl G. Johnson and Frank E. Johnson served notice upon the said Emery Arnold and his attorney, James K. Reddington, and also served said notice upon J. F. Bradley, sheriff of Esmeralda county, state of Nevada, of notice of intention to redeem the said property as redemptioners and assignees of the said judgment obtained by the said A. E. Boyce, and thereupon paid to the sheriff the amount paid by said Emery Arnold for said property under said execution sale, together with all penalties and assessments as required by law, said notice of intention to redeem being accompanied by the requisite affidavits as required by law showing their right to redeem from said execution sale.

The record further shows that upon the hearing of the motion to set aside the judgment, and after certain documentary evidence had been introduced and the testimony of certain witnesses taken, and while a wit-

ness was on the stand, "counsel for plaintiff offered to stipulate, and without objection or exception made or offered by or on the part of the interveners, or any one of them, and S. L. Carpenter, attorney at law, being present in court, as the representative of 200,000 shares of stock in the defendant company of certain Eastern stockholders, and no objection or exception being offered or taken by the said S. L. Carpenter or by James K. Reddington, attorney for the interveners, owning 90,000 shares of stock, it then appearing from the evidence and by the admissions of counsel for the interveners and by the records and files of the court that the effect of granting the motion would be, in the event that the company did not redeem its property sold under execution sale on the judgment obtained by Marvin Arnold, one of the interveners, against the defendant, and purchased at said execution sale by Emery Arnold, son of the said Marvin Arnold, that the said Emery Arnold would take the entire property of the company, and it further appearing that the assignees of the judgment of the plaintiff, A. E. Boyce, would be deprived of all possibility of realizing on the judgment, if the property sold was not redeemed by the company, and it appearing by the records, papers, and files in this action and in the action entitled Marvin Arnold v. Goldfield Third Chance Mining Company that the said motion, if granted, would not be of any benefit whatsoever to the stockholders of the defendant as such, but would inure solely to the benefit of Emery Arnold, son of the intervener Marvin Arnold, and that therefore said motion was not made in good faith by the said interveners in behalf of the company, thereupon, in pursuance of the stipulation offered by counsel for plaintiff and not objected to or excepted to by the interveners, and which stipulation so offered was acquiesced in and accepted by the said interveners, the court made an order, which order was entered upon the minutes of the court and is as follows, to wit: 'At this day this cause comes on in its regular order to be heard by the court, on the intervening petitioners' motion to set aside and vacate default judgment. Plaintiff appearing by his attorneys, S. W. Smith, Jno. F. Kunz, and R. G. Withers, Esqs., and the intervening petitioners by their attorney James K. Reddington, Esq., the defendant company not being represented. Intervening petitioners present part of their oral and documentary evidence; witness McGarry is on the stand when the court orders in the premises that hearing be continued until Monday, January 31, 1910, at 3 o'clock p. m.; that, if property is redeemed from Arnold judgment in favor of the company by that time, plaintiff Boyce's default judgment be vacated and set aside; that, if Arnold judgment is not redeemed in favor of company by said time, the order will go denying this motion with-



out prejudice to stockholders or company to take such proceedings as they may be advised for the purpose of protecting the rights of the company.'

"January 31, 1910, upon the resumption of the hearing of said motion under said last-mentioned order, the court being first advised by the attorneys representing the several interests that no redemption had been made by the defendant company or by any one for it or in its behalf, or that no redemption under the execution sale of the real property of the defendant would be made by the intervening stockholders or by any other stockholder of the company, the attorney for the interveners moved the court as follows: 'Come now said interveners and move the court to vacate, set aside, and for naught hold so much of the action, ruling, or order of the court, taken, made, or passed upon the 28th day of January, 1910, and entered upon the minutes, as reads as follows: 'That, if the property is redeemed from the Arnold judgment in favor of the company by that time, plaintiff Boyce's default judgment be vacated and set aside; that, if Arnold judgment is not redeemed in favor of the company by said time, the order will go denying this motion without prejudice to stockholders or company to take such proceedings as they may be advised for the purpose of protecting the rights of the company.'"

"This motion is based upon the following grounds, appearing upon the face of the record:

"(1) Said action, ruling, or order was improvidently taken, made, or passed during the presentation of the moving papers and the taking of testimony on behalf of said interveners, and before the conclusion of such presentation and such testimony, and while said interveners were proceeding, in regular order, under the rules of this court, to present said moving papers and testimony.

"(2) Said action, ruling, or order was taken, made, or passed without jurisdiction; the moving papers and testimony on behalf of said interveners not having been fully presented to or heard by the court.

"(3) Said action, ruling, or order was erroneous, because made before the full submission of the moving papers and testimony on behalf of the interveners.

"(4) Said action, ruling, or order was an abuse of the discretion vested in the court by law upon a motion to open or set aside a default or default judgment, for the reason: First, that the same was made without full opportunity to the interveners to present all their moving papers and testimony; second, that upon the moving papers and testimony, so far as presented, the interveners have clearly established a right to have such default and default judgment vacated and set aside.

"(5) It was error for the court to decide

the motion, either tentatively, conditionally, or otherwise, upon consideration of any fact connected with the Arnold judgment, or any redemption of the same; such judgment and no fact in connection with the same being before the court or within the judicial knowledge of the court.

"The foregoing motion was overruled by the court, to which action of the court the attorney for interveners then and there excepted. Whereupon attorney for the interveners further moved the court as follows: 'Come now the interveners and move the court for permission to resume the presentation of their moving papers and the introduction of testimony in support of said motion, and hereby offer and ask leave to introduce the oral testimony of the following named witnesses, viz., L. E. McGarry, Marvin Arnold, A. E. Boyce, and any and all other witnesses whose names are included in the notice of motion served upon plaintiff. Intervenors hereby also offer to introduce other and additional documentary evidence in support of said motion.'

"The foregoing motion was overruled by the court, to which action of the court attorney for interveners then and there excepted.

"It then appearing that no redemption had or would be made by the company defendant from the execution sale in the case of Marvin Arnold (one of the interveners) v. Goldfield Third Chance Mining Company (the defendant herein) and S. L. Carpenter (attorney at law appearing in behalf of Eastern stockholders, holding 200,000 shares of stock, stating that no redemption had or would be made and that the time to redeem from said judgment would expire that day), the following order was made, filed, and entered after settlement: 'On this 31st day of January, 1910, this cause came on to be heard upon the motion of interveners, Jessie F. Bailey, J. F. Dougherty, and Marvin Arnold, to vacate and set aside the default and default judgment heretofore, to wit, upon the 1st day of November, 1909, entered in said cause, and also upon the motion of plaintiff to vacate and set aside the order of the court heretofore, to wit, upon the 19th day of January, 1910, found in said cause, permitting said interveners to intervene in the action and to appear and defend the same on behalf of the defendant; and the moving papers in connection with both of said motions having been read, and the oral testimony of some, but not all, of the witnesses, on behalf of said interveners having been taken, and counsel for the respective parties having been heard, it is hereby ordered: (1) That said motion of interveners to vacate and set aside said default and default judgment be, and the same is hereby, overruled, upon the ground and for the reasons that, if granted, certain real estate of the defendants heretofore, to wit, July 31, 1909, sold under execution sale in the case of Marvin Arnold v. Said Defendant, and not at the



date of this hearing redeemed by said defendant, will be lost to it; that, if overruled, said defendant will have two months from January 14, 1910, in which to redeem the same from the plaintiff, under redemption by him, as a redemptioner under his said judgment of November 1, 1909, from the purchaser at said sale of July 31, 1909, and that under these circumstances it would be inequitable to now and in this proceeding set aside said judgment of November 1, 1909. This order is without prejudice to the right of said interveners to take any such further proceedings to vacate and set aside said default and default judgment as they may be thereunto legally advised."

[2] That the court did not err in denying the motion to set aside the judgment is, we think, manifest from a mere reading of the record. As soon as the court's attention was called to the fact that the time for redemption of the property of the defendant, sold upon the Arnold judgment, would expire on January 31st following, the court was justified in imposing a condition to further proceedings that the property be redeemed in favor of the defendant company. Otherwise, to set aside the Boyce judgment could be of no benefit to the stockholders and would forever prevent Boyce from realizing on his claim, for the title to the property would be absolute in Emery Arnold, the son of one of the interveners. True, the interveners had not completed their showing in support of their motion to set aside at the time the order of January 28th was made, but the showing made thus far justified the order. No request at the time was made to be permitted to then conclude the hearing, nor was any exception taken to the order.

[3] The motion subsequently made to set aside the order upon the ground that the court was without jurisdiction to make it is so clearly without merit as not to require extended consideration. When an indisputable fact appears upon a hearing in any case that makes necessary or proper the making of a certain order or the imposing of a certain condition, the court has the discretion to make the order or condition at once, without waiting for counsel to conclude. It would seem from the record that counsel for the plaintiff was willing to have the judgment set aside, if the property was redeemed from the Arnold judgment in favor of the defendant company, and this notwithstanding that the testimony of interveners' witnesses who had testified, including the secretary of the company and one of the interveners, was quite to the contrary of the allegations made by interveners that the company had a defense to plaintiff's action or that he had secured his default judgment by fraudulent means.

[4] If, as alleged by interveners, the plaintiff Boyce had secured his default judgment

fraudulently, and interveners were acting in the interest of the stockholders and not selfishly to secure the benefit of the sale under the Arnold judgment, as alleged by the plaintiff, their rights were not cut off by the order denying the motion to set aside, for the same was made without prejudice. An action in equity would still lie to set aside the judgment for fraud. *Nevada Con. M. Co. v. Lewis*, 34 Nev. 500, 126 Pac. 105. Boyce, being president of the company, could not take advantage of his position to gain a private benefit, and if he acted fraudulently, as alleged, equity doubtless would decree his redemption from the sale under the Arnold judgment as accruing to the corporation or its stockholders.

The court exercised a sound legal discretion in refusing to grant the motion to set aside the Boyce judgment, and the judgment, subject to the order, and the order are affirmed.

TALBOT, C. J., and McCARRAN, J., concur.

(17 N. M. 516)

#### STERN v. FARAH BROS.

(Supreme Court of New Mexico. March 19, 1913. On Motion for Rehearing. June 7, 1913.)

(Syllabus by the Court.)

#### 1. SALES (§ 1\*) — CONTRACTS — VALIDITY — AGREEMENT FOR CONSIDERATION.

In the matter of the consideration for a sale, there must be an agreement between the parties upon the price, or upon the manner in which it is to be determined.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1, 3-5; Dec. Dig. § 1.\*]

#### 2. SALES (§ 1\*) — CONTRACT — VALIDITY — AGREEMENT OF CONSIDERATION.

Where parties to an executory agreement for the sale of goods agree that the price to be paid for the property shall be fixed by valuers appointed by them, there is no contract of sale, if the persons appointed as valuers fail or refuse to act; and this is true even where one of the parties to such an agreement is the cause of such failure or refusal.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1, 3-5; Dec. Dig. § 1.\*]

#### 3. SALES (§ 77\*)—AGREEMENT FOR CONSIDERATION—CONSTRUCTION.

Where one of the persons nominated in such an agreement as valuers refuses to act, the other has no power, without the consent of both parties to the agreement, to select a third person to act as a valuer in the place of the person so refusing, nor could one of the principals select a valuer under such circumstances.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 208-212; Dec. Dig. § 77.\*]

On Motion for Rehearing.

(Additional Syllabus by Editorial Staff.)

#### 4. ACTION (§ 27\*)—REMEDIES—TORT AND CONTRACT.

While, in case of a breach of duty imposed by law, plaintiff may at his election sue upon an express or implied contract for the tort, yet, where there is no legal duty except that arising

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Note Series & Rep'r Indexes



from the contract, there can be no election between one on contract and one on tort, since in such case there is no cause of action in tort.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 160-195; Dec. Dig. § 27.\*]

Appeal from District Court, Bernalillo County; before Justice H. W. Reynolds.

Action by Leon B. Stern against Farah Bros., a firm and copartnership composed of Andres Farah and M. Farah. From judgment for plaintiff, defendants appeal. Reversed and remanded, with directions, and motion for rehearing denied.

On the 19th of October, 1908, the plaintiff and defendants, in this cause below, entered into the following agreement, viz.:

"Leon B. Stern.

"Albuquerque, N. M., 10-19-08.

"An agreement entered into this day between Leon B. Stern, party of the first part, and Farah Bros., party of the second part, both parties being residents of Albuquerque, territory of New Mexico, to wit: The party of the first part agrees to secure for the party of the second part a lease for the store now occupied by him for one year at a monthly rental of \$125 per month, to take effect January 1, 1909, or before if it can be so agreed upon by both parties. The party of the second part agrees to take all the shelving and counters and tables now in the store of the party of the first part, at one-half of what they are worth new, the value to be determined by two competent carpenters, one to be named by each of the parties to this agreement. The party of the second part also agrees to take assorted merchandise to the amount of \$5,000 (or more, if so agreed upon by both parties). The price at which said merchandise is to be paid for to be determined by two appraisers, one to be named by each party to this agreement.

"In consideration of the foregoing, the party of the second part has paid to the party of the first part the sum of \$500, the receipt of which is hereby acknowledged by the party of the first part as part payment on said merchandise and fixtures.

"Leon B. Stern.  
"Farah Bros.

"It is also agreed between the two parties to this agreement that, if the appraisers chosen by them to appraise the merchandise above mentioned cannot agree, they shall call in a third party of their own choosing to arbitrate between them, and that they agree to abide by the decision of the said third party.

"[Signed] Leon B. Stern.

"[Signed] Farah Bros."

After the execution of said agreement the plaintiff testified that he procured a lease in accordance with the terms of said agreement, and, later discovering that the defendants had procured a lease of the same building for three years, from December 1, 1908, that

thereupon the written agreement was orally modified; the defendants agreeing to take all of the merchandise which the plaintiff might have on hand on the 1st day of December, 1908, the plaintiff to reduce his stock in the meantime and to close his store on November 21, 1908, that an appraisal of the stock might be had.

On November 22d Nathan Salmon went to Albuquerque, at defendant's request, to act as their appraiser. He was introduced to the plaintiff by one of the defendants on the following day, and testifies that he examined the stock and refused to appraise it. On the same day plaintiff, Stern, notified defendants, in writing, that he had appointed one Gustafson to appraise the counters and shelving, pursuant to the contract, and calling upon defendants to name some one to join with Mr. Gustafson in this appraisal, also notifying them that he had selected one McDowell as his appraiser of merchandise. Later the same day, defendants notified plaintiff, in writing, that they named one Gertig to appraise counters and shelving, referred to in plaintiff's notice, but that they declined to appoint any other appraiser to appraise the merchandise, because Salmon "declined to appraise said merchandise, for the reason that the same consisted entirely of remnants, odd sizes, shopworn and nonsalable goods." On the following day plaintiff notified defendants that, unless they designated a person to act as appraiser at once, plaintiff would designate one or more fair and impartial men to make the appraisal of the remaining stock of merchandise, and that defendants would be held liable under the contract of October 19th for the appraised value of said stock. On the 30th day of November plaintiff further notified defendants, in writing, that he had had the stock appraised according to the terms of the contract, and that this appraisal was subject to defendants' inspection; that the amount was \$12,143.64, exclusive of shelving, counters, and tables, which were worth, new in position, \$638.70—demanding payment of alleged balance due from defendants for said merchandise, etc., according to the appraisal and said contract, and, in default, plaintiff would hold defendants liable therefor, pursuant to terms of said contract. On December 1, 1908, defendants acknowledged receipt of notice of November 30th, advising that they would accept the shelving, tables, and counters if the landlord would permit same to remain in the storeroom until possession was delivered to defendants, but again refusing to be bound in the matter of the stock of merchandise. On December 2d, plaintiff advised defendants, in writing, that he had begun the sale of the merchandise, and would sell as much, in the due course of trade and at retail, as he could until December 5th, on which date, at 2 p. m., he would begin a public auction and continue

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
133 P.—26



the same each day until January 1st; that defendants would be held liable for all damages accruing to plaintiff by reason of the breach of the contract. On January 20, 1909, the defendants made demand for the return of the \$500 referred to in the agreement of October 19, 1908.

The plaintiff in his amended complaint alleged damages in the sum of \$7,000 by reason of the alleged breach of the contract of October 19, 1908. The cause was tried to a jury, and the issues found in favor of the plaintiff; verdict and judgment being for \$6,495, from which judgment defendants appealed.

Nell B. Field, of Albuquerque, for appellants. George S. Klock and Harry P. Owen, both of Albuquerque, and F. W. Clancy, of Santa Fé, for appellee.

HANNA, J. (after stating the facts as above). [1-3] The first point contended for by appellants is that: "The instrument sued on amounted in law to no more than an agreement to make a binding contract in the future, provided the parties could agree upon its terms." In support of this contention instructions were asked, by the defendants, appellants here, and refused, to the effect that the contract did not, at the time of its execution, bind either of the parties thereto to any action, and that either might lawfully withdraw at any time before the other had done anything in pursuance of said contract; and that before the prices for the merchandise were fixed in the manner prescribed by the contract either party might recede, without incurring any obligation or liability to the other party by reason thereof; and that *"if the jury believe that the defendants in good faith appointed Nathan Salmon to appraise the merchandise of the plaintiff, and that said Salmon refused to proceed with the appraisal of his own volition and not because of anything said to him by defendants, such appointment of Salmon constituted a full compliance with the agreement on their part, and the jury should find for the defendants."*

We are not prepared to say that the trial court erred in refusing the first two instructions, referred to above, because we can see possible obligations and liabilities that might flow from an election not to proceed with an agreement of this character. We are of the opinion, however, that error was committed in refusing defendants requested instruction No. 9, quoted above, and here set out in italics, and that this error was, of necessity, highly prejudicial to the case of the defendants.

In the matter of the consideration for a sale there must be an agreement, between the parties, upon the price or upon the manner in which it is to be determined. 35 Cyc. 47, 48. Benjamin on Sales, § 87, lays down the law upon this question of the consideration in the following language: "It is not

uncommon for the parties to agree that the price of the goods sold shall be fixed by valuers appointed by them. In such cases they are, of course, bound by their bargain, and the price when so fixed is as much a part of the contract as if fixed by themselves; *but it is essential to the formation of the contract that the price should be fixed in accordance with this agreement*, and if the persons appointed as valuers fail or refuse to act, there is no contract in the case of an executory agreement, even if one of the parties should himself be the cause of preventing the valuation. But if the agreement has been executed by the delivery of the goods, the vendor would be entitled to recover the value estimated by the jury, if the purchaser should do any act to obstruct or render impossible the valuation." See, also, *Hutton v. Moore*, 26 Ark. 382; *Wittkowsky v. Wasson*, 71 N. C. 451; *Mechem on Sales*, § 213; *Fort v. Union Bank*, 11 La. Ann. 708; *Tierman v. Martin et al.*, 2 Rob. (La.) 523; *Elberton Hdw. Co. v. Hawes*, 122 Ga. 858, 50 S. E. 904; *Pomeroy on Contracts*, §§ 149 and 150; *Vickers v. Vickers*, L. R. 4 Eq. 529; *Shepard v. Carpenter*, 54 Minn. 153, 55 N. W. 906; *Arnold v. Scharbauer* (C. C.) 116 Fed. 492. *Hopedale El. Co. v. Electric S. B. Co.*, 184 N. Y. 356, 77 N. E. 394; 1 *Parsons on Contracts*, 524.

It is not contended in this case that any portion of the stock, or fixtures, were delivered, and is admitted that Salmon was named by defendants as their appraiser and declined to make such appraisal. There can be no question but that the written agreement between the parties would have resulted in a sale, if the conditions upon which the sale depended had been complied with, and both parties would then have been bound, but until the price was fixed the sale was incomplete.

The agreement was executory, and provided, by its terms, the manner in which it was to be fully consummated. Can it be said that the court had the power to make a new agreement between the parties, or to permit one of the parties to vary its express terms and arrive at a valuation of the goods by a method not provided for, or outside of the terms of the agreement, and, after such calculation is thus arrived at, to make it the measure of damages sustained? We do not think so. However we may view the question of good morals, or good conscience, in a case such as this, it is not for us to make a new contract between these parties, or to give force and efficacy to a departure, by one party, from the terms of the alleged contract. When Salmon refused to act as appraiser, Stern had no authority to designate other appraisers to make the appraisal of the stock.

It has been held in the case of *Elberton Hdw. Co. v. Hawes*, supra, that: "Where parties to an executory agreement for the



sale of goods agree that the price to be paid for the property shall be fixed by valuers appointed by them, there is no contract of sale if the persons appointed as valuers fail or refuse to act; and this is true even where one of the parties to such an agreement is the cause of such failure or refusal." With this holding we fully agree, and after careful examination of all the authorities available we are compelled to conclude that the principle is controlling in this case.

This well-considered Georgia case (*Elberton Hardware Co. v. Hawes*, supra), which in point of facts has much similarity to the case at bar, went further in holding that: "Where one of the persons nominated in such an agreement as valuers refuses to act, the other has no power, without the consent of both parties to the agreement, to select a third person to act as a valuer in the place of the person so refusing." With this view of the question we likewise concur, and it necessarily follows that one of the principals could not select a valuer under such circumstances.

We note the contention of the appellee that a breach of contract, as alleged in the case at bar, gives rise to an action for damages, and that such damages are those which were, or ought to have been, within the contemplation of the parties when the agreement was made or when the breach occurred. The authorities cited by appellee in support of this contention are all cases where the property had been delivered, or defendant had come into possession of the same, and are clearly within the exception to the rule laid down in *1 Benjamin on Sales*, § 87. See, also, *Elberton Hdw. Co. v. Hawes*, 122 Ga. 858, at 865, 50 S. E. 964. Had this been an action for damages in connection with services rendered by plaintiff in procuring the lease for defendants, much greater weight could be given to the contentions of appellee; but the purpose of insisting upon and recovering under the alleged contract of sale is quite evident.

An effort was clearly made by appellee to comply, as nearly as possible, with the conditions pertaining to a valuation of the merchandise, and that value is sought to be made controlling as to the measure of damages in this case. It follows, in our opinion, that the court erred in the matter of refusing the instruction referred to.

Our conclusion as to this point in the case makes it unnecessary for us to pass upon the remaining numerous assignments of error, except in the matter of alleged error in the trial court's refusal to direct the jury to find for the defendants for the recovery of the money paid and interest. The instruction requested was as follows: "The court instructs the jury to find the issues for the defendants and assess their damages on their counterclaim at the sum of \$500, with interest thereon at 6 per cent. per annum from the 20th day of January, 1909, until this

date." Our conclusion in this case necessarily results in our agreeing with this last contention of appellant.

The \$500 paid was in part performance of an incomplete agreement, which has never become an executed contract. Not only the merchandise, but the fixtures as well, were sold to third parties, and never came into the hands of appellants, in whole or in part; therefore the consideration cannot be retained, or treated as liquidated damages, in the absence of an agreement to that effect. We find error in the refusal of the last-mentioned instruction.

For the reasons given, the judgment of the lower court is reversed, and the cause remanded, with instructions to enter judgment in the district court of Bernalillo county in favor of the defendants in this cause, and against the plaintiffs, for the recovery of the sum of \$500, with interest from the 20th day of January, 1909, until paid, and their costs.

ROBERTS, C. J., and PARKER, J., concur.

#### On Motion for Rehearing.

HANNA, J. Plaintiff and appellee assign the following grounds for rehearing in this cause, viz.:

"1. Because the action of plaintiff was based upon a breach of the contract sued on, taken as a whole and considered in the light of all the surrounding conditions and circumstances, and not upon a breach of an executory contract for the sale of goods, and this question was duly submitted by counsel, and has apparently been overlooked by the court.

"2. Because the action of plaintiff was to recover damages suffered on account of the necessity of hurriedly selling his merchandise for what he could get for it, and at a sacrifice, a necessity brought about by plaintiff's performance of his part of the agreement with defendants, coupled with their refusal to perform their part of that agreement, and this question was duly submitted by counsel, and has apparently been overlooked by the court.

"3. The question of whether the agreement sued on constituted one entire, indivisible contract, duly submitted by counsel, has apparently been overlooked by the court."

In our consideration of this case we did not overlook the contention of appellee that the alleged agreement constituted one entire, indivisible contract, and have again given this point our careful consideration in passing upon the merits of the motion now before us. Precise rules for the determination of whether a contract be entire or separable cannot be laid down, and it is well said to depend upon the intention of the parties. *Parsons on Contracts*, § 517. We do not deem it necessary to inquire into what the parties intended in framing the alleged agreement involved in the present case. Conceding that the contract be one entire agreement, we



could not find authority supporting the contention that damages should be awarded for the breach of that portion of the contract providing for the sale of the merchandise. In our opinion there was, in effect, no contract so far as the proposed sale of the merchandise was concerned. In our view of this case, to sustain the judgment of the court below would be to enforce as a valid contract an alleged agreement otherwise not enforceable so far as the sale of merchandise is concerned.

Counsel for appellee, in their brief upon this motion, state that the amended complaint will show that there is no purpose of insisting upon a recovery under the contract of sale, and in the first ground urged in support of the present motion further say that the action of plaintiff was based upon a breach of the contract sued on, taken as a whole and considered in the light of all the surrounding conditions and circumstances, and not upon a breach of an executory contract for the sale of goods. In our earlier consideration of the case we were viewing the facts of the case as one where damages were sought for the breach of a contract which the law could not enforce, which could be avoided, at the election of either party, without the violation of a common-law duty. We believed that, if there was not a right to enforce the contract of sale, there could not be a measure of damages for the breach of the alleged contract in that respect. Now, if we are to divorce from our consideration of the case the element of attempted recovery under a contract of sale, and consider only the breach "in the light of all the surrounding conditions and circumstances," we pass from an action *ex contractu* to an action *ex delicto*, or one sounding in tort.

In the agreement with which we are concerned, the plaintiff agreed to secure a lease for the defendants to take effect at a later date, January 1, 1909, or before, if mutually agreed upon; the defendants agreed to take all shelving, counters, and tables at one-half what they were worth new, the value to be determined by persons to be named by each of the parties; the defendants also agreed to take assorted merchandise to the amount of \$5,000 (or more, if so agreed upon by both parties), at a price to be determined by two appraisers, etc. The consideration for the sale of the fixtures was to be determined by persons other than the appraisers of the merchandise, and the defendants never refused to take the fixtures, but did refuse to take the merchandise for reasons given by them. The plaintiff refused to deliver the fixtures after the appraisal of same, because of defendants' refusal to take the merchandise. The amended complaint, so far as the claim for damages for the alleged breach of the contract is concerned, deals only with that portion of the alleged contract which provided for the sale of the merchandise.

The plaintiff alleged that, in consequence of the failure, neglect, and refusal of defendants to carry out and perform their part of the agreement, he found himself with the large stock of merchandise on his hands, deprived of his place of business, except for the remainder of his leasehold term, and compelled to hurriedly sell said stock at the best prices obtainable, and thereby suffered loss and incurred expenses in the sum of \$7,000, all of which was caused by the failure and refusal of defendants to keep and perform their agreement. The complaint concludes with a prayer for "damages caused by defendants' breach of their said contract and agreement."

We have grave doubts as to whether, in any light we may look upon this case, the amended complaint can be considered as stating a cause of action in tort; but, if we assume that it does, we could not find in favor of the plaintiff below. We have not lost sight of the fact that a tort may grow out of, or be coincident with, a contract, and that a breach of a contract may be so intended and planned as to become a tortious and wrongful act or omission.

[4] It is a general rule that, where there is a breach of duty which is imposed upon one by law, plaintiff may, at his election, sue and declare upon the expressed or implied contract, or for the tort. 15 Cyc. 254. It has been decided, however, that where there is no legal duty, except that arising from the contract, there can be no election between an action on contract and one on tort, since in such case there is no cause of action in tort. 15 Cyc. 255; *Parrill v. Cleveland*, etc., 23 Ind. App. 638, 55 N. E. 1026; *Rich v. New York Cent. & Hud. Riv. R. R. Co.*, 87 N. Y. 398.

It was said by the New York Court of Appeals in the case of *Rich v. New York Cent. & Hud. Riv. R. R. Co.*, supra, that: "It may be granted that an omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty. But such legal duty may arise, not merely out of certain relations of trust and confidence, inherent in the nature of the contract itself, as in the cases referred to in the respondent's argument, but may spring from extraneous circumstances, not constituting elements of the contract as such, although connected with and dependent upon it, and born of that wider range of legal duty, which is due from every man to his fellow, to respect his rights of property and person, and refrain from invading them by force or fraud. It has been well said that the liability to make reparation for an injury rests, not upon the consideration of any reciprocal obligation, but upon an original moral duty enjoined upon every person so to conduct himself, or exercise his own rights, as not to injure another. *Kerwhacker v. C., C. & O. R. R. Co.*, 3 Ohio St. 188 [62



Am. Dec. 246]. Whatever its origin, such legal duty is uniformly recognized, and has been constantly applied, as the foundation of actions for wrongs; and it rests upon and grows out of the relations which men bear to each other in the framework of organized society. It is, then, doubtless true that a mere contract obligation may establish no relation out of which a separate or specific legal duty arises, and yet extraneous circumstances and conditions, in connection with it, may establish such a relation as to make its performance a legal duty, and its omission a wrong to be redressed. The duty and the tort grow out of the entire range of facts, of which the breach of the contract was but one. The whole doctrine is accurately and concisely stated in 1 Chit. Pl. 135, that "if a common-law duty result from the facts, the party may be sued in tort for any negligence or misfeasance in the execution of the contract."

We cannot see what common-law duty resting upon defendants is disclosed by the facts of this case.

Without going further into the merits of the motion, we must deny the same.

ROBERTS, C. J., and PARKER, J., concur.

(18 N. M. 15)

# TERRITORY v. LYNCH.

(Supreme Court of New Mexico. May 31, 1913.)

(Syllabus by the Court.)

## 1. CRIMINAL LAW (§ 1152\*)—APPEAL—EXERCISE OF DISCRETION—IMPANELING OF JURY.

In the superintendence of the process of impaneling the jury, a large discretion is necessarily confided to the judge, which discretion will not be revised on error or appeal, unless it appears to have been grossly abused or exercised contrary to law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3053-3057; Dec. Dig. § 1152.\*]

## 2. JURY (§ 135\*) — EXAMINATION ON VOIR DIRE.

Within reasonable limits, each party has a right to put pertinent questions to show, not only that there exists proper grounds for a challenge for cause, but to elicit facts to enable him to decide whether or not he will exercise his right of peremptory challenge.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 509-606; Dec. Dig. § 135.\*]

## 3. HOMICIDE (§ 20\*)—"MURDER"—RESISTANCE OF LEGAL ARREST.

Where persons have authority to arrest, and are resisted and killed in the proper exercise of such authority, the homicide is "murder" in all who take part in such resistance.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 33, 34; Dec. Dig. § 20.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4632-4637; vol. 8, pp. 7726, 7727.]

## 4. HOMICIDE (§ 55\*)—"MANSLAUGHTER"—RESISTANCE OF ILLEGAL ARREST.

Where the arrest is illegal, the offense is reduced to "manslaughter," unless the proof shows express malice toward the deceased.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 79; Dec. Dig. § 55.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4338-4342; vol. 8, p. 7715.]

## 5. HOMICIDE (§ 20\*)—MURDER—RESISTANCE OF ILLEGAL ARREST.

If the outrage of an attempted illegal arrest has not excited the passions, a killing will be murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 33, 34; Dec. Dig. § 20.\*]

## 6. HOMICIDE (§ 111\*)—DEFENSES—RESISTANCE OF ILLEGAL ARREST.

Nothing short of an endeavor to destroy life or inflict great bodily harm will justify the taking of life in those cases where an illegal arrest is attempted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 143, 144; Dec. Dig. § 111.\*]

## 7. ARREST (§ 65\*)—"WARRANT"—SUFFICIENCY.

As to the sufficiency of a "warrant," it should appear on its face to have duly proceeded from an authorized source. It need not set out the crime with the fullness of an indictment, but it should contain a reasonable indication thereof.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 161-164; Dec. Dig. § 65.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7393-7396.]

## 8. ARREST (§ 65\*)—WARRANT—PROTECTION OF OFFICER.

A ministerial officer, acting under process fair on its face, issued from a tribunal or person having judicial powers, with apparent jurisdiction to issue such process, is justified in obeying it against all irregularities and illegalities except his own.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 161-164; Dec. Dig. § 65.\*]

## 9. HOMICIDE (§ 309\*)—INSTRUCTION—MANSLAUGHTER.

Where there is any evidence tending to show such a state of facts as may bring the homicide within the grade of manslaughter, defendant is entitled to an instruction on the law of manslaughter, and it is fatal error to refuse it.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. § 309.\*]

Appeal from District Court, Chaves County; before Justice Roberts.

James O. Lynch was convicted of murder in the first degree, and he appeals. Reversed and remanded.

The appellant was indicted by a grand jury of the county of Chaves for the murder of Roy Woofter at the city of Roswell, in said county, and thereafter on change of venue was tried and convicted of murder in the first degree in the district court sitting for Eddy county. He now brings the case into this court by appeal.

From the record it appears that Woofter was the city marshal of the city of Roswell, and that in the afternoon of the 26th day of May, 1911, between the hours of 4 and 5 o'clock, he, accompanied by Henry and Ed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Carmichael, who were city policemen, encountered the defendant and one Fred Higgins in an alley of the city of Roswell, and there informed the defendant that he had a warrant for his arrest and for the search of defendant's house for the purpose of seizing any intoxicating liquor which might be found upon the premises, and handed the warrant to defendant, who examined the same; that the defendant told the deceased that he had no right to search his house for liquor, as the same was not a place of business; that the deceased then stated that the search was to be made, and, in company with the defendant, the two policemen, Fred Higgins, and one Red Tom, proceeded to the house of defendant; that defendant opened the front door of the house, and all six men entered the front room. Shortly after entering, the defendant passed out of the front room by a side door and into a hallway, fastening the door behind him, and the five men left in the room immediately went out of the front door, and the deceased, together with Henry Carmichael, went around the house on the porch thereof to a room which was used as a kitchen. In the meantime, according to the testimony of the defendant, having left the front room, he went into the kitchen, slipped off his shoes, and transferred three cases of whisky from the pantry into the dining room, and then sat down in the kitchen, and at about that time he saw the deceased pass the south window of the kitchen, walking in a westerly direction, and he next saw him when he appeared at the west window, when the deceased started to raise the screen of the window, and at the same time Henry Carmichael appeared at the south window "with his six-shooter in his hand and tried to look in." The defendant jumped up close to the window at which the deceased was standing, and said, "Don't you break into this window or house," or something like that, and the deceased "kind of stepped back and went for his gun like this, in a stooping position," whereupon the defendant instantly shot him with a Winchester rifle; the bullet first passing through a curtain which was on the window and also the wire screen. The deceased, after receiving the shot, staggered away from the window in a stooping position with his hands clutching to his stomach, and was thereafter assisted by the two Carmichaels and Higgins to an adjacent house, where he was placed upon the bed and his pistol removed from a hip pocket. Subsequently Woofter was removed to a hospital, where he died the following morning, after making a dying declaration, which was introduced in evidence upon the trial of the case. In this declaration the deceased stated that he was walking along on the porch at the time he was shot, and that he could not see the defendant at the time the shot was fired; that immediately preceding the firing of the fatal shot the defendant said, "Keep off my back

porch;" and that he knew that it was the defendant who used that language.

W. W. Gatewood, of Roswell, R. L. Graves, of El Paso, Tex., O. O. Askren, of Roswell, and A. B. Story, of San Antonio, Tex., for appellant. F. W. Clancy, Atty. Gen., for the Territory.

HANNA, J. (after stating the facts as above). The first nine errors assigned by appellant relate to the impaneling of the jury.

The first assignment predicates error, by the trial court, in sustaining a challenge for cause by the territory, over objection of the defense, to the venireman J. D. Merchant, on the grounds that there was insufficient proof to support the challenge, and that the defendant was not given an opportunity to examine said venireman.

The second assignment of error is based upon the alleged failure of the territory to specify grounds for challenge in the case of venireman Merchant, which was sustained by the court.

The third assignment avers a lacking of proof to support the territory's challenge in the case of venireman J. R. James.

The fourth assigns error in sustaining the territory's challenge in the case of venireman James, for an alleged failure to specify a ground for challenge.

The fifth error is predicated upon the trial court's action in overruling defendant's challenge for cause to venireman Gossett, who testified that he had a fixed and abiding opinion, predicated upon what he had read in the newspapers and conversations with different persons, which would require evidence to remove; later testifying, however, that if selected as a juror he would decide the case solely upon the sworn testimony, and not permit what he had heard to influence him in reaching a verdict.

The sixth error has to do with the trial court's action in overruling the challenge of the defendant for cause to venireman Schuester, who testified to an opinion arrived at through what he had heard one witness in the case say, which opinion was an abiding and fixed opinion requiring evidence to remove it. In response to questions by the court he said he would lay aside his opinion, when sworn as a juror, and would decide upon the evidence as introduced upon the witness stand.

The seventh error assigned by appellant is based upon the overruling of defendant's challenge, for cause, directed against venireman Galton. This venireman, upon his examination, testified that he had read newspaper accounts, shortly after the occurrence, from which he formed a decided opinion concerning the guilt or innocence of the defendant, requiring evidence to remove and which was then abiding with him; later he said he thought he could try the case with the same degree of equipoise of mind and im-



partiality as if he had never formed an opinion.

The eighth alleged error relied upon is based upon the overruling of defendant's peremptory challenge directed against venireman Crawford. The defendant had exhausted his quota of peremptory challenges, and asserts he was wrongfully forced to use a peremptory challenge in each of the cases referred to under assignments of error numbered 5, 6, and 7, and that it was an abuse of discretion, on the part of the trial court, to refuse to allow an additional peremptory challenge, good cause being shown.

The ninth assignment predicates error upon the refusal of the trial court to allow certain questions to be propounded to venireman Wm. Carson by the defense. The facts pertinent to this assignment of error can be more clearly pointed out by quoting from the record, viz.: "Q. I will ask you whether now you have any strong leaning for or against prohibition? Mr. Fullen: We object to that method of interrogating the juror, on the ground we don't believe a prohibition question enters into the trial of this case. The question is whether or not this man was justified in the killing of the man he did. Mr. Gatewood: We would like to be heard on that. (Jury withdrawn.) Court: I will hear you ten minutes. Will your defense be self-defense? Mr. Gatewood: Yes, sir. Court: I will sustain the objection for that defense. The question of prohibition will not enter into it. Mr. Gatewood: Exception. (Jury returns.) I will ask you this question: That if in the course of this trial it should be developed by the testimony that the deceased, Roy Woofter, was a strong Prohibitionist, and this defendant an Anti-Prohibitionist, and that the homicide grew out of those differences and issues involved therein, can you try this case under that situation of facts strictly according to the law and evidence, or would those facts that I have related be permitted to have any influence whatever over your mind in determining this case? Mr. Fullen: We object. It is not a proper subject of inquiry, nor the proper matter to qualify the juror on. Court: Objection sustained. Mr. Gatewood: Exception. Mr. Carson, if it shall develop by the testimony in this case that the deceased, Roy Woofter, was a strong Prohibitionist and that this was one of the causes of difference that led up to the homicide between them, would that fact influence your mind in this case in any degree whatever against the defendant? Mr. Fullen: We object on the same grounds. Court: Objection sustained. Mr. Askren: Exception."

[1] We are of the opinion that Mr. Thompson correctly states the general rule regarding the discretion of the court in respect of impaneling the jury as follows: "In the superintendence of the process of impaneling the jury, a large discretion is necessarily confided to the judge, which discretion will not

be revised on error or appeal, unless it appears to have been grossly abused or exercised contrary to law." 1 Thompson, Trials, § 88.

With this principle in mind we have made a careful examination of the record pertaining to the matters referred to under the first eight assignments of error, and we find that the fifth, sixth, and seventh assignments present very close questions for our consideration, for which reason we prefer to pass to the consideration of the ninth assignment, which presents a more clear-cut question, one at least less open to argument. Not that we would shirk our responsibility in these matters, but that our decision may rest upon less debatable ground.

[2] What is, or is not, an abuse of judicial discretion will always remain a most difficult question for solution. In the ninth assignment we have presented a question not confined to the phase of this problem referred to as abuse of discretion, but which trenches hard upon the legal rights of the defendant. The learned Attorney General has considered the question as falling within the rule of *Connors v. United States*, 158 U. S. 414, 15 Sup. Ct. 953, 39 L. Ed. 1033, where the Supreme Court said that: "The court correctly rejected the question put to the juror Stewart as to his political affiliations. The law assumes that every citizen is equally interested in the enforcement of the statute enacted to guard the integrity of national elections, and that his political opinions or affiliations will not stand in the way of an honest discharge of his duty as a juror in cases arising under that statute."

We think that the case at bar presents a materially different question from that of the *Connors Case*, which is concerned only with the bias resulting from political affiliation. In that case, however, the trial court said that, had its attention been called to the matter at the time, it would have allowed the inquiry. It also appeared that the Supreme Court believed that the rejection of the question did not prejudice the substantial rights of the accused, or a new trial would have been granted.

In the case at bar we have an inquiry directed toward possible bias and prejudice resulting from a division of a community over a great social and economic question. Political affiliations are broken down, and the community, during the throes of the change from a wet to a dry territory, and consequent effort at enforcement of new laws, finds itself divided in opinion and swayed by strong passions and prejudices. Those of one side may feel that the personal liberty of the individual is encroached upon, their property confiscated, and even their rights to continue a residence in the community challenged. The opposing view contemplates the protection of the community from a menacing evil affecting every family and each individual. Such conflict of opinion must result in such



a condition that to refuse an inquiry into the attitude, or bias, of an individual juror, called upon to try the accused for his life, where his alleged crime grew out of an attempt to enforce a prohibitory liquor law, would certainly violate our American sense of justice. The least that can be said in favor of permitting the inquiry is that it was necessary in order that the defendant might intelligently exercise his right to peremptorily challenge. As was well said by the Supreme Court of Missouri in the case of *State v. Mann*, 83 Mo. 597: "One may not be incompetent as a juror, and yet may stand in such relations to the prosecutor, or the cause, as, if known to the accused, would be deemed a good reason for peremptorily challenging him. He is entitled to an impartial jury, and may make such inquiries as will enable him to secure that constitutional right. Must he exercise his right of peremptory challenge, without the privilege of making inquiries, except such as relate to the competency of the panel? In capital cases, the accused is imprisoned, and is brought from prison, and there for the first time, possibly, meets 40 men summoned as jurors in his case, and if blindly to make his peremptory challenges, may strike from the panel the very men whom he would have wished to retain, had he known their antecedents. If such is the law, the right of peremptory challenge may prove a snare, and, at best, is of no earthly value to the accused." See, also, *Lavin v. People*, 69 Ill. 304; *Com. v. Eagan*, 4 Gray (Mass.) 18.

The rule, or guiding principle, in this regard, has been correctly stated in our opinion, by Mr. Thompson, in the following language, viz.: "Within reasonable limits, each party has a right to put pertinent questions to show, not only that there exist proper grounds for a challenge for cause, but to elicit facts to enable him to decide whether or not he will exercise his right of peremptory challenge." 1 Thompson, *Trials*, § 101. See, also, *Faber v. C. Reiss Coal Co.*, 124 Wis. 562, 102 N. W. 1049; *Am. Bridge Works v. Pereira*, 79 Ill. App. 97; *Hale v. State*, 72 Miss. 140, 16 South. 387; *State v. Garrington*, 11 S. D. 178, 76 N. W. 327; *State v. Steeves*, 29 Or. 85, 43 Pac. 950; *Pinder v. State*, 27 Fla. 370, 8 South. 837, 26 Am. St. Rep. 77; *People v. Car Soy*, 57 Cal. 103; *Patrick v. State*, 45 Tex. Cr. R. 588, 78 S. W. 947; *Baye v. State*, 45 Neb. 269, 63 N. W. 811; *Monaghan v. Agricultural Fire Ins. Co.*, 53 Mich. 238, 18 N. W. 800; *Dunsmuir v. Port Angeles*, etc., 30 Wash. 586, 71 Pac. 9.

Our consideration of the ninth assignment of error results in the conclusion that the trial court was in error in refusing to permit the inquiry into the bias or prejudice of the juror upon the question of prohibition. We are of the opinion that the case must be reversed and remanded for new trial, upon this ground. Such being the case, and for the purpose of disposing of such other questions as this record indicates may arise in the

new trial, we will briefly consider the remaining assignments of error.

The tenth error assigned is based upon the admission in evidence of a copy of an ordinance (No. 213) of the city of Roswell. The offer was limited first to show that the original ordinance had been passed by the city council of Roswell (and not as proof that it was a constitutional ordinance or one authorized by law); second, to show on what the complaint made by the deceased was based.

The first objection, here urged, is that the record of said ordinance was not the best evidence thereof. The record discloses that the city clerk Roswell testified that he was clerk of said city at the time of the passage of the ordinance, and that he engrossed the same upon the official record of city ordinances, which record was produced in court and identified by him; the authenticating signatures being also proven by him. This record is the one provided for by section 2413, C. L. 1897, which does not provide in express terms that the record shall be received in evidence without other proof. The section referred to, however, does provide as follows, to wit: "But the book of ordinances herein provided for shall be taken and considered in all courts of this territory as prima facie evidence that such ordinances have been published as provided by law." This indicates an intention that these records were to be received in evidence, when conforming in all respects to said section 2413. It would be safer practice, nevertheless, to prove an ordinance in accordance with the terms of section 2412, C. L. 1897, and avoid the necessity of proving authenticating signatures of the officers named in said section 2413.

We do not consider it necessary to further discuss the remaining objections presented under this assignment.

The eleventh assignment of error is based upon the admission in evidence, over defendant's objection, of the original affidavit, made by the deceased, upon which the warrant was based. The first objection to its admission—I. e., that no predicate therefor had been laid by proof of the enactment of any ordinance—is disposed of by our opinion upon the tenth assignment of error. The appellant also urges, in connection with this alleged error, that the pretended ordinance, No. 213, on which said affidavit was based, expressly provides that said complaint should be made only before the police judge of said city, whereas there was and could be no such officer; that said affidavit is in the nature of a complaint for search and seizure in the enforcement of said so-called liquor ordinance, for which there is no authority of law; that a part of the supposed offense therein alleged is the keeping of liquors on hand with intent to sell or give them away, etc., whereas the statute "authorizes the municipality to provide only against the selling,



giving away," etc., of such liquors; that said affidavit on its face purports to be a complaint on information and belief, in the nature of a libel for the seizure and destruction of certain intoxicating liquors and is so entitled, but that there is no authority of law for such proceeding by the city of Roswell; that it was not proven that precinct No. 1 was within or partly within the corporate limits of Roswell; that said complaint purports to be a complaint on information and belief, which is in violation of the fourth amendment of the Constitution of the United States.

[3] The Attorney General argued that these contentions, respecting the legality or validity of the affidavit or complaint, and warrant issued thereupon, were immaterial and irrelevant. He contended that if the complaint and warrant were illegal, and likewise the attempted search of the house, yet those facts did not justify the defendant killing the deceased.

We cannot fully agree with this conclusion of the honorable Attorney General. We are of the opinion that the legality of the arrest is a material question in determining the character of the homicide. The Supreme Court of the state of Illinois in the case of *Rafferty v. People*, 69 Ill. 111, 18 Am. Rep. 604, on this point held: "That where persons have authority to arrest, and are resisted and killed in the proper exercise of such authority, the homicide is murder in all who take part in such resistance." See case, note 66 L. R. A. 354.

[4] And, on the other hand, it is equally well settled that, "where the arrest is illegal, the offense is reduced to manslaughter, \* \* \* unless the proof showed express malice toward the deceased." See, also, 2 Bishop, New Crim. Law, § 699; *Galvin v. State*, 6 Cold. (Tenn.) 283.

Mr. Bishop has given much assistance to us in our consideration of this question, and we consider his exposition of the law as laid down in said section 699, truly expressive of the principles controlling the subject.

[5] We particularly approve his qualification of the rule, last laid down, that, if in fact the outrage of an attempted illegal arrest has not excited the passions, a killing in cold blood will be murder.

[6] The doctrine that nothing short of an endeavor to destroy life or inflict great bodily harm will justify the taking of life prevails in those cases where an illegal arrest is attempted. 1 Bishop, New Crim. Law, § 868. The reason why a man may not oppose an attempt on his liberty by the same extreme measures permissible in an attempt on his life appears to be because liberty can be secured by a resort to the laws. 1 Bishop, New Crim. Law, § 868.

[7] In our opinion, Mr. Bishop has correctly stated the law as to the sufficiency of a warrant when he says: "It should appear

on its face to have duly proceeded from an authorized source. It need not set out the crime with the fullness of an indictment, but it should contain a reasonable indication thereof." 1 Bishop, Crim. Proc. § 187.

[8] In this connection we also desire to say that we agree with the authorities holding that a ministerial officer, acting under process fair on its face, issued from a tribunal or person having judicial powers, with apparent jurisdiction to issue such process, is justified in obeying it against all irregularities and illegalities except his own. *Appling v. State*, 95 Ark. 185, 128 S. W. 866, 28 L. R. A. (N. S.) 548; *State v. Weed*, 21 N. H. 262, 53 Am. Dec. 188; *Keady v. People*, 32 Colo. 57, 74 Pac. 892, 66 L. R. A. 353. It cannot be questioned that it is a duty incumbent upon every citizen to submit to a lawful arrest, and that resistance to an illegal arrest should be without excessive violence. It has been held that, if a person kill a known officer to prevent him from making an illegal arrest, he is guilty of manslaughter at least, and may be guilty of murder if the killing was prompted by personal malice against the officer. *Rafferty v. People*, 72 Ill. 37; *Roberts v. State*, 14 Mo. 138, 55 Am. Dec. 97. The law does not, and cannot, sanction the taking of life to repel a threatened trespass or invasion of personal rights.

A distinction is made, by the authorities, between arrests by those who are known to be officers and by persons who are not. *Yates v. People*, 32 N. Y. 509. In the latter case homicide may be justified to prevent an illegal arrest, but it cannot be in the former. The law seeks to protect the officer in the discharge of his duty, and calls upon the citizen to exercise patience, if illegally arrested, because he knows he will be brought before a magistrate, and will, if improperly arrested, suffer only a temporary deprivation of his liberty. *Johnson v. State*, 30 Ga. 426.

Under the twelfth assignment of error numerous objections are made to the warrant, which was offered in evidence in this case. A careful consideration of all would unduly lengthen this opinion. We have attempted to briefly state the general principle applicable, and must be content with that for the purposes of this opinion.

[9] The thirteenth error assigned alleges error by the trial court in refusing a requested instruction as to manslaughter, it being urged that there were sufficient facts to require such instruction. It is needless to cite authority for the proposition that, where there is any evidence tending to show such a state of facts as may bring the homicide within the grade of manslaughter, defendant is entitled to an instruction on the law of manslaughter, and it is fatal error to refuse it. The facts pertaining to this question may be presented with greater certainty and detail at the next trial of this case, and it seems unnecessary to discuss the facts dis-



closed in the present record in connection with the present opinion.

The remaining questions having to do with matters that may not arise in the new trial, and, not necessary to this opinion, will not be passed upon at this time.

For reasons given, the judgment and sentence of the district court is set aside, and this cause remanded for a new trial.

ABBOTT, District Judge, and PARKER, J., concur.

(14 Ariz. 558)

GOULD et al. v. SOTO et al.

(Supreme Court of Arizona. June 28, 1913.)

1. JUDGMENT (§ 691\*)—RES JUDICATA—PARTIES—PRESENCE BY REPRESENTATION.

Where in ejectment defendants other than an infant claimed no title, but the infant by his guardian ad litem claimed the equitable title to the property under an alleged contract between his mother and plaintiffs' testatrix that, in consideration of the mother's services in caring for testatrix, she would leave the property to the infant, such action was barred by a former judgment against the infant's parents in the same court as trustees of an express trust for the infant to enforce the same contract, though the infant was not formally joined as a party to such suit under Civ. Code 1901, par. 1299, giving to the trustee of an express trust the absolute right to maintain an action for the benefit of the cestui que trust without joining the beneficiary.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1214; Dec. Dig. § 691.\*]

2. JUDGMENT (§ 572\*)—RES JUDICATA—DETERMINATION—DEMURRER—OBJECTION TO INTRODUCTION OF EVIDENCE.

An objection to the introduction of any evidence on the ground that the complaint showed on its face that plaintiffs had no equities and were not entitled to maintain a suit in equity, and that they had an adequate remedy at law and had elected to pursue the same, was in the nature of a demurrer to the complaint, and, having been sustained and judgment rendered, such judgment was on the merits and available to support a plea of res judicata.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1041, 1047-1049; Dec. Dig. § 572.\*]

Appeal from District Court, Pima County; John H. Campbell, Judge.

Ejectment by P. B. Soto and another, as executors of the estate of Altigracia Ochoa, deceased, against Silvester Gould and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Owen T. Rouse, of Tucson, and J. M. Feiler, for appellants. S. L. Kingan, of Tucson, for appellees.

CUNNINGHAM, J. This is a statutory action in the nature of an action in ejectment commenced by the appellees against the appellants in the court below to recover for the estate of Altigracia Ochoa, deceased, the possession of lots 5 and 9 of block 230 of the Tucson townsite, together with

rent therefor alleged to be overdue. The complaint is in substantially the form employed in such actions and among other things alleges that Silas Gould as the minor son of Silas H. and Silvester Gould, and the defendants are members of and constitute one family. It is further alleged that Silas H. Gould with his family were tenants of the deceased at the time of her death and as such occupied part of the buildings on lot 5, and after her death they became the tenants of these appellees as executors and as such tenants occupied all the buildings on lot 5 at a rental of \$20 per month and under a lease from month to month. It is further alleged that Silvester Gould, as trustee for Silas Gould, Jr., claims some right in the premises adverse to the plaintiffs. Demand for the possession and for the payment of rent and refusal are alleged. The relief prayed for is the restitution of the possession, a judgment for rent, costs, and general relief.

Silas H. Gould makes no individual claim to the property but defends as the father of Silas Gould, Jr. He sets forth a paramount equitable title to the property in his said minor son, Silas, and alleges that the possession is held by Silvester Gould, his wife, under the equitable title of the minor son, Silvester, the wife and mother, makes no defense in her individual right, but as the guardian ad litem of the minor, Silas Gould, she sets up the same equitable title interposed by Silas H. Gould. The equitable title thus pleaded by the defendants is alleged by them to have arisen from an oral contract made between Silvester Gould and her sister, the decedent, by the terms of which Silvester promised to devote her personal services to the necessities of decedent as long as decedent should live, and in consideration therefor decedent promised to convey the property here in question to the minor son, Silas Gould. It is alleged that pursuant to such agreement Silvester took possession of the said premises and devoted her personal services to the necessities of the decedent, as promised, but no conveyance of the property was made by decedent, nor has any conveyance been made by any one since her death. They pray that these plaintiffs, executors, be required to make a conveyance of said property to Silas Gould, Jr., in accordance with such contract. To this new matter plaintiffs pleaded in bar as an estoppel a judgment in their favor recovered by them of these defendants in the same court involving the same contract and equitable title, and allege that such judgment was on the merits, between the same parties, and it is yet a valid, subsisting judgment unreversed. To this plea in bar the defendant Silas Gould, Jr., by his guardian ad litem, denies that he was a party to the suit mentioned in plaintiffs'

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



reply "in his own proper person or by any one having legal authority whatever to represent him in any such action. \* \* \*". The cause went to trial first upon the issues raised on the plea in bar. Upon the trial in support of their plea, plaintiffs introduced the complaint, answer, and judgment in the former action and the evidence of a witness. The defendants offered no evidence. The court upon a hearing sustained the plea.

After the plea in bar had been sustained, the cause proceeded to trial upon the remaining issues and resulted in a judgment for plaintiffs against all the defendants for the immediate possession of the property and against Silas H. Gould alone for the accrued rent and for rent to accrue at a monthly rate and for costs. The defendants moved for a new trial and assigned many grounds for the motion, but we deem it unnecessary in this opinion to set forth these grounds in detail. The court denied the motion for a new trial, and the defendants appeal from the judgment and from the order refusing a new trial.

The appellants assign as error the order sustaining the plea in bar for the reasons the evidence offered in its support was not sufficient to show that the judgment was res adjudicata of the questions presented in the defendants' defense and cross-complaint. That the rights of Silas Gould, Jr., could not be decided upon a demurrer nor motion, but they must be decided upon the merits, and the judgment offered was not rendered on the merits. The other assignments are too general to merit notice.

[1] On the question of the plea of res adjudicata the complaint, answer, and judgment were filed as exhibits and are before us, but the oral testimony of the witness introduced is not before us. It is clear, however, from these exhibits, that the former action was prosecuted by the plaintiffs therein as trustees of an express trust to enforce the specific performance of a contract made by one of them for the benefit of Silas Gould, Jr. It is equally clear that the contract therein involved is the identical contract set up in the cross-complaint in this action, and for the maintenance of the cause of action in the former, as well as to maintain the defense in the cross-complaint, the identical evidence would be required. In each the validity of the title of Silas Gould, Jr., wholly depends upon the existence and binding effect of the contract set forth. In each the same res or thing is involved.

There can be no serious question that the rights of Silas Gould, Jr., could be amply protected by the trustee with whom the contract was made for his benefit. The law gives such trustee the absolute right to maintain such an action for the benefit of a cestui que trust without the formality of joining such beneficiary in the action. Paragraph 1299, R. S. Ariz. 1901. The complaint offered and

received in evidence is conclusive that such action was prosecuted for the sole benefit of Silas Gould, Jr. Upon the face of that complaint it is alleged "that plaintiffs (Silas H. and Silvester Gould) have no personal interest in said real estate and no personal claim against the estate of said" decedent. The claim that Silas Gould, Jr., was not a party to such action is wholly without foundation. True, he was not named as a party in the title of the action, but the only rights submitted were his rights, and, if the judgment rendered in that action would be binding at all, it would bind him and adjudicate his rights. The beneficiary in such action is in effect and to all intents and purposes the real party in interest. 23 Cyc. 1245.

The oral evidence, not preserved in the record, was offered, we must presume, to supply any defects in evidence not furnished by the exhibits and served with such documentary evidence to support the finding of the court on the issues presented by the plea. In such a suit commenced and prosecuted by the party with whom the contract involved was made for the benefit of another, the judgment rendered therein will bind the beneficiary in all respects in the same manner and to the same extent as if he had commenced and prosecuted such action in his own name.

The appellants further contend that the decree or judgment in the former action is not conclusive as a bar in this action for the reason such judgment was not upon the merits but was a dismissal of that action upon demurrer without a trial on the merits, and for that reason it was in effect a non-suit. This raises the question, What is a judgment on the merits?

"To create such a judgment, it is by no means essential that the controversy between the plaintiff and the defendant be determined 'on the merits,' in the moral or abstract sense of those words. It is sufficient that the status of the action was such that the parties might have had their lawsuit disposed of according to their respective rights, if they had presented all their evidence and the court had properly understood the facts and correctly applied the law. But if either party fail to present all his proofs, or improperly manage his case, or afterward discover additional evidence in his behalf, or if the court find contrary to the evidence, or misapply the law, in all these cases the judgment, until corrected or vacated in some appropriate manner, is as conclusive upon the parties as though it had settled their controversy in accordance with the principles of abstract justice. Frequent instances occur tending to convince us of the unwelcome truth that many judgments, which in law are regarded as being 'on the merits,' are, in fact, repugnant to any disposition of the rights of the parties 'on the merits,' as those



words would be employed in relation to the ordinary affairs of men." Freeman, Judgments (3d Ed.) § 260.

An examination of the judgment in the record in evidence discloses that the trial of the action came to an end when the plaintiffs offered evidence in support of the allegations of their complaint. The defendants objected to the introduction of any evidence upon the grounds that the complaint shows upon its face that the plaintiffs had no equities and are not entitled to sustain an action for specific performance; and, having an adequate remedy at law and having elected to pursue the same, plaintiffs were estopped from maintaining such action. Upon these grounds the court sustained the objection and refused to permit the plaintiffs to offer any evidence whatever, and upon motion of defendants the court ordered the cause dismissed. An objection to the introduction of any evidence is in all respects equivalent to and raises the same questions as a demurrer to the complaint. *Goodrich v. Board, etc.*, 47 Kan. 355, 27 Pac. 1006, 18 L. R. A. 113; *Johnson v. Bank*, 59 Kan. 250, 52 Pac. 860; *Raymond v. Blancgras*, 36 Mont. 449, 93 Pac. 648, 15 L. R. A. (N. S.) 976; *Hoskins v. Northern Pac. Ry. Co.*, 39 Mont. 394, 102 Pac. 988.

[2] In this instance the objection was in effect a demurrer to the complaint upon the grounds that the complaint fails to state facts sufficient to constitute a cause of action entitling the plaintiffs to any equitable relief. "A demurrer to a complaint because it does not state facts sufficient to constitute a cause of action \* \* \* raises an issue which, when tried, will finally dispose of the case as stated in the complaint, on its merits, unless leave to amend or plead over is granted. The trial of such an issue is a trial of the cause as a cause, and not the settlement of a mere matter of form in proceeding. There can be no other trial except at the discretion of the court, and, if final judgment is entered on the demurrer, it will be a final determination of the rights of the parties which can be pleaded in bar to any other suit for the same cause of action." *Alley v. Nott*, 111 U. S. 472, 4 Sup. Ct. 495, 28 L. Ed. 491; *City of Los Angeles v. Mellus*, 58 Cal. 16, 19, reaffirmed in 59 Cal. 455; 2 Black, Judgments, 848, § 709.

It is clear that the former action was a general dismissal on the merits and a final decree rendered thereon, and no leave to amend nor plead over was given by the court. A judgment so rendered will constitute a bar to the use of the same cause of action there involved as a counterclaim in a subsequent action at law between the same parties. *Baker v. Cummings*, 181 U. S. 117, 21 Sup. Ct. 578, 45 L. Ed. 776. And with equal force will it constitute a bar to the use of the cause of action there involved as

a defense set up in a cross-complaint in a subsequent action at law between the same parties, as is attempted here.

We have found no reversible error on the record presented, and therefore the judgment is affirmed.

FRANKLIN, C. J., and ROSS, J., concur.

(14 Ariz. 566)

KAIN v. ARIZONA COPPER CO., Limited.†

(Supreme Court of Arizona. June 28, 1913.)

1. LIMITATION OF ACTIONS (§ 127\*)—AMENDED PLEADINGS—CAUSE OF ACTION.

Where the cause of action stated in an amended complaint is the same as that alleged in the original complaint, the court must look to the date of filing of the original complaint to determine whether limitations had run when the action was brought.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.\*]

2. LIMITATION OF ACTIONS (§ 21\*)—BREACH OF CONTRACT—PLEADINGS.

A complaint which alleges a contract between plaintiff, an employé, and defendant, his employer, whereby defendant for a consideration specified agreed to furnish plaintiff proper hospital accommodations and the services of skilled physicians and surgeons, and which avers a breach of contract in that defendant furnished unskilled physicians and surgeons who improperly treated plaintiff, states a cause of action for breach of contract and not for personal injury or for malpractice, and the one-year statute of limitations (Laws 1903, No. 16, § 1) is inapplicable.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 90-99; Dec. Dig. § 21.\*]

3. LIMITATION OF ACTIONS (§ 27\*)—BREACH OF VERBAL CONTRACTS.

The right to sue for a breach of a verbal contract is limited to three years from its accrual as provided by Civ. Code 1901, par. 2951, subd. 1.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 132, 133; Dec. Dig. § 27.\*]

4. LIMITATION OF ACTIONS (§ 24\*)—BREACH OF WRITTEN CONTRACTS.

An action founded on a contract in writing must be commenced within four years after accrual of the cause of action as provided in Civ. Code 1901, par. 2954.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 112-117; Dec. Dig. § 24.\*]

5. LIMITATION OF ACTIONS (§ 46\*)—BREACH OF CONTRACT—TIME OF ACCRUAL OF CAUSE OF ACTION.

An employer who contracts for a valuable consideration to furnish hospital accommodations and skilled physicians and surgeons to employes sustaining personal injuries must, when an employé is injured, furnish hospital accommodations and skilled physicians and surgeons, and a failure so to do is a breach of contract and starts the running of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 240-253; Dec. Dig. § 46.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
† Rehearing denied September 23, 1913.



**6. LIMITATION OF ACTIONS (§ 180\*)—BREACH OF CONTRACT—CONTRACT IN WRITING—PRESUMPTIONS.**

Where the complaint stating a cause of action for breach of contract does not show that the contract was not in writing, the court, for the purpose of a special demurrer raising the statutes of limitations, will presume that it was in writing; four years not having run from the accrual of the cause of action at the time of the beginning of the action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 670-675, 681; Dec. Dig. § 180.\*]

**7. MASTER AND SERVANT (§ 92\*)—CONTRACTS BY EMPLOYERS TO FURNISH HOSPITAL ACCOMMODATIONS AND PHYSICIANS TO EMPLOYEES—LIABILITY.**

A corporation which establishes hospitals and undertakes to furnish treatment to injured and sick employes for a part of the wages of the employes does not maintain a charity but stands in no different light from the ordinary physician.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 143; Dec. Dig. § 92.\*]

Appeal from Superior Court, Greenlee County; F. B. Laine, Judge.

Action by Richard Kain against the Arizona Copper Company, Limited. From a judgment sustaining general and special demurrers to the complaint, plaintiff appeals. Reversed and remanded.

L. Kearney, of Clifton, for appellant. W. C. McFarland, of Clifton, for appellee.

ROSS, J. On July 3, 1912, appellant filed his complaint against appellee for damages. On the theory that it was an action for personal injuries, the court sustained a special demurrer raising the one-year statute of limitations. It is not necessary to state the facts of the original complaint; suffice it to say that it contained, in legal effect, the facts alleged in the amended complaint which was filed on October 14, 1912. In the amended complaint the appellee, which we shall hereafter designate as the mining company, is described as a corporation engaged in the business of mining, smelting, railroading, merchandising, and conducting of hospitals in Greenlee county, Ariz. It is alleged that the mining company owned and conducted at Clifton, Metcalf, and Morenci hospitals for gain and profit; that, for the purpose of shielding itself from actions for damages for negligence and malpractice of its physicians and surgeons, said hospitals are carried on under the name of Clifton Accident Benevolent Society, which is not a copartnership nor a corporation, but is a general hospital business conducted, owned, and managed by the mining company in connection with its other business for hire, gain, and profit.

The contract upon which the complaint is bottomed is alleged as follows: "That in the month of September, 1908, and for more than two years prior thereto, the plaintiff was in the employ of the defendant in and about

said mining and smelting business at Morenci, Graham (now Greenlee) county, territory (now state) of Arizona, as engineer of a stationary engine at the agreed compensation of \$3.50 per day. That a part of said agreement and contract of employment between plaintiff and defendant was that the plaintiff should pay to the defendant each month while in the employ of the defendant out of his wages as such employe the sum of \$1.80 per month for the support and maintenance of the defendant's said hospitals. That, in consideration of said payment of said sum of money to the defendant from month to month, the defendant contracted and agreed with the plaintiff to furnish plaintiff with hospital accommodations in said hospitals and to provide and furnish trained and capable nurses and skilled and competent physicians and surgeons in said hospitals for the care and treatment of the plaintiff in the event that he should become sick or disabled or accidentally injured while working for the defendant and in the regular course of his employment, and contracted and agreed, for the consideration aforesaid, to furnish the plaintiff with the services of skilled and competent physicians and trained and capable nurses in case of any injury to the plaintiff while working for the defendant as aforesaid. (5) That under said contract of employment, and in consideration of the payment by the plaintiff to the defendant from month to month of the said sums of money while plaintiff worked for the defendant, it became and was the duty of the defendant, in case the plaintiff should become injured while working for the defendant under said contract, to furnish the plaintiff with proper hospital accommodations and to treat him with due care and skill therein and furnish him the services of skillful and competent physicians and surgeons and trained and capable nurses, and to use and exercise due and reasonable care in the selection of such nurses and physicians and surgeons; but the plaintiff alleges that, on the contrary, the defendant, neglecting and disregarding its duty in the premises and under said contract and agreement with the plaintiff, when the plaintiff became injured while working for the defendant, as hereinafter alleged, did not furnish the plaintiff with proper hospital accommodations in said hospitals, and did not treat him in a careful nor skillful manner therein, and did not furnish him the services of skilled or competent physicians or surgeons or of trained or capable nurses, and did not use or exercise due or reasonable care in the selection of such nurses and physicians and surgeons as were furnished to the plaintiff." There follows the allegations of accidental injury by a fall in which appellant's left femur, hip joint, and left leg were greatly injured, his entrance into the hospital on September 29, 1908, for treat-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ment, where he remained until February 18, 1910, when he was sent by the mining company to the Presbyterian hospital at Chicago for further treatment, where he was treated until June 5, 1910, when he was discharged. That the first examination of his injury in September, 1908, was negligent and unskillful and without due care and a failure to discover that the leg was broken or the femur fractured, and of incompetent treatment until February 10, 1909. That on the last-mentioned date the physician and surgeon in charge discovered that the femur was fractured and performed an operation thereon and left foreign matter in and about said fracture which tended to prevent a union thereof, and that the treatment thereafter was negligent and unskillful until February 10, 1910, when appellant was sent to Chicago, as aforesaid. There is the allegation that the mining company did not exercise due care and caution in the selection of its physicians and surgeons, and that it retained them in its employment after knowledge of their unfitness and incompetency. To this amended complaint there was interposed a general demurrer and special demurrer raising the one, three, and four year statute of limitation. The demurrers were sustained.

[1] The cause of action stated in the amended complaint being the same cause of action as alleged in the original complaint, we must look to the date of filing the latter to determine if, when the action was brought, limitation had run.

[2] It is not an action for personal injury nor for malpractice by the mining company. The complaints, both original and amended, allege a contract between appellant and mining company by which the former was to pay the latter a monthly sum of \$1.80 and the latter in consideration thereof, in case of sickness or injury, was to furnish him proper hospital accommodations and the services of skilled and competent physicians and surgeons and trained and capable nurses and competent treatment. The alleged breach of this contract is that the appellee did not furnish skilled and competent physicians and surgeons, but, on the contrary, did furnish unskilled and incompetent physicians and surgeons who incompetently and improperly treated his injuries. The cause of action stated is for a breach of contract to furnish skilled and competent physicians and surgeons and competently to treat appellant's injuries as it had agreed to do. *Denver & R. G. R. Co. v. Iles*, 25 Colo. 19, 53 Pac. 222; *Youngstown, etc., Street Ry. Co. v. Kessler*, 84 Ohio St. 74, 95 N. E. 509, 36 L. R. A. (N. S.) 50, Ann. Cas. 1912B, 933. It is therefore clear that it is not for personal injury or for malpractice, as contended by appellee, and consequently the limitation of one year, as provided in section 1, Act 16, Laws Arizona 1903, is inapplicable.

[3] The contract upon which this suit is

based is pleaded as an express contract, but it is not shown whether it is a written or verbal contract. If the contract was verbal, the right to sue for a breach thereof is limited to three years from its accrual, as provided in subdivision 1, par. 2951, R. S. 1901. This provision of our statute was taken from Texas (article 3354, R. S.), and the courts of that state have held that a suit for damages for a breach of a verbal contract is an action for "debt" within the meaning of the statute. *Wood M. & R. Co. v. Hancock*, 4 Tex. Civ. App. 302, 23 S. W. 384.

[4] If the indebtedness sued for is founded upon a contract in writing, the action should be commenced and prosecuted within four years after the cause of action accrued as provided in paragraph 2954, R. S. 1901.

[5] When did the appellant's cause of action accrue? Under the contract as alleged, the moment the appellant was injured it became incumbent upon the appellee mining company to act by furnishing him hospital accommodations, skilled and competent physicians and surgeons and trained nurses. The allegation is that it undertook to do that, but failed to furnish services of the high standard contracted, or even competent and efficient service. It is the contention of the mining company that on September 29, 1908, when it took charge of appellant and undertook to treat his injuries, the contract was breached, and from that date the statute of limitation began to run. The appellant insists that limitation did not begin to run until he was discharged from the hospital in June, 1910. It would seem that, the instant the mining company was obligated by its contract to perform its part thereof, a failure to perform in the manner and with the means contracted would logically constitute a breach and start the running of the statute. The instant unskilled and incompetent physicians and surgeons were placed in charge of appellant's injuries the contract was violated and a wrong was done the appellant.

In *Aachen & M. F. Ins. Co. v. Morton*, 156 Fed. 654, 84 C. C. A. 366, 15 L. R. A. (N. S.) 156, 13 Ann. Cas. 692, Lurton, J., speaking for the court, said: "If an act occur, whether it be a breach of contract or duty which one owes another or the happening of a wrong, whether willful or negligent, by which one sustains an injury, however slight, for which the law gives a remedy, that starts the statute. That nominal damages would be recoverable for the breach or for the wrong is enough. The fact that the actual or substantial damages were not discovered or did not occur until later is of no consequence. The act itself, which is the ground of action, cannot be legally separated from its consequences. Were this so, successive actions might be brought in many cases of contract and tort as the damages developed, although all the consequential injuries had one common root in the single original breach



or wrong. This would in effect nullify the statute."

It seems to be the conceded law by practically all the authorities that in cases of breach of contract the statute of limitations begins to run against the right of the person damaged to recover from the time of the breach, and not from the time actual damages are sustained in consequence thereof. Case note, *Aachen & M. F. Ins. Co. v. Morton*, supra.

"Whether the negligence out of which the cause of action arises is the breach of an implied contract, or the affirmative disregard of some positive duty, is immaterial. In either case the liability arises immediately upon such breach of contract or disregard of duty, and an action to recover the damages, which are the measure of such liability, may be immediately maintained. The right to maintain the action is distinguished from the measure of damages, and although the entire damage resulting from such negligence may not have been sustained, or the fact that the negligence occurred may not have been known until the right to a recovery is barred, yet the time within which an action may be brought is not thereby prolonged." *Lattin v. Gillette*, 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115.

The mining company agreed to furnish the appellant, in case of sickness or injury, certain kind of service—good service, skilled service—and when it presented inferior and inefficient service the terms of the contract were violated and the statute began to run. The wrong done appellant was not so much the incorrect diagnosis of his injuries but the furnishing of incompetent and unskilled physicians and surgeons from which the wrong diagnosis may have been the result. He contracted for a superior quality of skill and knowledge, but when he called for it he was given incompetency. That was certainly the injury from which all subsequent damages followed.

Under the contract, however, it was not enough to furnish skilled and competent physicians and surgeons. The contract contemplated and the law implied that the injury of appellant should be diagnosed with skill and that it should be competently treated thereafter. The charge is incompetency of the surgeons, incorrect diagnosis, and negligent, incompetent, and careless treatment. We may assume that, if the surgeon had possessed necessary knowledge and skill, the diagnosis and treatment would have been proper. If that be true, then the chief primal wrong consisted in placing over appellant unskilled and incompetent physicians and surgeons. It might present a different question, however, if the physicians and surgeons had been skilled and competent and the injury consisted in unskillful, incompetent, and negligent treatment of the patient. In the latter

case, although we do not so decide, it is possible the statute would not begin to run until the patient was discharged.

[6] The complaint does not show upon its face that the contract pleaded was not in writing, and we have treated the contract sued upon, for the purpose of the special demurrer, as a written contract. If the contract was in writing, the court erred in sustaining the special demurrer raising the statute of limitations; four years not having run from the accrual of the action at the time of its institution.

[7] We also think the complaint is good as against the general demurrer. Railway and mining companies that establish hospitals for profit and gain occupy the position of ordinary physicians and surgeons and are bound by the same rules. If they undertake to furnish treatment, not as a charity, they stand in no different light from the ordinary physician. *Phillips v. St. Louis, etc., R. Co.*, 211 Mo. 419, 111 S. W. 109, 17 L. R. A. (N. S.) 1167, 124 Am. St. Rep. 786, 14 Ann. Cas. 742; and note.

The judgment is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

(55 Colo. 33)

# WENTZEL v. PEOPLE.

(Supreme Court of Colorado. March 3, 1913.  
Rehearing Denied July 7, 1913.)

## 1. CRIMINAL LAW (§ 996\*)—APPEAL—DISCRETION OF TRIAL COURT—AMENDMENT OF RECORD.

A part of the record in a prosecution for incest was amended so as to state, in place of "the consequences of his plea [of guilty] being fully explained to him," "the court having advised him that if he persists in said plea that it is the duty of the court to pass a sentence upon him and to sentence him to imprisonment in the state penitentiary and in its discretion may sentence him to a term in the state penitentiary at hard labor for a period of not less than 1 year nor more than 20 years," and by inserting in the passage reading, "Whereupon the court orders the evidence upon the plea of guilty entered herein," the name of the witness after the word "Evidence," and the same amendment in the passage reciting that the hearing of the evidence was continued to the time stated. *Held*, that the amendment was within the trial court's discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1483, 2529, 2544-2546; Dec. Dig. § 996.\*]

## 2. CRIMINAL LAW (§ 1147\*)—APPEAL—DISCRETION OF TRIAL COURT.

The trial court's discretion in amending the record in a criminal case will not be reviewed in absence of abuse thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3038, 3072, 3073; Dec. Dig. § 1147.\*]

## 3. CRIMINAL LAW (§ 288\*)—LIMITATIONS—DEFENSE—PLEADING.

Though more than 18 months had elapsed after the commission of the offense of incest and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



before the filing of the information, so that the prosecution was barred by limitations, if the case were not brought within the statutory exceptions, and the information did not recite any of such exceptions, accused cannot claim that the prosecution was barred, not having set it up in defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 660, 661; Dec. Dig. § 288.\*]

#### 4. CRIMINAL LAW (§ 980\*)—PLEA OF GUILTY—EVIDENCE.

Evidence, in a prosecution for incest in which accused pleaded guilty, *held* to sustain a conviction under the statute requiring evidence to be offered where a plea of guilty is entered in such cases.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2493-2496; Dec. Dig. § 980.\*]

Error to District Court, Pueblo County; Charles S. Essex, Judge.

George M. Wentzel was convicted of incest, and brings error. Affirmed.

Morrison & Bailey, of Denver, for plaintiff in error. John T. Barnett, Atty. Gen., and Elmer L. Brock, of Denver, for the People.

SCOTT, J. The plaintiff in error was on the 10th day of August, 1907, and under a plea of guilty to an information charging the crime of incest, sentenced to a term in the penitentiary. Some three years thereafter counsel for the defendant filed a motion to amend the record of conviction, which motion was denied by the trial court. The case is now before us for review.

The information charged the crime to have been committed on the 25th day of September, 1905, and was filed on the 8th day of August, 1907. The record sought to be amended, in so far as need be considered, is as follows: "Comes now the defendant and is arraigned and this information read to him and he answers and says that he is guilty as charged in the information and the consequences of his plea being fully explained to him he still persists therein. Whereupon the court hears the evidence upon the plea of guilty entered herein. And the court having heard the evidence herein continues the further hearing of this cause to August 10th, at 10 o'clock a. m. August 10th, 1907: At this day come the people by S. H. White, district attorney, and the said defendant, George M. Wentzel, as well in his own proper person as by his counsel, W. B. Vates, also come, and now neither the defendant nor his counsel saying anything further why the judgment of the court should not now be pronounced against him on the plea of guilty heretofore pleaded in this cause. The defendant was sentenced to hard labor in the penitentiary for a period of not less than 15 nor more than 20 years."

The motion to amend the record was filed July 25, 1910. The suggested amendments to the record are as follows: "That the part of the record of this court in this cause entered as of the 8th day of August, A. D.

1907, reading, 'Comes now the defendant and is arraigned and this information read to him and he answers and says that he is guilty as charged in the information and the consequences of his plea, being fully explained to him, he still persists therein,' be corrected so that it may speak the truth and read as follows: 'Comes now the defendant and is arraigned and this information read to him, and he answers and says that he is guilty as charged in the information, and the court having advised him that, if he persists in said plea, it is the duty of the court to pass sentence upon him and to sentence him to imprisonment in the state penitentiary and in its discretion may sentence him to a term in the state penitentiary at hard labor for a period of not less than 1 year nor more than 20 years, the said defendant still persists therein.' And that part of the record entered herein as of the 8th day of August, A. D. 1907, reading, 'Whereupon the court hears the evidence upon the plea of guilty entered herein,' be amended so that it may speak the truth to read as follows: 'Whereupon the court hears the evidence of Mary Wentzel upon the plea of guilty entered herein.' And that part of the record entered in this cause as of the 8th day of August, 1907, reading, 'And the court, having heard the evidence, continues the further hearing of this cause to August 10th, at 10 o'clock a. m.,' be corrected and amended so to speak the truth and read as follows: 'And the court, having heard the evidence of Mary Wentzel, continues the further hearing of this cause to August 10th, at 10 o'clock a. m.'"

The motion was supported by an affidavit of the defendant, in which it is said that: "When he pleaded guilty to the information, he was advised, in substance, that if he persisted in pleading guilty it would be the duty of the court to pass sentence upon him and to sentence him to the penitentiary for a term of not less than 1 year nor more than 20 years. That no other consequences of his plea were explained to him. That he was not advised that the statute of limitations had run against the offense nor that he might plead the statute of limitations; nor was it explained to him that if he persisted in pleading guilty he might be deemed to have waived his right to plead the statute of limitations; nor was he advised that the information showed the offense charged to be barred by the statute of limitations; nor was he advised that he might avail himself of the benefits of the statute of limitations. That he was not advised of his right to a trial by jury nor that if he pleaded guilty he would waive his right to a trial by jury." The motion was supported also by a transcript of the testimony of Mary Wentzel, the daughter upon whom the crime was committed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



The testimony of Wentzel in his affidavit, as above set forth, was contradicted in every particular by the testimony of the clerk of the district court.

[1,2] The question of amendment of the record was clearly within the discretion of the court, subject as in case of every such discretion to review, by reason of abuse of such discretion only. Clearly there was no abuse of discretion in this case.

[3] It is also the contention that, inasmuch as more than 18 months had elapsed after the commission of the offense, and before the filing of the information, the action was barred by the statute of limitations, and that if so barred then the information is invalid on its face in that no one of the exceptions contained in the statute is recited in the information.

In *Packer v. People*, 28 Colo. 306, 57 Pac. 1087, the very contention and under the same section of the statute was fully considered and determined adversely to the claim of plaintiff in error here.

[4] It is also argued that there was insufficient testimony to comply with the statute requiring testimony to be offered where the plea of guilty is entered in such cases. The record shows the testimony of the witness Mary Wentzel and a letter properly identified from the defendant addressed to her containing repeated confessions of guilt. This letter was written and mailed prior to the filing of the information. The testimony was sufficient.

The judgment is affirmed.

MUSSER, C. J., and GARRIGUES, J., concur.

(55 Colo. 97)

#### BALFE v. RUMSEY & SIKEMEIER CO.

(Supreme Court of Colorado. June 2, 1913.)

#### 1. APPEARANCE (§ 24\*)—WAIVER OF OBJECTIONS TO PROCESS—APPEARANCE AFTER JUDGMENT.

Where the defendant appeared for the first time more than 19 years after judgment had been rendered, and moved that an execution be recalled on the ground that it was barred by the statute of limitations, such an appearance was general, and the defendant could not thereafter object to the jurisdiction of the court on the ground that the original summons had not been served upon him, since the rule that the general appearance waives objections to the service of process applies to appearance after final judgment.

[Ed. Note.—For other cases, see *Appearance*, Cent. Dig. §§ 118-143; Dec. Dig. § 24.\*]

#### 2. EXECUTION (§ 75\*) — ISSUANCE — TIME — AMENDED STATUTE.

Where a statute providing for a ten-year limitation against execution upon judgment was amended so as to allow execution at any time within 20 years, an execution, issued within 20 years after a judgment rendered less than 10 years before the amendment was adopted is not barred.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 164-170; Dec. Dig. § 75.\*]

#### 3. APPEAL AND ERROR (§ 339\*)—WRIT OF ERROR—TIME FOR TAKING—CHARACTER OF ORDER.

Where a defendant moved to set aside a default judgment, entered against him 19 years before, on the ground that he was not served with summons, the motion is in the nature of a bill in equity to set aside the judgment and not a motion after judgment, and is reviewable under Code (Rev. St. 1908, § 433) by writ of error, so that a writ of error to the action of the court upon such motion is not barred by the lapse of time since the judgment was rendered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1883-1887; Dec. Dig. § 339.\*]

Error to County Court, City and County of Denver; Ira C. Rothgerber, Judge.

Action by the Rumsey & Sikemeier Company against Patrick H. Balfe. Motion by the defendant to recall and quash an execution issued on judgment for the plaintiff was overruled, and the defendant brings error. On application of defendant for supersedeas and of plaintiff to dismiss the writ of error on the ground that the final judgment had been rendered more than three years prior to the bringing of the writ of error, application and motion both denied.

Rice W. Means and Bernard J. Ford, both of Denver, for plaintiff in error. Rogers, Ellis & Johnson, of Denver, for defendant in error.

BAILEY, J. Rumsey & Sikemeier Company, defendant in error, brought suit in the county court of Arapahoe County, now the county court of the City and County of Denver, on June 6, 1893, and on the 14th day of July next thereafter recovered judgment against plaintiff in error, Patrick H. Balfe, for the sum of \$841.39 and costs. From that judgment no appeal was taken, nor has there ever been any attempt to review it on error. The proceedings now under consideration were begun April 2, 1913, more than nineteen years after the rendition of the judgment assailed. On the 14th day of November, 1912, execution on that judgment was issued out of the county court, and on the 30th day of January, 1913, plaintiff in error filed his motion to recall and quash that execution. The motion was overruled by the county court and error is assigned on the ruling. Thereafter, on February 1, 1913, plaintiff in error filed a motion to vacate the judgment, stay further proceedings under it, set aside the return showing service of summons, and vacate and quash the writ of execution, on the grounds that the summons never had been in fact served, that the return did not speak the truth, and that the judgment was entered without jurisdiction. Thereafter a hearing, on affidavits and oral testimony, was had on the motion. The court denied the application, holding that there had been valid service. Upon this ruling error is also as-



signed. That order left the judgment rendered in 1893 in full force and effect.

The matter is here on application of plaintiff in error for a supersedeas, and upon motion of defendant in error to dismiss the writ of error.

[1] The facts show that the plaintiff in error appeared first in the court below by motion to recall and quash the execution that had been issued, on the ground that more than ten years had elapsed between the entry of the judgment and the issuance of the execution, and that, therefore, under the limitation against the issuance of an execution after the lapse of ten years, the judgment not having been revived, it is deemed and considered in law satisfied in full, and that no writ of execution could lawfully have been issued thereon after the 14th day of July, 1903.

In this motion plaintiff in error did not question the validity of the judgment, or the sufficiency of the service of the summons, or the return, or the jurisdiction of the county court over him at the time of the entry of the original judgment. The appearance was in every respect general. There is nothing in the motion even suggesting a limited or special appearance. Moreover, there is nothing in the motion which the court below could have had any jurisdiction to consider upon a special appearance. The matters which the court was asked to pass upon were such as could only be considered upon a general appearance. By filing this motion and appearing generally, as he did, and failing to raise any objection to the service of the summons in the original action, or the return of the sheriff thereon, plaintiff in error waived any defect or irregularity which may have occurred in reference to such service or return.

In *Union Pacific Railway Co. v. De Busk*, 12 Colo. 294, 20 Pac. 752, 3 L. R. A. 350, 13 Am. St. Rep. 221, the court said:

"The early decisions in this state have been uniform to the effect that by a general voluntary appearance all objections to the summons and return thereof, and to the jurisdiction of the court over the person of the defendant, are waived."

In the opinion in *Everett v. Wilson*, 34 Colo. 476, at page 480, 83 Pac. 211, at page 212, it was said:

"The presumption is that any appearance is general. 2 Enc. Pl. & Pr. §32. Merely because a defendant says he enters a special appearance does not make it such. That must be determined, in part at least, by the object he has in view. A special appearance is one made for the purpose of urging jurisdictional objections. 2 Enc. Pl. & Pr. 620; 3 Cyc. 511. If a defendant separately, or in conjunction with a motion going only to the jurisdiction, invokes the power of the court on the merits, or moves to dismiss the action, or asks relief which presupposes that jurisdiction has attached this constitutes a gener-

al appearance. 3 Cyc. 508; 2 Enc. Pl. & Pr. 626; *Bucklin v. Strickler*, 32 Neb. 602 [49 N. W. 371]; *Wood et al. v. Young*, 38 Iowa, 102; *Belknap v. Charlton*, 25 Or. 41 [34 Pac. 758].

"The defendant's motion here asked for relief, which is inconsistent with his avowed object to test the jurisdiction of the court over his person, and which could be granted only after jurisdiction was obtained."

Under all the authorities there is no limitation on this rule, whether the appearance be before or after final judgment. A general appearance by defendant after final judgment waives any and all defects and irregularities in the service of summons and return, just as fully as it does where such appearance is entered before final judgment. *Barra v. People*, 18 Colo. App. 16, 69 Pac. 1074; *Gilbert-Arnold Land Co. v. O'Hare et al.*, 93 Wis. 194, 67 N. W. 38; *Crane v. Penny (D. C.)* 2 Fed. 187; *McCarthy v. McCarthy et al.*, 66 Ind. 128; *Boulware v. Chicago & Alton Railroad Co.*, 79 Mo. 494; *German Mutual Farmers' Fire Ins. Co. v. Decker et al.*, 74 Wis. 556, 43 N. W. 500; *Rogers v. McCord-Collins Mer. Co.*, 19 Okl. 115, 91 Pac. 864; and *Kilpatrick et al. v. Horton*, 15 Wyo. 501, 89 Pac. 1035.

In *Barra v. People*, supra, judgment had been taken against defendant by default. He thereafter appeared and asked that such judgment be vacated on the ground that it had been rendered through excusable neglect on his part. The court denied the motion. He then urged that the summons was invalid. It was held that by basing his motion to vacate the judgment on other than jurisdictional grounds the defendant had waived any right to question the validity of the summons, and the court said, at page 18 of 18 Colo. App., at page 1075 of 69 Pac.:

"Further, we think defendant waived the right to question the summons on this ground by his general appearance in asking that the judgment be set aside on account of his excusable neglect and that he be permitted to plead to the merits of the action."

In *Gilbert-Arnold Land Co. v. O'Hare et al.*, supra, the Supreme Court of Wisconsin, at page 197 of 93 Wis., at page 39 of 67 N. W., said:

"The settled rule is that, if a party desires to take advantage of want of service of process sufficient to give the court jurisdiction of his person, by moving to set aside the proceedings on that ground, he must appear specially for that purpose and keep out of court for all others. *Alderson v. White*, 32 Wis. 308. If a motion be made to set aside a judgment on a ground inconsistent with the claim that it is void for want of jurisdiction of the person, as, for instance, for irregularity in entering the judgment, or because costs are excessive, or not warranted by the pleadings, or because of some fact or facts constituting a defense, as is said in *Alderson v. White*, supra, in effect, such mo-



tion carries with it all objections to the jurisdiction of the court growing out of defective service or want of service of process on the persons of the defendants making the motion."

So in this case, when plaintiff in error appeared in the court below and moved an order recalling and quashing the execution, with no suggestion that the judgment had been entered without jurisdiction over his person, or that the summons had not in fact been served and that the sheriff's return did not speak the truth respecting such alleged service, he waived those questions absolutely. In effect, he admitted the propriety, regularity and validity of the judgment, but sought to avoid its enforcement on the ground that the statute of limitations had run against it. Plaintiff in error will not be permitted, where he has thus admitted the validity of the judgment, by seeking to have its enforcement stayed, on the ground that the statute of limitations has run against it, to allege its invalidity, after having been met by an adverse ruling on his first contention. If one desires to raise a jurisdictional question, he must do so at the very first opportunity. If he appears and questions the right to have a judgment enforced upon any other grounds than that the court was without jurisdiction to enter it, then such jurisdictional question is waived, and cannot thereafter at any stage of the proceedings be successfully urged or relied on.

[2] The motion of the defendant to recall the execution, on the ground that the collection of the judgment under execution was barred by the statute of limitations, was properly overruled, for the statute passed in 1901 permits executions to be issued upon judgments at any time within twenty years after their rendition. The statute extending the time within which executions may legally issue was passed before the ten-year limitation, provided for in the earlier statute, had run against this judgment. A statute extending the time within which an execution on a judgment may issue is remedial, and applies to all judgments against which, at the time of its passage, as here, no limitation statute had actually run. Therefore, the execution in this case, which it was sought to recall, was lawfully issued, and the motion to quash it properly denied. *Harrington v. Anderson et al.* (App.) 130 Pac. 616, and cases there cited.

[3] The motion to dismiss the writ of error must, purely as a matter of practice, also be denied. The plaintiff in error has a clear right to have the judgment and finding of the county court, on his motion to stay proceedings on the original judgment, in the

circumstances of this case, reviewed on error, upon the merits. This case is clearly distinguishable from the cases in which writs of error to review proceedings subsequent to judgment, under the Code, have been dismissed on motion. An examination of the several records discloses that they were all cases in which the parties had appeared and were in court, and where, upon the facts, the sole remedy was by motion in the original proceedings, in which it was necessary to assign error to the main judgment itself, and bring up the whole record for review. In this case plaintiff in error never appeared in the cause, and he had a remedy, if the facts are as he alleges them to be respecting failure of service, either by bill in equity to set aside the judgment, or by motion in the original proceedings for the like relief, independent of the Code provision. *Du Bois v. Clark*, 12 Colo. App. 220, 55 Pac. 750. Indeed these proceedings cannot be regarded as falling under the Code, and section 433 thereof, R. S. 1908, is not involved, as it was in all of the cases cited and relied upon to support motions to dismiss. It is not sought here to review the original judgment; but rather to review the judgment of the court entered in a matter which must be regarded as an independent proceeding. It is clear that if plaintiff in error had filed a bill in equity, as he might well have done, *Smith v. Morrill*, 12 Colo. App. 233, 55 Pac. 824, and the court had denied him relief, that such judgment would be subject to review on error in this court. The motion which plaintiff in error did file must be treated as equivalent to, and a substitute for, a bill in equity, and the judgment of the court denying him the relief thus sought is reviewable here. To hold otherwise would be either to deprive plaintiff in error of a substantial right, or limit him to a bill in equity, in the strictest sense, which is so much a sacrifice of substance to form that we are unwilling to so declare. For this reason the writ of error cannot be properly disposed of on motion, but must abide a hearing on the merits.

In denying the application for a supersedeas on the ground stated, we realize that the ruling, if finally adhered to, is practically an adverse decision to plaintiff in error on the merits, and for this reason we deem it essential to announce an opinion at this time, that all parties in interest may be fully advised.

Both the application for a supersedeas and the motion to dismiss the writ of error are denied.

MUSSER, C. J., and GABBERT, J., concur.



(24 Colo. App. 336)

SHWAYDER et al. v. CLAY, Clerk of  
District Court.

(Court of Appeals of Colorado. June 10, 1913.  
Opinion Modified July 14, 1913.)

PLEADING (§ 345\*)—JUDGMENTS THEREON—  
DEFECTIVE ANSWER.

While judgments upon the pleadings should be restricted, yet a judgment on the pleadings is proper where the answer largely controverted conclusions of law and the complaint stated an uncontroverted cause of action for money which defendant should have paid into court, it appearing that defendant as attorney for the plaintiff in a divorce case had acquired possession of \$1,000, that plaintiff subsequently reunited with her husband, whereupon the court required the defendant to commence a civil action to determine the amount of his fee, which was to be deducted from the deposit, the remainder to be paid into court, and that in such civil action defendant was awarded only \$200, for the judgment of \$200 must be taken as fixing the full amount of defendant's fee.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1055-1059; Dec. Dig. § 345.\*]

Appeal from District Court, Denver County; Greeley W. Whitford, Judge.

Action by Perry A. Clay, clerk of the district court, as registrar of said court against Solomon Shwayder and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Solomon Shwayder, Philip Hornbein, L. M. Goddard, and Hugh McLean, all of Denver, for appellants. Charles H. Talbot, of Denver (Milton J. Helmick, of Socorro, N. M., of counsel), for appellee.

BELL, J. This controversy grows out of certain proceedings in the divorce suit of Carrie O'Donnell v. Michael O'Donnell, commenced in the district court of the city and county of Denver in the year 1906. Solomon Shwayder, one of the appellants herein, was the attorney for Carrie O'Donnell in said divorce suit, and, as such, secured a temporary injunction restraining Michael O'Donnell from transferring his property pendente lite. Subsequently the O'Donnells settled their dispute out of court, and, after taking evidence, the court entered an order fixing the amount of counsel fees due the appellant Solomon Shwayder for the services rendered by him to Carrie O'Donnell in said divorce suit. Later the court vacated its order in this respect, and directed the appellant Shwayder to institute proceedings in said district court for the purpose of determining the proper compensation for his services and of enforcing his lien therefor against the sum of \$1,000 which he held, and which had previous to his possession thereof been placed by Michael O'Donnell, as a result of the divorce proceedings, in the custody of Otis B. Spencer, predecessor in office of the appellee, as registrar of said court. In pursuance of an order of court, the appellant Shwayder was directed to return to the registry of said court said sum of \$1,000 within 30 days from the

10th day of November, 1906, or to give a good and sufficient bond, with sureties thereon, conditioned that he would return to the registry of said court said sum of \$1,000, or so much thereof as might be determined he was not entitled to retain as compensation for his services aforesaid, the value of which services was to be determined in a proper civil proceeding which he was directed to institute in said district court within 10 days from the 10th day of December, 1906. On or about the 10th day of November, 1906, the appellants herein, for the purpose of allowing said Shwayder to retain said sum of \$1,000 pending the determination of the value of his said services as provided in said order of court, and in compliance with the terms of said order, did execute and deliver to the appellee's predecessor as aforesaid their bond in the sum of \$1,500 with Solomon Shwayder as principal and David Schwartz and Harry Schwartz as sureties. Said bond provided that Solomon Shwayder might retain said sum of \$1,000 pending the final determination of a certain proceeding to be brought by him in said court for the purpose of establishing the value of his services as aforesaid and of enforcing his lien therefor, and that he should return to the registry of said court the said sum of \$1,000, or so much thereof as might be determined in said proceeding he was not entitled to retain as compensation for his said services. On or about the 18th day of December, 1906, said Shwayder, in compliance with said order of court and the conditions of his bond, brought an action in the district court against Carrie O'Donnell and Michael O'Donnell to establish the full value of his services rendered to Carrie O'Donnell as aforesaid, and to enforce his lien therefor, and on or about the 13th day of October, 1908, the value of said services was tried to a jury, which rendered a verdict in favor of said Shwayder in the sum of \$200, and upon which verdict the court rendered and had judgment entered. Subsequently the appellee herein brought the action now before us to recover the sum of \$800, the balance of \$1,000 held by Shwayder after deducting therefrom the amount of his \$200 judgment, setting up the bond in *hæc verba*, its breach, and the resultant indebtedness of \$800 accruing to the appellee thereon. The appellants, after preliminary proceedings by way of demurrers, filed their answer admitting the capacity of the appellee, the proceeding in said divorce case, the issuing of said injunction, the settlement between the O'Donnells, the discontinuance of the divorce suit, the dissolution of the injunction, and the execution and delivery of the bond sued upon, but deny the power of the court to require such a bond. They also admit that suit was brought by appellant Shwayder in the district court against the O'Donnells to recover the full value of his services rendered in said divorce suit, and to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



enforce his attorney's lien therefor, and further admit the verdict and judgment therein in the sum of \$200, and their refusal to pay the sum of \$800 demanded, or any part thereof, claiming that Shwayder is entitled to the whole sum of \$1,000 mentioned in the bond, in addition to the sum of \$200, the amount of the judgment. Much of the answer filed as aforesaid was stricken out, and the appellants in open court elected to and did stand upon their answer as reduced, whereupon the appellee asked for judgment on the pleadings, which was rendered by the court in the sum of \$784 and costs to be taxed, from which judgment the appellants appealed.

Counsel for appellants abandon all assignments of error, except Nos. 6 and 7, wherein they complain of the action of the court in rendering and entering judgment on the pleadings. Counsel's contentions are that the pleadings raised a triable issue as to whether the verdict of the jury for \$200 in favor of Shwayder embraced his entire compensation, or whether it was the intention of the jury to permit him to retain the sum of \$1,000 mentioned in the bond and award him an additional sum of \$200, the amount mentioned in its verdict, making an aggregate compensation to the appellant Shwayder of \$1,200 for the services rendered by him in said divorce suit.

We are in complete unison with the contention of counsel for appellants that judgments upon the pleadings should be restricted. However, where the answer largely controverts conclusions of law, as it does in this case, and under the general condition of the pleadings before us, we think an uncontroverted cause of action is stated in the complaint, and that such a judgment was proper. We also think that it is almost self-evident from the record before us that it was understood by the court and jury at the trial of the Shwayder-O'Donnell Case that Shwayder's entire compensation for his services in the O'Donnell divorce suit was being submitted, and was determined to be in the sum of \$200, and the court was justified in the case before us in rendering judgment for the appellee herein in the sum of \$784 and costs; hence we think the judgment should be, and it is hereby, affirmed, with costs.

(24 Colo. App. 239)

TEBOW v. TELLER et al.

(Court of Appeals of Colorado. June 10, 1913.)

1. EJECTMENT (§ 65\*)—PLEADING—TITLE AND ESTATE OF PLAINTIFF.

In an action to recover possession of a reservoir site, a complaint, which alleges that the estate of the plaintiff consists of a lawful filing for a reservoir, with a right, either by purchase or condemnation, to acquire the fee title from the owners, whom the plaintiff had not yet been able to locate, is not sufficient, under Mills' Ann. Code, § 265, providing that a plaintiff may sue to recover real property where he claims a legal estate therein, or the

legal right to occupy and possess the same, and section 267, providing that plaintiff shall set forth the nature and extent of his title, or a brief statement of his possessory claim, under the local laws and rules of any mining district, or of the United States, or the state of Colorado, since it alleges that the title to the land is not vested in the government, and expressly alleges that the plaintiff has no title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 165-174; Dec. Dig. § 65.\*]

2. EMINENT DOMAIN (§ 74\*)—NATURE OF POWER — RIGHT TO POSSESSION WITHOUT PROCEEDINGS.

The right to condemn private property for a reservoir site does not give the right to enter the premises before the institution of the proceedings required by Rev. St. 1908, § 2416 et seq.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 188-197; Dec. Dig. § 74.\*]

Appeal from District Court, Pueblo County; C. S. Essex, Judge.

Action by F. L. Tebow against John C. Teller and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Theo. H. Thomas, of Denver, for appellant. Dugan & Brayton, of Pueblo, and Harry E. Pratt, of Fairbanks, Alaska, for appellees.

HURLBUT, J. April 5, 1910, appellant (plaintiff below) filed his second amended complaint against appellees for possession of a reservoir and reservoir site. Neither the abstract nor transcript of record shows when the suit was commenced, but for the purpose of deciding this appeal we will assume the suit to have been begun on the date mentioned. The complaint alleges substantially that at all times mentioned therein plaintiff is and was the owner and entitled to the possession of the Pueblo reservoir and reservoir site, situate in Pueblo county; that the reservoir and reservoir site embrace certain lands, therein described; that plaintiff did not own the fee title to the lands mentioned, but had endeavored, both before and after the suit was brought, to find the owners of the fee title thereto, for the purpose of purchasing or condemning such fee title; that the estate of the plaintiff in said property and premises consists of a lawful filing for a reservoir and reservoir site under the law, with a right, either by purchase, or by condemnation proceedings, to acquire the fee title thereto; that on March 6, 1907, plaintiff located and filed upon said reservoir and reservoir site, and on August 12, 1907, filed a preliminary map and statement of the same with the State Engineer; that ever since March 6, 1907, to the time he was ousted by defendants, he had been in the quiet and peaceable possession and enjoyment of said reservoir and reservoir site; that plaintiff never abandoned or forfeited his right or claim to the same; that he commenced constructing said reservoir on March 12, 1907, and has at all times diligently prosecuted the work of constructing and building the same; that plaintiff is entitled to the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



immediate possession of the reservoir and site; and that the same were of the value of \$60,000. The complaint further alleges, on information and belief, that in January, 1909, defendants, without right or authority, without the knowledge or consent of plaintiff, and against his wishes, wrongfully took possession of the reservoir and site, deprived plaintiff of the use and possession of the same, and are still in such possession; that defendant, the Teller Reservoir and Irrigation Company, a Colorado corporation, was organized after the ouster of plaintiff as aforesaid; that on or about April 6, 1909, defendant, John C. Teller, conveyed or caused to be conveyed to said company the Pueblo reservoir and reservoir site, and that at the time the company had knowledge of plaintiff's right, title, interest and ownership in and to the same; that ever since June 1, 1909, the company, in common with its co-defendants, has held possession of the reservoir and site against plaintiff; that plaintiff did not learn of the organization of said company and the transfer to it of the reservoir site until on or about March 1, 1910. Prayer that the company be made party defendant; that injunction issue, restraining defendants from interfering with the reservoir and site or plaintiff's possession, and right of possession, to the same; that defendants be directed to turn over possession of the reservoir and site to plaintiff; that defendants be declared to be trespassers on plaintiff's property; that, if possession cannot be delivered, plaintiff have judgment for the value of the reservoir and site in the sum of \$60,000, and for general relief.

A demurrer was interposed to the complaint, alleging, among other things that the same did not state facts sufficient to constitute a cause of action. Upon hearing the demurrer was sustained. Plaintiff elected to stand on his amended complaint.

[1] It seems to be clear from the complaint that at the time suit was brought plaintiff was out of possession of the lands described therein, and out of possession of the so-called reservoir and reservoir site, and that he sought to regain possession by and through the action commenced by him. Appellées contend, and it seems to be conceded by appellant, that this action is founded upon section 265, Mills' Annotated Code. That section provides, among other things, that: "An action to recover the possession of real property may be brought in any case where an action of ejectment or a writ or right might have been brought at common law, and in any case where the plaintiff claims a legal estate in real property or lands, in fee, or for life, or for years, or claims the legal right to occupy and possess the same," etc. Section 267, *Id.*, reads in part as follows: "The plaintiff in his complaint, shall set forth the nature and extent of his estate in the property, and state whether it be in fee, for life, or for the life of another, or for a term of

years and specifying such life or the duration of such term; or, if such plaintiff claims the legal right to occupy and possess the premises under the local laws and rules of any mining district, or of the United States, the state of Colorado, or otherwise, the complaint shall contain a brief statement of such possessory claim," etc. It will be observed that any one relying upon this kind of an action must allege in his complaint "the nature and extent of his estate in the property, and state whether it be in fee, for life, or for the life of another, or for a term of years, and specifying such life or the duration of such term," and, further, "The plaintiff shall also state that he is entitled to the possession of the premises, and that the defendant wrongfully ousted the plaintiff, or wrongfully withholds the premises from him, or both, as the facts may be," etc. We think the complaint in this case fails to comply with the requirements of the Code, in that it shows on its face that plaintiff has no title or right of possession in and to the land covered by the reservoir and reservoir site. It fails to set forth the nature and extent of plaintiff's estate in the land embracing the reservoir and reservoir site, unless the following allegation can be so considered, which is the only one that attempts to allege such estate, viz.: "The estate of the plaintiff in said property and premises consists of a lawful filing for a reservoir and reservoir site, under the law, with a right, either by purchase or by condemnation proceedings, to acquire the fee title to said land from the owners." This is not equivalent to the statement required by the Code, and, further, there is a total absence of a statement as to whether the estate claimed by plaintiff is "in fee, for life, or for the life of another, or for a term of years," as the Code requires. The averments of the complaint show that plaintiff has no interest, title, or right of possession in or to the land upon which the reservoir and site are located. According to its allegations, he once had possession of the premises, but was ousted therefrom by defendants. The averments to the effect that plaintiff did not own the fee-simple title to the premises but was diligently engaged in trying to find such owner for the purpose of condemning or purchasing the same, sufficiently show the title not to be in the government, but rather in private ownership. If the complaint be tested by section 267, quoted, the matters required to be stated therein will be found wanting. Neither the allegations in the complaint that at the time of ouster by defendants plaintiff had not secured the fee title to the land comprising the reservoir and site, but was diligently engaged, both before and after the bringing of suit, in an endeavor to find the owners of the fee-simple title for the purpose of purchasing same or acquiring the title by condemnation proceedings, nor the allegation that "the estate of plaintiff in said property



and premises consists of a lawful filing for a reservoir and reservoir site under the law, with a right either by purchase or by condemnation proceedings, to acquire the fee title to said land from the owners, whoever the owners may be or have been" states the nature and extent of any estate in the property in question.

[2] Appellant's position seems to be that when his complaint pleads the filing of the statement and map of the reservoir and site with the State Engineer he thereby shows a legal right in him to enter the private premises of another for the purpose of constructing such reservoir. The Constitution and laws of the state are both authority for the right to condemn private property as a reservoir site for private use, but a lengthy, complete, and detailed proceeding for such condemnation has been enacted by the Legislature, which can be found in section 2416 and accompanying sections, Revised Statutes, 1908. There is not a sentence in the complaint tending to show that plaintiff had attempted to comply with this statute. It affirmatively shows that plaintiff had no estate whatever in the land, and no right of possession thereof. Plaintiff, having elected to seek redress through this Code proceeding, it was incumbent on him to conform his pleadings to its requirements. Having failed to do this, necessarily his action fails. It would appear from the averments of the complaint that probably the statute of forcible entry and detainer could have been successfully invoked and full relief obtained thereby.

It has been held by our Supreme Court that the common-law rule that in actions of ejectment plaintiff must recover upon the strength of his own title, and not upon the weakness of that of defendant, applies to actions brought under the Code sections here considered. *Chivington v. Colo. Spgs.*, 9 Colo. 597, 14 Pac. 212; *Iron Silver M. Co. v. Campbell*, 17 Colo. 267, 29 Pac. 513. This doctrine, however, is held not to apply where title is in the United States. *Lebanon M. Co. v. Consolidated R. M. Co.*, 6 Colo. 371. In the case at bar plaintiff pleads no title or facts showing a legal right of possession in and to the land in issue. On the contrary, he states he has no title therein.

In *Tracy v. Norwich & Worcester R. Co.*, 39 Conn. 382, being an action in ejectment, the court used this language: "We, however, ought to say that we regard it as elementary law in Connecticut that in this action of dispossessin or ejectment the plaintiff must recover, if he recover at all, by the strength of his own title. Ample remedies are provided by actions of trespass and by proceedings for forcible entry and detainer for the disturbance of quiet possession, and we see no good reason for any change or mitigation of the familiar rule in respect to proof of title in ejectment." Chapter 27, entitled "Eject-

ment," Revised Statutes, Colo. 1866, is similar in many respects to chapter 23, Mills' Annotated Code, so much so that it is a fair presumption that, when the framers of the Code were drafting that instrument, they incorporated therein a substantial part of the former chapter.

In *Drake et al. v. Root*, 2 Colo. 685, the action was founded upon this chapter of the Revised Statutes, section 8 of which reads as follows: "The plaintiff shall in every case state in his declaration whether he claims in fee, or whether he claims for his own life or the life of another, or for a term of years, specifying such life or the duration of such term," etc. In construing this section, Judge Hallett, who rendered the opinion of the court, spoke as follows: "The finding of the jury is a more serious matter, for by the seventh clause of the twentieth section of the act (R. S. p. 277), it is provided that the verdict shall specify the estate which shall have been established upon the trial by the plaintiff, whether in fee or for life, or a term of years, or a right of possession and occupancy only. By the eighth section the plaintiff is required to set forth the estate which he hath in the premises, and by the twenty-third section, the judgment is to be given according to the verdict, while by the twenty-fifth section the judgment is made conclusive as to the title established at the trial. Thus, in the pleadings, as well as in the verdict and judgment, the estate or interest of the plaintiff in the property is made a matter of substance, which is not upon any account to be overlooked or omitted."

*Mash v. Bloom*, 133 Wis. 646, 114 N. W. 457, 4 L. R. A. (N. S.) 487, 14 Ann. Cas. 1012, was an action in ejectment, founded upon certain sections of a statute almost identical with our Code section above quoted. The question there arose on a demurrer as to whether or not the complaint stated facts sufficient to constitute a cause of action. The Supreme Court held the demurrer to be good, reversing the lower court. The following excerpt is found in the opinion: "The complaint fails to state the statutory requirements for a complaint in ejectment, and especially in the following particulars, namely, as to the plaintiff's estate or interest in the premises or that plaintiff is entitled to the possession of the premises. It is well settled that the requirements of the statute in complaints in ejectment must be strictly complied with (citing cases). Not only has the plaintiff failed to allege in her complaint the statutory requirements, but she has negatived a right to recover at the time of the commencement of action by showing a conveyance of the property to defendant on condition subsequent, and failure to show in the complaint any action evincing a purpose on her part to reinvest herself of her former estate because of forfeiture on account of condition broken."



So it may be said in the case at bar that plaintiff not only has failed to allege in his complaint the requirements of the Code, but he has negatived a right to recover at the time of the commencement of the action, by alleging a state of facts showing that he had no right, title, or estate in the premises, and no legal right to the possession of the same at the time he claims to have been ousted.

*Thompson v. Wolf*, 6 Or. 308, was an action in the nature of ejectment, brought under a Code section identical with our own. The following excerpts are taken from the opinion of the court: "From the complaint it appears that the respondent's grantor \* \* \* 'leased and let' to the appellant, 'as tenant at will or by sufferance,' a certain parcel of land in Washington county. Thereafter the land was conveyed to respondent, and \* \* \* he served appellant with notice to quit. \* \* \* Two questions arise upon this record. The first is, What is the character of the action? It cannot be regarded as an action of ejectment. In that action it is necessary that the plaintiff set forth the nature of his estate in the property, whether it be in fee, for life, or for a term of years, \* \* \* thereby enabling the courts to settle the question of title, which is the great end of the action of ejectment with us. The complaint herein is entirely silent as to the nature of the respondent's estate; the recovery of the mere possession of the premises being all that is sought. Therefore we are of opinion that this must be regarded as an action brought under the forcible entry and detainer act."

We discover no error on behalf of the trial court in sustaining the demurrer to the complaint. Judgment affirmed.

(24 Colo. App. 264)

#### KENT et al. v. COBB.

(Court of Appeals of Colorado. June 10, 1913.)

#### 1. PARTNERSHIP (§ 1\*)—NATURE OF RELATION.

A partnership is a contract, express or implied, between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in business, and to divide the profits and bear the losses in certain proportion.

[Ed. Note.—For other cases, see *Partnership*, Dec. Dig. § 1.\*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5191-5202; vol. 8, pp. 7746, 7747.]

#### 2. PARTNERSHIP (§ 55\*)—HUSBAND AND WIFE AS PARTNERS—EVIDENCE—SUFFICIENCY.

Much more evidence is necessary to establish the existence of a business partnership between husband and wife when denied by them than between persons not sustaining that relation.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 75, 78, 79, 81; Dec. Dig. § 55.\*]

#### 3. PARTNERSHIP (§ 55\*)—HUSBAND AND WIFE AS COPARTNERS—EVIDENCE—SUFFICIENCY.

Evidence in an action for damages against a husband and wife charging them as copart-

ners held insufficient to show that the wife was a partner, as against explicit denials by her and her husband, or to show partnership by estoppel.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 75, 78, 79, 81; Dec. Dig. § 55.\*]

#### 4. EVIDENCE (§ 472\*)—CONCLUSIONS OF WITNESS.

Where the issue was whether defendants, who were husband and wife, were partners in business, it was error to permit plaintiff to testify that defendants were copartners, and that the wife assumed responsibility over, and acted as manager of, the business; such statements being conclusions of the witness.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2186-2196, 2248; Dec. Dig. § 472.\*]

#### 5. EVIDENCE (§ 148\*)—EXCLUSION — TELEPHONE CONVERSATIONS.

Where the issue was whether plaintiff gave defendant consent to rent plaintiff's automobile, and defendant testified that plaintiff gave him his consent to rent it in a conversation over the telephone, which plaintiff denied, refusal to then permit defendant to show that he had had a number of conversations over the telephone with plaintiff in order to show that he knew his voice, or to show who was present when the conversation took place, or to show by those present what the conversation was, was error.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 438; Dec. Dig. § 148.\*]

#### 6. EVIDENCE (§ 148\*) — CONVERSATION OVER TELEPHONE.

A telephone conversation between the parties and upon the subject-matter of the litigation, having been testified to by one of the parties, may also be testified to by a bystander so far as he heard it.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 438; Dec. Dig. § 148.\*]

#### 7. PARTNERSHIP (§ 44\*)—EVIDENCE—PROOF OF COPARTNERSHIP—BURDEN OF PROOF.

In an action against a husband and wife charging them as copartners in business, the burden of proof of the existence of partnership was upon the plaintiff.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 61-63; Dec. Dig. § 44.\*]

#### 8. APPEAL AND ERROR (§ 263\*)—ERRONEOUS INSTRUCTIONS—ERRORS NOT EXCEPTED TO.

Where exceptions were not taken to erroneous instructions, the errors will have no influence in determining the appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1516-1523, 1525-1532; Dec. Dig. § 263.\*]

Appeal from District Court, City and County of Denver; Greeley W. Whitford, Judge.

Action by Clarence A. Cobb against E. R. Kent and Carrie A. Kent. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Charles R. Bosworth, of Denver, for appellants. Martin Herbert Kennedy, of Denver, for appellee.

KING, J. Clarence Cobb, as plaintiff, brought his suit against the appellants herein, as defendants, to recover damages in the sum of \$1,200, of which \$500 were claimed as exemplary damages. The complaint alleged that at all times mentioned the defendants

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



were conducting an automobile business in Denver under the firm name of the Kent Automobile Company, a copartnership; that about April 18, 1908, for a commission of 10 per cent. of the selling price, plaintiff employed defendants to sell his automobile, valued at \$1,700, and that on said date he delivered the automobile to the defendants for such purpose; that defendants agreed that the automobile would not be used or operated except by the said E. R. Kent, and then only for the purpose of demonstrating the same to contemplated purchasers, but that immediately after receiving the same the defendants, without the knowledge or consent of plaintiff, placed the automobile in the rent service and in charge of incompetent and unskillful chauffeurs, and that it was used in such a reckless and unskillful manner that it was damaged while in the possession of defendants in the sum of \$600; that plaintiff spent \$100 in repairing the same. Defendant Carrie A. Kent filed a general denial. Defendant E. R. Kent pleaded a general denial, and also a separate defense and cross-complaint, alleging that the automobile was left with him for repairs, which were made, of the value of \$25.07, no part of which had been paid, and prayed judgment in the said sum. Trial was had to a jury and a verdict of \$500 for plaintiff returned, upon which judgment was entered and from which this appeal was taken.

The liability of the defendant Carrie A. Kent depends wholly upon the question of partnership. If it be said the complaint might have been so construed as to charge the defendants jointly, or jointly and severally, irrespective of the allegations of copartnership, nevertheless the cause was not so tried. The court, without objection by plaintiff, instructed the jury that the suit was against the defendants as copartners, and that, unless a copartnership was established by the evidence, the verdict must be for the defendants. Defendants were husband and wife. At and prior to the events giving rise to the suit the husband was the owner of certain real estate at 1748 Logan street, in Denver. The lower part of the building thereon was used as a garage, and the upper portion as apartments in which the defendants with their children resided. The husband was also the owner of the machinery and equipment with which the automobile business was carried on. No part of the property, either personal or real, stood in the name of, or belonged to, the wife, so far as disclosed by the evidence. The front of the garage bore the sign: "The Kent Automobile Co." The evidence upon the part of the plaintiff tended to show that on April 18, 1908, he delivered his automobile to E. R. Kent, between whom and plaintiff it was understood and agreed that the automobile should be received and kept at said garage for sale at a commission of 10 per cent. upon

the selling price; that Kent said he would give the car his personal attention, and not allow anybody, excepting himself, to take it out of the shop, and then only to make personal demonstration to prospective purchasers; that under these conditions the car was delivered by plaintiff in good condition; that he heard nothing from defendants until election day, May 19, 1908, when he saw that his car was being used in taking voters to and from the polls, and driven by a man not the defendant; that about 4 o'clock that afternoon he went to the garage and saw Mrs. Kent, and the car also, standing near the curbing in front of the garage. He asked her what the car was doing there, and she said she did not know. He then attempted to run it into the garage, but on account of its damaged condition was unable to get it in without great difficulty. He then took the car away, and on February 26, 1909, filed his complaint in this suit. It is unnecessary to dwell upon the conflicting testimony as to the condition of the car when received and when taken away, as the errors based thereon need not be determined. The further testimony of the plaintiff introduced for the purpose of tending to show that Carrie A. Kent was a partner of her codefendant was, in substance, that he dealt with the Kent Auto Company; that Mr. Kent had charge of the place and he always dealt with Mr. Kent when he was there, but had some dealings with Mrs. Kent; that she had charge of the books, answered questions relative thereto, made out his bill for repairs and gasoline, and receipted the same, and in speaking of the business she used the plural pronoun "we" upon one occasion, namely, when making out and receipting a bill of July 14, 1908, at which time she said to her husband, "I thought we would not charge him for the gasoline." In reply to this Mr. Kent said, "I guess we will." In addition to this testimony of plaintiff, he was permitted, over the objection of defendants, to state that the defendants were copartners; that Mrs. Kent "assumed responsibility in Mr. Kent's absence, so far as my experience went," and that she "acted as manager of the business." Motions to strike these conclusions of the witness were overruled. Mr. and Mrs. Kent were called by plaintiff and interrogated as his own witnesses, but not as upon cross-examination under the statute. Mr. Kent testified positively that he was the sole owner of the business; that his wife and children lived with him in apartments over the garage, and that his wife sometimes helped with the books and remained at the garage when he was away; that she did not conduct sales; that the proceeds of the business were not divided between him and his wife, and no such arrangement existed; that the only use she got from the proceeds was the support he furnished her as his wife; that he did not pay



her a salary, although he sometimes paid her for work done; that such work as she did on the books, or in making out the bills and receipting the same, was done under his control and upon his authority. Mrs. Kent, as plaintiff's witness, testified in substance the same as her husband, but stated that some weeks after the automobile was taken away the real estate was conveyed to her by her husband, and thereafter he rented the same and paid the rental to her monthly.

[1] 1. A partnership is a contract, express or implied, between two or more competent persons, to place their money, effects, labor, and skill, or some or all of them, in business, and to divide the profits and bear the losses in certain proportions. To constitute a partnership *inter se*, there must be a unity of interest and for the prosecution of the business in which the supposed partner is charged. *Omaha & Grant S. & R. Co. v. Rucker*, 6 Colo. App. 334, 40 Pac. 853; *Phillips v. Phillips*, 49 Ill. 437; *Parsons on Partnership*, § 6. And whether or not a partnership existed depends upon the real intention of the parties. *Lindley on Partnership* (6th Ed.) pp. 10, 11; *Salter v. Ham et al.*, 31 N. Y. 321; *Omaha & Grant S. & R. Co. v. Rucker*, *supra*; *Garrett v. Pub. Co.*, 61 Neb. 541, 85 N. W. 537; *Randall v. Ditch and Locke*, 123 Iowa, 582, 99 N. W. 190.

[2] Evidence of the acts of the wife in and about the business of the husband was competent as tending to show that she was a partner. But much more evidence is necessary to establish the existence of a business partnership between husband and wife, when denied by them, than between persons not sustaining that relation.

[3] The acts of the wife in assisting or advising her husband in the business, such as keeping the books, making out bills and receipting the same, and her use of the personal pronoun "we" in speaking of the business, and such other acts as have been hereinbefore recited, are not in themselves sufficient to establish her actual partnership interest against her explicit denial as well as that of her alleged copartner, as all these matters might be satisfactorily explained by her wifely sympathy, and the fact that her own well-being and that of her children would be affected by the business success or failure of her husband. And we think that all such testimony as is here given will not, alone, raise any presumption that the wife was entitled to any share of the product of the business as a copartner therein. It is so held in *John Bird Co. v. Hurley*, 87 Me. 579, 33 Atl. 164, a well-considered case in which the court, by Mr. Justice Emery, said: "The law cherishes the marriage relation. It recognizes the deep interest the wife should, and does, take in the business carried on by the head of the family. It regards and commends this interest as arising naturally from marital affection and duty rather than from

any partnership in the business. This wifely interest is essential to the completeness of the marriage relation. Its quick and ample manifestation should not be restrained by any fear of danger therefrom to the wife or her separate estate." In this case the evidence of plaintiff offered for the purpose of tending to show partnership falls far short of proof that the wife was a partner against explicit denials made by her and her husband. There is present no element of partnership by estoppel.

[4] 2. The action of the court in permitting plaintiff to testify that defendants were copartners, and that defendant Carrie A. Kent assumed responsibility over, and acted as manager of, the business, was error, and we think prejudicial. Those were ultimate facts for determination by the jury under appropriate instructions from the court, and as to the defendant Carrie A. Kent, at least, the question of partnership was the pivotal question in the case. The statement of plaintiff that defendants were copartners was merely his conclusion. Witnesses are only competent to state facts. The objections to these questions should have been sustained and the answers stricken out, and refusal so to do was error. *Omaha & Grant S. & R. Co. v. Rucker*, *supra*; *Dwinel v. Stone*, 30 Me. 384.

[5] 3. The only direct evidence of the use of the car by the defendants or either of them was the use made of it on election day. Whether that use was with or without the knowledge or consent of the plaintiff was an issue made by the pleadings. It was material and possibly decisive of the liability of the defendant E. R. Kent. The court instructed the jury that, if the car was used on that day with the consent of plaintiff, then defendants would not be liable. Defendant E. R. Kent testified that preceding the use of the car on election day he had a telephone conversation with the plaintiff whom he knew and whose voice he recognized, and that he asked and received permission from plaintiff to rent the car on that day, and acted upon such permission in so renting it. He also attempted to testify that he had had numerous conversations with the plaintiff, for the purpose of showing that he was acquainted with plaintiff's voice, but was not permitted so to testify. He was also refused permission to testify as to who were present during said telephone conversation. He offered two witnesses to prove that they were present in his office at the time and heard the telephone conversation, and what it was, but such testimony was not permitted. We think this was error. As we have said, this was a crucial question. Defendant had testified to the conversation, and that plaintiff's consent to run the automobile had been then obtained, and this conversation the plaintiff denied. It was important that defendant should be able to



corroborate his own statement as to such conversation, and the testimony offered and which was refused might, if received, have been decisive of that question. There seems to be no doubt of the admissibility of such testimony, either upon reason or authority.

[6] A telephone conversation between the parties, and upon the subject-matter of the litigation, having been testified to by one of the parties, may also be testified to by a bystander, so far as he heard it. 12 Enc. of Ev. 478; Miles v. Andrews, 153 Ill. 262, 38 N. E. 644; McCarthy v. Peach, 186 Mass. 67, 70 N. E. 1029, 1 Ann. Cas. 801; Snively v. Colburn, 78 Ill. App. 93.

[7, 8] We think the two instructions on the question of partnership were erroneous—the one numbered 2, because it did not correctly state the law applicable to the facts of this case considering the relation of the defendants as husband and wife, and the one numbered 10, in placing the burden of proving that no copartnership existed upon the defendants, instead of placing the burden of proving its existence upon the plaintiff. But as proper exceptions were not reserved these errors have no influence in determining this appeal.

Numerous other errors are assigned, and we think some of the objections therein well taken, but they need not be mentioned.

For the reasons stated, the judgment will be reversed and the cause remanded.

Reversed and remanded.

(24 Colo. App. 256)

**BROWN v. WELLINGTON MINES CO.**  
et al.

(Court of Appeals of Colorado. June 10, 1913.)

**1. APPEAL AND ERROR (§ 715\*)—MATTERS NOT APPARENT OF RECORD—AFFIDAVITS.**

Affidavits filed by an appellant directly in the Court of Appeals cannot be considered as testimony regularly offered on the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2964, 2965, 3273; Dec. Dig. § 715.\*]

**2. JUDGMENT (§ 714\*)—MATTERS CONCLUDED—FACTS ESSENTIAL TO JUDGMENT.**

In an action in support of an adverse proceeding, where it appears that in a previous litigation the right to the portion of the plaintiff's mining claim upon which his discovery shaft is located was determined adversely to him as against the defendant, that determination is conclusive upon him, even though the subsequent action involves territory in addition to that involved in the preceding action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1240, 1242, 1243; Dec. Dig. § 714.\*]

**3. APPEAL AND ERROR (§ 386\*) — APPEAL BOND—APPROVAL—DUTY OF APPELLANT.**

It is the duty of one seeking to perfect an appeal to see that his bond is properly approved by the clerk as required by the order of the court, and his failure to do so cannot be excused on the ground of negligence of the clerk.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2059-2063; Dec. Dig. § 386.\*]

**4. APPEAL AND ERROR (§ 373\*) — APPEAL BOND—NECESSITY.**

Without a duly approved appeal bond, no jurisdiction vests in the Court of Appeals to review proceedings of the lower court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2001-2004; Dec. Dig. § 373.\*]

**5. APPEAL AND ERROR (§ 613\*)—BILL OF EXCEPTIONS—SEAL—FILING—AUTHENTICATION.**

A bill of exceptions which does not show that it was filed in the district court, nor that it was attested by the seal of that court, or otherwise authenticated by the clerk or any other officer connected with the court, cannot be considered by the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2702-2707; Dec. Dig. § 613.\*]

Appeal from District Court, Summit County; Charles Cavender, Judge.

Action by Thomas A. Brown against the Wellington Mines Company and others. Judgment for the defendants, and plaintiff appeals. Appeal dismissed, and judgment affirmed.

Thomas A. Brown, of Breckenridge, pro se. James T. Hogan and Quentin D. Bonner, both of Leadville, for appellees.

CUNNINGHAM, P. J. Appellant Brown, as plaintiff below, filed his complaint in the district court in support of an adverse proceeding against the appellees. When the case was called, after a considerable parley in which the court, the plaintiff, and the attorney for the defendant took part, plaintiff moved orally that the case be nonsuited. No attempt was made by Brown to withdraw his motion for a nonsuit which, before the taking of any testimony, was granted, or at least the trial judge entered the nonsuit, to which plaintiff saved an exception. Assuming that under this state of the record the plaintiff has a right to prosecute this appeal, still we may not consider it because of the fatally defective condition of the record. So far as we are able to discover, every rule of this court and every provision of the Code pertaining to appellate procedure, which are in any manner applicable to these proceedings, have been utterly ignored by appellant, who appears here, as he appeared in the district court, in his own behalf and without other counsel.

[1] Much of the record in this court is made up of affidavits which appellant has filed directly in this court and which he asks us to treat as testimony regularly offered on the trial. This, of course, we cannot do.

[2] Moreover, it appears clearly from the record that the plaintiff was attempting, in the court below, to relitigate questions that were finally determined against him as between himself and the Wellington Mines Company in a former action, in which former trial the plaintiff was represented by able lawyers. See *Brown v. Colorado-Wyoming*



Development Co., 47 Colo. 294, 107 Pac. 258. It may be true that there is additional territory included in the mining claim here involved, but the mining claim involved in the former suit, which was determined adversely to the plaintiff, included the discovery shaft on which the plaintiff must depend in this case for his title.

[3] The record also discloses that the appeal bond in this case has never been approved by the clerk or the presiding judge. The order of the trial court allowing the bond requires that it be approved by the clerk. The appellant seeks to excuse this defect in his bond upon the theory, apparently, that no other duty rested upon him than to prepare and file the bond with the clerk; that it then became the duty of the clerk to approve the same. This contention cannot be allowed. It is the duty of one who seeks to perfect an appeal from the judgment of a nisi prius court to see to it that his appeal bond is approved, and he cannot excuse his neglect in this behalf by pleading the carelessness or oversight of the clerk of the trial court.

[4] Without an appeal bond duly approved, no jurisdiction vests in this court to review the proceedings of the lower court. *State Bank v. Plummer*, 46 Colo. 71, 102 Pac. 1082.

[5] There is nothing to indicate that the so-called bill of exceptions, which has been filed in this court, was ever filed in the district court or attested by the seal of said court or otherwise authenticated by the clerk or any other officer connected with that court; hence it cannot be considered by us for any purpose. There are other fatal defects in the record to which it is not necessary to direct attention.

For the reasons assigned, the appeal must be dismissed, and the judgment of the trial court affirmed.

Judgment affirmed.

(90 Kan. 299)

#### SMITH v. BANK OF HAMLIN.

(Supreme Court of Kansas. July 5, 1913.)

MORTGAGES (§ 86\*)—VALIDITY—DURESS—SUFFICIENCY OF EVIDENCE.

Evidence, in an action to cancel a note and mortgage on the ground that it had been executed and delivered to defendant bank upon a threat of its director to cause plaintiff's son to be sent to the penitentiary if she did not give security for his debt, *held* sufficient to sustain a judgment for plaintiff.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1350, 1355, 1364; Dec. Dig. § 86.\*]

Appeal from District Court, Brown County.

Action by Bettle Smith against the Bank of Hamlin. Judgment for plaintiff, and defendant appeals. Affirmed.

S. M. Brewster, of Topeka, and S. F. Newlon, of Hiawatha, for appellant. A. B. Crockett, of Horton, for appellee.

PER CURIAM. This action was brought by the appellee to set aside and cancel a note and mortgage which she had executed and delivered to the appellant to secure an indebtedness of her son to the appellant. The ground upon which appellee demanded the cancellation of the instruments was that she had been coerced by a threat of an officer of the appellant to cause her son to be sent to the penitentiary if she did not give the security for the debt to the appellant.

The son was engaged in the implement business and did business with the appellant bank and had once before overdrawn his account with it to the amount of \$1,000, which amount he was unable to pay. At his request appellee had mortgaged her 40-acre farm to secure the indebtedness and had then informed him that she would not further incumber her property to aid him. Thereafter the son again overdraw his account at the appellant bank to the amount of \$4,000 and had been informed by the officers of the bank that it must be settled. Not having the money, the son offered his stock of implements and other property as security and was informed by them that they could not use that kind of security. This conversation was had with a director of the bank. The son informed the director that the security he offered was all he could give unless he could get his mother to give a second mortgage on her land, and she had told him that she would not do so. The director thereupon asked the son if he knew that allowing an overdraft like that was a penitentiary offense. The director also said to the son that he would like to have it fixed up right away as he was going to the county seat the next morning to see about some other business. From this conversation the son inferred that if he did not get the security demanded the directors would institute a criminal prosecution against him the next day. The son immediately went to his mother, informed her of the conversation with the director and what had been said about security on his own property and told her that he did not know how he was going to fix it up unless she would give another mortgage. She said that if that was the only way out of it she supposed she would have to do so. The appellee testified that her son told her that if she did not give the mortgage they would send him to the penitentiary and for that reason she gave the mortgage. The director also testified, in effect, that he told the son that making the overdraft was a penitentiary offense and that he was going to the county seat next morning and wanted to have it fixed up; that he told this to the son; and that the son might draw his own conclusions therefrom. The effect of his evidence clearly showed that he intended an implied threat to send the son to the penitentiary if the security was not given by the mother.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



A point is made by the appellant that the mortgage, given by the mother on the morning following the conversation, described land which the mother did not own for the reason that the number of the section was incorrectly stated; that a few days thereafter the mother executed another mortgage to correct the mistake and correctly describing her own land. There is nothing, however, to show that she was not still acting under the belief that if she did not do so her son would be prosecuted and sent to the penitentiary.

The trial court found that the execution of the mortgage was effected through coercion and rendered judgment in favor of the appellee canceling the note and mortgage. There is ample evidence to support the finding and the judgment of the court.

The judgment is affirmed.

(39 Kan. 335)

PHILLIPS et al. v. ARKANSAS VALLEY INTERURBAN RY. CO.†

(Supreme Court of Kansas. June 7, 1913.)

(Syllabus by the Court.)

**1. MUNICIPAL CORPORATIONS (§ 43\*)—PLATS—VACATION—FORECLOSURE OF MORTGAGE.**

Where, in a sale and purchase of land, a mortgage is taken to secure any part of the purchase price, and provision is made in the mortgage for the platting of the land as an addition to the town or city, it is held that the mortgagee thereby consents to such platting, and that after such plat is, in fact, made and recorded the judgment of a court foreclosing such mortgage does not vacate the plat, especially where various portions of the tract, described by reference to the plat, are by the decree excepted from the sale.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 120, 121; Dec. Dig. § 43.\*]

**2. MUNICIPAL CORPORATIONS (§ 43\*)—PLATS—VALIDITY.**

Where it appears that, in the making of a plat of an addition to a city or town, the wife of one of the proprietors did not acknowledge the plat, this fact of itself does not invalidate the plat.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 120, 121; Dec. Dig. § 43.\*]

**3. MUNICIPAL CORPORATIONS (§ 657\*)—VACATION OF STREET—BURDEN OF PROOF.**

The burden of showing that a street, which appears to have been duly dedicated to the use of the public, has been vacated by operation of law rests upon the party alleging such vacation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 722, 844, 1429, 1496; Dec. Dig. § 657.\*]

**4. EMINENT DOMAIN (§ 119\*)—COMPENSATION—USE OF STREET BY STREET RAILROAD.**

A street car company is not responsible in damages to the owners of adjacent lots for the laying out of its tracks and operation of its railway in the street.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 304-314; Dec. Dig. § 119.\*]

Appeal from District Court, Sedgwick County.

Action by Rebecca L. Phillips and others against the Arkansas Valley Interurban Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Holmes & Yankey, of Wichita, for appellant. Dale & Amidon, of Wichita, for appellees.

SMITH, J. This action was brought by appellees to recover damages for the appropriation by appellant of a strip of land along and near the south side of a tract of six or seven acres of land which appellees had bought at sheriff's sale resulting from the foreclosure of a mortgage on the tract.

[1] The appellant answered that this tract, some years before the appropriation, had been platted by the proprietors thereof and was called Garland Brook addition to the city of Wichita, and that the portion thereof appropriated by appellant was in a street of such addition called Twenty-Fourth street. The appellees in turn contended that the tract had not been legally platted for the reason that the wife of one of the proprietors had not acknowledged the plat; that the mortgagee had not recognized or consented to the plat; and further, if legally platted, the plat had been vacated by the judgment of the court in foreclosing a mortgage given upon the land by the proprietors, which mortgage had been of record before the filing of the plat; and further, if the plat was legally made and was not vacated by the judgment of the court in the foreclosure action, that Twenty-Fourth street, not being within the limits of the city, was vacated by section 7312 of the General Statutes of 1909 in that said Twenty-Fourth street remained unopened for public use for the space of seven years at one time after the making and recording of the plat.

It is conceded that, as the recording of the mortgage antedated the recording of the plat, the judgment in the foreclosure action did vacate the plat unless the plat was made with the consent of the mortgagee. The tract of land was deeded by Charles N. Louthan to James F. Toohey, John Davis, and George W. Conner April 28, 1887. A part of the purchase price of the tract was secured by a mortgage given by the purchasers to Louthan at the same time the deed to them was made. The mortgage contained the following provision: "In case of foreclosure and sale the parties of the first part hereby waive the right of appraisal of the premises. A further and important condition of the foregoing indenture is the agreement of the grantee to release from the provisions of this mortgage deed any number of lots, after the premises herein are duly and legally platted into lots, upon the payment to him of a proportionate sum of said (\$9,000) nine thousand dollars, or at the rate of fifty dollars (\$50) per each lot so released. These payments to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied July 5, 1913.



be made in cash or in first mortgages on said lots released as per parol contract and are to be indorsed upon the said notes described above at the time of payment. The said notes and this mortgage are given to secure a part of the purchase money for said premises." From this it appears that the mortgagee not only consented to the platting of the land but that the deed and mortgage were given in contemplation of such platting, and therefore the judgment of foreclosure did not vacate the plat. Indeed, the court, in rendering the judgment, and the mortgagee, in taking the judgment, recognized that the land was platted in that 21 lots were excepted from the sale ordered and by number according to the plat. The only reason suggested for such exception is that the lots had been sold under the provisions in the mortgage. The sheriff's sale and deed must have made the same exception, and the appellees were thereby notified that the tract they were purchasing was platted. We conclude, therefore, that the plat was not vacated by the judgment of foreclosure.

The remaining question is whether Twenty-Fourth street had been vacated by operation of the statute cited. The only evidence that appears to have been given on that subject was of one witness who testified that the street had not been open since 1908, much less than seven years before the rendition of the judgment.

[3] It having been shown that the land was platted, with the strip known as Twenty-Fourth street dedicated thereby to public use, the burden of showing that the street had been vacated by operation of law rested upon the appellees. There was no evidence that the street was obstructed at the time of the recording of the plat nor for about 20 years thereafter. In *Kiehl v. Jamison*, 79 Kan. 788, 101 Pac. 632, it is said: "Where open and unobstructed lands lying wholly outside the corporate limits of a city have been regularly platted and laid as an addition and the streets dedicated to the public, such streets or roads cannot be regarded as unopened and unused within the meaning of section 6058 of the General Statutes of 1901 [section 7812 of the General Statutes of 1909], making country roads vacant which have remained unopened for public use for seven years. Neither the failure of the county authorities formally to open up and work the streets in such an addition nor the fact that such streets have not been used by the public will make them in law closed or unopened streets, where everything was done at the time the plat was filed which was necessary to open them for public use." Syl. 1 and 2.

[2] But it is contended that the plat of the addition was not legally made in that it was not acknowledged by the wife of one of the proprietors. The statute only requires acknowledgment by the proprietors. The mak-

ing and filing of a petition for an addition to a town or city is a sufficient conveyance to vest the fee to the streets and alleys named and intended for public use in the county in which the addition is situated. Section 5523, General Statutes of 1909.

At least one case from another state is cited in which it is held that the failure of the wife of the proprietor to acknowledge the plat invalidates the plat; but in this state, where it has been held repeatedly, where no writing whatever is given, that certain acts or omissions to act by the owner of the fee resulted in the dedication of land to the public use for streets or roads, and also in view of the general doctrine announced in 13 Cyc. 474, 9 A. & E. Encycl. Law, 44, etc., we hold it is not requisite to the validity of such a plat that the wife of the proprietor should acknowledge the plat.

[4] If Twenty-Fourth street was in legal existence at the time of the laying of the track and the operation of the cars of appellant, the appellant was not responsible in damages to the appellees by reason of the fact only that they owned lots abutting upon the street. As the evidence affirmatively showed that the plat was made with the consent of the mortgagee and was legally acknowledged, and the appellees failed to produce sufficient evidence that Twenty-Fourth street had been vacated by operation of law, the judgment in foreclosure did not vacate the street, and the appellees failed to produce sufficient evidence to sustain a judgment in their favor.

The judgment is therefore reversed, and the case is remanded, with instructions to render judgment for appellant. All the Justices concurring.

(89 Kan. 879)

RYAN et al. v. CULLEN et al.

(Supreme Court of Kansas. June 7, 1913.)

(Syllabus by the Court.)

1. PLEADING (§ 376\*)—ISSUES—MATTERS ADMITTED IN PLEADING—NECESSITY OF PROOF.

In an action by certain heirs and devisees to set aside an alleged title held by the principal defendant and for partition, it was averred that certain parties permitted or procured such defendant to take out tax deeds, and that one of the heirs and devisees afterwards, with her husband, pretended to convey to him, but that such deeds were void for mala fides and for other reasons. The defendant declared upon the same instruments, alleged their validity, and prayed to have his title quieted. *Held*, that in this condition of the pleadings the execution of such deeds was conceded; rendering it unnecessary for the defendant to introduce them in evidence, and it was error to bar him from all interest in the property by reason of his failure so to introduce them.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1225-1227; Dec. Dig. § 376.\*]

2. PARTITION (§ 109\*)—DECREE—INTEREST OF PLAINTIFFS.

In such action certain minor remaindermen were made parties, and their interests

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



were set forth in the decree. In that portion providing for a sale in case partition could not be had no mention or reservation was made of such interests. *Held*, that such remaindermen, not being cotenants, should not be affected by such sale or partition, and the decree should be made free from ambiguity in this respect. —[*Ed. Note.*—For other cases, see *Partition*, Cent. Dig. §§ 375-397; Dec. Dig. § 109.\*]

Appeal from District Court, Leavenworth County.

Action by Helen F. Ryan and another against William J. Cullen and others. From a judgment for plaintiffs, defendants appeal. Reversed and remanded.

James F. Getty and Nathan Cree, both of Kansas City, and Lee Bond, of Leavenworth, for appellants. J. K. Coddling, of Lansing, W. W. Hooper, of Leavenworth, and Thos. J. White, of Kansas City, for appellees.

WEST, J. This is an action in ejectment and for partition brought by two of the heirs of Matthew Ryan, deceased, against William J. Cullen and others. The second amended petition, among other things, alleged that the defendants Mary R. Loftus, personally and as executrix of the estate of Matthew Ryan, and Thos. J. Loftus, her husband, while in possession of the property and receiving the rents and profits and with a duty imposed upon them to pay the taxes out of the proceeds, and with the intention to defraud the other beneficiaries of the estate, permitted the property to be sold for taxes, and purchased the same at tax sale for their own benefit, and paid subsequent taxes on the tax certificates. "And by assignment to and connivance with the defendant William J. Cullen permitted or procured the said defendant William J. Cullen to take a tax deed or tax deeds thereon, and under which pretended tax deed or tax deeds said defendant William J. Cullen is now claiming the ownership of the property, and the said Mary R. Loftus and Thos. J. Loftus, her husband, have since pretended to convey to the said defendant William J. Cullen all of the above-described premises, and each and every part thereof, but plaintiffs allege that said conveyance is not bona fide, that said defendant William J. Cullen is simply holding the legal title to whatever interest defendant Mary R. Loftus may have in the premises for her use and benefit, and that the said pretended tax deed or tax deeds is or are for the reason stated and otherwise illegal, null, and void as a title or titles to any of said property." The plaintiff prayed, among other things, "that the pretended tax deed or tax deeds of defendant William J. Cullen be declared illegal and void as a title or titles to any of said property"; that Mary R. Loftus, Thos. C. Loftus, William J. Cullen, and Mary R. Loftus, as executrix, be decreed to pay the plaintiff Helen F. Ryan

two-sixths of the rents collected, and the plaintiff Decatah R. Ryan one-sixth of the rents and profits since May 15, 1907, and that the amount due for rents be made a lien "upon the respective interests of Loftus and wife and William J. Cullen," or either of them as their interest may appear in said estate. The answer, among other things, alleged a conveyance from Loftus and wife, and that "Thos. J. Loftus, after he had acquired the tax sale certificate on said property, sold and assigned the same to this defendant, and that he therefore took out tax deeds, to wit, in 1908, and acquired title to said property thereby; that the title to said property which he obtained from Mary R. Loftus was acquired subsequently thereto."

By way of further answer and cross-petition, it was alleged that Cullen was owner in possession of certain described lots, that the other parties to the action claimed some adverse interest which was in fact subsequent, inferior, and void as against Cullen, and he prayed to have his title quieted as against them. At the close of the trial, the defendant requested findings to the effect that the tax deeds issued to Cullen vested in him a fee-simple title, and that the conveyance by Mary R. Loftus to him was a valid expression of the power of disposal granted to her by the will of her father and vested in Cullen a fee-simple title, and that Cullen was entitled to a judgment quieting his title. These were refused, and in the fourth finding of fact made by the court it was recited that Loftus acted as the agent of his wife and had charge of the premises from November 25, 1904, to some time in 1909, collecting the proceeds, and in August, 1904, arranged with the county treasurer to make tax sale of the premises at the proper time in September, and to hold the certificates for him, which was done; that certificates of sale were issued to Loftus who paid the subsequent taxes for 1904, 1905, and 1906, "and it is claimed that he then assigned the certificates to the defendant William J. Cullen, and in 1908 said William J. Cullen took out tax deeds under said certificates against said premises. However, there was no evidence introduced of any assignment of any tax sale certificates to William J. Cullen, and no evidence of any tax deed or deeds having been issued to said William J. Cullen." The court found further that Mary J. Loftus was the owner in fee of a one-sixth interest and an undivided one-sixth interest for life with power of disposal, also owner of the undivided one-sixth interest of Ethan B. Ryan for life, subject to his power of disposal as provided in the will, and that she was entitled to possession of the property subject to the liens of certain other parties. It was also determined that William J. Cullen had no right, title or interest in the premises or any part thereof.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



[1] It would seem, therefore, that because the defendant did not offer any evidence of assignments, tax deeds, or conveyances from Mary J. Loftus it was deemed by the court that he had no interest in the property. But, as the plaintiffs had alleged an assignment of certificates, the issuance of the tax deeds and a conveyance by Mary J. Loftus, all of which they asserted were void, and Cullen had declared upon the same instruments and asserted their validity, the fact of their execution must be taken as established or conceded. A quitclaim deed from Cullen to Decotah S. Ryan for the ice plant property was introduced in evidence, indicating that a conveyance from him was deemed essential by Loftus and wife in perfecting the title. Even if the tax deeds had been examined and found void, still the alleged conveyance by Mary J. Loftus joined in by her husband would, if valid, convey all her interest in the estate to Cullen, and he justly complains of being eliminated from the case for failure to prove what was admitted.

[2] It was also alleged that certain interests were acquired by Loftus and wife from Decotah S. Ryan in exchange for a conveyance by them of certain other property, and that the consideration entirely failed because they had no title. It appears that Decotah S. Ryan had an ice plant on a small tract of land, and, desiring to perfect her title so as to make it security for a loan, it was proposed that conveyances by quitclaim be made. It is clear from the evidence that she received some interest in the property conveyed by Loftus and wife, and there was at most only a partial failure of consideration. The court found that at the time the exchange was made Loftus and wife knew that they had only certain partial interests in the property, and that they could not convey a good fee-simple title as agreed and represented, and that Decotah S. Ryan did not know of such defect. It was therefore ordered and decreed that the deed from Decotah S. Ryan be set aside, and that she be adjudged the owner of an undivided one-sixth of the premises, and entitled to possession upon her reconveyance to Mary R. Loftus of such interest as she had acquired from her and her husband. As Loftus and wife had attempted to comply with their agreement by procuring a quitclaim deed from Cullen to Decotah S. Ryan, this disposition of the matter appears to leave Cullen entirely out of the controversy. By ordering Decotah S. Ryan to convey back to Loftus and wife whatever she had acquired from them, the title, if any, acquired from Cullen by his quitclaim deed would seem to be left in De-

cotah S. Ryan. But, as Cullen is presumed to have parted with his interest upon sufficient consideration, it is not clear that he has any cause for complaint because the interest conveyed by him still remains in his grantee.

The guardian ad litem for certain minor remaindermen complains that the appeal was not perfected as to his wards within the required time, and insists that it should be dismissed as to them. The defendant replies that under section 573 of the Civil Code (Gen. St. 1909, § 6168), additional parties may be brought in at any time before hearing, and also suggests that the interests of remaindermen cannot be partitioned in any event, and that, as the court attempted to cover their interests by the decree, it is for their benefit that the appeal be prosecuted. The court found that they were owners of certain interests in remainder, but did not find that they were entitled to possession, and it is not clear whether their holdings were intended to pass by any sale which might be made in the event that partition could not be had. While it may have been proper to make them parties and to set forth their interests in the decree, we do not see how such interests could be partitioned or sold (*Love v. Blauw*, 61 Kan. 496, 59 Pac. 1059, 48 L. R. A. 257, 78 Am. St. Rep. 334) or affected beyond the terms of the life tenants in case they should die without exercising the power of disposition given by the will (*Eversole et al. v. Combs et al.*, 130 Ky. 82, 112 S. W. 1132). We do not deem it necessary to construe section 573 or to pass directly on the motion to dismiss further than to say that, as the case must be retried, it should be with full power to determine all the questions presented and frame a proper decree unhampered by any findings or conclusions already made.

Many matters are argued which we do not deem it necessary to consider and determine in view of the situation presented by the record. It is insisted that Cullen, who was by the plaintiffs made the principal defendant, is either a myth or a convenient agent for Loftus and wife. But on the face of the pleadings it must be assumed that whoever or whatever he is the paper title to certain of the property is held in his name, and this should be disposed of upon proper evidence.

In order that Cullen's real interests, if any, may be properly considered and adjudicated, the decree is reversed, and the cause remanded for further proceedings in accordance herewith. All the Justices concurring.



(74 Wash. 327)

**SHEETS v. COAST COAL CO. et al.**  
(Supreme Court of Washington. July 14, 1913.)

**1. BILLS AND NOTES (§§ 4, 68\*)—"BILL OF EXCHANGE"—ACCEPTANCE—FORM.**

Orders drawn on a coal mining company by employes, authorizing it to deduct \$1 a month from their monthly pay for the services of the holder of such orders as mine doctor, were substantially "bills of exchange" within Rem. & Bal. Code, § 3516, providing that a bill of exchange is an unconditional order in writing, addressed by one person to another, requiring the person to whom it is addressed to pay on demand, at a fixed or determinable future time, a sum certain in money to order or bearer, and hence were not binding on the drawee until accepted by it in writing, under section 3517, providing that such a bill does not of itself operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and that the drawee is not liable thereon unless and until he accepts it, and section 3522, providing that the acceptance must be in writing.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 22-25, 110-115; Dec. Dig. §§ 4, 68.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 784-787.]

**2. MASTER AND SERVANT (§ 78\*)—RELIEF FUNDS—EMPLOYMENT OF PHYSICIAN.**

Where a coal mining company, by consent of its employes and in pursuance of a custom, deducted \$1 a month from each employe's wages for the payment of a mine physician, a physician holding orders drawn by certain employes on the employer, authorizing the deduction of \$1 a month from their wages for the payment of the holder thereof as mine physician, had no standing to attack the validity of the choice of another physician as mine physician, or to attack his right to the fund collected by the employer; it not having been collected by authority of such orders.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 78.\*]

Department 1. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by John H. Sheets against the Coast Coal Company and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Walter M. Harvey, of Tacoma, for appellant. Williamson, Williamson & Freeman, and Ray & Dennis, all of Tacoma, for respondent.

**PARKER, J.** The plaintiff, a practicing physician, seeks recovery from the Coast Coal Company, a coal mining corporation, upon a number of orders signed by its employes for the payment of portions of their wages, in form as follows: "Spiketon, Wash. ———, 1911. Coast Coal Co. You are hereby authorized to deduct one dollar per month from my monthly pay, to pay for the services of Dr. Sheets as mine doctor. Signed, ———." These orders the plaintiff claims the coal company accepted and agreed to pay. The coal company answered, denying that it accepted or agreed to pay the orders, and further pleaded, in substance, that

it had collected by common consent from each of its employes \$1 per month, by deducting the same from their wages for the purpose of paying a mine physician; that the fund so collected is claimed by the hospital board of Local No. 2369, Iron Workers of America, a union of which nearly all of the coal company's employes are members, for the purpose of paying the same to Dr. William H. Douglas, who the union claims to be the duly chosen mine physician by the employes, and to whom the sums are payable; that it has the amount so collected in its possession, and, being unable to determine to whom it is legally payable, prays for an order requiring the union to appear in the action and set forth its claims thereto, and that the court render judgment designating the party to whom the fund shall be paid. Thereupon the union intervened in the action, set forth its claim to the fund as the employer of Dr. William H. Douglas as the mine physician, claiming authority to so employ Dr. Douglas by virtue of an agreement with the coal company, and by virtue of an election of Dr. Douglas as such physician by vote of the employes of the company, including the employes not members of the union as well as the employes who are such members. A trial before the court resulted in a finding and judgment in favor of the coal company and the union, from which the plaintiff has appealed.

[1] Counsel for appellant seems to rest his claim against the coal company entirely upon the giving of the orders, a copy of which we have quoted, and the claimed acceptance thereof by the coal company. Considerable evidence was introduced bearing upon the question of the acceptance of these orders by the coal company. We would be inclined to regard this evidence as insufficient to establish the fact of acceptance by the coal company, even if oral acceptance by the coal company would, under our law, render it liable for the payment of such orders. However that may be, it seems plain to us that these orders are, in substance, bills of exchange as defined by section 3516, Rem. & Bal. Code, as follows: "A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer."

The manner in which the drawee may bind himself to pay such an order is limited by the provisions of sections 3517 and 3522, Rem. & Bal. Code, as follows:

"A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same."

"The acceptance of a bill is the signifi-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 133 P.—28



cation by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee.  
\* \* \*

These provisions of our statute have been noticed and given effect by this court in the following cases: *Nelson v. Nelson Bennett Co.*, 31 Wash. 116, 71 Pac. 749; *Wadhams v. Portland, etc., R. Co.*, 37 Wash. 86, 79 Pac. 597; *Frederick & Nelson v. Spokane Grain Co.*, 47 Wash. 85, 91 Pac. 570.

No evidence whatever of an acceptance of these orders in writing by the coal company was introduced. It follows that appellant cannot recover from the coal company upon the theory of his complaint.

[2] We are unable to understand from the record that appellant is claiming recovery upon any other theory than that of the giving and acceptance of these orders; but, if we assume that he is entitled to be heard upon the question as to whether he or Dr. Douglas is the duly chosen physician of the employes, we are met with the fact that at an election held for that purpose, which manifestly was fairly conducted, and where all of the employes were entitled to vote, whether members of the union or not, and where nearly all of them did vote, Dr. Douglas received a clear majority of such votes over appellant, in pursuance of which election the contract was entered into between the union and Dr. Douglas for a period of one year, which entitled all of the employes, whether union members or not, to his services. Some considerable argument is indulged in touching the authority of the union to enter into this contract with Dr. Douglas. We think, however, there is sufficient evidence in the record, especially as against the claims of appellant, to warrant the conclusion that Dr. Douglas was employed by the union at the instance of the coal company, and thereby became the duly chosen mine physician for the benefit of all the employes. The orders upon which appellant rests his claim were obtained from a number of the employes during a period of about a month following the election. We think that appellant, having failed to make sufficient showing entitling him to recover upon the theory of his complaint, has no standing to question the binding force of the choosing of Dr. Douglas by the election as the mine physician. There is no question but that the \$1 per month was retained from the wages of each of the employes, for the purpose of paying a mine physician, by consent of all the employes and in pursuance of the custom obtaining there: and, the physician having been fairly chosen and contracted with for the service to be rendered, appellant cannot defeat the validity of such choosing by the method he invokes. It is plain that the coal company did not collect any of the funds by authority of these orders, but by common

consent of all of the employes who so paid \$1 each monthly and in pursuance of the prevailing custom. No employe was obliged to pay, in fact some did not do so, but as to all who did so voluntarily pay, appellant is in no position to challenge the method adopted by the coal company and the union for choosing a physician.

The judgment is affirmed.

GOSE, MOUNT, and CHADWICK, JJ.,  
concur.

(74 Wash. 318)

#### CHRISTIANSEN v. McLELLAN.

(Supreme Court of Washington. July 14, 1913.)

#### 1. MASTER AND SERVANT (§ 88\*)—MASTER'S LIABILITY—RELIEF OF PARTIES.

Where plaintiff was hired to drive a team which his employer let to defendant at a certain price per day, and where defendant had control of the team, plaintiff for anything done in that particular employment was the servant of defendant, though remaining the general servant of his own employer.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 144-151; Dec. Dig. § 88.\*]

#### 2. APPEAL AND ERROR (§ 1001\*)—REVIEW—CONCLUSIVENESS OF JURY'S FINDING.

Where there was evidence in the record from which the jury could find that plaintiff while engaged with a team in hauling earth was under the direction and control of defendant, and the question was submitted under instructions to which no complaint was made, the jury's finding thereon was conclusive.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

#### 3. MASTER AND SERVANT (§ 107\*)—MASTER'S LIABILITY—PLACE OF WORK BECOMING UNSAFE.

Where defendant, a contractor, was present directing the work of the drivers of teams, he was bound to take notice of the change in conditions, and not direct them into a place of more than ordinary danger, and where plaintiff drove down an embankment on defendant's specific order, he could not escape liability for the injury on the principle that the conditions of the place with reference to safety were constantly changing.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.\*]

#### 4. MASTER AND SERVANT (§ 222\*)—MASTER'S LIABILITY—ASSUMPTION OF RISK—RELIEF ON CARE OF MASTER.

Where the slope of an embankment was steep and was obvious to plaintiff, the order of his master to drive thereover contained the implied assurance that it was a reasonably safe thing to do, and the mistake in judgment was the mistake of the master, since the danger was so apparent that there could be no two opinions concerning it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 648-651; Dec. Dig. § 222.\*]

#### 5. MASTER AND SERVANT (§ 288\*)—INJURIES TO SERVANT—QUESTION FOR JURY—ASSUMPTION OF RISK.

Unless the danger to the servant is so plain and apparent that there can be no two opinions

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



concerning it, the question of his assumption of risk is for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.\*]

**6. APPEAL AND ERROR (§ 1002\*)—CONCLUSIVE-NESS OF VERDICT—CONFLICTING EVIDENCE.**

A jury's finding on conflicting evidence is conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

**7. EVIDENCE (§ 512\*)—EXPERT EVIDENCE—SAFETY OF GRADE.**

In a servant's action for personal injuries from the overturning of his wagon while driving upon an embankment to dump a load of earth, the opinion of certain expert witnesses as to whether or not the grade over which plaintiff was directed to drive was reasonably safe for that purpose, was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2316; Dec. Dig. § 512.\*]

**8. MASTER AND SERVANT (§ 270\*)—INJURIES TO SERVANT—ADMISSIBILITY OF EVIDENCE.**

In an action for injuries from the overturning of his wagon while driving upon an embankment to dump a load of earth, evidence as to the grade of the embankment subsequent to the accident and before the trial, and when it was not in the same condition as at the time of the accident, but which by comparison with other evidence aided the jury to determine the grade of the slope, was admissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.\*]

**9. DAMAGES (§ 130\*)—EXCESSIVE DAMAGES—PERSONAL INJURIES.**

A verdict of \$1,500 for severe injuries to a teamster was not so excessive as to justify interference therewith.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357-367, 370; Dec. Dig. § 130.\*]

Department 2. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Oliver Christiansen, an infant, by Christian Christiansen, his guardian ad litem, against F. McLellan. Judgment for plaintiff, and defendant appeals. Affirmed.

John W. Roberts and Geo. L. Spirk, both of Seattle, for appellant. Arctander, Halls & Jacobsen, of Seattle, for respondent.

**FULLERTON, J.** In the year 1911, the appellant, McLellan, had a contract with the city of Seattle to grade and otherwise improve parts of certain streets therein, included in which were parts of Battery and Elliott streets. Elliott street had been filled up to grade where it crossed Battery street, leaving an abrupt embankment of a considerable height between the surface of the streets. The improvement required the filling of Battery street at this point, and work was commenced thereon by hauling and dumping earth on the edge of the embankment on Elliott street and shoveling it from there into the street to be filled. After the fill reached a certain height the foreman directed the teamsters hauling the dirt to drive over the embankment onto the fill and dump the loads as they passed down the

same. The respondent was driving one such wagon, and on driving onto the dump with a load of earth his wagon overturned, falling upon him and severely injuring him. He brought the present action to recover for the injuries suffered. At the trial the jury returned a verdict in his favor for \$1,500. From the judgment entered thereon this appeal is taken.

[1] The appellant first contends that the relation of master and servant did not exist between himself and the respondent, and hence the respondent cannot predicate a right of recovery against him on the liabilities growing out of that relation. The contention that the respondent was not the appellant's servant is founded on the fact that the team and wagon was owned by one Rennie, who hired the respondent to drive the same, and then let the team, wagon, and driver to the appellant at a given consideration per day. But the respondent was the servant of the person under whose direction and control he was at the time he was injured. As was said in *Coughlan v. Cambridge*, 166 Mass. 268, 44 N. E. 218: "It is well settled that one who is the general servant of another may be lent or hired by his master to another for some special service so as to become, as to that service, the servant of such third party. The test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his master, or becomes subject to that of the party to whom he is let or hired." And this court in *Wiest v. Coal Creek R. Co.*, 42 Wash. 176, 84 Pac. 725, speaking through Judge Dunbar, said: "But the law is well established that when one person lends his servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him."

[2] There is evidence in the record from which the jury could find that the respondent while engaged in hauling the earth was under the direction and control of the appellant. Since therefore the court submitted the question to the jury, under instructions to which no complaint is made, their finding is conclusive upon the question.

[3] It is next contended that the rule requiring the master to provide his servant with a safe place in which to work has no application to the facts shown in this record, for the reason that the place of work was constantly changing with reference to its safety, and the servant under the circumstances must be held to have assumed the risks. But the record shows that the master was present on the ground directing the work of the drivers of the teams, of which there were some 12 or more, telling them where to drive and where to drop their

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.



loads. Since the master assumed this function, he was bound to take notice of the change in conditions himself, and not direct the teams into situations where more than the ordinary dangers were likely to be encountered. The respondent drove down the embankment in the presence of and on the specific order of the appellant, and the appellant, cannot escape liability for the injury suffered on the principle that the conditions of the working place did not remain stationary.

[4, 5] The third contention is that the respondent assumed the risk of injury from driving down the embankment, but we think this was a question for the jury. True the slope was steep, and was obvious to the respondent, but the order of the master directing him to drive thereover contained the implied assurance that it was a reasonably safe thing to do, and the mistake in judgment is the mistake of the master, unless the danger was so plain and apparent that there could be no two opinions concerning it, and whether or not it was so was for the jury. *Anus-tasakas v. International Contract Co.*, 57 Wash. 453, 107 Pac. 342; *Johnson v. Collier*, 54 Wash. 478, 103 Pac. 818; *Hilgar v. Walla Walla*, 50 Wash. 470, 97 Pac. 498, 19 L. R. A. (N. S.) 367; *Parr v. City of Spokane*, 67 Wash. 164, 121 Pac. 453; *Fueston v. Langan*, 67 Wash. 212, 121 Pac. 55; *Knudsen v. Moe Brothers*, 66 Wash. 118, 119 Pac. 27.

[6] Further contentions on this branch of the case are made to the effect that the injury to the respondent was caused by a defect in the wagon which he was driving, that the place over which he was directed to drive was reasonably safe, and that the respondent was guilty of contributory negligence because of the manner in which he handled the team and wagon. But on each of these questions the evidence was conflicting, and the court submitted them to the jury. This concludes the inquiry in this court.

[7] The court in the course of the evidence allowed certain expert witnesses to give their opinion as to whether or not the grade over which the respondent was directed to drive was reasonably safe for that purpose. The appellant objected to the evidence when offered by the respondent, although he afterwards availed himself of the court's ruling and introduced evidence on his own behalf of the same character. In this court it is complained that the court erred in admitting such evidence, but we think the complaint unfounded. The line of demarcation between matters that fall within the common knowledge of mankind and matters that are the subject of special and peculiar knowledge cannot, from the nature of things, be accurately drawn; the one of necessity shades into the other, and even though the extremes of the opposing rules be definitely marked

and error predicated thereon easy of determination, the trial court must have something of discretion whether he will or will not admit opinion where the line is approached. There are places, of course, over which a person of common understanding would know whether or not it was reasonably safe to drive a wagon loaded with earth, but there must be many such which would take a person of special experience and knowledge to say whether the act would be safe or unsafe. The case at bar seems to us to be such a case, and we think no reversible error was committed in admitting the testimony.

[8] A witness, an engineer, was permitted to testify to the grade of the slope as it existed at a period before the trial but subsequent to the time the respondent was injured, and when it was conceded not in the same condition it was at the time of the injury. This is thought to be error, but the evidence by comparison with other known data enabled the jury in some degree to determine the grade of the slope at the time of the injury. This rendered it admissible.

[9] Finally the appellant complains of the excessiveness of the verdict, but we see no reason to interfere with the conclusion of the jury in that regard.

The judgment is affirmed.

MAIN, ELLIS, and MORRIS, JJ., concur.

(74 Wash. 305)

#### NORDGREN v. LAWRENCE

(Supreme Court of Washington. July 12, 1913.)

#### 1. LANDLORD AND TENANT (§ 132\*)—ACTION AGAINST LANDLORD—VARIANCE—"SEISED."

Rem. & Bal. Code, § 299, provides that no variance shall be material unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. The amended complaint in an action against a landlord for damages alleged that plaintiff was "seised and possessed and entitled to the possession of said house and premises," but the proof showed a tenancy from month to month. *Held* that, while the word "seised" is ordinarily used to express possession of a freehold estate, yet, as defendant knew the character of plaintiff's possession and could not be misled by such allegation, the variance, if any, was not material.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 460-464, 467-469, 1198; Dec. Dig. § 132.\*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6395-6396; vol. 8, p. 7797.]

#### 2. LANDLORD AND TENANT (§ 127\*)—TENANCY FROM MONTH TO MONTH—EXPIRATION.

Where premises were first rented on June 11th, without knowing when the tenancy would commence, and the receipt for rent deposited read for rent to commence about the 28th of the month, and the tenant moved in on July 3d and fully paid his rent, he was in lawful possession of the premises on August 28th.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 446, 447; Dec. Dig. § 127.\*]



**3. LANDLORD AND TENANT (§ 132\*)—WRONGFUL ENTRY BY LANDLORD—NATURE AND FORM OF REMEDY.**

A tenant's action against the landlord for damages for wrongfully entering the premises need not be brought under the forcible entry and detainer statute.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 460-464, 467-469, 1198; Dec. Dig. § 132.\*]

**4. DAMAGES (§ 49\*)—COMPENSATION—MENTAL SUFFERING.**

Mental suffering may be considered in assessing damages where it is the result of a wrongful act, even though there be no actual physical injury.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 100, 255; Dec. Dig. § 49.\*]

**5. DAMAGES (§ 87\*)—PUNITIVE OR VINDICTIVE DAMAGES.**

In this state vindictive damages are not allowed.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 188-192; Dec. Dig. § 87.\*]

**6. LANDLORD AND TENANT (§ 132\*)—EXCESSIVE DAMAGES—MENTAL SUFFERING.**

In an action for damages because of acts of the landlord, it appeared that the only occupants of the house rented by plaintiff were women and a small boy, that plaintiff was in ill health and was greatly disturbed and frightened by defendant's entry and actions, but it did not appear that her illness was augmented as a result thereof or that her disturbance and fright were more than temporary. *Held*, that a verdict for plaintiff for \$1,000 was excessive and should be reduced to \$500.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 460-464, 467-469, 1198; Dec. Dig. § 132.\*]

Department 2. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by Kathrina Nordgren against John Lawrence. Judgment for plaintiff, and defendant appeals. Judgment reversed unless plaintiff within 30 days accepts judgment for \$500, otherwise a new trial ordered.

Frank E. Green, of Seattle, for appellant.  
Thos. H. Bain, of Seattle, for respondent.

MORRIS, J. Respondent brought this action to recover damages suffered by her because of certain acts of appellant while with her family she was occupying a furnished house belonging to appellant. The pertinent facts are these: Respondent and her family had occupied the house since July 3d as a tenant from month to month. On August 26th appellant was informed that respondent would not occupy the house the third month. About 8 o'clock on the morning of August 28th appellant, by the use of a ladder, climbed upon a back porch extending out from the second story and forced open a door leading from the porch into a bedroom then occupied by a daughter of respondent, who had just risen and was not yet dressed. This daughter, whose age is not given, ran to the room of an older sister, who came and ordered appellant out of the room. He left, and the door was shut and locked. Appellant then effected an entrance into the room through

a window and took the door from its hinges. He then went through the house and attempted to enter the bedroom occupied by the respondent but was prevented from doing so by other members of the family. Appellant then proceeded to make a general nuisance of himself, entering all the rooms into which he could gain entrance, opening cupboards and closets, removing electric light bulbs, turning off the water and gas, and creating a general disturbance until about 5 o'clock, when he left at the suggestion of a police officer. At the time respondent was in ill health and was greatly disturbed by these acts of appellant until some time in the afternoon, when she was taken from the house. She subsequently brought this action, in which she obtained a verdict for \$1,000, and appellant alleging various errors, appeals.

Appellant first complains that certain instructions to the jury were erroneous. He contents himself with alleging error, but points out no vice in the instructions nor no reason why his claim of error should be sustained. Having read them, no suggestion presents itself to our mind why they should be held erroneous, and they are sustained.

[1] It is next contended that the action should have been dismissed because of a variance between the amended complaint and the proof. The amended complaint alleged the respondent was "seised and possessed and entitled to the possession of said house and premises." The proof showed a tenancy from month to month. While the word "seised" is ordinarily used to express the owner's possession of a freehold estate, we fail to see how the appellant could be misled by this allegation. He certainly knew the character of respondent's possession of the premises, and the variance complained of in the pleading could not have misled him in maintaining his defense. If we assume there was a variance, it was not material. Rem. & Bal. Code, § 299.

[2] It is next contended that the tenancy had expired. We think not. When the premises were first rented on June 11th it was not known what time the tenancy would commence. The receipt for the rent deposited reads, "Rent to commence about the 28th of this month." Respondent moved in on July 3d. The rent was fully paid, and there can be no doubt but that respondent was in lawful possession of the premises on August 28th.

[3] The next contention is that the action should have been brought under the forcible entry and detainer statute. There is no merit in this contention, and no discussion of it is necessary.

The next assignment is that there was no proof of damages and that there could be no recovery for respondent's mental distress. Whether or not an action will lie for mental

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



distress alone, when unaccompanied by injury to person or property, need not here be discussed. Such a question is not present in this case.

[4] In this state mental suffering may be taken into consideration in assessing damages, where the same is a result of a wrongful act, even though there be no actual physical injury. *Wilson v. Northern, etc., R. Co.*, 5 Wash. 621, 32 Pac. 468, 34 Pac. 146; *Davis v. Tacoma, etc., Co.*, 35 Wash. 209, 77 Pac. 209, 66 L. R. A. 802.

Other assignments are the denial of judgment and motion for new trial. There was no error in denying the motion for judgment. The motion for new trial included, among other questions, a claim that the verdict was excessive, thus presenting that question here. In discussing this assignment no reference need be made to the reprehensible conduct of appellant. It speaks for itself.

[5, 6] In this state, however, vindictive damages are not allowed, and upon this assignment of error we must look to the nature of the injury suffered by respondent to determine whether or not more than compensatory damages have been allowed. Respondent was in ill health at the time, and the only thing she complains of as a result of appellant's actions is that she was greatly disturbed and frightened. There is no evidence that her illness was augmented as a result of appellant's actions, or that her disturbance and fright was more than temporary, and much as appellant deserves censure for his conduct while in the house occupied as it was only by women and a young lad, the jury could not visit that censure upon him except as they could determine the amount of damages that would compensate respondent. We think \$500 is ample compensation for the injury to respondent.

The judgment is reversed, and if within 30 days from the going down of the remittitur respondent shall accept judgment for \$500, the judgment so entered will stand; otherwise a new trial is ordered. No costs to either party in this court.

ELLIS, FULLERTON, and MAIN, JJ.,  
concur.

(74 Wash. 314)

GRAND COURT OF WASHINGTON, FORESTERS OF AMERICA, et al. v.  
HODEL et al.

(Supreme Court of Washington. July 12, 1913.)

BENEFCIAL ASSOCIATIONS (§ 17\*)—PROPERTY AND FUNDS.

Where the general laws of a benevolent association organized on the lodge plan provided that all property and funds of a court should be held exclusively as a trust fund for carrying on the fraternal and beneficial features of the order and should not be expended for any other purpose, that none of the property or

money of a court should be divided among the members or a gift thereof made except from the benevolent fund in accordance with the laws of the order, that in case a court from any cause should cease to exist, be suspended, dissolved, or have its charter or dispensation revoked, or be surrendered, all funds or property of such court should immediately revert to the grand court of the state, the majority of the members of a subordinate court could not secede from the organization taking with them the money and property of such subordinate court against the wishes of the minority; since the property could not be diverted from the trust purposes by any number of members less than the whole.

[Ed. Note.—For other cases, see *Beneficial Associations*, Cent. Dig. §§ 36-40; Dec. Dig. § 17.\*]

Department 2. Appeal from Superior Court, King County; John B. Yakey, Judge.

Action by the Grand Court of Washington, Foresters of America, and others against Charles A. Hodel and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

J. D. Bauer, of Seattle, for appellants.  
Geo. H. Rummens and J. Henry Denning, both of Seattle, for respondents.

FULLERTON, J. The Foresters of America is a voluntary benevolent and social association, having courts or lodges throughout the United States. The highest court in authority is called the Supreme Court, which "is the source of all true and legitimate power and authority in the Foresters of America, wheresoever established." Next in order are the Grand Courts, which possess certain defined powers granted them by the Supreme Court. Lastly come the subordinate courts which receive their charters from the Grand Court. The order is governed by a written constitution and laws enacted thereunder, which provide minutely for the collection of the revenues of the order and the purposes for which it may be expended; section 110 of the general laws relating thereto reading as follows: "All property and funds of a court and their increment, shall be held exclusively as a trust fund for carrying on the fraternal and beneficial features of the order, and shall not be expended for any other than those purposes, and the payment of the necessary expenses of a subordinate court and the order. The funds may be invested from time to time, but such investment shall be made only in the stock of hall associations for the order, which associations shall be owned exclusively by the members of the order; bonds of the United States, state of Washington, building and loan societies under the control of the state building and loan commissioners, or deposited in savings banks, under the control of the state bank commissioners, or loaned on unincumbered real estate. Neither the whole nor any part of the court property or money shall ever be divided among the members, and no gift thereof shall ever be

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index



made, except from the benevolent fund, and in accordance with the laws of the order. Funds of the court shall never be loaned to any of its members. In case a court from any cause shall cease to exist, or be suspended, or dissolved, or have its charter or dispensation revoked, or be surrendered, all the funds and property of the courts of whatsoever kind shall immediately and ipso facto revert to the Grand Court of the state of Washington, and shall be immediately surrendered and delivered up to the Grand Court officers, or agents authorized to receive the same."

The order has a subordinate court at the city of Seattle, known as Court Enterprise No. 3, which is within the territorial jurisdiction of the Grand Court of Washington. On August 18, 1911, at a regular meeting of the subordinate court, a resolution was introduced to the effect that the local court secede from the order and amalgamate with another fraternal order, known as the Knights of the Golden West, which was then being organized. The court fixed the next regular meeting as the time for voting on the resolution, and directed that notice be sent to each member in good standing notifying him of the introduction of the resolution, and that a vote would be taken thereon at the next regular meeting of the court. The court then had a membership in good standing of 203; it owned property and lodge fixtures of some value, had cash on hand in the sum of \$387.67, and owned local improvement bonds of the city of Seattle of the face value of \$1,260.07. At the meeting named in the notice, August 25, 1911, about 70 of the members attended. The meeting was opened in ritualistic form and proceeded with the formal order of business until the appropriate order for the resolution was reached, when a vote was taken on the same. All of the members present except some five or seven voted in favor of the resolution, whereupon the same was declared carried, and the members present and voting in the affirmative withdrew from the order and carried with them the money and property of the court.

At the meeting at which the vote was taken the Grand Chief Ranger of the Grand Court of Washington was present, and when the vote was announced, that officer, acting in his official capacity, suspended from the order the members voting for the resolution, and declared all the offices of the court vacant. At a later date on a regular meeting night of the court this officer, acting pursuant to the laws of the order, issued a dispensation, permitting the members of the court then present to hold an election for the purpose of filling the vacated offices. A new election was thereupon held and installed, and the persons so elected have since performed the duties of officers of the subordinate court.

This action was instituted by the Grand

Court of Washington, and Court Enterprise No. 3, and certain of their officers and members against the individuals carrying away the court's property for the recovery of the same. Judgment went in the plaintiff's favor in the court below, and this appeal was taken therefrom.

The principal contention made by the appellants is that a subordinate lodge in an order, such as the one in consideration here, may secede from the parent organization, if the majority of such lodge wills it, and may take with them the money and property of the subordinate lodge. But such is not the rule. All of the property which this branch of the order, as a fraternal and benevolent organization, had gathered together were trust funds, in the sense that they were collected for particular uses. They were held in trust for the purposes designated by the constitution and laws of the order, and every member of the order has an interest in the fund to the extent of seeing that it is appropriated to the uses for which it was collected. No number of the members of the order less than the whole could therefore divert the funds to other uses than the uses defined in the constitution and laws of the order. The majority of any subordinate court can undoubtedly direct the use of the funds of the order for purposes of the order, and when there are two or more purposes for which the funds can be lawfully used may select between them, but the majority cannot, against the will of the minority, lawfully divert such funds for uses other than those permitted by the constitution and laws of the order. This, as we understand the authorities, is the universal rule. *Smith v. Pedigo*, 145 Ind. 361, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433, 32 L. R. A. 838; *Mt. Zion Baptist Church v. Whitmore*, 83 Iowa, 138, 49 N. W. 81, 13 L. R. A. 198; *Ferraria v. Vasconcellos*, 31 Ill. 25; *Stebbins v. Jennings*, 27 Mass. (10 Pick.) 172; *Nance v. Busby*, 91 Tenn. 303, 13 S. W. 874, 15 L. R. A. 801; *Grand Lodge of Conn. v. Grand Lodge of Mass.*, 81 Conn. 189, 70 Atl. 617; *Knights of Pythias v. Germania Lodge*, 56 N. J. Eq. 63, 38 Atl. 341; *Schubert Lodge v. Schubert Kranken Unterstutzen Verein*, 56 N. J. Eq. 78, 38 Atl. 347; *Watson v. Jones*, 13 Wall. 679, 20 L. Ed. 666; 2 Beach, Private Corporations, §§ 908, 910.

Some time after the institution of Court Enterprise No. 3, an attempt was made to incorporate the court under the statutes relating to the incorporation of fraternal societies. It may be questioned, we think, whether the proceedings were sufficiently regular to accomplish the purpose intended. But were the facts otherwise, the rule with relation to its property would not be changed. Its funds would still be trust funds, subject to such disposition as the laws of the order permitted to be made of them, and could not be diverted to a use contrary to such laws



without the unanimous consent of the members of the order.

The judgment is affirmed.

MAIN, MORRIS, and ELLIS, JJ., concur.

(74 Wash. 309)

**PURDY v. SHERMAN.**

(Supreme Court of Washington. July 12, 1913.)

**1. MASTER AND SERVANT (§ 330\*)—COLLISION WITH AUTOMOBILE—EVIDENCE—AGENCY OF DRIVER.**

A showing that the automobile which ran over plaintiff belonged to defendant at the time establishes a prima facie case that it was then in defendant's possession, and that the driver was defendant's agent, sustaining a finding of ownership in defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1270-1272; Dec. Dig. § 330.\*]

**2. TRIAL (§ 344\*)—VERDICT—IMPEACHMENT—AFFIDAVIT OF JUROR.**

The law presumes in aid of the verdict that all matters submitted to the jury were considered, and such presumption cannot be overcome by the affidavit of a juror.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 813; Dec. Dig. § 344.\*]

Department 1. Appeal from Superior Court, Snohomish County; W. P. Bell, Judge.

Action by J. Spencer Purdy against E. B. Sherman. From a judgment for plaintiff, defendant appeals. Remanded, with directions to enter judgment for a reduced sum.

E. C. Dailey, of Everett, for appellant. Faussett & Smith, of Everett, for respondent.

**CHADWICK, J.** An automobile, driven by one Thomason, but owned by the defendant, was carelessly driven into a machine driven and owned by plaintiff. Plaintiff brought this action to recover for personal injuries suffered, for damage to the machine, and for some special damages. A verdict was returned in favor of the plaintiff for \$585, and defendant has appealed.

[1] The principal error assigned is that the verdict is contrary to the law and the evidence, and that a motion for an instructed verdict should have been sustained. The defense was that the machine was operated by Thomason upon an independent percentage basis; that he was a principal, and not the agent of the defendant. The evidence offered by defendant might have sustained a verdict in favor of the defendant, but under repeated decisions of this court the jury was not bound to believe such testimony; the ownership of the automobile being admitted to be in the defendant. "In cases of this kind, where it is shown that the wagon and team doing damage belonged to the defendants at the time of the injury, that fact establishes

prima facie that the wagon and team were in the possession of the owner, and that whoever was driving it was doing so for the owner." *Knust v. Bullock*, 59 Wash. 141, 109 Pac. 329. *Kneff v. Sanford*, 63 Wash. 503, 115 Pac. 1040; *Burger v. Taxicab Motor Co.*, 66 Wash. 676, 120 Pac. 519. Whether the prima facie case made by the respondent was overcome was a question for the jury, and it has decided that it was not.

One of the items of damage claimed is the loss of a certain surgical operation. Respondent is a physician and surgeon, and conducts a hospital near the town of Sultan. This is objected to as an improper element of damage, and in support of his motion for a new trial defendant has submitted the affidavit of the prospective patient or subject showing that it is extremely improbable that respondent suffered any loss on this account. The operation was prospective, and its performance, under respondent's own testimony, would be so speculative and uncertain as to afford no proper foundation for an assessment of damages. Respondent does not seriously contend that this item can be lawfully recovered, but meets the argument of appellant with an affidavit signed by one of the jurors in which it is said that the loss of the surgical operation was not considered by the jury, and that it was not included in the verdict. Respondent then insists that, inasmuch as he claimed a greater sum than was allowed by the jury, the error, if any, was harmless.

[2] The law will presume in aid of a verdict that all matters testified to and submitted by the court to the jury were considered, and this presumption cannot be overcome by the affidavit of a juror. The issue inheres in and becomes a part of the verdict. To put verdicts upon issues properly submitted at the mercy of a juror, or to make them subject to explanation, would make trials by jury useless, for if jurors can disobey the instructions of the court, and then be heard to affirm such disobedience in aid of a verdict that might have been rendered for the amount returned, they could also be heard to impeach the verdict as between the parties. No authority is cited nor do we find any that will sustain the supporting affidavit of the juror. The amount claimed on account of the lost surgical operation is \$60.

The case will be remanded, with directions to the lower court to enter a judgment for the sum of \$525, provided a remission of all in excess of that sum is filed within 30 days after the remittitur goes down, otherwise a new trial will be granted. Appellant will recover costs in this court, and respondents will recover costs in the court below.

MOUNT, PARKER, and GOSE, JJ., concur.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



(74 Wash. 312)

## PASAREL v. ANDERSON.

(Supreme Court of Washington. July 12, 1913.)

## DAMAGES (§ 132\*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

A verdict for \$1,200, for personal injuries inflicted by defendant shooting plaintiff in the arm, was not excessive, where plaintiff, earning \$3 per day prior to his injury, was prevented from following his occupation for nearly five months, and where thereafter he was able to obtain only \$2.50 per day, though the wound made by the bullet, entering the arm below the elbow and extending upwards through the fleshy part of the arm for about 2½ inches, healed readily.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

Department 2. Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Action by Frank Pasarel against S. M. Anderson. From a judgment for plaintiff, defendant appeals. Affirmed.

Bridges & Bruener, of Aberdeen, for appellant. Frank Beam, of Aberdeen, and Teats, Teats & Teats, of Tacoma, for respondent.

FULLERTON, J. In March, 1912, during a strike among the employes of the lumber mills on Grays Harbor, the respondent was shot in the arm by some one while at the mill of the Anderson & Middleton Lumber Company, which had been shut down as a result of the strike. The respondent charged the appellant with the shooting, and brought this action against him to recover in damages for the resulting injury. On the trial a verdict and judgment was entered in his favor for the sum of \$1,200, and this appeal is prosecuted therefrom.

In this court the appellant makes but one contention, namely, that the verdict is excessive, arguing that it is so much so as to show that it was the result of passion and prejudice on the part of the jury. But the jury had the right to believe the evidence most favorable to the side of the respondent on the question of the effect of the injury. This evidence tended to show that the bullet entered the arm below the elbow and extended upwards through the fleshy part of the arm for some 2½ inches, coming out above the elbow; that while the wound did not become infected, and healed readily, it prevented the respondent from following his occupation for a period of nearly five months, and at the time of the trial, which was some seven months after the injury, had not then recovered its normal strength. His testimony also tended to show that he was earning \$3 per day prior to his injury, and that the best wage he was able to obtain since he recovered sufficiently to resume work was \$2.50 per day. Conceding, as we must on the face of the record, that the appellant was liable for the injury, we cannot conclude that the verdict was excessive. The appellant's

loss in wages alone was considerable; and, when we consider the manner in which the injury was inflicted, and the consequent mental suffering that would follow, it can hardly be said that the sum awarded was more than just compensation.

The judgment is affirmed.

MAIN, ELLIS, and MORRIS, JJ., concur.

(74 Wash. 306)

## SWEENEY v. LEWIS CONST. CO.

(Supreme Court of Washington. July 11, 1913.)

## INTEREST (§ 47\*)—UNLIQUIDATED DEMANDS.

In an action for damages for breach of a contract to grade property down to specified levels, interest on the amount of damages found was properly allowed from the commencement of the action.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 106-112; Dec. Dig. § 47.\*]

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Bo Sweeney against the Lewis Construction Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Preston & Thorgrimson and Turner & Hartge, all of Seattle, for appellant. Dorr & Hadley, of Seattle, for respondent.

MOUNT, J. This is the second appeal in this case. When it was here before upon the appeal of this same appellant, we reversed the case upon the question of damages and sent it back for a new trial between the respondent and the appellant. In the opinion upon that appeal we said: "The appellant corporation was entitled to have that measure of damages applied which would protect it and which at the same time would fully compensate respondent for any actual loss he may have sustained. \* \* \* In other words, only such changes in values should be considered as were produced by or directly resulted from the partial performance of the work of regrading." *Sweeney v. Lewis Construction Co.*, 66 Wash. 490, 119 Pac. 1108. So that the only question to be determined upon the retrial was the amount of damages. The cause was retried upon that question. The trial court found that the appellant had damaged the respondent's property in the sum of \$3,900, to which was added interest from the date the suit was brought, amounting in all to \$4,558.45, for which amount a judgment was entered against the appellant. This appeal followed.

It is argued by the appellant that the damages allowed are excessive; that there was no depreciation or damage to the land; and that the allowance of interest was error. Upon the second trial it was stipulated that the evidence introduced at the first trial should be considered upon the second; other evidence also was produced. The facts are



fully stated in the former opinion of this court, which will be found in 66 Wash. beginning at page 490, 119 Pac. 1108. It is unnecessary to restate the facts at this time.

Counsel for appellant now contend that the damages found by the trial court upon the last trial were \$2,000 to the houses which were located upon the property and \$1,000 to the lots. It is true the trial court in rendering his oral decision in the case stated the damages as contended for by the appellant; but the formal finding was to the effect that the property was damaged in the sum of \$3,900. It is argued by the appellant that the five dwellings which were located upon the property were not worth \$2,000 according to the preponderance of the evidence, and therefore that the court erred in finding that amount to be the damages for the destruction or partial destruction of the houses. It is also argued by the appellant that there is no evidence to show that the lots themselves were damaged in the sum of \$1,000. These two questions depend entirely upon the facts. A cursory reading of the record convinces us that there is abundant evidence in the record to justify the finding of the court that the property was damaged by the appellant in the sum stated. There was much dispute among the witnesses upon the facts; but there is certainly sufficient to support the finding of the trial court thereon. It is apparently conceded by the appellant that the \$900 loss of rents for the houses was proper. Appellant also argues that the court erred in allowing interest for the reason that the damages were entirely unliquidated and could not be determined by mere computation. We are satisfied, however, that interest was properly allowable under the rule in *Eller's Music House v. Hopkins et al.*, 131 Pac. 838; *Gray v. Reeves*, 69 Wash. 374, 125 Pac. 162; *Parks v. Elmore*, 59 Wash. 584, 110 Pac. 381.

The judgment is therefore affirmed.

CHADWICK, PARKER, and GOSE, JJ.,  
concur.

(74 Wash. 277)

#### CITY OF SEATTLE v. KING.

(Supreme Court of Washington. July 10, 1913.)

#### 1. LICENSES (§ 6\*)—ORDINANCES—LICENSING OCCUPATIONS—VALIDITY.

Rem. & Bal. Code, § 7507, empowering any city to grant licenses for any lawful purpose and to fix by ordinance the amount to be paid therefor, authorizes a city to adopt an ordinance licensing the use of vehicles for hire.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 5, 6, 19; Dec. Dig. § 6.\*]

#### 2. LICENSES (§ 6\*) — ORDINANCES — LICENSING OCCUPATIONS—VALIDITY.

The licensing power conferred on cities by Rem. & Bal. Code, § 7507, empowering any city to grant licenses for any lawful purpose and to fix by ordinance the amount thereof,

may be exercised by imposing licenses for revenue or for regulation, and an ordinance imposing an annual license fee of \$4 for each vehicle used or hire is not void because of the amount of the license.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 5, 6, 19; Dec. Dig. § 6.\*]

#### 3. LICENSES (§ 7\*)—ORDINANCES—VALIDITY.

Const. art. 7, requiring uniformity of taxation, relates only to taxes levied on property and does not apply to license taxes on occupations imposed by a municipal ordinance.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 7-15, 19; Dec. Dig. § 7.\*]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Arthur King was convicted of violating an ordinance of the City of Seattle, and he appeals. Affirmed.

Scott Calhoun, of Seattle, for appellant. Jas. E. Bradford, Ralph S. Pierce, and Geo. A. Meagher, all of Seattle, for respondent.

PARKER, J. The plaintiff was convicted in the police court of the city of Seattle of unlawfully using a vehicle for transportation of merchandise for hire, without having procured a license therefor, in violation of an ordinance of the city relating to the licensing of vehicles. He appealed to the superior court for King county, wherein he was again adjudged guilty, from which judgment he has appealed to this court.

The provisions of the ordinance involved, so far as we need notice them are as follows: "It shall be unlawful for any person, firm or corporation, to drive or operate within the city of Seattle, any automobile, taxicab, coach, carriage, omnibus, dray, truck, cart, wagon or vehicle of whatsoever kind or by whatsoever power propelled, used for the transportation of passengers, baggage, goods, merchandise or other article or thing, for hire, without first procuring a license so to do for each and every vehicle so used to be known as 'vehicle license.' The fee for such vehicle license shall be the sum of four dollars (\$4.00) per annum, and every such vehicle license shall expire on the 31st day of December of the year for which such license is issued." It is stipulated in an agreed statement of facts that the license fee is "more than sufficient to reimburse the city of Seattle for the expense of police supervision, issuance of license, and regulation necessary under said ordinance." No questions are here presented other than as to the power of the city to enact such an ordinance.

[1] Counsel for appellant contends that the city possesses no statutory or charter authority for the passage of an ordinance licensing the use of such vehicle for hire. This contention, it seems to us, needs no answer other than a quotation from section 7507, Rem. & Bal. Code, relating to powers of cities of the first class, as follows: "Any such city shall have power \* \* \* (33) to grant licenses for

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



any lawful purpose, and to fix by ordinance the amount to be paid therefor."

[2] It is further contended that the ordinance is void because the license fee exacted is more than sufficient to reimburse the city for issuing the license and for expenses incident to the regulation of the business. This contention apparently rests upon the theory that the ordinance amounts to the imposing of a tax under the guise of the power to license for regulation only. The decision of this court in *Fleetwood v. Read*, 21 Wash. 547, 58 Pac. 665, 47 L. R. A. 205, holds that the licensing power conferred by the language of the statute above quoted, upon cities of the first class, gives to such cities power to license for revenue as well as regulation. So the fact that the amount of the license fee charged may be more in amount than the city could lawfully charge under the power to license for regulation only is of no avail to appellant. The court would be slow to hold a license fee of \$4 unwarranted in amount, even under the power to license for regulation only; but, since the city has the additional power to license for revenue, it is plain that the ordinance is not void because of the amount of the license fee charged.

[3] Some contention is made against the ordinance rested upon the provisions of article 7 of our state Constitution, relating to uniformity of taxation. This contention also finds its answer in the *Fleetwood* decision as well as in our decisions in *Stull v. De Matos*, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892, and in *Re Garfinkle*, 37 Wash. 650, 80 Pac. 188, holding that those provisions of our Constitution have no application to license taxes upon occupations but relate only to taxes levied upon property. *Sperry & Hutchinson Co. v. Tacoma*, 68 Wash. 254, 122 Pac. 1060, is in harmony with this view.

Counsel for appellant call our attention to *State v. Bruce*, 23 Wash. 777, 63 Pac. 519, where the town of Hoquiam, a town of the fourth class, was held not to possess the power to license bicycles to be ridden upon the public streets. A reading of that decision, however, will disclose the fact that there was no such charter power given the town of Hoquiam to license for both regulation and revenue as is found in the law relating to cities of the first class. Counsel for appellant also call our attention to and place reliance upon the cases of *In re Aubrey*, 36 Wash. 308, 78 Pac. 900, 104 Am. St. Rep. 952, 1 Ann. Cas. 927, and *State ex rel. Richey v. Smith*, 42 Wash. 237, 84 Pac. 851, 5 L. R. A. (N. S.) 674, 114 Am. St. Rep. 114, 7 Ann. Cas. 577, wherein the laws providing for licensing and regulating horseshoers and plumbers were held unconstitutional. A reading of those decisions, however, will show that those laws were held unconstitutional not because of the mere charge of a license fee but because of other limitations put upon those desiring

to enter those occupations. All persons are free to operate a vehicle for hire upon the streets of Seattle by the mere payment of the fee prescribed. Had that been the only qualification required of horseshoers and plumbers under those acts, it is manifest from the decisions we have noticed that the decisions in those two cases would have been different.

The judgment is affirmed.

GOSE, CHADWICK, and MOUNT, JJ., concur.

(74 Wash. 284)

### GRIFFITH v. GRIFFITH.

(Supreme Court of Washington. July 10, 1918.)

#### 1. DIVORCE (§ 184\*)—APPEAL—REVIEW—FINDINGS OF FACT.

In an action for divorce, where the testimony was conflicting and the record does not convince the appellate court that the truth was on the plaintiff's side, a finding for the defendant will not be reversed, since the policy of the law is to deny a divorce in doubtful cases.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 570-573; Dec. Dig. § 184.\*]

#### 2. DIVORCE (§ 286\*)—APPEAL—REVIEW—DISCRETION OF COURT.

Under Rem. & Bal. Code, § 988, giving the court discretion as to counsel fees and suit money, its action with reference thereto at the time of the commencement of the action will not be reviewed except for abuse of discretion.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 769, 770; Dec. Dig. § 286.\*]

#### 3. DIVORCE (§ 227\*)—COUNSEL FEES AND SUIT MONEY—AMOUNT.

Where the husband's property was worth not to exceed \$5,000, and there was a large indebtedness, some of which was a lien against the property, an allowance of \$25 as suit money and \$50 counsel fees to the plaintiff in an action for divorce, after a judgment dismissing the action had been rendered, was not an abuse of the court's discretion.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 653, 654; Dec. Dig. § 227.\*]

Department 1. Appeal from Superior Court, Pierce County; C. M. Easterday, Judge.

Action by Leva Griffith against Daniel Griffith. Judgment for the defendant, and plaintiff appeals. Affirmed.

Frank H. Kelley, of Tacoma, for appellant. Rickabaugh & McElroy and Williamson, Williamson & Freeman, all of Tacoma, for respondent.

GOSE, J. This is an action for divorce, based upon alleged acts of cruelty on the part of the defendant. After a hearing upon the merits, the court dismissed the action. The plaintiff has appealed.

[1] The appellant testified to acts of cruelty, which, if the testimony is true, entitled her to a divorce. These acts were specifically denied by the defendant while upon the wit-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ness stand. Both sides are in a measure corroborated. In view of this fact, we do not feel warranted in disturbing the judgment of the trial court. In cases of this character the trial judge has a much better opportunity to arrive at the truth than has this court from a mere reading of the evidence. He saw the witnesses in action, and had an opportunity to observe and test their prejudices. The testimony of either the plaintiff or the defendant is essentially false. A reading of the record has failed to convince us that the truth lies with the plaintiff. The policy of the law as reflected by the decisions of this court is to deny divorces in doubtful cases. *Bounds v. Bounds*, 23 Wash. 593, 63 Pac. 1134.

[2] Error is assigned, in that the trial court denied the appellant's motion for counsel fees and suit money at the time of the commencement of the action, and in denying her motion for reasonable counsel fees after the dismissal of the case. The Code (Rem. & Bal. § 988) clothes the trial court with a discretion in these matters which will not be reviewed except for abuse. *Arey v. Arey*, 22 Wash. 261, 60 Pac. 724; *Willey v. Willey*, 22 Wash. 115, 60 Pac. 145, 79 Am. St. Rep. 923; *Lee v. Lee*, 3 Wash. 236, 28 Pac. 355. In the *Willey* Case the court said: "The amount allowed as suit money and attorney's fees is peculiarly within the discretion of the superior court, and it does not appear that there was any abuse of that discretion in the order made." In the *Lee* Case the court, in addressing itself to this question, said: "And while we might not consider the whole sum awarded as reasonable, under the circumstances, if the question were left to our determination, still, the court having exercised its discretion in the matter, we do not think its action should be here reviewed."

[3] After the entry of the judgment of dismissal, the court on the application of the appellant allowed her \$25 as suit money and \$50 as attorney's fees. The court found that the property was not worth to exceed \$5,000. The evidence shows a large indebtedness, some of it in the form of liens against the property. Upon the entire record we are not prepared to say that there was an abuse of discretion.

The judgment is affirmed.

PARKER, CHADWICK, and MAIN, JJ.,  
concur.

(74 Wash. 280)

#### STATE v. NEIS.

(Supreme Court of Washington. July 10, 1913.)

#### 1. CRIMINAL LAW (§ 1086\*)—APPEAL—INSTRUCTIONS—REVIEW.

Under Rem. & Bal. Code § 339, authorizing either party before the hearing of motion for new trial to except to the instructions, instructions are not reviewable unless the record

affirmatively shows that exceptions were brought to the attention of the trial court before disposing of the motion for new trial, and the mere service of written exceptions on opposing counsel and filing the same does not show that they were brought to the trial judge's attention, and the instructions will not be reviewed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2736-2769, 2770, 2772, 2794; Dec. Dig. § 1086.\*]

#### 2. CRIMINAL LAW (§ 1166½\*)—TRIAL—CONDUCT OF PRESIDING JUDGE.

Where the questions on the cross-examination of prosecutrix testifying for the state on a trial for larceny suggested improper relations between her and accused, the remarks of the court on ruling on objections to the questions that, if accused was guilty of the larceny, it was immaterial what the relations between him and prosecutrix were or what her character was, were not prejudicial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3114-3123; Dec. Dig. § 1166½.\*]

#### 3. CRIMINAL LAW (§ 1159\*)—VERDICT—CONCLUSIVENESS.

A verdict sustained by evidence, if believed, will not be disturbed, since the credibility of the witnesses is for the jury.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

H. A. Neis was convicted of grand larceny, and he appeals. Affirmed.

Wm. R. Bell, of Seattle, for appellant. John F. Murphy, Crawford E. White, and Reah M. Whitehead, both of Seattle, for respondent.

PARKER, J. The defendant was charged with the crime of grand larceny by information filed in the superior court for King county. A trial resulted in verdict and judgment of conviction, entered on September 30, 1911, from which he appealed to this court. That judgment was reversed upon hearing in this court because of error occurring in the trial. Our decision upon that appeal may be found in 68 Wash. 599, 123 Pac. 1022. The case being remanded to the superior court, a new trial was had when the defendant was again found guilty by the verdict of the jury, and judgment entered thereon accordingly. From that judgment he has again appealed to this court.

[1] Contentions are made by counsel for appellant rested upon alleged errors of the trial court in giving its instructions to the jury. It is insisted, however, by counsel for the state that such contentions cannot be considered in this court, for want of proper exception being taken to the alleged erroneous instructions before the disposition of the motion for a new trial in the superior court. It appears from the record before us that a few days after the trial and rendition of the verdict counsel for appellant filed in writing exceptions to the instructions, not having theretofore in any manner taken any

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



exceptions thereto. These written exceptions were served upon counsel for the state and filed with the papers in the case on the day the motion for new trial was overruled. There is nothing in the statement of facts indicating that these or any other exceptions to the instructions were ever called to the attention of the trial judge, nor is there any notation upon the exceptions nor elsewhere in the record by the trial judge indicating that they were ever called to his attention. Under the statute and our previous decisions, it is clear that these exceptions were not taken and placed of record in such manner as to entitle appellant to have reviewed the alleged error of the trial court in giving the instructions complained of. *Rem. & Bal. Code, § 339; Coffey v. Seattle Elec. Co., 59 Wash. 686, 109 Pac. 202; Gerber v. Aetna Indemnity Co., 61 Wash. 184, 112 Pac. 272; White v. Ratliff, 61 Wash. 383, 112 Pac. 502; State v. Peeples, 129 Pac. 108.* It is manifest from these holdings that, in order to call for review of alleged error of the trial court in giving instructions to the jury, the record must affirmatively show that such exceptions were brought to the attention of the trial judge before disposing of the motion for a new trial. A mere serving of written exceptions upon opposing counsel and filing the same with the papers in the case is not sufficient to show that they were brought to the attention of the trial judge. We conclude that the alleged error of the trial court in giving the instructions complained of in this case is not reviewable by us.

[2] It is contended that certain remarks of the trial judge during the progress of the trial constitute such prejudicial error against appellant as to entitle him to a new trial. Appellant was accused of stealing a certain gold chain from Mrs. Ryan, the prosecuting witness. During her cross-examination counsel for appellant sought to show that she had been divorced, and we think the following cross-examination on that subject suggests the thought of possible improper relations between the prosecuting witness and appellant:

"Mr. Bell: Q. You got your divorce, didn't you? A. Yes, sir. Q. And got it in this court? A. Yes, sir. Q. And the ground on which you got your divorce was that your husband had made accusations against you that bore on your chastity in reference to this very case?

"Mr. White: I object to that as incompetent.

"The Court: Sustained."

After further cross-examination of considerable length, the following occurred:

"Mr. Bell: Q. Mrs. Ryan, you have been supporting yourself and your children for the last several months? A. I certainly have.

Q. Without any assistance from your husband? A. I get assistance from my husband. Q. Who supports the children?

"Mr. White: Are we trying the divorce case?

"The Court: I don't see what that has to do with this.

"Mr. Bell: I am offering it now in lieu of the papers I tried to introduce this morning.

"The Court: Objection sustained. I am going to instruct this jury that the relations of these two parties, if there is any such relation, can only be considered for one purpose only, and it could not be for that purpose, for the purpose of impeachment, unless you go further and show what the Supreme Court says you have to show. If this man stole that chain, he is just as much guilty of larceny, no matter what their relations were or what her character is as though he stole it from any other person in the world.

"Mr. Bell: We now desire to take an exception to the court's remarks, for the reason that they are prejudicial to the defense, specially prejudicial before the testimony has been placed in by the defendant."

This last remark of the court is the matter complained of as being prejudicial. While we regard this remark as somewhat unfortunate, yet, in view of the manner in which it was invited by cross-examination on the part of counsel for appellant, we do not think it is of sufficient seriousness to call for a new trial. Apparently whatever suggestion there was in all of this touching the improper relationship between appellant and the prosecuting witness was brought on by questions asked by counsel for appellant. We are unable to see that the remarks of the court were any more suggestive of improper relations between the prosecuting witness and appellant than were the remarks of counsel.

[3] Some contention is made in behalf of appellant rested upon the sufficiency of the evidence to sustain the verdict and judgment. We deem it sufficient to say that a review of the record convinces us that we would not be warranted in interfering with the conviction upon that ground. Manifestly there is sufficient evidence, if believed by the jury, to sustain the conviction. The only substantial ground for argument touching the insufficiency of evidence is as to the credibility of witnesses, and in the light of this record we are clear that this question was for the jury.

Other suggested grounds of error, we think, are wholly without merit, and do not call for discussion. We are constrained to affirm the judgment. It is so ordered.

MOUNT, GOSE, and FULLERTON, JJ., concur.



(74 Wash. 236)

## THOMAS v. LEE et al.

(Supreme Court of Washington. July 10, 1913.)

## 1. APPEAL AND ERROR (§ 467\*)—SUPERSEDEAS BOND—CONSTRUCTION—PARTIES EXECUTING.

A supersedeas bond, in an action against D. L. and G. L. and wife, which was signed only by D. L. and G. L., recited that whereas plaintiff recovered judgment against "the above-named defendants, now, therefore, if the above-named principals, D. L. and G. L., shall pay," all costs and damages, and perform the judgment or order appealed if affirmed, and any judgment which the Supreme Court may make, the bond shall be void. *Held*, that where no objection was taken to the form of the bond below, a motion to dismiss the appeal on the ground that G. L.'s wife did not join as a principal in the bond will be denied; the bond fairly indicating that it was given on behalf of all appellants, including the wife.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2230, 2233; Dec. Dig. § 467.\*]

## 2. APPEAL AND ERROR (§ 1225\*) — SUPERSEDEAS BOND — LIABILITY — OBJECTIONS BY SURETY.

A surety on a supersedeas bond could not object thereto on the ground that one of the defendants and appellants did not join as a principal in the bond.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4729-4733; Dec. Dig. § 1225.\*]

## 3. MONEY LENT (§ 7\*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence, in an action to recover money claimed to have been loaned to defendants for their use and benefit, *held* not to show that two of defendants ever had any knowledge of the loan, or used the money for any purpose.

[Ed. Note.—For other cases, see Money Lent, Cent. Dig. §§ 11-13; Dec. Dig. § 7.\*]

Department 1. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by Arian T. Thomas against G. W. Lee and others. From a judgment for plaintiff, defendants appeal. Affirmed as to one defendant, and reversed and remanded for new trial as to defendant named and another.

Gates & Emery, of Seattle, for appellants. Beechler & Batchelor, of Seattle, for respondent.

CHADWICK, J. [1] The notice of appeal in this case was given by each of the defendants, but the bond was signed by D. H. Lee and G. W. Lee only, as principals. The bond is in form a supersedeas, and is conditioned "that, whereas, the above-named A. T. Thomas \* \* \* recovered judgment against the above-named defendants, \* \* \* now, therefore, if the above-named principals, D. H. and G. W. Lee, shall pay to A. T. Thomas \* \* \* all costs and damages \* \* \* not exceeding the sum of \$200, and shall satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the Supreme Court may render or make, \* \* \* then this shall be void \* \* \*" etc. No

objection was taken to the form of the bond, or to the sufficiency of the surety, in the court below, but a motion to dismiss the appeal is made upon the ground that Anna Lee, the wife of G. W. Lee, did not join as a principal in the bond. The bond is conditioned to pay the judgment; the objection, therefore, goes to the form rather than to the substance of the undertaking. We think the bond fairly indicates that it is given on behalf of all the appellants, and is within the spirit, if not the letter, of the case of Fidelity & Deposit Co. v. Seattle Renton & Southern R. R. Co., 50 Wash. 391, 97 Pac. 453.

[2] The only interest respondent can have in the bond is whether a recovery can be had upon it. No objection could be made by the surety under the principle announced in Yost v. Empire State Surety Co., 69 Wash. 397, 125 Pac. 167. The motion to dismiss the appeal is denied.

Respondent brought this action to recover the sum of \$520, alleged to have been loaned by him to the defendants for their use and benefit. The amounts were paid by check, and it is alleged that "D. H. Lee and G. W. Lee were and now are in business together, the said D. H. Lee acting for himself and as agent for said G. W. Lee, and that said money so loaned to them by the plaintiff was loaned and used for the use and benefit of each." A bill of particulars itemizes the amounts loaned as follows: "September 16, 1911, cash advanced to pay taxes, \$500. September 26, 1911, by check \$20." A general power of attorney, dated October 24, 1911, given by G. W. Lee and Anna Lee to D. H. Lee, was offered by respondent to sustain his theory of agency. We find no other testimony tending to prove agency, and the slightness of this evidence is apparent when it is noted that the power of attorney is dated more than a month after the money alleged to have been loaned to pay taxes was paid to D. H. Lee. Respondent says that the money—we are now speaking of the \$500 item—was loaned to pay taxes on certain property owned by G. W. Lee. But there is no evidence other than the power of attorney to show agency, nor is there any evidence tending to prove that "D. H. Lee and G. W. Lee are now in business together," so as to sustain the finding of the court upon the theory of partnership. Nor does the record disclose the fact that the money was ever paid over, in whole or in part, to G. W. Lee, or that any taxes were paid with it, a fact which, if appearing, would tend to support plaintiff's theory of the case.

[3] Following the frequently announced policy of this court, we are disposed to follow the finding and conclusion of the court that D. H. Lee borrowed the money, but we cannot hold, under the facts as they are disclosed in the record, that G. W. Lee and Anna Lee ever had any notice or knowledge

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



of the loan, or that they obtained or used the money for the purpose specified, or for any other. We have not overlooked the admission of G. W. Lee that there were certain delinquent taxes and outstanding certificates on his land, but this fact is clearly insufficient, when standing alone, to sustain a judgment.

Appellants contend that if the proof of agency fails, no recovery can be had against D. H. Lee; this upon the ground that where the agency is disclosed, and no fraud is proven, the principal and not the agent is the proper party. *Wilson v. Wold*, 21 Wash. 398, 58 Pac. 223, 75 Am. St. Rep. 846. As we read the record, D. H. Lee is not sued as an agent, but as a principal; and, if the evidence of the plaintiff is to be believed, he is severally liable for the repayment of the money borrowed.

As for the \$20 check, the evidence does not in any way connect G. W. Lee and Anna Lee with either its giving or receipt. If it represents a debt, it is that of D. H. Lee.

The case is affirmed as to D. H. Lee, and reversed and remanded for a new trial as against G. W. Lee and Anna Lee.

GOSE, MOUNT, and PARKER, JJ., concur.

(74 Wash. 257)

#### GRANT v. HUSCHKE.

(Supreme Court of Washington. July 8, 1913.)

#### 1. APPEAL AND ERROR (§ 999\*) — REVIEW — CONCLUSIVENESS.

In an action upon a contract for the exchange of property, where the defendant sets up a counterclaim for money damages for misrepresentations, but does not ask for a rescission of the contract, the questions of fact are for the jury, and their verdict is binding upon appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912-3921, 3923, 3924; Dec. Dig. § 999.\*]

#### 2. FRAUD (§ 13\*) — MISREPRESENTATIONS — MATTERS OF FACT — KNOWLEDGE OF FALSITY.

Where one party, to the contract for the exchange of land, knowing that the other had no opportunity to inspect the land he was to receive, falsely stated that it was level as a floor and first-class fruit land, he is liable for the damage occasioned by the reliance thereon, even though he had no knowledge of their falsity, since the representations were, as to matters of fact, susceptible of knowledge which he represented as of his own knowledge, in ignorance of their truth.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 3-5; Dec. Dig. § 13.\*]

#### 3. FRAUD (§ 11\*) — MISREPRESENTATIONS — MATTERS OF OPINION — KNOWLEDGE OF FALSITY.

Representations as to matters of opinion are not actionable, unless made under circumstances entitling the other party to act upon them, and with knowledge of their falsity, since the fraud in such a case consists in the representation as an opinion of what is not, as a matter of fact, an opinion.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.\*]

Department 2. Appeal from Superior Court, Spokane County; J. Stanley Webster, Judge.

Action by J. D. Grant against Ernest Huschke. Judgment for the defendant, and plaintiff appeals. Affirmed.

See, also, 126 Pac. 416.

Mark F. Mendenhall, of Spokane, and Gates & Emery, of Seattle, for appellant. Merritt, Oswald & Merritt, of Spokane, for respondent.

ELLIS, J. This action is here for the second time on appeal. The complaint states two causes of action; the first declares upon a promissory note, the second upon taxes paid by the plaintiff upon certain real estate situated in Seattle, which he had received from the defendant in exchange for 20 acres of land in Spokane county, which taxes, it is claimed, the defendant had agreed to pay. To the second cause of action the defendant counterclaimed damages because of alleged false and fraudulent representations made by the plaintiff concerning the Spokane land as an inducement to the exchange. Upon the first trial the defendant had a verdict for \$618.15 upon his counterclaim. The trial court granted a new trial upon a single ground mentioned in the order, but denied it on all other grounds. The defendant appealed, and this court, refusing to consider any other ground than that upon which the order was based, reversed the order and remanded the cause, with direction to enter judgment upon the verdict. *Grant v. Huschke*, 70 Wash. 174, 126 Pac. 416. Upon receipt of the remittitur judgment was entered accordingly. The plaintiff now appeals.

[1] The trade was made in Seattle. The respondent had never seen the land which he received in exchange, and knew nothing of the character of the country around it. The appellant knew this. The appellant admitted that the respondent told him that he (the respondent) could not go to see the land. It was several hundred miles from the place of negotiation. The respondent testified that the appellant represented that the land was level as a floor, was first-class fruit land, and was ready for irrigation, and that he relied upon these representations in making the exchange. The appellant testified that he represented that the land was practically level and could all be placed under irrigation, and that it was good fruit land. As to the actual character and value of the land there was a sharp conflict in the evidence. While several witnesses for the appellant testified that other lands in that vicinity were good fruit lands, no one, who had any actual knowledge of this particular tract, testified that it was good as the average fruit lands in that vicinity. There was much evidence to the effect that it was not; that the top soil was very thin and underlaid with pure sand or

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



gravel; that it was not level, but was covered with depression from one-half foot to two feet deep, and could not be irrigated by the ordinary means of furrows without leveling. There was also some evidence that the top soil was so thin that the process of leveling would remove all of the soil from the higher places and deposit it in the lower, thus leaving much of the land unproductive sand. There was evidence tending to show that the land, as it actually was, was worth \$25 to \$35 an acre, and that, if it had been as represented, it would have been worth from \$75 to \$100 an acre. Much of this evidence was controverted, but the respondent's evidence in support of his counterclaim tended to establish that the representations as claimed by him were made, that they were false, and that he relied upon them to his damage in a sum equal to the verdict. The counterclaim was for damages. The questions of fact were for the jury under proper instructions. Whatever our personal views as to the weight of the evidence, we are bound by the verdict. We cannot try the case *de novo*, as we would an equitable action for rescission. We must confine our review to a consideration of the admissibility of the evidence and the correctness of the instructions.

[2] The appellant contends that there was no evidence that he knew that his representations were false, that such knowledge is an essential element in the establishment of actionable fraud, and that, in the absence of proof of such knowledge, the admission of evidence as to his representations was error. It is usually held that representations to be actionable must be made scienter, but it does not follow that actual knowledge of the true facts or of the falsity of the representations must be shown. Representations, as of his own knowledge, of material and inducing facts susceptible of knowledge made by a vendor in ignorance of the facts, but with the knowledge that the vendee is relying upon the representations as true, and under circumstances reasonably excusing the vendee from investigating for himself, are actionable on the part of a vendee so relying to his injury. In such a case the fraud of the vendor consists in representing as true, with knowledge that it is being relied upon as true, that which he did not know to be true. This rule is supported by the trend of modern authority, and has been consistently adhered to by this court. *Hanson v. Tompkins*, 2 Wash. 508, 27 Pac. 73; *Sears v. Stinson*, 3 Wash. 615, 29 Pac. 205; *O'Connor v. Lighthizer*, 34 Wash. 152, 75 Pac. 643; *Lawson v. Vernon*, 38 Wash. 422, 80 Pac. 559, 107 Am. St. Rep. 880; *West v. Carter*, 54 Wash. 236, 103 Pac. 21; *Best v. Offield*, 59 Wash. 466, 110 Pac. 17, 30 L. R. A. (N. S.) 55; *Godfrey v. Olson*, 68 Wash. 59, 122 Pac. 1014; *Arrowsmith v. Nelson*, 132 Pac. 743; *Sutherland, Damages* (3d Ed.) § 1169. The evidence was competent and sufficient to take

the case to the jury under this rule. Obviously the rule is the same whether the action be in equity for a rescission or at law for damages.

As covering the question of fraudulent representations the court gave the following instructions:

"(7) With respect to the alleged representation that said land was as level as a floor, I instruct you that by that expression is meant that said land was reasonably and practically level; and with respect to the alleged representation that said land was first-class fruit land, I instruct you that that representation refers to first-class fruit land in the locality in question. The burden of proof with respect to this cause of action is upon the defendant, *Huschke*, and I instruct you that it is incumbent upon him, in order to recover, to establish said cause of action, not merely by a preponderance of the evidence but by evidence that is clear, satisfactory, and convincing.

"(8) If, therefore, you find from the evidence in this case that is clear, satisfactory, and convincing, and in view of the conditions and surroundings of the parties, that the plaintiff, *Grant*, at the time and place in question, did represent that the said land in *Spokane county* was as level as a floor, taking said representations as heretofore explained to you as meaning a representation that it was reasonably and practically level, and that said land would not have to be leveled for the purpose of irrigating, and that it was all first-class fruit land, and that all of it was capable of being cultivated and irrigated, and if in truth and in fact said land was not reasonably and practically level, but would have to be leveled for the purpose of irrigating, or was not first-class fruit land in that locality, or that all of it was not capable of being cultivated and irrigated, and you further find that the defendant, *Huschke*, in good faith believed and relied on said representations and pretenses, and by means thereof was induced to enter into the exchange of lands in question, and would not have done so but for said representations and pretenses, then you should find for the defendant *Huschke*. If, upon the other hand, you do not believe by testimony that is clear, satisfactory, and convincing, either that said representations were made, or that same, if made, were untrue, then you should find for the plaintiff, *Grant*."

The appellant contends that these instructions did not correctly state the law, in that they did not submit to the jury the question as to whether the appellant knew of the falsity of the representations, and made them with fraudulent intent. Under the foregoing decisions it is plain that an instruction that the jury must find from the evidence an actual knowledge on the appellant's part of the falsity of his representations before



it could find for the defendant would have been positive error. In *Lawson v. Vernon*, supra, the same contention was made, and objection taken to an instruction, reading as follows: "If you find from the evidence, as a matter of fact that, prior to the date of sale, the defendant, Vernon, pointed out certain lands to one of the plaintiffs, which were not, as a matter of fact, the lots conveyed, and that plaintiffs believed they were the same lands, and were told by the said Vernon that they were the same lands, that plaintiffs are entitled to recover any damages which they sustained by reason of such misinformation, even if the said Vernon did not purposely mislead them; in other words, if the defendant, Vernon, made a mistake and pointed out the wrong property, even if his mistake were unintentional, yet he and his partner must be held for any pecuniary damage said mistake may have caused the plaintiff." It is obvious that this instruction is less favorable to the vendor than that here complained of. In the *Lawson Case*, in approving the above quoted instruction, this court said: "The prevailing doctrine is that, if a person states as true, as of his own knowledge, material facts susceptible of knowledge, to one who relies and acts thereon to his injury, he cannot defeat recovery by showing that he did not know that his representations were false, or that he believed them to be true. The falsity and fraud consists in representing that to be true which he did not know to be true." In *West v. Carter*, supra, the instruction sustained in the *Lawson Case* was quoted and approved as a correct statement of the law. It is there said: "And this is the just theory, for the result to the party who is deceived is exactly the same whether the intention of the party upon whose representations he relied was fraudulent or not. If one by misrepresentation, even though innocent, is the cause of damage and injury, it would certainly be inequitable to visit that damage and injury upon the head of one who was in no way to blame, rather than upon the one who was the cause of such damage or injury." And again we said in *Best v. Offield*, supra: "It makes no difference whether the representations made were known by the vendor, as found by the court in this instance, to be false or not. The effect on the purchaser would be the same, and if he had a right, under all the circumstances, to rely upon them, and did rely and act upon them, he can recover." The rule as supported by a preponderance of authority is stated in 4 *Sutherland, Damages*, (8d Ed.) § 1169: "But the doctrine which seems supported by the preponderance of authority is that if a person states, as of his own knowledge, material facts which are susceptible thereof to one who relies and acts upon them as true, it is no defense to an action for deceit, if the representations are false, that the person making them believed

them to be true. The falsity and fraud consist in representing that he knows the facts to be true of his own knowledge when he has not such knowledge."

[3] The case of *Curtley v. Security Savings Society*, 48 Wash. 50, 89 Pac. 180, when its facts are analyzed, does not militate against the view expressed in the several cases above cited. In that case it was sought by parol testimony of representations as to title to import into a quitclaim deed a warranty of title. The court, there holding that in such a case the deceit must be intentional, said: "Were this not so, there could be no virtue in a warranty clause in a deed, as it would always be possible to show a warranty, even though the grantor may have expressly refused to warrant his title." The seeming conflict between that decision and the long line of decisions which we have cited is found in the inadvertent intimation in the *Curtley Case*, appearing near the bottom of page 53, that a representation as to title is a representation of fact. Representations as to title are usually, if not always, mere statements of opinion, not of fact. Herein lies the real distinction between the case in hand and the *Curtley Case*. Representations as to mere matters of opinion are usually not actionable at all. In order to be actionable they must be made, not only under circumstances clearly entitling the adverse party to rely upon them as true, and with the actual intent that he shall so rely, but with conscious knowledge on the part of the person making them that they are false. The fraud consists in representing as his opinion that which is not his opinion. In such a case there must be an actual intent to defraud, and this must be proved by positive evidence. On the other hand, where the representations are as to pure matters of fact, and made under circumstances entitling the adverse party to rely upon them as true, then the fact that they are false raises a legal presumption of fraudulent intent. The question of fraud thus becomes in such cases a question of law for the court, not a question of fact for the jury. In *Northwestern Steamship Co. v. Dexter Horton Co.*, 29 Wash. 565, 70 Pac. 59, we find the same situation presented. As pointed out in *West v. Carter*, supra, the representation complained of in the *Dexter Horton Case* was as to the solvency of a person, and necessarily involved a mere expression of opinion. In view of the foregoing, we are constrained to hold that the instruction complained of was a correct statement of the law as applied to the facts presented.

The appellant bases several assignments of error upon the admission of evidence and the qualification of certain of the witnesses to testify as to value. We have examined all of these assignments, and we are satisfied that none of them presents sufficient ground for a reversal. We cannot discuss them in



detail without extending this opinion to an unreasonable length.

The judgment is affirmed.

MAIN, MORRIS, and FULLERTON, JJ., concur.

(74 Wash. 264)

**COLLINS et al. v. HOFFMAN et al.**

(Supreme Court of Washington. July 8, 1913.)

**1. TAXATION (§ 708\*)—ACTIONS—DEFENSES.**

The regularity of the proceedings for the foreclosure of a certificate of delinquency for unpaid taxes is no defense to an action to set aside the foreclosure for fraud in the issuance of the certificate.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1291-1297, 1406, 1635-1642; Dec. Dig. § 708.\*]

**2. CORPORATIONS (§ 428\*)—REPRESENTATION BY OFFICERS—NOTICE TO OFFICER OR AGENT.**

The secretary and manager of a trust company, owning land, who was also the president and practical owner of a land company, allowed the taxes upon the trust company's land to become delinquent. The certificate of delinquency was subsequently assigned to a figurehead upon the payment of the amount with money furnished by the land company through its president. The trust company conveyed the land to another by a special warranty deed and thereafter the certificate of delinquency was foreclosed in an action brought in the name of the figurehead in which the secretary accepted service of the summons for the trust company, but no other service was made by publication or otherwise, although all unknown claimants were made defendants. *Held*, that the land company had notice through its president of the fraud committed upon the trust company by its secretary in procuring the assignment of the certificate after allowing the taxes to become delinquent.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1748-1761; Dec. Dig. § 428.\*]

**3. CORPORATIONS (§ 312\*)—OFFICERS—CERTIFICATE OF DELINQUENCY—WHO MAY ACQUIRE.**

The purchase of the certificate of delinquency by the secretary of the trust company or by the corporation, of which he was chief owner, was in law in payment of the taxes for the trust company.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1376-1386, 1388-1392; Dec. Dig. § 312.\*]

**4. COVENANTS (§ 48\*)—CONSTRUCTION—SPECIAL WARRANTY.**

The fact that the deed by which the trust company conveyed the land, after the certificate was purchased and before the foreclosure, was a special warranty deed in consideration of the settlement of a dispute would not relieve the trust company of its obligation to pay the taxes or to notify the purchaser of the tax foreclosure, since it thereby warranted the title against the acts done by it.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 48; Dec. Dig. § 48.\*]

**5. CORPORATIONS (§ 312\*)—OFFICERS—ADVERSE INTEREST—SETTING ASIDE CERTIFICATE OF DELINQUENCY—GROUNDS.**

The conveyance by the trust company was wholly immaterial in the suit to set aside the foreclosure proceedings, since the purchase of the certificate canceled it by force of law, and the subsequent conveyance and foreclosure proceedings could not revive it.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1376-1386, 1388-1392; Dec. Dig. § 312.\*]

**6. TAXATION (§ 708\*)—SETTING ASIDE CERTIFICATE OF DELINQUENCY—BURDEN OF PROOF.**

Where the purchaser of the land from the trust company was dead, proof that he was not a party to the proceedings, that no summons was published or service had, except the acceptance by the secretary of service upon the trust company, is sufficient to shift the burden to the holder of the certificate to show that the purchaser had actual notice of the foreclosure.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1291-1297, 1406, 1635-1642; Dec. Dig. § 708.\*]

**7. CORPORATIONS (§ 312\*)—OFFICERS—ADVERSE INTEREST—SETTING ASIDE CERTIFICATE OF DELINQUENCY—DEFENSES—NEGLECT.**

If the purchaser of the land was negligent in not defending a foreclosure proceeding, such negligence does not purge the transaction of the fraud.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1376-1386, 1388-1392; Dec. Dig. § 312.\*]

Department 2. Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Action by Angie B. Collins and others against A. N. Hoffman and another. Judgment for the plaintiffs, and defendants appeal. Affirmed.

See, also, 62 Wash. 278, 113 Pac. 625, Ann. Cas. 1913A, 1.

Kerr & McCord, of Seattle, for appellants. Hughes, McMicken, Dorell & Ramsey, Otto B. Rupp, and J. B. Joujon-Roche, all of Seattle, for respondents.

ELLIS, J. This is an action to vacate and set aside, upon the ground of fraud, the proceedings in foreclosure of a certificate of delinquency for unpaid taxes upon certain land in Chehalis county. It is here for the second time on appeal. The undisputed facts are as follows: On February 13, 1900, the certificate of delinquency was issued to one Robert Lytle. At and for long prior to that time and until May 8, 1901, the land covered by the certificate was owned by the Fidelity Trust Company, a corporation, of which the defendant Gleason was secretary and manager. On June 18, 1900, the certificate was assigned by Lytle to the defendant Hoffman, who was cashier of the American Savings Bank & Trust Company, of which the defendant Gleason was also manager. On May 3, 1901, the Fidelity Trust Company conveyed the property covered by the certificate to John Collins. On August 6, 1902, the defendant Hoffman instituted foreclosure proceedings upon the certificate of delinquency. The Fidelity Trust Company and all persons unknown, if any, having or claiming an interest in the land were made defendants. No summons was ever published. On August 7, 1902, the defendant Gleason accepted service of summons in that action on behalf of Fidelity Trust Company as its secretary. The Fidelity Trust Company made default and on October 17, 1902, a judgment foreclosing the



tax certificate was entered. At a public sale pursuant to that judgment the property was bid in by the defendant Hoffman, to whom the treasurer of Chehalis county executed a tax deed on November 13, 1902. John Collins died testate in April, 1903. On September 29, 1903, the plaintiffs Angie B. Collins, John Francis Collins, and R. L. Hodgdon, as executors and trustees under the will of John Collins, deceased, and Angie B. Collins in her own right as widow of John Collins, deceased, commenced this action.

The allegations of the complaint are sufficiently set forth in our opinion on the former appeal, to which reference is made. *Collins v. Hoffman*, 62 Wash. 278, 113 Pac. 625, Ann. Cas. 1913A, 1. The relief sought was a vacation of the foreclosure proceedings, the cancellation of the tax deed, and the entry of a decree removing the cloud created by those proceedings and quieting the plaintiffs' title to the premises against the defendants and each of them. The claim of right to this relief was based upon the theory that the defendant Gleason was the real party in interest in the tax foreclosure proceeding; that he thereby sought to secure title to the property in violation of his duty as secretary and manager of the Fidelity Trust Company; that he acquired the delinquency certificate while that company was the owner of the land; and that the proceedings and the tax deed founded thereon were void as to the Fidelity Trust Company and its successors in title. At the first trial the foregoing facts were established. The plaintiff offered certain letters tending to prove that the defendant Gleason was the real party in interest; that he personally directed the foreclosure proceedings, paid all the expenses thereof, and directed that the tax deed when issued to Hoffman be delivered to himself; and that the defendant Hoffman was a mere figurehead representing the defendant Gleason in the entire transaction. This evidence was excluded and the action was dismissed. Upon appeal the exclusion of this evidence was held error and the cause was reversed and remanded for new trial. The second trial resulted in a judgment for the plaintiffs. The defendants now appeal.

[1] The appellants devote much of their brief to an argument based upon the regularity of the tax foreclosure proceedings and to the establishment of the claim that, as a matter of law, John Collins was not a necessary party to those proceedings for the reason that, as a matter of fact, the land was assessed in the name of the Fidelity Trust Company. Neither the fact nor the law is disputed. The respondents contend, and we think soundly, that they are both immaterial to the issue here presented. The respondents do not seek to set aside the foreclosure proceedings because of any irregularity therein or because of any failure to comply with the law regulating such proceedings.

This action is grounded in fraud, and it is manifest that if the fraud is established the statutory regularity of the proceedings would constitute no defense.

[2] The law of the case was clearly settled by our former decision. We there said: "The law would hardly permit Gleason, representing the Fidelity Trust Company in so close and confidential a relation, whose duty it was to pay the taxes, to become a purchaser at a sale made because of a failure to pay the taxes and obtain a title without color of fraud as against either the trust company or its grantee." *Collins v. Hoffman*, supra. The clear effect of our former decision was that the evidence offered to show fraud on the part of the appellant Gleason was sufficient, prima facie, to establish that fraud, unless overcome by other evidence. The evidence offered and refused was documentary and was then in the record as identifications. If such was not the meaning of our former decision, it was an idle thing to remand the cause for a new trial because of the exclusion of that evidence. These letters are now in evidence. We shall not set them out in full nor analyze them in detail. Space will not permit it. It is enough to say that they are largely set out in the briefs and have been carefully examined by every member of this department of the court, and we are at one in the opinion that, without other explanation of his connection with the transaction, they are sufficient to establish that the appellant Gleason was the real party in interest; that he owned the certificate, directed its foreclosure, paid all the expenses of the proceeding; and that the appellant Hoffman acted as a mere figurehead and received the tax deed for Gleason's benefit. The only explanation of this correspondence and of the relations of the appellant Gleason to the transaction is found in his own testimony. He testified that the certificate of delinquency was assigned to the appellant Hoffman "for convenience," admitted that Hoffman represented the Paxton Land Company; that the Paxton Land Company furnished the money to acquire the assignment; that he (Gleason) was president of the Paxton Land Company; that he was the largest stockholder in the Paxton Land Company; that in 1901 and ever since then he owned something like 13,000 out of 16,000 shares of the capital stock of that company; that the company was practically "owned" by him; that after the deed was issued Hoffman conveyed the property to the Paxton Land Company; that the Paxton Land Company later deeded the property to one Hogan or to a corporation in which Hogan was interested; that he (Gleason) gave Hogan a written guaranty that if the title failed Gleason would personally repay to Hogan the money invested; that when he wrote letters on behalf of the Paxton Land Company he used the word "I" instead of the Paxton



Land Company and used his own personal stationery. We thus have the appellant Gleason attempting to occupy and take advantage of a triplicate capacity in his relation to the transaction: Gleason, the man; Gleason, the stockholder, secretary, and manager of the Fidelity Trust Company; and Gleason, the president and chief owner of the Paxton Land Company, which is, in effect, Gleason, incorporated. It is manifest that neither Gleason, the man, nor the Paxton Land Company can claim immunity from the infection of fraud imported into the transaction by the connection therewith of Gleason, the stockholder, secretary, and manager of the Fidelity Trust Company. He being the moving spirit in each of these three entities throughout the entire transaction, every sound consideration of equity affects the Paxton Land Company with notice of his relation and duty to the Fidelity Trust Company. The Paxton Land Company, whether regarded as Gleason incorporated or as a separate entity, cannot profit by the fraud of which, through its president and principal owner, it had notice. *Concordia Loan & Trust Co. v. Parrotte*, 62 Neb. 629, 87 N. W. 348.

[3] Every right which the Paxton Land Company can claim by reason of the tax deed relates to and must find its validity in the purchase of the delinquency certificate. This took place while the Fidelity Trust Company was the owner of the land and while the appellant Gleason was its secretary and manager and was in violation of Gleason's duty to the latter company in that capacity. The purchase of the delinquency certificate was in law a payment of the taxes. As an officer and manager of the Fidelity Trust Company, it was Gleason's primary and elementary duty to see that its taxes were paid and its property protected from tax sale. He occupied to that company the closest relation of trust and confidence. He had charge of its records as its secretary and conducted its business as its manager. It would be against the plainest principles of equity and public policy to permit him or a corporation of which he was the chief owner to profit by his dereliction of duty in this capacity.

"There is a general principle applicable to such cases which may be stated thus: That a purchase made by one whose duty it was to pay the taxes shall operate as payment only. He shall acquire no rights, as against a third party, by a neglect of the duty which he owed to such party. This principle is universal and is so entirely reasonable and just as scarcely to need the support of authority. Show the existence of the duty, and the disqualification is made out in every instance." *Cooley, Taxation* (2d Ed.) p. 501.

"It is well settled that one who is under a moral or legal obligation to pay the taxes is not in a position to become a purchaser at a sale made for such taxes. If such person

permits the property to be sold for taxes, and buys it in, either in person or indirectly through the agency of another, he does not thereby acquire any right or title to the property, but his purchase is deemed one mode of paying the taxes." *Christy v. Fisher*, 58 Cal. 256, 258; *Maier v. Potter*, 60 Wash. 443, 111 Pac. 453; *Moss v. Shear*, 25 Cal. 38, 85 Am. Dec. 94; *Barlow v. Hitzler*, 40 Colo. 109, 90 Pac. 90; *Gibson v. Sexson*, 82 Neb. 475, 118 N. W. 77; *Concordia Loan & Trust Co. v. Parrotte*, supra; *Brooks v. Garner*, 20 Okl. 236, 94 Pac. 694, 97 Pac. 995. See, also, note to *Cone v. Wood*, 75 Am. St. Rep. 229.

If the Fidelity Trust Company had not subsequently conveyed this land to Collins, we apprehend that no one would have the hardihood to contend that its title would be divested by the tax sale, even as in favor of the Paxton Land Company, much less as in favor of appellant Gleason under the facts disclosed by this record.

[4] But it is argued that the deed of the land in question from the Fidelity Trust Company to John Collins was made in consideration of the settlement of litigation then pending between those parties, and that the land was conveyed by the Fidelity Trust Company by a special warranty deed, and therefore neither the Fidelity Trust Company nor the appellant Gleason, as its officer, owed any duty to Collins either to pay the taxes or to notify him of the tax foreclosure. Even if these facts might be held material, it is manifest that the Fidelity Trust Company, having warranted the title against acts done by it, was in duty bound to either pay the taxes accruing while it was owner of the land or at least notify Collins that the certificate was outstanding.

[5] We think, however, that these matters are wholly immaterial. As we have seen, the tax sale must find its validity in the purchase of the delinquency certificate. That having taken place while the Fidelity Trust Company was the owner of the land, it amounted only to a payment of the taxes. The transfer of the certificate to the officer of the company canceled it by force of law. The subsequent conveyance of the land to Collins did not infuse life into this dead certificate. The foreclosure proceedings could not revive it. The proceedings and the deed founded thereon are as void as to Collins as grantee of the Fidelity Trust Company as they would have been as to that company had it retained the land.

[6] It is further argued that there was no evidence that John Collins did not have actual notice of the tax foreclosure proceedings. Obviously, he being now dead, absolute proof of such a negative is next to impossible. It was, however, proved that he was not a party to the proceedings; that no summons was ever published; and that no service of any kind was had save the acceptance by Gleason for the Fidelity Trust



Company. This raised a probable lack of actual notice sufficient to shift the burden of proof. If the appellant ever gave such notice, he is cognizant of that fact, and the duty was thus cast upon him to show it. The relation of the appellant Gleason to the entire transaction was such as to make this matter of notice a thing peculiarly within his knowledge. He attempted no such showing.

[7] We are not impressed by the contention that if Collins in his lifetime had used due diligence he would have known of the foreclosure proceedings and protected his rights. Even had he known of the purchase of the tax certificate by the appellant Gleason and the Paxton Land Company and all of the attendant circumstances, he would have had the right to treat it as a payment of the taxes. His negligence, if he was negligent, in failing to defend in the tax foreclosure, to which he was not a party, by setting up these facts, cannot purge the transaction of fraud as to him. "The doctrine is well settled that as a rule a party guilty of fraudulent conduct shall not be allowed to cry 'negligence' as against his own deliberate fraud." *Lindington v. Strong*, 107 Ill. 295, 302; *Albany City Savings Institution v. Burdick*, 87 N. Y. 40.

Whether it was incumbent upon the respondents to tender these taxes in order to maintain this action, we find it unnecessary to decide. They have confessed that duty, made the tender, and kept it good by payment into court.

The judgment is affirmed.

MAIN, MORRIS, and FULLERTON, JJ., concur.

(74 Wash. 234)

POWERS et ux. v. MUNSON

(Supreme Court of Washington. July 8, 1913.)

1. DEEDS (§ 17\*)—VALIDITY—GOOD CONSIDERATION.

A good consideration is sufficient to the validity of a deed otherwise regular.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 26-37; Dec. Dig. § 17.\*]

2. HUSBAND AND WIFE (§§ 255, 266\*)—COMMUNITY PROPERTY—SEPARATE PROPERTY OF HUSBAND.

The title to property acquired by deed, whether separate or community, is determined, not from the form of the deed, but from the manner of its acquisition, and property given by the wife to the husband, or purchased by his individual funds, becomes his separate property.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 900-902, 925-928; Dec. Dig. §§ 255, 266.\*]

3. HUSBAND AND WIFE (§ 48\*)—CONVEYANCE BY WIFE TO HUSBAND—FORM OF CONVEYANCE.

Rem. & Bal. Code, § 8766, relating to conveyances of community property between husband and wife, has no application to property conveyed by the wife to the husband as a gift,

or purchased by him with his individual funds; and, under section 5916, defining the wife's separate property, section 5925, enabling married persons to hold and dispose of property as if unmarried, section 5928, abolishing the wife's property disabilities, and section 5927, enabling her to contract as if unmarried, the wife may convey to her husband the whole, or any part, of her separate property, by any of the recognized forms of conveyance, as fully and freely as she may to other persons.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 242-248; Dec. Dig. § 48.\*]

4. HUSBAND AND WIFE (§ 6\*)—CONVEYANCE BY HUSBAND—JOINDER OF WIFE.

Under the express provision of Rem. & Bal. Code, § 5915, a husband may convey his separate property without the wife joining in the conveyance.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 13-18; Dec. Dig. § 6.\*]

5. APPEAL AND ERROR (§ 169\*)—REVIEW—THEORY OF CASE BELOW.

The court on appeal will not discuss a question not among the issues submitted to the trial court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1018-1084; Dec. Dig. § 169.\*]

Department 2. Appeal from Superior Court, Lewis County; A. B. Rice, Judge.

Action by Charles R. Powers and wife against Mary A. Munson. Judgment for plaintiffs, and defendant appeals. Affirmed.

C. B. Reynolds and B. H. Rhodes, both of Centralla, for appellant. Dysart & Ellsbury and C. D. Cunningham, all of Centralla, for respondents.

FULLERTON, J. The respondents brought this action against the appellant to quiet their title to an undivided one-half interest in certain real property. They had judgment in the court below, and this appeal was taken therefrom.

[1] The property in question consisted of two lots situated in the city of Centralla, on which there was a building used as a rooming and boarding house. The property was acquired by the appellant while she was a single woman. Subsequent to its acquisition she intermarried with one George N. Munson, and after the marriage deeded to Munson, by a quitclaim deed, an undivided one-half interest in the property, subject to two certain mortgages, the one for \$400 and the other for \$100. The deed was executed on October 23, 1909, and recited that it was made for a "valuable consideration and one dollar." Subsequent to the execution of the deed Munson resided on the premises with the appellant for some 1½ years. The court found that the deed was a gift from the appellant to her husband. The evidence, however, we think would have justified a different finding. The appellant testified that Munson agreed to pay, as a consideration for the deed, the mortgages on the premises, and certain other obligations then due, the nature of which was not made clear, possibly car-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



tain back taxes and overdue insurance premiums. A portion of these obligations he did pay, but whether all that was due or not the evidence does not show. But whether the deed is founded on a good or a valuable consideration is not very material. A good consideration is sufficient to its validity; it being otherwise regular.

On July 8, 1911, George N. Munson, for a consideration of \$800, conveyed by warranty deed to the respondent Charles R. Powers his undivided one-half interest in the property. In this deed the appellant did not join, and when the respondent sought to exercise ownership in the property, she forbade him access thereto, and refused to account to him for the rents, issues, and profits thereof. The appellant defended the action on the ground that the deed of conveyance from her husband to the respondent passed no interest in the property sought to be conveyed. She contends that the property, on the execution of the deed from herself to her husband, became the community property of herself and her husband, and she invokes the rule, heretofore announced by this court, to the effect that a deed of conveyance of community real property, executed by only one of the spouses, passes no interest in the property to the grantee named in the deed. But we think the appellant mistakes the effect of the deed from herself to her husband.

[2] The title to property acquired by deed, whether separate or community, is determined, not from the form of the deed by which it is conveyed, but from the manner of its acquisition. Property acquired by gift, or purchased with the separate funds of the spouse to whom it is conveyed, is the separate property of that spouse. So this property, whether it was a gift from the wife to the husband, as the court found, or whether it was purchased by her husband's individual funds, as the court might have found, became the separate property of the husband, and the husband and wife held it thereafter, not as property belonging to them as a community, but as tenants in common; that is to say, each of them held a separate estate in an undivided half thereof.

[3] There is no objection under the statutes, as the appellant seems to contend, to the form of the conveyance. The statute relating to conveyances between husband and wife of community real property (Rem. & Bal. Code, § 8766), has no application to conveyances of this character. The wife may convey to her husband the whole or any part of her separate property, by any of the recognized forms of conveyances, as fully and freely as she may convey the same to any other person. Id. §§ 5916, 5925, 5926, 5927.

[4] Since, therefore, the deed from the appellant to her husband vested in him as his

separate property an undivided half interest in the land conveyed, it follows that the husband could, without his wife joining him, make a valid conveyance of the same to the respondent. Id. § 5915.

[5] It is contended in the brief of counsel that the property was the homestead of the appellant and her husband, and hence no part of it could be conveyed without both of them joining in the conveyance. But there is no suggestion, either in the pleadings or the evidence, of this nature, and were it possible that a homestead could be claimed in property situated as this property is situated, we must decline to enter upon a discussion of the question, since it was not among the issues submitted to the trial court.

The judgment will stand affirmed.

MAIN, MORRIS, and ELLIS, JJ., concur.

(74 Wash. 272)

### TROVIK v. GRANT SMITH & CO.

(Supreme Court of Washington. July 10, 1913.)

RELEASE (§ 58\*)—TRIAL—QUESTION FOR JURY.

In an action for negligence, defended on the ground of a release of the claim, where it appeared that defendant had received a certain amount and executed a release, and no undue influence or fraud on the part of the defendant or want of understanding on the part of the plaintiff was shown, the direction of a verdict for defendant was proper.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 109-114; Dec. Dig. § 58.\*]

Department 1. Appeal from Superior Court, King County; King Dykeman, Judge.

Action by I. S. Trovik against Grant Smith & Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Carl Smith and John E. Humphries, both of Seattle, for appellant. Preston & Thorgrimson and Sandford C. Rose, all of Seattle, for respondent.

PARKER, J. The plaintiff seeks recovery of damages from the defendants claimed to have resulted to him from their negligence. At the close of all of the evidence introduced upon the trial in the superior court counsel for the defendants moved the court for a directed verdict in their favor, which motion was granted, when a verdict was rendered by the jury accordingly. Thereupon judgment of dismissal upon the merits was entered. From this disposition of the cause the plaintiff has appealed.

Among other defenses made by respondents, they alleged that by way of compromise of appellant's claim for damages, but not admitting liability thereon, they paid to him the sum of \$150 in full satisfaction thereof, and that thereupon appellant executed and delivered to them a written release acknowledging the receipt of that sum in full satisfaction of his claim. The trial court evidently

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



granted the motion for a directed verdict upon the ground, among others, that the compromise and satisfaction was made and executed by appellant as alleged by respondents. That appellant accepted the \$150 and executed the written satisfaction of his claim is not only proven beyond controversy, but is admitted by appellant in his own testimony. Without noticing in detail the evidence touching the circumstances attending the receipt of this sum and the execution of the written satisfaction by appellant, we deem it sufficient to say that it wholly fails to show any undue influence or fraud on the part of respondents, or want of understanding on the part of appellant, attending the compromise and execution of the written satisfaction by appellant, as claimed by him. The learned trial court was clearly warranted in taking the case from the jury upon this ground. This renders it unnecessary to notice other contentions made by counsel.

The judgment is affirmed.

CHADWICK, GOSE, and MOUNT, JJ., concur.

(74 Wash. 290)

#### STATE v. COLUMBUS.

(Supreme Court of Washington. July 10, 1913.)

#### 1. CRIMINAL LAW (§ 1159\*) — APPEAL — REVIEW—QUESTIONS OF FACT.

Where the state's evidence, although strenuously contradicted, is sufficient to take the case to the jury, the verdict is conclusive on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

#### 2. PROSTITUTION (§ 3\*) — ACCEPTING EARNINGS OF PROSTITUTES—INFORMATION.

Under Rem. & Bal. Code, § 2440, subd. 5, providing that every person living with or accepting the earnings of a common prostitute shall be punished as therein provided, an information charging that defendants between dates specified unlawfully and feloniously accepted the earnings of B., the said B. being a common prostitute, charged a crime in substantial conformity to the statute.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 3; Dec. Dig. § 3.\*]

#### 3. INDICTMENT AND INFORMATION (§ 125\*) — DUPLICITY.

An information charging two persons between certain dates with accepting the earnings of a prostitute charged only one crime and was not duplicious.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.\*]

#### 4. WITNESSES (§ 344\*) — IMPEACHMENT — ADMISSIBILITY OF EVIDENCE.

On a trial for accepting the earnings of a prostitute, where it was in evidence that she was a prostitute, evidence that subsequent to the offense she lived with another man to whom she paid all of her earnings was not admissible as affecting her credibility as a witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1120, 1125; Dec. Dig. § 344.\*]

#### 5. WITNESSES (§ 374\*) — IMPEACHMENT — MOTIVE.

On a trial for accepting the earnings of a prostitute, evidence that the prosecuting witness, subsequent to the offense charged, lived with another man to whom she paid her earnings was not admissible as tending to show that her motive in accusing defendant was to divert attention from such other man and from the offense of which he was guilty.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1201, 1202; Dec. Dig. § 374.\*]

#### 6. PROSTITUTION (§ 4\*) — ACCEPTING EARNINGS OF PROSTITUTE — EVIDENCE — CORROBORATION.

Under Rem. & Bal. Code, § 2443, providing that no conviction under the preceding sections of that chapter shall be had on the testimony of the female upon or against whom the crime was committed, unless supported by other evidence, on a trial for accepting the earnings of a prostitute, the testimony of such prostitute could be corroborated by that of another admitted prostitute, although she claimed to have been subjected to the same exactions as the prosecuting witness; the fact that she was a prostitute going only to the credibility of her testimony.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 4; Dec. Dig. § 4.\*]

#### 7. PROSTITUTION (§ 4\*) — ACCEPTING EARNINGS OF PROSTITUTE — EVIDENCE — CORROBORATION.

On a trial for accepting the earnings of a prostitute, testimony of the prosecuting witness held sufficiently corroborated to support a conviction.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. § 4; Dec. Dig. § 4.\*]

#### 8. PROSTITUTION (§ 1\*) — ACCEPTING EARNINGS OF PROSTITUTE—INSTRUCTIONS.

On a trial for accepting the earnings of a prostitute, it was proper to charge that the crime was not committed by accepting her earnings in exchange for food, clothing, or shelter, but only by their acceptance as a gratuity, or with the intent to aid, assist, or abet in her prostitution, but that if the woman mentioned in the information was a prostitute, and if defendant, knowing her to be such and being in charge of rooms, entered into an arrangement with her to use such room or rooms for the purpose of holding intercourse with men, and to pay him a specified amount for the use thereof for each man with whom she occupied such room, such amount would be money received as the earnings of a prostitute, especially where the evidence showed that accused participated in the negotiations for, and in the payment made in consideration of, each separate act of prostitution, and that the agreed amount for each man with whom she occupied a room was exacted whether she occupied the room for which she paid weekly room rent or another.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.\*]

#### 9. CRIMINAL LAW (§ 1159\*) — APPEAL — REVIEW—QUESTIONS OF FACT.

Where the testimony of the prosecuting witness in a criminal case tended to establish every element of the crime charged and was so amply corroborated as to leave no doubt of its truth, if the other witnesses for the state were believed, the fact that the jury believed them rather than accused's witnesses did not show passion or prejudice requiring a reversal, where the trial court had refused to interfere by arresting the judgment or granting a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]



Department 2. Appeal from Superior Court, Skagit County; Geo. A. Joiner, Judge.

Christopher Columbus was convicted of accepting the earnings of a prostitute, and he appeals. Affirmed.

Coleman & Gable, of Sedro Woolley, and Hurd & Hilen, of Mt. Vernon, for appellant. Augustus Brawley, of Mt. Vernon, for the State.

ELLIS, J. The defendant was charged with the crime of accepting the earnings of a prostitute. The charging part of the information was as follows: "That in Skagit county, state of Washington, and between the 1st day of December, 1911, and the 1st day of May, 1912, the said defendants, Christopher Columbus and Billie Liaskos, then and there being, did unlawfully and feloniously accept the earnings of one Mary Blakely, she (the said Mary Blakely) then and there being a common prostitute." The defendant demurred to the information, and the demurrer was overruled. He then pleaded not guilty and demanded a separate trial, which was accorded. At the close of the state's case the defendant challenged the sufficiency of the evidence and asked an instruction not guilty, which was denied. The evidence adduced by the state at the trial and relied upon for the conviction was, briefly, as follows: The defendant, Columbus, and his codefendant in the information, Liaskos, both natives of Greece, were cousins and partners conducting a restaurant and rooming house in Sedro Woolley, Skagit county. The prosecuting witness, Mary Blakely, an admitted prostitute, testified that she rented a room in this place from about December 15, 1911, to March 31, 1912, paying the defendant and his partner therefor \$7 a week; that much of the time while she was there another prostitute shared the room with her, also paying therefor to the defendant and his partner \$7 a week; that the prosecuting witness plied her vocation by frequenting in the afternoons and evenings the boxes in the defendant's restaurant, and when men came in had drinks with them from an adjoining saloon, took them upstairs and practiced prostitution with them for money, and that the defendant and his partner were paid for each man so accommodated a stipulated sum in addition to what she received; that the defendant sometimes brought men back to the boxes and introduced them to the prosecuting witness; that all of this was in pursuance of an agreement with the defendant, Columbus, and his partner that she would be permitted to take men upstairs only upon condition that such payments, designated as "room rent," were made; that this was in addition to the regular room rent paid by the woman for her room and was paid whether the men were taken to the woman's room or to another; that these amounts were paid either by the woman with money given to her

by the men or directly by the men themselves. Her testimony with regard to the charge for taking men to the rooms, the manner and amount of the payments, and the general arrangement with the defendant and his partner and mode of operation was corroborated by another inmate of the house, one Myrtle Delaney, the woman who for a time shared the regular room of the prosecuting witness. There was also evidence that there were other female inmates of the place during this time, but under what arrangement with the proprietors did not appear. Other evidence will be noticed as may be necessary in the course of this opinion. Upon the whole evidence and the court's instructions, the jury returned a verdict of guilty as charged.

[1] All of the evidence introduced by the state was strenuously contradicted by the defendant and his partner, but it is elementary that, if the state's evidence was sufficient to take the case to the jury, the verdict is conclusive upon us. The defendant moved to set aside the verdict and for a new trial. The motion was denied. The defendant also moved in arrest of judgment, which was also denied. Exceptions were reserved to these rulings of the court and to the admission and exclusion of evidence. Judgment was entered, sentence pronounced, and the defendant appealed.

[2, 3] I. The appellant first assigns as error the refusal of the court to sustain the demurrer to the information. The demurrer was upon the grounds: (1) That the information did not substantially conform to the statute; (2) that it charged more than one crime; (3) that the facts charged did not constitute a crime. The statute under which the information was filed, so far as material, reads as follows: "Every person who \* \* \* shall live with or accept any earnings of a common prostitute, or entice or solicit any person to go to a house of prostitution for any immoral purpose, or to have sexual intercourse with a common prostitute, shall be punished by imprisonment in the state penitentiary for not more than five years or by a fine of not more than two thousand dollars." Rem. & Bal. Code, § 2440, subd. 5. A reading of this statute makes it plain that the information charged the crime practically in the words of the statute so far as applicable to the facts. While it charged the offense as being committed by two persons, it charged but a single crime and was therefore not vulnerable to attack for duplicity. It is manifest also that the facts charged, if proven, constitute a crime under the express terms of the statute. The demurrer was properly overruled.

[4, 5] II. On cross-examination of the prosecuting witness and also by other witnesses, who it is claimed heard her so state, the appellant sought to prove that the prosecuting witness had subsequent to leaving the appellant's place lived with another man and paid



him all of her earnings. The exclusion of this evidence is assigned as error. The appellant contends that it was admissible: First, as affecting the credibility of the witness; and, second, as tending to show, as a motive on her part in accusing the defendant, an intent to protect the other man by diverting attention from him and a like offense with which he was also charged. Neither of these grounds is well taken. So far as the credibility of the prosecuting witness could be affected by evidence of her unchastity and immorality that evidence had already been admitted. She was a common prostitute and had so testified. Evidence that she lived with another man even at the time charged in the information, unless she paid all of her earnings to such other man, would be at most only cumulative as to her unchaste character and would not otherwise tend to discredit her testimony. The court excluded the testimony on the ground that it referred to a time subsequent to her leaving the defendant's place and did not tend to show that she paid all of her earnings to another during the time she remained at the defendant's place. There was no error in excluding the evidence on the first ground of the offer. The second ground, namely, that the evidence was admissible as tending to show, as a motive, a diversion of attention from the offense charged against the other man, seems to us also untenable. The appellant relied mainly upon the case of *State v. Griffin*, 43 Wash. 591, 88 Pac. 951, 10 Ann. Cas. 177, in which it was the theory of the defense that the complaining witness charged the crime of statutory rape against the defendant in order to protect the real offender, and the court limited the consideration of the evidence of illicit relations with another to its tendency to account for her condition when examined by a physician, thus taking the theory of the defense from the jury. This was held error. The distinction between that case and this is patent. The fact that the complaining witness in the *Griffin* Case had voluntarily submitted to illicit relations with another man than the defendant had some tendency to prove that the charge against the defendant was for the purpose of protecting the real culprit. The evidence offered in the case at bar would have no such tendency. The charge of the complaining witness that she paid a part of her earnings to the appellant would in no wise tend to disprove the fact, if it be a fact, that she at a subsequent time paid all of her earnings as a prostitute to another man. The evidence had no reasonable tendency to establish motive for the charge against the defendant. It was properly rejected.

[8, 7] III. It is next contended that the testimony of the prosecuting witness that the appellant had accepted any of her earnings was uncorroborated. The witness Myrtle Delaney corroborated the prosecuting witness in near-

ly every particular. The appellant contends that because the Delaney woman was also an admitted prostitute her evidence was not admissible. This, however, went to the credibility of her testimony rather than to its admissibility. *State v. Stone*, 66 Wash. 625, 120 Pac. 76. The statute touching corroboration (*Repn. & Bal. Code*, § 2443) does not render the testimony of a prostitute inadmissible. Nor does the fact that the Delaney woman also claimed to have been subjected to the same exactions as the prosecuting witness during her stay at the appellant's place render her testimony inadmissible in corroboration. *People v. Panyko*, 71 App. Div. 324, 75 N. Y. Supp. 945. Moreover, another witness testified that he on several occasions had paid 50 cents, either to the appellant or his partner, for going to the room with the prosecuting witness. Other witnesses testified to seeing the prosecuting witness around the restaurant and the lodging house, and there was also evidence tending to show that, when the prosecuting witness had been arrested and was in jail for disorderly conduct with another man, the defendant sent her money. We think there was ample evidence in corroboration of the complaining witness to satisfy the statute relative to corroboration. Its weight was for the jury.

[8] IV. The court gave the following instructions:

"(5) You are instructed that the crime of accepting the earnings of a prostitute is not committed by the acceptance of the earnings of a prostitute in exchange for food, clothing, or shelter, but is only committed by the acceptance of such earnings as a gratuity, or with the intent to aid, assist, or abet in her prostitution.

"(6) But you are instructed that if you believe from the evidence beyond a reasonable doubt that Mary Blakely, who is mentioned in the information, was during the period mentioned in the information a prostitute, and that the defendant, Christopher Columbus, knowing her to be such and he himself or in partnership with Billie Liaskos was in charge of rooms and did enter into arrangement with the said Mary Blakely for her to use any such room or rooms for the purpose of holding intercourse with men, and to pay the said Christopher Columbus, or the said partnership, if one existed, the sum of 50 cents, or any other amount, for the use of such rooms for every man that she occupied such room with, then you are instructed that such sum received for the use of such rooms would be money received as the earnings of a prostitute, and you should find the defendant guilty as charged in the information."

The appellant contends that the latter of these instructions is erroneous in that charging for the use of rooms to be used in prostitution does not constitute accepting the earnings of a prostitute within the mean-



ing of Rem. & Bal. Code, § 2440; above quoted. It is argued that, if it constitutes any offense, it is either that of keeping a house of ill fame under Rem. & Bal. Code, § 2904, or that of maintaining a common nuisance under Rem. & Bal. Code, §§ 8319, 8320. It is true that the evidence did tend to bring the defendant within the purview of these sections, but it also went much further. Keeping a house and renting rooms therein to prostitutes for their home and shelter, even with knowledge that they ply their vocation therein, where the only consideration paid is the stipulated room rent regardless of the number of men entertained by the tenant, may be assumed for the purpose of this discussion merely to constitute the offense of keeping a house of ill fame or maintaining a common nuisance and punishable as such only under the three last-cited sections of the Code; but the evidence here, if believed, shows not only the case we have assumed but something more and very different from the case assumed. The distinction was recognized by the trial court and is clearly apparent from a comparison of the two instructions above quoted. The evidence here shows a direct participation by the appellant in the negotiations for and in the payment made in consideration of each separate act of prostitution. The extra payment over and above the ordinary room rent of the prostitute was not room rent in any just sense of the term. It was pay in a specific sum for the privilege of each specific act of prostitution committed by the prostitute on the premises whether performed in the prostitute's own room or, if more convenient, in another. The use of the room for which this extra payment was exacted was merely incidental to the particular act of prostitution. The sole moving consideration to the prostitute's customer, whether paid directly to the appellant by the customer or by the prostitute with money received from her customer, was the specific act of prostitution then performed by her. She earned it to the same extent and by the same act by which she earned the money paid to her for the same performance. The acceptance of it by the defendant was the acceptance of a part of her earnings as a common prostitute. It was a tribute levied on her earnings in consideration of prostitution alone. This is clear since it was exacted whether she used her own room for which she had already paid or another for the specific act. It clearly falls within the ban of the statute against accepting "any earnings of a common prostitute." Any other view would render the statute so easily evaded by the shallow subterfuge of room rent as to make it a dead letter. We find no error in this instruction as applied to the evidence.

V. These considerations effectually dispose of the further claim that the court erred in refusing to direct an acquittal for insufficiency of the evidence to establish the crime charged and also of the claim of error in the court's refusal to grant the appellant's motion in arrest of judgment.

[9] VI. The motion for a new trial was based upon grounds as follows: (1) Error of law occurring at the trial excepted to by the defendant; (2) that the verdict was contrary to the law and the evidence; (3) misconduct of the jury consisting of passion and prejudice; (4) fatal variance between the allegations of the information and the proof. What we have already said disposes of all of these grounds save the third and that is not sustained by the record. It was the province of the jury to weigh the evidence. The testimony of the prosecuting witness tended to establish every element of the crime charged. It was so amply corroborated as to leave no doubt of its truth if the other witnesses for the state were believed. Their credibility was for the jury. If the jurymen believed this evidence, it was their duty to convict. That they did believe it is no mark of passion or prejudice, and none other is pointed out. The trial court having denied the motion in arrest of judgment and refused a new trial, we must decline to interfere. *State v. Bailey*, 31 Wash. 89, 71 Pac. 715; *State v. Murphy*, 15 Wash. 98, 45 Pac. 729; *State v. Kroenert*, 13 Wash. 644, 43 Pac. 876; *State v. Coates*, 22 Wash. 601, 61 Pac. 726; *State v. Bailey*, 67 Wash. 336, 121 Pac. 821; 12 Cyc. pp. 906, 907, 908.

The judgment is affirmed.

MORRIS, MAIN, and FULLERTON, JJ., concur.

(74 Wash. 296)

JAHN CONTRACTING CO. v. CITY OF SEATTLE et al.

(Supreme Court of Washington. July 10, 1913.)

MUNICIPAL CORPORATIONS (§ 327\*)—STREET RAILWAY SYSTEM—CONSTRUCTION BY CITY—RATE OF WAGES—"LOCAL IMPROVEMENT WORK"—"PUBLIC UTILITY."

Rem. & Bal. Code, § 8006, authorizes cities to build a street railway system as a public utility, and section 8006 requires a ratification thereof at an election. On or about March 7, 1911, the city of Seattle voted to construct a street railway system, and on January 12, 1912, plaintiff's bid was accepted, and though plaintiff was thereafter ready to execute such contract, it was not formally executed until June 8, 1912, before which time the city adopted an amendment providing that minimum wages on local improvement work should be \$2.75 per day. *Held*, in an action to enjoin a threatened forfeiture of the contract because he was paying only \$2 per day, that the work was a "public utility," and not a "local improvement work" which is an improvement which, by reason of its being confined to a locality, enhances the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



value of adjacent property as distinguished from public benefits and the cost of which may be assessed on the property specially benefited, and hence that the contract was not controlled by the amendment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 850; Dec. Dig. § 327.\*

For other definitions, see *Words and Phrases*, vol. 5, pp. 4206-4208; vol. 8, pp. 7709, 7774.]

En Banc. Appeal from Superior Court, King County; John F. Main, Judge.

Action for injunction by the Jahn Contracting Company against the City of Seattle and others. Judgment for plaintiff, and defendants' appeal. Affirmed.

James E. Bradford, Melvin S. Good, and Ralph S. Pierce, all of Seattle, for appellants. West & Wright, of Seattle, for respondent.

MOUNT, J. This action was brought by the plaintiff to enjoin the city of Seattle and its board of public works from forfeiting and canceling a contract for the construction of a railway within the city limits. On the trial of the case judgment was entered in favor of the plaintiff. The defendants have appealed from that judgment.

The facts are not in dispute, and are briefly as follows: On January 9, 1911, the city council regularly passed an ordinance by which it was proposed to construct a street railway system within the city of Seattle and to pay for the same by the issuance of bonds of the city, which bonds were to be a general indebtedness of the city. On or about March 7, 1911, at an election duly called for that purpose, the electors voted favorably to the issuance of these bonds and approved the said ordinance. In pursuance thereof the city council thereafter passed an ordinance which authorized the board of public works to call for bids for the construction of a section of the street railway system to be known as "division A." On or about December 13, 1911, the board of public works called for bids for the construction of said division A by publishing notice, as required by the city charter, which notice stated that bids would be opened on January 12, 1912. The plaintiff thereupon bid for the construction of division A of said street railway, and filed its bid with the board of public works, together with a certified check for \$7,700, as required by sections 14 and 15 of article 8 of the charter of the city. Said section 15 reads as follows: "At the time and place named such bids shall be publicly opened and read; no bid shall be rejected for informality, but shall be received if it can be understood what is meant thereby. The board shall proceed to determine the lowest bidder, and may let such contract to such bidder, or, if in their opinion all bids are too high, they may reject all of them and readvertise, and in such case all checks shall be returned to the bidders; but if such

contract be let, then and in such case all checks shall be returned to the bidders except that of the successful bidder which shall be retained until a contract be entered into for making such improvement between the bidder and the city in accordance with such bid. If the said bidder fails to enter into such contract in accordance with his bid within ten days from the date at which he is notified that he is the successful bidder, the said check and the amount thereof shall be forfeited to the city, and the secretary shall deliver said check to the city comptroller, who shall draw said amount and pay the same into the city treasury, to the credit of the 'local improvement fund,' and the board shall readvertise for proposals for such work. Neither the board nor the city council shall have power to remit such forfeiture." On January 12, 1912, all bids made for the construction of the work on said division A were opened. Plaintiff's bid was the lowest of all bids submitted, it being \$148,927.20. Thereupon the certified checks of all other bidders were returned, and the certified check of the plaintiff was retained. Thereafter the plaintiff was at all times ready and willing to execute a formal written agreement with the city of Seattle to construct the work in accordance with said bid. Thereafter, on March 5, 1912, the electors of the city of Seattle, at a regular election, adopted an amendment to the charter, which provides as follows: "Minimum wage to be paid on local improvement work: Every contractor and subcontractor performing any local improvement work for the city of Seattle shall pay or cause to be paid to his employes on such work not less than the current rate of wages paid by the city of Seattle for work of like character and in any event not less than two and seventy-five hundredths (\$2.75) dollars per day. Said contractor and subcontractor shall, on such work, give preference to resident laborers. This article shall be enforced by the city council by ordinance." This amendment became effective about March 8, 1912. On June 28, 1912, the contract for the construction of said division A was formally awarded to the plaintiff by the board of public works, and on July 8, 1912, a formal written contract was executed by the plaintiff and the board of public works for the construction of the work. The plaintiff gave a bond to secure the faithful performance of the contract. Thereafter, under and by virtue of the contract, the plaintiff commenced the construction of the railway system in accordance with the terms and conditions of the contract, prosecuting the work up to the time this action was brought. In doing so the plaintiff was required to engage a large number of laborers. Plaintiff did engage men to work upon the construction of the railway under an agreement to pay the laborers \$2 per day

\*For other cases, see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



of eight hours. The going and prevailing wage in the city of Seattle for this class of work ranged from \$2 to \$2.25 for eight hours. The laborers were willing to accept \$2 per day for said work. While the work was in progress, the board of public works served notice upon the plaintiff to the effect that plaintiff was paying the employes engaged upon said work a sum as wages substantially less than \$2.75 per day, as provided in the amendment to the city charter, and directed the plaintiff to appear before the board of public works on the 9th day of August, 1912, and show cause why the contract should not be forfeited and canceled for that reason. Thereupon this action was brought to restrain the city and the board of public works from carrying this threat into effect.

Two questions are presented upon this appeal: First, is the amendment to the city charter above quoted valid? Second, is the contract in question controlled by that amendment?

More than 150 pages of appellants' opening and reply briefs are devoted to a discussion of the first question. For the purposes of this case it may be conceded that the amendment is valid, and we shall not further notice that question.

It will be noted that the amendment under consideration applies only to "local improvement work." At the time this amendment was passed, and ever since that time, the term "local improvement work" has had a clearly defined and well-understood meaning. Chapter 98 of the Laws of 1911 is a chapter relating to local improvements in cities and towns. This chapter, at section 6, page 442, authorizes cities and towns to make certain local improvements which are enumerated therein, and to assess the cost thereof upon the property specially benefited. The general definition of "local improvement" is: "A local improvement, within the meaning of the statute, is a public improvement which, by reason of its being confined to a locality, enhances the value of adjacent property, as distinguished from benefits diffused by it throughout the municipality." *City of Chicago v. Blair*, 149 Ill. 310, 36 N. E. 829, 24 L. R. A. 412; *Black's Law Dictionary* (2d Ed.) p. 598, and cases there cited. And the cost of such improvement may be assessed to the property specially benefited. *Seanor v. County Commissioners*, 13 Wash. 48, 42 Pac. 552; *Smith v. Seattle*, 25 Wash. 300, 65 Pac. 612. It is plain, we think, that the work here undertaken was not local improvement work. This railway system was being built upon the credit of the whole city. The city was authorized to build it under the provisions of section 8005, Rem. & Bal. Code, as a "public utility" which is required to be ratified by the qualified voters of a city at a general or special election. Section 8006, Rem. & Bal. Code. It seems plain, therefore, that this railway was a public

utility, and was being built as such, and cannot be said to be local improvement work. The contract is therefore not controlled by the charter amendment quoted, and the lower court properly restrained the city from interfering with the work under the contract. The judgment is therefore affirmed.

CROW, C. J., and CHADWICK, ELLIS, MORRIS, PARKER, FULLERTON, and GOSE, JJ., concur. MAIN, J., took no part.

(74 Wash. 697)

**JOHNSON v. SUPERIOR PORTLAND CEMENT CO.**

(Supreme Court of Washington. July 17, 1913.)

On rehearing. Former opinion adhered to, and judgment for plaintiff reversed, and cause dismissed.

For former opinion, see 69 Wash. 250, 124 Pac. 1119.

**PER CURIAM.** Upon a rehearing of this case by the court en banc, the majority still adhere to the original opinion as found in 69 Wash. 250, 124 Pac. 1119, and for the reasons there given are of the opinion that the judgment should be reversed, and the cause dismissed.

(74 Wash. 274)

**LARNED v. HOLT & JEFFERY, Inc.**

(Supreme Court of Washington. July 10, 1913.)

**MUNICIPAL CORPORATIONS (§ 744\*) — PUBLIC IMPROVEMENTS — INDEPENDENT CONTRACTOR — LIABILITY.**

An independent contractor of a city for public improvements consisting in excavating earth at one place and filling in earth at another place is not liable for consequential damages caused by the operation of its cars and engines for the transportation of the earth from the excavation to the place of filling, where it was under the control of the city, which granted the privilege of constructing a railway on certain streets for the transportation of the earth, and where it was not negligent in the operation of the cars and engines.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1565; Dec. Dig. § 744.\*]

Department 1. Appeal from Superior Court. King County; H. A. P. Myers, Judge.

Action by H. D. Larned against Holt & Jeffery, Incorporated. From a judgment for plaintiff, defendant appeals. Reversed, with directions to dismiss.

Preston & Thorgrimson and Sandford C. Rose, all of Seattle, for appellant. Peterson & Macbride, of Seattle, for respondent.

**PARKER, J.** The plaintiff sought to recover from the defendant damages in the sum of \$1,032 for injury to his hotel business by noise, smoke, and vibration, which he claims resulted from the operation of the defendant's

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index



cars and engines upon a temporary trestle in the street in front of the hotel building occupied by him in Seattle. A trial before the court and a jury resulted in verdict and judgment against the defendant in the sum of \$250, from which it has appealed.

Respondent is the proprietor of a hotel business located in the building at the southwest corner of Lenora street and Westlake avenue in the city of Seattle. Appellant is a contracting company, and from November 1, 1910, to June 1, 1911, was engaged in the execution of two large street improvement contracts for that city. One of these, referred to as the Denny Hill improvement, called for the excavation and removal of a very large quantity of earth; while the other, referred to as the Westlake avenue improvement, called for a very large quantity of earth filling. It was evidently desirable on the part of the city, as well as the appellant, that the earth taken from the Denny Hill improvement should be placed in the Westlake avenue improvement. To this end, the city granted to appellant the privilege of constructing in certain streets leading from the Denny Hill improvement to the Westlake avenue improvement a small railway, upon which to run dump cars and a small locomotive engine for the purpose of transferring the earth from the Denny Hill improvement to the Westlake avenue improvement. The city not only granted this privilege, but directed what streets should be used and also directed the manner of constructing the track. The route thus selected by the city passed along Lenora street in front of respondent's hotel. At this point it was necessary, and the city so directed, that the track be elevated so as to permit street cars and other traffic to proceed uninterrupted on that avenue. The track was so constructed, which brought it at no point nearer than 38 feet to respondent's hotel building, and from 10 to 18 feet above the surface of the street along in front of the building. Upon the track thus constructed appellant operated its cars and engines during the period mentioned from November 1, 1910, to June 1, 1911, when the work was finished. There is no allegation or proof whatever of negligence on the part of the city or appellant in the prosecution of this work, nor as to unreasonableness of the time occupied in its prosecution. We assume for argument's sake that during this period respondent suffered some appreciable inconvenience and damage to his business by noise, smoke, and vibration occasioned by the operation of appellant's cars and engines, though, as we have noticed, it was undisputed that such annoyance and damage was not the result of negligent operation of the cars and engines.

It is contended by counsel for appellant

that its challenge to the sufficiency of the evidence to sustain any judgment against it made by request for an instructed verdict in its favor and for motion for judgment notwithstanding the verdict should have been sustained by the trial court, and that it is now entitled to a reversal of the judgment and a dismissal of the action upon that ground. We are constrained to agree with this contention. Upon the holding of this court in *Lund v. St. Paul, M. & M. Ry. Co.*, 31 Wash. 286, 290, 71 Pac. 1032, 61 L. R. A. 506, 96 Am. St. Rep. 908, it seems plain the fact that appellant was doing public improvement work for the city, which, though appellant was an independent contractor, was under the direction and control of the city, places appellant in the same position that the city would be in had it been prosecuting the work itself, so far as liability for damages to respondent flowing therefrom is concerned; that is, if the city was not liable for consequential damages, upon the same principle appellant would not be. It seems to us that our recent decisions in *Stern v. City of Spokane*, 131 Pac. 476, and *Hieber v. City of Spokane*, 131 Pac. 478, are decisive of this case in appellant's favor upon the question of the damages claimed being consequential. This is the theory upon which counsel for appellant insists that it is not liable. We are constrained to so hold. It being plain that the city was engaged in a perfectly lawful undertaking, and to that end was temporarily causing its streets to be used by appellant, neither was liable to respondent for damages other than those which were the result of negligence.

It is apparent to the most casual observer that property and business locations in our centers of population are desirable, and derive well-known advantages from being so situated. The density of population which renders such locations valuable also renders the more necessary public improvements of the nature here involved, to the end that such advantages may be more fully enjoyed. The making of such public improvements necessarily results in more or less temporary inconvenience and even damage to property and business in their neighborhood while being constructed. Aside from acts of negligence on the part of the public authorities in constructing such improvements, owners of property and business so temporarily inconvenienced or even damaged must bear such burdens as an incident to the enjoyment of the advantages which their locations give them.

The judgment is reversed, with directions to the superior court to dismiss the action.

CHADWICK, MOUNT, and GOSE, JJ., concur.



(74 Wash. 368)

**GERARD-FILLIO COMPANY, Inc., v. McNAIR et al.**

(Supreme Court of Washington. July 18, 1913.)

**JUDGMENT (§ 253\*) — AMOUNT DEMANDED — ACTION ON CONTRACT.**

One seeking a recovery of the sum due under an express contract for services rendered is entitled to judgment for the full amount where the defense of a subsequent modification of the contract is not sustained, and the court may not substitute its opinion of the value of the services and render judgment for a less sum.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 443, 444; Dec. Dig. § 253.\*]

En Banc. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by the Gerard-Fillio Company, Incorporated, against James McNair and another, copartners doing business under the firm name of McNair & McCallum. From a judgment granting relief to plaintiff, both parties appeal. Reversed and remanded, with instructions.

Kerr & McCord, of Seattle, for appellants. Hamlin & Meier, of Seattle, for respondent.

MORRIS, J. The respondent brought this action to recover \$600 claimed by it to be the balance due upon a commission for bringing about an exchange of properties between appellants and third parties.

The facts are set forth in detail in Gerard-Fillio Co., Inc., v. McNair et al., 68 Wash. 321, 123 Pac. 462, where we were called upon to review a judgment granted respondent upon the pleadings. That judgment was reversed, with instructions to the lower court to proceed with the trial; the court holding that appellants were entitled to put in their proof and to a judgment in their favor, if sustaining the allegations of their affirmative answer pleading a subsequent partly performed oral modification of the original written contract. Under this direction the case has been tried, the court awarded respondent a judgment for \$400, and both parties appealed.

The original contract, being admitted, it is evident that there was only one issue before the court and that was, as indicated by this court in its opinion on the first appeal, the modification of the written contract by subsequent oral agreement which had been partly performed. The lower court in its findings of fact expressly holds and finds "that the said defendants have failed to prove their affirmative defenses pleaded herein." Having so found, nothing remained for the lower court but to enter judgment for respondent as prayed for under the terms of the original written contract. As it was evident from the issues as framed, either respondent was entitled to judgment as prayed for under the original contract, or appellants were entitled to the benefit of the subse-

quent modification pleaded. The lower court, however, adopted a new theory and gave judgment for the sum he believed represented a fair commission to respondent for the services rendered by referring to an attempted adjustment of the differences between the parties in which the appellants expressed a willingness to pay respondent \$600, making the balance now due \$400. Believing this sum to be a proper compensation for respondent, judgment was granted accordingly. Both parties complain of this judgment; appellants contending the court was in error in awarding judgment in any sum upon the theory that they had sustained the affirmative defenses, and respondent contending that under its findings the court should have awarded it judgment for \$600. There was but one issue before the court. The respondent was entitled to judgment of \$600 or nothing. There is no theory known to the law under which the judgment granted can be sustained. When a litigant comes into court pleading a specific contract as his right of recovery, there is no question of equity as between the parties submitted to the court. Such litigant must rely on the contract pleaded or not at all. The court cannot make a new contract or substitute its opinion of values for that expressed in the contract. The contract being admitted and the court finding that the appellants had failed in their plea of a subsequent modification, it should have been enforced and judgment granted accordingly. Not to do so was error. We believe the court was right in its finding that the affirmative defenses had not been sustained. It only remains to direct the proper judgment.

The judgment is reversed and set aside, and the cause remanded, with instructions to the lower court to enter judgment for respondent in the sum of \$600.

ELLIS, MAIN, and FULLERTON, JJ., concur.

(74 Wash. 253)

**WALKER v. LANNING et al.**

(Supreme Court of Washington. July 8, 1913.)

**1. MECHANICS' LIENS (§ 121\*)—PERFECTION OF LIEN—NOTICE.**

Laws 1911, c. 77, amending Rem. & Bal. Code, § 1133, and effective June 7, 1911, provides that a single notice be delivered or mailed not later than five days after the first delivery of material. For material contemplated to be delivered between June 7th and September 30th a materialman on June 6th mailed a written notice to the owner, purporting to be given under the new law, which notice was received and retained by the owner. Held, in a proceeding to enforce the lien for such material, that, as the notice was given before the new law was effective, it was not a compliance therewith sufficient to entitle the materialman to a lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 164; Dec. Dig. § 121.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**2. MECHANICS' LIENS (§ 121\*)—PERFECTION OF LIENS—EFFECT OF ACTUAL NOTICE.**

A notice of the furnishing of materials purporting to be given under Laws of 1911, c. 77, effective June 7, 1911, requiring a single notice to be delivered or mailed to the owner, void because given before the law became effective, but amounting to actual notice, was not a substantial compliance with the law.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 164; Dec. Dig. § 121.\*]

Department 2. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by William Walker against W. L. Lanning, one Pierano and wife, and others, in which the Bratnobar Lumber Company intervened. From a judgment denying its lien upon certain property, intervener appeals. Affirmed.

Edwin H. Flick and C. E. Hughes, both of Seattle, for appellant. Moncrieffe Cameron, of Seattle, for respondent.

ELLIS, J. This is an appeal by the intervener, Bratnobar Lumber Company, from a judgment denying a lien upon certain property belonging to the defendants Pierano for the value of materials delivered at the request of the defendant Lanning, their contractor.

[1] Materials for the construction of the building on the property were delivered by the lumber company between May 6, 1911, and September 30, 1911. For the materials delivered between May 5th to and including June 6th the lien was allowed. But for the material delivered between June 7th and September 30th the lien was refused on the ground that the new law as to notice, which went into effect on June 7, 1911, was not complied with, in that the notice of the contemplated furnishing of the subsequently delivered materials was given on June 6, 1911, before the new law went into effect, and was hence premature. Whether this notice confessedly prematurely mailed was sufficient basis for a lien is the sole question presented for our consideration. The lien law of 1909 (Rem. & Bal. Code, § 1133) required successive notices to be sent to the owner at the time of each delivery of materials. The act of 1911 (Laws 1911, p. 376), which went into effect on June 7, 1911, amended the law of 1909 by requiring a single notice to be delivered or mailed "not later than five days after the first delivery of such material." It is admitted that the owner received the written notice in due course of the mail and retained it. On that circumstance the appellant bases its contention that the spirit of the statute having been met the lien should be sustained. It seems plain, however, that, unless the notice was given while the law under which it purports to have been given was in force, there was no compliance with that law either in letter or in spirit. There can be no compliance with a nonexistent law. The real inquiry is, when was the notice

given? The duty of giving notice is imposed by the statute upon the materialman. It is his act which constitutes the notice. Neither the notice itself nor its efficacy is by the statute made to depend upon any disposition which may be made of the notice after he complies with the statute by a performance of the duty of delivering or mailing the notice which it imposes upon him. Whether the owner of the property sought to be charged reads the notice, loses it, destroys it, or keeps it, in no manner affects the fact of notice or its efficacy. Manifestly the notice was given, if at all, and the statute was complied with, if ever, at the time when the claimant mailed the notice. If he did not give the statutory notice then and by that act, he never did. The character or quality of that act cannot be changed by the subsequent retention and reading of the notice by the owner. There being no statute in force at the time the claimant did the only act which could constitute compliance with the statute, the act was no more a compliance than if the law had never been passed. If he could effectually comply by the advance performance of the duty imposed by the subsequently existing law by one day, then he could so comply by an advance performance of a week or a month. If he could comply by anticipating the future law, then for the same reason and with equal logic he could comply by anticipating the terms of that future law. He could comply by anticipating the first delivery of materials by a day, or any other period, provided only that the owner keep the notice until after the first delivery of materials. This may not be done, as is clearly shown by our decision in *Finlay v. Tagholm*, 60 Wash. 539, 111 Pac. 782. In that case we held under the prior statute (Rem. & Bal. Code, § 1133), requiring a duplicate statement of all materials to be delivered or mailed to the owner "at the time" when such material is delivered, that a notice mailed at a subsequent time, a few days, a week or a month after the delivery of the materials, furnished no basis for a lien. The facts here are inverted, but the reasons are the same. The lien is statutory; the notice is its statutory basis. Phillips on *Mechanics' Liens* (3d Ed.) § 63. It must be given under and comply with the statute in force when it is given. When this notice was given the old law was in force. It did not comply with that law. Conceding that it was in such form as prescribed by the law of the next day, still it was not given under that law. In either view, therefore, it must fail to furnish a basis for the statutory lien depending upon it.

[2] A law speaks for the first time when it goes into effect. Whether it has a retroactive effect depends not upon when it speaks, but how it speaks. This act of 1911 does not speak retroactively; it is not a cu-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes



rative act. It is plainly prospective in its operation. "Until the day arrives when it is to take effect and be in force, a statute which has been passed by both houses of the Legislature and approved by the executive has no force whatever for any purpose, and all acts purporting to have been done under it prior to that time are void." 36 Cyc. 1192; *State ex rel. Atkinson v. Northern Pac. R. Co.*, 53 Wash. 673, 102 Pac. 876, 17 Ann. Cas. 1013; *Harrison v. Colgan*, 148 Cal. 69, 82 Pac. 674; *Santa Cruz Water Co. v. Kron*, 74 Cal. 222, 15 Pac. 772; *Miller v. Kister*, 68 Cal. 142, 8 Pac. 813.

The notice in this instance, giving it its utmost effect by reason of its retention by the owner of the property, was no more than actual notice. It will not do to say that the object of the notice is merely to give notice, and that any notice which serves that purpose is a substantial compliance with the law. This would nullify the statute. It would make actual notice, however acquired or given, take the place of statutory notice. We have held to the contrary. *Robinson Mfg. Co. v. Bradley*, 129 Pac. 382. We have been cited to no authority, and have found none sustaining the appellant's contention.

The judgment is affirmed.

MAIN, MORRIS, and FULLERTON, JJ.,  
concur.

(74 Wash. 230)

WRIGHT RESTAURANT CO. et al. v.  
WRIGHT et al.

(Supreme Court of Washington. July 8, 1913.)  
TRADE-MARKS AND TRADE-NAMES (§ 73\*)—  
UNFAIR COMPETITION.

Where, when Chauncy Wright, conducting a restaurant under the name "Chauncy Wright's Café," took in G. as partner, there was no agreement as to use by them, while so associated, of the name "Chauncy Wright," and it was not agreed by them when subsequently incorporating the business under the name Wright Restaurant Company that the name "Chauncy Wright's Café" should remain on the window, but was agreed that the place should be run under the name "Wright Restaurant Company," it was not unfair competition for Wright, after selling his interest in the corporation to G., to use on the window of a restaurant, started by him in the same neighborhood, the name "Chauncy Wright."

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 118; Dec. Dig. § 73.\*]

Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by the Wright Restaurant Company and another against Chauncy Wright and another. Judgment for defendants. Plaintiffs appeal. Affirmed.

Jas. B. Murphy and Lucas C. Kells, both of Seattle, for appellants. Leopold M. Stern and Donworth & Todd, all of Seattle, for respondents.

MAIN, J. The purpose of this action is to obtain a permanent injunction restraining the use of a trade-name and to recover damages. This cause was heretofore before this court upon an appeal from a judgment dismissing the case after a general demurrer interposed to the complaint had been sustained and the plaintiffs had refused to plead further. The court there held that the complaint stated a cause of action, and the cause was reversed and remanded, with directions to overrule the demurrer and determine the cause upon the merits. *Wright Restaurant Co. et al. v. Seattle Restaurant Co. et al.*, 67 Wash. 690, 122 Pac. 348.

For a period of approximately 25 years prior to September 19, 1912, the date of the trial in the superior court, the defendant Chauncy Wright had been a successful restaurateur in the city of Seattle, Wash. He and the places operated by him had become widely known among certain classes of patrons. About six or seven years prior to the above-mentioned date he opened a restaurant at No. 164 Washington street, in Seattle. Thereafter he became acquainted with the plaintiff, Charles Gearhart, who upon a number of occasions subsequent thereto and prior to October, 1909, offered to purchase a half interest in the business. Wright, however, refused to sell a half interest but did in October, 1909, agree with Gearhart to sell him the entire interest in the business at 164 Washington street. Gearhart paid one-half of the purchase price, took possession, and the papers were prepared and ready to be signed on the following day. But, when Wright took the lease for the building to his lessors to be transferred, they refused to accept an assignment from Wright to Gearhart. Wright not being able to assign the lease, and Gearhart being unwilling to give up the deal, they became equal partners in the business. If the sale had been completed as originally contemplated, it was arranged that the business should be conducted by Gearhart at this location under a name other than that of "Chauncy Wright's Café." During the time the business was operated by Wright and Gearhart, it was understood and agreed that the signs bearing the name "Chauncy Wright's Café," which had been used by Wright when he was the sole proprietor, should be removed. For this purpose a painter was at one time employed. The work, however, was delayed, and the signs were not changed or removed, and at the time of the trial remained practically the same as when Wright conducted the business alone. The business was conducted as a partnership for about five months when, by mutual agreement, a corporation was formed under the corporate name of "Wright Restaurant Company" (the plaintiff corporation); each of the partners taking one-half of the capital stock. Thereafter, and in October,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.



1910, Wright sold and transferred all of his stock to Gearhart. At the time the proposal to sell his stock was made, Wright stated: "If you buy me out you cannot use my name on your restaurant." After Gearhart became the sole proprietor of the place, he had painted on the alley side of the building the words, "Wright Restaurant Company." Gearhart also advertised his place under the name of "Wright Restaurant Company" and not as "Chauncy Wright's Café." It was clearly understood by Gearhart when he purchased the stock that Wright intended soon to again engage in the restaurant business. A short time after the sale of the stock to Gearhart, Wright did open two new restaurants, one of which was soon sold, and the other located at 110 Occidental avenue, just around the corner from Gearhart's restaurant and not over 400 feet distant, continued to be conducted by Wright. This latter business was owned by the Seattle Restaurant Company, the defendant corporation; Wright being the president thereof. The name on the window was "Chauncy Wright" in large letters and in smaller letters underneath, "President of Seattle Restaurant Co." Wright advertised this business extensively under practically the same name as appeared on the window. The plaintiffs assert that, by reason of the use of this name in the manner indicated, their business at 164 Washington street, which prior to the opening of this restaurant was a prosperous and paying one, has been injuriously affected and that their business has dwindled until at the time this action was brought they were operating at a loss; that this loss of business is solely due to the use, in the manner indicated, of the trade-name "Chauncy Wright." The facts above stated are substantially as found by the trial court, and an examination of the record demonstrates that they are sustained by the evidence. The plaintiffs in their complaint pray for a permanent injunction prohibiting and restraining the defendants from the use of the name "Chauncy Wright" and for damages. The cause was tried to the court without a jury and resulted in a judgment in favor of the defendants. The plaintiffs appeal.

When the cause was here on the former appeal (67 Wash. 690, 122 Pac. 348), the law of the case was settled. It was there held, based upon the allegations of the complaint, that Wright had the privilege of entering the restaurant business when and where he would and to use his name in connection therewith, but that it was his duty to adopt such affirmative precautions in the use of his name as to prevent unnecessary confusion of his with Gearhart's business. According to the allegations of the complaint as stated in the former opinion, when Gearhart entered into partnership with Wright, it was mutually agreed that the trade-name, "Chauncy

Wright's Café," should be used by the partnership; and on the formation of the corporation it was also agreed that the name "Chauncy Wright's Café" should remain upon the window and that the business of the corporation should be conducted under that name. But, upon the trial of the cause upon the merits on which the present appeal is predicated, the trial court found that when the partnership was formed there was no agreement as to the use of the name "Chauncy Wright" by them while they were associated in business together; and it was further found that at the time of the incorporation of the Wright Restaurant Company it was not agreed between the parties that the name "Chauncy Wright's Café" should remain upon the window, but that it was agreed that the restaurant should be run under the name of the Wright Restaurant Company and not under the name of "Chauncy Wright's Café." These findings are amply supported by the evidence. It will be seen, therefore, that the facts as developed upon the trial do not support the allegations of the complaint, and consequently the case is not within the rule announced in the prior decision.

The judgment will be affirmed.

ELLIS, MORRIS, and FULLERTON, JJ.,  
concur.

(74 Wash. 248)

# JORGUSON v. APEX GOLD MINES CO.

(Supreme Court of Washington. July 8, 1913.)

## 1. CORPORATIONS (§ 484\*)—DIVIDENDS—PAYMENT FROM CAPITAL.

Since dividends can only be paid from profits or surplus earnings under Rem. & Bal. Code, § 3697, making it unlawful to declare dividends except from the net profits and prohibiting payment to stockholders of any part of the capital stock or reduction thereof, except as provided, a bond given by a corporation to a purchaser of stock guaranteeing that the dividends would amount to a certain sum within a certain time could not be enforced if its enforcement would require the taking of money from the capital stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1815; Dec. Dig. § 484.\*]

## 2. CORPORATIONS (§ 99\*)—DIVIDENDS—BONDS FOR PAYMENT—VALIDITY.

A bond given by a corporation to the purchaser of stock, providing that if a certain sum was not paid as dividends within a certain time the corporation would pay such sum, less any dividends paid, was illegal under Const. art. 12, § 6, prohibiting corporations from issuing any stock except to a bona fide holder or any bond for the payment of money except for money or property received or labor done, where compliance with the bond would require payment back of the money received for the stock permitting the purchaser to retain the stock as fully paid while its issue was without consideration.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 444-446; Dec. Dig. § 99.\*]

\*For other cases see same topic and section NUMBER, in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
133 P.—30



Department 2. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by J. M. Jorguson against the Apex Gold Mines Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Milo A. Root, of Seattle, for appellant. Frank A. Steele and Harrison Bostwick, both of Seattle, for respondent.

MORRIS, J. On March 22, 1909, appellant purchased from the respondent 2,000 shares of its capital stock for the sum of \$1,000. As a part of said transaction it was agreed that the corporation should guarantee that the dividends upon such stock would amount to \$1,000 within the next 18 months, and that the corporation would pay to the plaintiff the sum of \$1,000 as dividends within that time. Pursuant to this agreement the respondent, acting under a resolution unanimously adopted by its stockholders, executed and delivered to appellant a bond, the condition of which was that if, within the period of 18 months, the corporation should pay to appellant, his heirs, personal representatives, or assigns, the sum of \$1,000 in cash as dividends on the stock so purchased, then the obligation should be void, otherwise it should remain in full force and effect and the appellant should, in addition to holding his shares of stock as fully paid up, be entitled to receive from the corporation the sum of \$1,000, less any amount which he should have received in dividends on the stock during the time. The 18 months having expired and the corporation having failed to pay to the appellant any sum in dividends upon his stock and having otherwise failed to comply with the obligations of its bond, appellant brought this action upon the bond in which he sought to recover from the corporation the sum of \$1,000. Upon a hearing it was found by the court that, since the execution of the bond, the net earnings of the corporation had not been sufficient to declare any dividends upon its capital stock, and that no dividend had been so declared. The court thereupon dismissed the action, and the case is brought here on appeal.

Upon these facts we think the judgment must be sustained. The bond sued upon obligated the company to pay \$1,000 in dividends within 18 months, or, if such sum be not paid as dividends, the same should be paid in any event.

[1] The courts have uniformly held that dividends can be declared and paid only out of the profits or surplus earnings of the corporation. "The rule of law that requires corporations to preserve their capital intact is alone sufficient to prevent the corporation from paying dividends except out of profits." Thompson on Corporations, § 5305.

It being established in this case that there were no profits out of which this dividend could be declared, it follows that, if the bond

be enforced against the corporation, payment must be made out of its capital, which the law will not permit, upon the ground that any contract whereby a corporation seeks to diminish its capital stock, except in some way permissible by statute, contravenes public policy and is unenforceable. Section 3697, Rem. & Bal. Code, contains provisions that it shall not be lawful to declare dividends except from the net profits arising from the business of the corporation, nor in any way pay to stockholders any part of the capital stock or reduce the same except in the manner thereafter provided. Under this section it has been held that a corporation could not reduce its capital stock by paying any portion of it to the stockholders. *Tait v. Pigott*, 32 Wash. 344, 73 Pac. 364; *Tacoma Ledger Co. v. Western Home Bldg. Co.*, 37 Wash. 467, 79 Pac. 992; *Tait v. Pigott*, 38 Wash. 59, 80 Pac. 172. Counsel for appellant contends this section has no application, and that the only question to be determined is whether or not the contract is ultra vires. We think, however, it is clear that, since there are no profits nor surplus out of which this dividend can be paid, payment must be made, if at all, from the capital of the corporation, which is a direct violation of the statute. In *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156, a corporation guaranteed a semiannual dividend of 5 per cent. upon its preferred stock, and it was held that, when it appeared there were no profits from which the dividends could be made, the guaranty became wholly inoperative for want of something to which it was applicable, and was void as opposed to public policy, and that the extent to which the law would permit a corporation to go in guaranteeing dividends would be to guarantee the payment when there were profits to pay them, or, if profits were not realized to the necessary amount in any one year, the stockholder would be entitled when they were realized to have all arrears paid up. In *Pittsburg & C. R. Co. v. County of Allegheny*, 63 Pa. 126, the railroad company guaranteed the payment of interest on county bonds given to it as a subsidy, and it was held that the payment of such interest out of the capital before earnings were made was within the prohibition of the charter against paying dividends out of the capital. Similar rulings have been made in *Bingham v. Marion Trust Co.*, 27 Ind. App. 247, 61 N. E. 29; *Painesville & H. R. Co. v. King*, 17 Ohio St. 534; *Ohio Coll. D. S. v. Rosenthal*, 45 Ohio St. 183, 12 N. E. 665; *Troy & Boston R. Co. v. Tibbits*, 18 Barb. (N. Y.) 297; *Memphis Grain & Elevator Co. v. Memphis & C. R. Co.*, 85 Tenn. 703, 5 S. W. 52, 4 Am. St. Rep. 798.

We have found one case where the facts are so similar that it would be useless to attempt to distinguish them: *Smith v. Alabama Fruit Growing & Winery Ass'n*, 123 Ala. 538, 26 South. 232. The corporation



there sold to the plaintiff \$1,500 worth of its capital stock and executed its bond with sureties that it would return the \$1,500 in four semiannual dividends. These dividends were not paid, and action was brought upon the bond. A demurrer was interposed to the complaint upon the grounds: (1) That the contract was illegal and void in that it undertook to indemnify plaintiffs against loss for a purchase of stock making issue thereof fictitious and without consideration; (2) that the contract was in violation of the Constitution prohibiting corporations to issue stock or any bond for the payment of money except for money, labor done, or property actually received, and declaring void all fictitious increase of stock; (3) that it appeared from the complaint that the contract sued upon was illegal, without consideration, and void. This demurrer was sustained and on appeal the court, in affirming the judgment, said: "It requires little, if indeed anything, beyond this statement of the case to demonstrate the correctness of the city court's ruling. The contract sued on is, of course, executory, and its enforcement is sought in this action in furtherance and completion and consummation of a fictitious subscription to the capital stock of a corporation, a transaction prohibited by the organic law of the land and frequently denounced as vicious and incapable of conferring or passing any rights. The jurisdiction of our courts cannot be invoked to enforcement and execution of such undertakings. In substance the contract is for the payment back by the corporation to the subscriber for its stock of the money he subscribes, thus leaving the issuance of the shares to him wholly unsupported by any consideration, fictitious, and void; and the action upon the contract is an invocation of the powers of the courts to the accomplishment of this end expressly forbidden by the Constitution of the state. If this could be done, an easy road would be opened to the utter emasculatation of this most just and necessary provision of the Constitution by evasions so palpable as to be little, if at all, short of avowed and direct attempts to defy and override it."

[2] We have a like provision in our Constitution, found in article 12, § 6: "Corporations shall not issue stock, except to bona fide subscribers therefor, or their assigns; nor shall any corporation issue any bond or other obligation for the payment of money, except for money or property received or labor done. The stock of corporations shall not be increased, except in pursuance of a general law, nor shall any law authorize the increase of stock without the consent of the person or persons holding the larger amount in value of the stock, nor without due notice of the proposed increase having been previously given in such a manner as may be

prescribed by law. All fictitious increase of stock or indebtedness shall be void."

The bond in suit provides that, in case the full sum of \$1,000 be not paid as dividends within 18 months, the purchaser of the stock shall, in addition to holding his stock as fully paid, be entitled to receive from the corporation \$1,000 in cash, less any amount received in dividends. This would mean, as said in the Alabama case, the payment back to the stockholder of the money he paid for his stock, while permitting him to retain his stock as fully paid, thus leaving the issuance of the stock wholly unsupported by any consideration a direct conflict with the constitutional provision. See, also, *Thompson on Corporations*, § 5354; *Cook on Corporations*, § 544.

The judgment is affirmed.

ELLIS, FULLERTON, and MAIN, JJ., concur.

(74 Wash. 370)

#### RICHMAN v. WENAHA CO.

(Supreme Court of Washington. July 18, 1913.)

#### 1. JUDGMENT (§ 113\*)—DEFAULT—RIGHT TO NOTICE OF SUBSEQUENT PROCEEDINGS.

Where a defendant appears after motion for default has been filed but before the entry of the order, he is entitled to notice of the hearing on the motion for default under Rem. & Bal. Code, § 242, requiring notice of any application or motion to be given to a defendant who has appeared.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 207; Dec. Dig. § 113.\*]

#### 2. APPEAL AND ERROR (§ 1170\*)—REVERSAL—TECHNICAL RIGHTS—SETTING ASIDE DEFAULT.

Since rulings on motion to open defaults are discretionary with the trial court, they will not be disturbed by the Supreme Court, even though technical error was committed, unless it affirmatively appears that more than a technical right has been invaded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig. § 1170.\*]

#### 3. APPEAL AND ERROR (§ 957\*)—DISCRETION OF COURT—SETTING ASIDE DEFAULT—WANT OF JURISDICTION.

Under Rem. & Bal. Code, § 206, providing that an action might be brought against a corporation in any county where the cause of action arose or where the corporation has an office or where any officer upon whom process may be served resides, which has been construed as giving the court no jurisdiction to enter judgment by default against a corporation when the action is brought in the wrong county, it is an abuse of discretion, requiring a reversal, to refuse to set aside a default entered against the corporation after motion for change of venue, even though the motion was filed after the motion for default.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. § 957.\*]

Department 1. Appeal from Superior Court, Benton County; O. R. Holcomb, Judge.

Action by A. B. Richman against the We-



naha Company. Motion to set aside a judgment entered upon default denied, and defendant appeals. Reversed.

J. G. Thomas and W. A. Tomer, both of Walla Walla, and McGregor & Fristoe, of Prosser, for appellant. H. Dustin, of Prosser, for respondent.

MORRIS, J. Appeal from an order denying motion to open up a default, and judgment entered thereon. The action was brought in Benton county, and service was made upon the appellant corporation in Walla Walla county on July 30, 1912. On August 22d, no appearance having been made, respondent made and filed a motion for default. On August 28th appellant filed a demurrer and motion for change of venue to Walla Walla county, setting forth in support of the motion for change of venue that it was not then, nor at the time when the cause of action arose, transacting any business in Benton county, nor had any office therein for the transaction of business or person representing it upon whom process might be served. On September 4th, without notice to appellant, the motion for default was granted and judgment entered. On September 18th appellant moved to set aside the default, which, being denied, it appeals.

[1] Appellant, having appeared in the case prior to the entry of default, was entitled to notice of all subsequent proceedings under section 242, Rem. & Bal. Code. It was therefore technical error to grant the default without notice.

[2] Rulings of lower courts upon motions to open up default, being so largely a matter of discretion, will not be disturbed here, even though technical error might be committed, unless it appears that such a ruling is prejudicial to defendant or that more than technical error has been committed. We believe this to be a sound rule, and before we will disturb the ruling of the lower court in such matters it must affirmatively appear that more than a technical right has been invaded.

[3] We think such a showing was made upon the application for change of venue. Section 206, Rem. & Bal. Code, provides: "An action against a corporation may be brought in any county where the corporation transacts business or transacted business at the time the cause of action arose; or in any county where the corporation has an office for the transaction of business or any person resides upon whom process may be served against such corporation, unless otherwise provided in this Code."

It was held in *McMaster v. Thresher Co.*, 10 Wash. 147, 38 Pac. 760, that under this section as it existed prior to the amendment of 1909, which enlarged its scope, the court had no jurisdiction to enter judgment against a corporation when the action was brought in the wrong county. This ruling

was followed in *Hammel v. Fidelity Mutual Aid Association*, 42 Wash. 448, 85 Pac. 35, and *Whitman County v. United States Fidelity & Guaranty Co.*, 49 Wash. 150, 94 Pac. 906. No jurisdiction having been acquired by the lower court to enter judgment of any character, it was more than a technical error to enter judgment of default without notice after appearance.

It must therefore be held that the lower court was not exercising a sound legal discretion in the entry of judgment when upon the face of its record it affirmatively appeared that it was without jurisdiction, and for this reason the judgment is reversed.

MAIN, ELLIS, and FULLERTON, JJ., concur.

(74 Wash. 696)

#### LIEBECK v. WILSON.

(Supreme Court of Washington. July 16, 1913.)

#### APPEAL AND ERROR (§ 1011\*)—FINDINGS—CONCLUSIVENESS.

A finding on conflicting testimony, and supported by the testimony of the successful party sustained by circumstances, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

Department 1. Appeal from Superior Court, King County; John F. Main, Judge. Action by Mary Liebeck against H. P. Wilson. From a judgment for plaintiff, defendant appeals. Affirmed.

F. C. Reagan, of Seattle, for appellant. Robt. A. Devers, of Seattle, for respondent.

CHADWICK, J. In the year 1906 respondent loaned appellant \$4,000. In January, 1907, a loan of \$2,000 was made. On July 1, 1909, the parties adjusted their affairs, and new notes were given, one for \$4,000, and two for \$2,000, making in all \$8,000. It seems to be conceded that the \$6,000 originally loaned was for the benefit of the Wilson Coal Company, a corporation in which appellant and other members of her family owned a considerable block of stock and of which she was an officer.

Action was begun to compel payment of these notes, and the appellant interposed the defense of usury. She testifies that she was charged a bonus of \$850 on the original \$4,000 note, and \$375 on the original \$2,000 note; that she has paid a part of these exactions, and that on the readjustment of the amounts due and the giving of the additional \$2,000 note that the unpaid part of the original bonus and an additional bonus was included therein. Respondent's testimony tends to show that the amounts alleged to have been paid or promised to be paid as bonuses were due for services rendered by her

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



to the Wilson Coal Company, and for advances made to George Wilson, a brother of the appellant; that neither of the present parties were able to determine the true amount due upon the settlement of July 1, 1909, and the readjustment of their differences was left entirely to George Wilson, who was at the time, and for a long time prior thereto had been, general manager of the company.

The trial court found on this disputed state of facts that the transaction was not tainted with usury, and rendered a judgment in favor of respondent. We have read the record carefully, and are convinced that, although appellant's testimony is positive, she has nevertheless not met the burden of proof. The testimony of respondent is equally positive, and it is sustained by many circumstances not now necessary to detail. The findings of the trial court will not be disturbed.

This conclusion makes it unnecessary to discuss the law of usury, which has been ably presented in the briefs of counsel.

Affirmed.

GOSE, MOUNT, and PARKER, JJ., concur.

(74 Wash. 335)

# TOON v. McCAW et al.

(Supreme Court of Washington. July 15, 1913.)

## EVIDENCE (§ 459\*)—PARTIES—REPRESENTATIVE CAPACITY.

Where a note stated, "We promise to pay," and was signed by a corporation and three individuals, the individual signers cannot defend an action brought against them by the original payee on the ground that they signed only as officers of the corporation, and that it was the intent of all parties that only the corporation should be bound, since the note itself is unambiguous, and shows on its face that all are bound.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1722, 1906-1910, 2109-2114; Dec. Dig. § 459.\*]

Department 1. Appeal from Superior Court, Mason County; Ben Sheeks, Judge.

Action by P. L. Toon against W. O. McCaw, Thomas Willikson, and others. Judgment for the plaintiff, and the defendants Thomas Willikson and others appeal. Affirmed.

Frank Beam, of Aberdeen, for appellants. Dan Pearsall and T. H. McKay, both of Aberdeen, for respondent.

GOSE, J. The plaintiff brought suit upon the following note: "\$500.00. June 20, 1910. One year after date, without grace we promise to pay to the order of P. L. Toon five hundred and no-100 dollars in gold coin of the United States of America, of the present standard value, with interest thereon; in like gold coin, at the rate of ten per cent. per annum from date until paid, for

value received. Interest to be paid at end of year and if not so paid, the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, we promise and agree to pay, in addition to the costs and disbursements provided by statute ——— dollars in like gold coin for attorney's fees in said suit or action. Due June 20, 1911. At Aberdeen, Wash. No. 4. Aberdeen Tug Boat Co., Thos. Willikson, Cash Manley, Swen Johnson." It is alleged in the complaint that the defendant, Aberdeen Tug Boat Company, at the time of the execution of the note, was and is a corporation; that the defendant McCaw had been regularly appointed receiver for its property; that he had qualified and was acting as such receiver; that the defendants made and delivered the note on the day it bears date; and that it had not been paid. The defendants Willikson, Manley, and Johnson answered jointly, and alleged affirmatively that the note was drawn on the day it bears date by the bookkeeper for the defendant corporation at the request of its officers; that it was then presented to such officers for their signatures; that the defendant Willikson signed the note as president of the corporation; that the defendant Manley signed it as vice president, and Johnson signed it as secretary of the corporation; that the three named defendants directed the bookkeeper not to deliver the note until he had written the title of each of such officers after his name; that he was directed to write after each of said names the respective official titles of the answering defendants; that the consideration for the note passed to the defendant corporation, and was used by it in paying some of its outstanding indebtedness; that no consideration whatsoever passed to said defendants individually; "that said note was understood by all of the parties thereto to be the note of said corporation, and the money was loaned on the credit of said corporation; that said defendants refused to indorse or sign said note in their individual capacity." A general demurrer interposed to this defense was sustained. The defendants declined to plead further, and on motion of the plaintiff, judgment was entered in his favor against all the defendants. The defendants Willikson, Manley, and Johnson prosecuted this appeal.

The appellants thus state their contention: "In the case at bar the signature to the note is certainly ambiguous. The signature might be interpreted to be that of the corporation alone, of the individuals alone, or of both the corporation and the individuals signing." We cannot acquiesce in this view. Ambiguity cannot be created by pleading it. It must appear in the instrument itself. It will be observed that the defendants jointly prom-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ised to pay the note. There is nothing upon the face of the note to indicate that it was a note of the corporation only, or that it was other than the joint obligation of all of the makers. The language of the note is "we promise to pay." This language is repeated in reference to the attorney's fee. Counsel for the appellants have quoted rather extensively from Thompson on Corporations; but, as we read the references, the views of the author afford them little comfort. In volume 2, page 986, the author says: "The general rule is that where an officer or agent executes a negotiable instrument in behalf of the corporation, but neither in the body of the note nor in his signature is the manner or capacity in which he acts shown, then he is personally liable." Any other rule would destroy the stability of written contracts. There is no language in the note which raises even a slight ambiguity or creates any doubt as to the meaning of the instrument, or that remotely suggests that the makers were acting for another. The same author at page 928 says: "As between the original parties, and where there is something on the face of the instrument that suggests a doubt as to what particular party is bound, and the court cannot by inspection determine the question from the paper itself, parol evidence is admissible to show the true intent and meaning of the persons executing the instrument."

Counsel further suggests that the corporation, being an artificial creature, could not have written its own name. This question is not before us. The corporation itself is not litigating the question of its liability. What defenses it might have successfully interposed is collateral to the inquiry.

This court has frequently announced principles directly antagonistic to the contention of the appellants. In *Bradley Engineering, etc., Co. v. Heyburn*, 56 Wash. 628, 106 Pac. 170, 134 Am. St. Rep. 1127, we held that under the negotiable instruments law, even between the original parties, one who signed a note as a general maker could not prove by parol that he was a surety; that he received none of the benefits of the transaction; that the payee knew that fact; and that he was discharged in consequence of an extension in the time of payment without his knowledge or consent. In *Shuey v. Adair*, 18 Wash. 188, 51 Pac. 388, 39 L. R. A. 473, 63 Am. St. Rep. 879, it was held, in an opinion written by the late Chief Justice Dunbar, after an exhaustive review of the cases, that one who executes a promissory note in his own name, with nothing upon the face of the note showing his agency, could not introduce parol evidence to show that he executed it for his principal, that the payee knew it, and hence that he incurred no liability. In *Anderson v. Mitchell*, 51 Wash. 265, 98 Pac.

751, we held that the maker of a note, the note being free from ambiguity, could not show by parol that he executed the note for a corporation which desired the loan, and to which the bank could not make the loan because the amount of the loan, together with the debt then owed by the corporation to the payee, a national bank, would be in excess of the amount permitted by the federal banking laws, and that he made the note at the request of the payee upon the distinct agreement that he should not be liable thereon, either as principal or surety. In that case the respondent became the holder of the note after its maturity. In *Daniel v. Glidden*, 38 Wash. 556, 80 Pac. 811, where the note was signed "H. M. Glidden, Secy.," it was held that Glidden could not exonerate himself from liability by parol proof that he executed the note as secretary of a corporation to which the plaintiff loaned the money. In that case the court said: "There are no apt words used in the note showing that the corporation is obligated. Therefore, although appellant's signature is followed by an abbreviated word indicating a representative capacity, yet, no obligated principal being disclosed, he cannot escape personal liability under our negotiable instrument law." These principles have abundant support in the cases from other jurisdictions. In *San Bernardino National Bank v. Anderson* (Cal.) 32 Pac. 168, the note was signed "John Anderson, President, J. A. Crawford, Secretary." The note was otherwise unambiguous. It was held that the defendants could not show by parol that they were respectively the president and secretary of the San Bernardino Fruit Company, a corporation, that the money was loaned to the corporation, and that the note was intended as and for the debt of the corporation, and not as the individual note of the defendants. The following authorities are to the same effect: *Keokuk Falls Imp. Co. v. Douglas Mfg. Co.*, 5 Okl. 32, 47 Pac. 484; *Matthews v. Dubuque Mattress Co.*, 87 Iowa, 246, 54 N. W. 225, 19 L. R. A. 676; and *Davis v. England*, 141 Mass. 587, 6 N. E. 731.

As we have said, any other rule would destroy the stability of written instruments. The note imports a joint obligation of the appellants, and they have sought to plead and prove that, while they apparently executed the note in their individual capacity, that they intended in fact to execute it as the note of the defendant corporation only. This would be to create an ambiguity where none exists, and to make for the parties a contract which they did not make for themselves.

Judgment is affirmed.

CHADWICK, MOUNT, and PARKER, JJ., concur.



(24 Colo. App. 279)

**MESA DE MAYO LAND & LIVE STOCK CO. v. HOYT.**

(Court of Appeals of Colorado. June 10, 1913.  
Rehearing Denied July 14, 1913.)

**1. ANIMALS (§ 33\*)—COMMUNICATION OF DISEASE—“ACT OF GOD.”**

In an action for damages for negligence in permitting sheep afflicted with a disease known as scab to stray and communicate the disease to plaintiff's flock, a showing that the storm on the night of their escape was a “bad one” or “a very severe one,” without showing the velocity of the wind, or the temperature, and that five to ten inches of snow and rain fell, did not entitle defendant to the defense known as the act of God, since to make that availing it was necessary to show that the escape was due to an unprecedented storm against which human prudence and caution could not guard, and that no act of omission or commission on the part of its employés contributed thereto.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 83-92; Dec. Dig. § 33.\*

\* For other definitions, see *Words and Phrases*, vol. 1, pp. 118-126.]

**2. ANIMALS (§ 33\*)—COMMUNICATION OF DISEASE—ACT OF GOD.**

Where defendant's sheep escaped from their herders and were found by plaintiff's herder, who drove them into plaintiff's corral, where they communicated to plaintiff's sheep the disease of scab with which they were afflicted at its incipient stage, and which was not apparent to a casual observer and was unknown to plaintiff, and where such care of defendant's sheep was not negligent or a contributing cause of injury, defendant could not invoke the defense of contributory negligence.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 83-92; Dec. Dig. § 33.\*]

**3. ANIMALS (§ 33\*)—COMMUNICATION OF DISEASE—ACT OF GOD.**

Defendant, in an action for damages for the disease of scab communicated by his sheep to those of plaintiff, had the burden of proving contributory negligence.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 83-92; Dec. Dig. § 33.\*]

**4. APPEAL AND ERROR (§ 762\*) — BRIEFS — POINTS FIRST RAISED IN REPLY.**

Unless good cause be shown therefor, points raised by appellant for the first time in his reply brief will not be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3097; Dec. Dig. § 762.\*]

Appeal from District Court, Weld County; James E. Garrigues, Judge.

Action by E. G. Hoyt against the Mesa De Mayo Land & Live Stock Company. Judgment for plaintiff, and defendant appeals. Affirmed.

H. E. Churchill, of Greeley, for appellant. William R. Kelly, Joseph C. Ewing, and Walter E. Bliss, all of Greeley, for appellee.

CUNNINGHAM, P. J. On the 30th day of July, 1910, the plaintiff Hoyt, appellee here, filed his complaint in the district court, claiming damages on account, as it is alleged, of negligence on the part of the defendant in permitting a band of sheep belonging to it, and which was afflicted with a disease known as scab, to stray from their accustomed

ed range and to become commingled with the sheep of plaintiff, thus communicating the disorder to plaintiff's flock, resulting in the death of many of the latter's sheep, great damage to those that did not die, loss of the wool crop or clip, and heavy expense incident to the treating of his flock while in its diseased condition. From a judgment in favor of the plaintiff, defendant appeals.

It is not denied that defendant's flock was afflicted with scab or that while in that condition it escaped from the custody of defendant's herdsmen and became commingled with the flock of plaintiff, which was in a healthy condition theretofore. There is no attempt to minimize plaintiff's damage, and no error is assigned as to the size of the verdict.

In appellant's opening brief but two grounds for reversal are urged: (a) That the escape of the sheep from the appellant was the result of inevitable accident or act of God; (b) that the plaintiff was guilty of contributory negligence.

[1] 1. The first contention is predicated upon the condition of the weather at the time the appellant's flock escaped from its herdsmen; it being contended that the storm was unprecedented and one against which appellant could not be required to safeguard its flock. There was considerable conflict in the testimony offered on behalf of the parties to this suit as to the extent and severity of the storm in question, but as we read the record not a single witness called by the defendant gave testimony that would entitle defendant to invoke the defense here under consideration. Appellant's witnesses spoke of the storm as a “big one,” or a “bad one,” or “a very severe one,” but there is no evidence as to the velocity of the wind, and no attempt to give the temperature, while the amount of snow and rain which fell during the night that the sheep escaped was placed at from five to ten inches, varying with the locality and the opinion of the various witnesses called for appellant. One of defendant's witnesses testified as follows: “We generally have snow storms in October. We expect them at that time of the year. I have been on the range ever since 1884. From that time until the present we expect snow storms in October.”

In *City of Denver v. Rhodes*, 9 Colo. 564, 13 Pac. 734, Mr. Justice Beck, who wrote the opinion, uses this language: “An ‘unusual flood of rain’ does not indicate a greater or more severe rain than has heretofore occurred, but rather such a rain as does not usually or but rarely occurs.” In the same opinion the following language occurs: “The degree of care or foresight which it is necessary to use must always be in proportion to the injury likely to result from the event to be guarded against; also that such a flood as has been known to occur” from a storm “within the memory of man should

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



have been anticipated by those in charge of the work of construction."

In order to make this defense (i. e., the act of God) availing, it was necessary for appellant to show that the escape of its sheep was due to an unprecedented storm against which human prudence and caution could not guard, and that no act of omission or commission on the part of its employes contributed thereto. *Kansas Pacific v. Lundin*, 3 Colo. 94; *City of Denver v. Rhodes*, 9 Colo. 564, 13 Pac. 729; *Elliott v. Roswell*, 10 Johns. (N. Y.) 1-11, 6 Am. Dec. 306; *The St. George Case* (D. C.) 95 Fed. 172; *C. B. & Q. v. Manning*, 23 Neb. 552, 37 N. W. 462; *Ryan v. Rogers*, 96 Cal. 349, 31 Pac. 244; *Gulf Red Cedar Co. v. Walker*, 132 Ala. 553, 31 South. 374.

The evidence in this case fails to establish a state of facts entitling appellant to the defense known as "the act of God."

[2, 3] 2. The evidence shows that on the 18th day of October, the day following the night when the sheep escaped from the custody of appellant's herdsmen, appellee's herder found them wandering upon the plains without a custodian. He took charge of them and at night drove them into plaintiff's corral, where they mingled freely with the latter's sheep until October 21st, when appellant's foreman, having learned of their whereabouts, claimed them and drove them away. The disease with which appellant's sheep were afflicted was, at the time appellee's herder took charge of them, in its incipient stage and not apparent to the casual observer. Neither appellee nor his herdsmen knew anything of the diseased condition of the sheep. Under these circumstances, to allow the defendant to invoke the doctrine of contributory negligence and thus escape liability would be harsh and unjustifiable. Moreover, there was evidence in the record that the appellant's sheep had before the day in question mingled with the appellee's sheep at the latter's watering place. Again, one of the officers of the appellant admitted that, if diseased sheep were allowed to bed down upon the prairie, the disease could thus be communicated to other sheep passing over such range. It is apparent that the sheep must have bedded down one night, on or near the range of appellee, before his herdsmen took them in charge and, if he had not taken them in charge, would in all probability have spent one or more nights, after the time he took them in charge upon the range where he found them; hence the act of plaintiff in caring for defendant's sheep was not only free from negligence but it cannot be said that his act in this respect was a contributing cause of the communication of the malady, and the burden of proving contributory negligence was on the defendant. The evidence also discloses that the appellant's employes and officers knew

that its flock was afflicted with scab, and knew that in that condition they had been mingling freely with appellee's sheep, and yet they never communicated this fact to appellee or warned him so that he could take precautionary measures to save his flock by dipping it. On the contrary, the foreman of appellant, when he came to drive the sheep away, and after having been entertained by appellee at his home overnight, was asked by appellee regarding the condition of his employer's sheep and was informed that they were "clean." The manager of appellant was in the neighborhood at the time the sheep were recovered and remained there for some 20 days thereafter. He testified that he never notified Hoyt that its sheep had scab, even though he knew they had mingled with Hoyt's sheep, and he knew that his company's sheep were so infected. His only excuse for this gross violation of duty was: "I had reason to believe that he [meaning Hoyt] knew our sheep were infected, as everybody knew it, and I did not publish it in the papers."

[4] 3. In his reply brief counsel for appellant, for the first time, raises the question of the insufficiency of the plaintiff's complaint to entitle him to invoke the statutory provision regarding diseased sheep (Rev. Stat. 1908, § 6399), and also the ownership of the sheep. In his closing brief counsel insists that the evidence does not show that the plaintiff had title in the sheep. We are not disposed to consider these contentions, for the reason that they were not seriously, if at all, relied upon by appellant on the trial, nor is anything whatever said concerning them in its opening brief. In *Isabella Gold Mining Co. v. Glenn*, 37 Colo. 172, 86 Pac. 351, it is said: "It does not comport with good practice for the court to consider points raised by the appellant or plaintiff in error for the first time in his reply brief; certainly unless good cause be shown therefor and leave of the court be obtained."

By declining to consider appellant's contentions just referred to, we must not be understood as intimating that they were well taken.

The judgment of the trial court is affirmed.

(43 Utah, 68)

UTAH BLACK MARBLE CO. v. AMERICAN MARBLE & ONYX CO. et al.

(Supreme Court of Utah. June 4, 1913.)

# 1. APPEAL AND ERROR (§ 994\*)—REVIEW—FINDINGS.

A finding upon sharply conflicting evidence will not be disturbed on appeal, where it depended largely upon the determination of the credibility of the witnesses.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 8901-3906; Dec. Dig. § 994.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**2. CORPORATIONS (§ 448\*)—ACTS OF CORPORATIONS — KNOWLEDGE IMPUTED TO CORPORATION.**

Where the locators of a mining claim, while stockholders and directors in a corporation to which they had transferred their claim, relocated the claim, the corporation paying the expense, but the location being taken in the names of the individuals, and organized a second corporation to which they transferred the new location, the second corporation cannot claim the location as a bona fide purchaser, for it appearing that the locators were the principal stockholders therein, and that the corporation had been organized as a cover to shield them from the consequences of their breach of trust, the knowledge of the incorporators will be imputed to the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1709, 1789-1792; Dec. Dig. § 448.\*]

Appeal from District Court, Utah County; J. E. Booth, Judge.

Action by the Utah Black Marble Company against the American Marble & Onyx Company and others. From a judgment for plaintiff, the named defendant appeals. Affirmed.

Cheney, Jensen & Holman, of Salt Lake City, for appellant. Dey, Hoppaugh & Fabian, of Salt Lake City, and J. W. N. Whitecotton, of Provo, for respondent.

STRAUP, J. The plaintiff by this action seeks to have adjudged that the defendants hold certain placer mining claims in trust for it, and prays that the defendants be required to convey them to it. The plaintiff had judgment. From a portion of it the defendant American Marble & Onyx Company appeals.

The evidence shows: The defendants Cornelius, Thor, and Oliver Cederstrom are brothers; the defendant Dolly Cederstrom is their sister; the defendant Ellen Cederstrom their mother; the defendant Elseman their brother-in-law. Prior to July, 1909, the defendants, in Utah county, located marble deposits, one claim as a placer claim called Marble Placer, and four claims as lode claims called the Lone Star, the Spring View, the Rockefeller, and the Thelma. On July 20, 1909, the defendants Oliver, Thor, and Cornelius Cederstrom and Elseman, with others, organized the plaintiff corporation, and on the same day, together with the other locators Ellen and Dolly Cederstrom, conveyed to it the lode claims and the placer claim. The capital stock was 1,000,000 shares—400,000, treasury stock; and 600,000 issued, of which the Cederstroms and Elseman held 550,000 shares. Oliver, Cornelius, and Thor Cederstrom and Elseman comprised four out of six members of the board of directors. Stock of the corporation was sold to others who became interested in the corporation. Efforts were made to raise something like \$30,000 for development and operative purposes. In September, 1909, it was concluded that the deposits could not be acquired and

held under lode locations; hence, it was determined to locate them as placer claims. The plaintiff adduced considerable testimony to show that the Cederstroms and Elseman agreed to locate the deposits covered by the lode claims as placer claims, and to make such locations on behalf of and for the benefit of the plaintiff. This the Cederstroms and Elseman denied. The fact, however, is that they while directors of the plaintiff corporation, and on the 22d day of September, 1909, made three locations of the deposits known as placer claim No. 1, located by Oliver, Cornelius, and Thor Cederstrom and Elseman; placer claim No. 2 located by the same locators; placer claim No. 3 located by Cornelius, Thor, Ellen, and Dolly Cederstrom; and that the expenses of such locations were paid by the plaintiff. Controversies and differences soon arose between the Cederstroms and Elseman on the one side and other stockholders of the plaintiff corporation on the other. Demands were made of the Cederstroms and Elseman that they convey the placer locations to the plaintiff. According to the evidence of the plaintiff, they at first did not refuse, admitted that the placer locations had been made for the benefit of the plaintiff, and stated that they had intended to convey such claims to it, but later asserted that "the company," the plaintiff corporation, had not treated them right. The Cederstroms and Elseman ceased to be directors on the 3d day of August, 1910. But before they ceased to be such directors, and after the trouble had arisen and the placer locations had been made, the Cederstroms became instrumental in organizing the defendant corporation, the American Marble & Onyx Company, which was organized by them in April, 1910. That company also had a capital stock of 1,000,000 shares; 400,000 in the treasury, and 600,000 issued, of which the Cederstroms held 470,000 shares. On the same day of the organization of the defendant corporation the locators of placer No. 3, Cornelius, Thor, Ellen, and Dolly Cederstrom, all incorporators of the defendant corporation, conveyed that claim to that corporation. The title of placer claims Nos. 1 and 2 at the time of the trial still remained in the name of the locators, Oliver, Cornelius, and Thor Cederstrom, and Elseman. The court found and adjudged that they held placer claims Nos. 1 and 2, and the defendant corporation placer claim No. 3, in trust for the plaintiff, and ordered a conveyance of them to it. The defendant corporation only has appealed. So the only claim involved on the appeal is placer claim No. 3.

[1] What principally divides the parties is this: (1) The plaintiff contends that the placer locations Nos. 1, 2, and 3 were made by the Cederstroms and Elseman for the benefit of the plaintiff. This the defendants

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



deny. (2) That the placer claims as located covered all the ground and deposits located and covered by the lode claims. This the defendants also deny, and claim that the lode claims lie to the east of the placer claims, and that the latter cover ground and deposits not covered by and not included within the lode claims; and that this was especially true with respect to placer claim No. 3. Much evidence was adduced by the parties in support of their respective contentions. The court found the facts as contended for by the plaintiff. The appellant does not contend that the findings in such particular are wholly unsupported. What it chiefly contends is that the facts as claimed by the appellant were established by witnesses in its behalf, the Cederstroms and Elseman, who actually had made the locations of both the lode and the placer claims, and who, for that reason, had better means of knowledge as to the exact location of the claims than the witnesses for the plaintiff, none of whom had assisted in the making of any of the locations. Whatever may be claimed for that is substantially met by the counterclaim that the testimony of the Cederstroms and Elseman in such particular was prompted by bad faith and personal interests. The evidence also is in conflict as to this proposition: The plaintiff claims that there is substantially but one vein or ledge of marble which extends in a northerly and southerly direction, and that the lode claims were located lengthwise along that ledge, first the Lone Star, then to the south of that the Spring View, then the Rockefeller, then the Thelma. Evidence was adduced on behalf of the defendants tending to show that there are two ledges, a west and an east ledge, running in a northerly and southerly direction, and that the lode claims are located lengthwise along the east ledge. But there is but little or no conflict in the evidence that the west ledge is the only valuable ledge, and is a continuous vein of good marble, and can readily be traced for some miles by the outcroppings and exposure of marble, and that the east ledge, as compared with the west ledge, is practically of no value. The placer claims were located along the west ledge. If, therefore, the lode claims were located along that ledge as contended for by the plaintiff and as found by the court, then are they included within the placer locations. If they are to the east thereof, as contended for by the defendants, then are they wholly without the placer locations. Surveys were made by both parties. According to a survey made by a surveyor of the plaintiff the lode claims were located along the west ledge, and are within the placer locations. According to surveys by surveyors of the defendants, the lode claims are to the east, and wholly without the placer locations. It was, in effect, stipulated that, as shown by plaintiff's survey and as testified to by its witnesses, the lode claims were located on the west ledge, and are within the

placer locations. The surveys themselves are not of much consequence. The corner monuments or stakes of the lode claims were missing when the surveys were made. The surveyors in making the surveys depended much on what those who pretended to have knowledge of the corners told them. The Thelma and the south half of the Rockefeller lode claims, if located along the west ledge, are within placer claim No. 3. We think there is good and sufficient evidence to show that the discovery monuments and the posted notices of those lode claims were, as found by the court, erected and posted on the west ledge and on ground covered by placer claim No. 3. Of course, there is a direct conflict as to that; but we cannot say the finding is against the manifest or greater weight of the evidence. The determination of the fact, whichever way it may be found, is almost wholly dependent upon the credibility of the witnesses and the weight to be given their testimony. Charges and countercharges are made of shifting stakes, locations of discovery monuments, and of posted notices. The trial court having had the witnesses before it, and who, at the request of the parties, visited and inspected the premises, was, better than we are, in a position to ascertain the real truth of the matter. The lode claims admittedly were made to acquire the marble. Now, with the west ledge well defined as a continuous vein of marble, and with outcroppings and exposures of clear marble at divers places along that vein, as found by the court, it is hard to believe that any one in making locations to acquire marble would place them, not on that ledge, but to the east of it where confessedly there are no indications of desirable marble either in quantity or quality, or at least greatly inferior to that clearly indicated and contained in the west ledge. There is evidence to show that the Cederstroms, after they had located both the lode and the placer claims, in pointing them out to stockholders and to prospective purchasers of stock of the plaintiff corporation, pointed out and showed the deposits and outcroppings of the west ledge as the location of the property and holdings of the plaintiff.

As already indicated, the evidence as to about all of the material issues is in conflict. We think, however, all the findings are supported by sufficient evidence, and on the record and for the reasons stated we are satisfied the court on the facts reached the right result. At least we do not feel justified in disturbing them.

[2] It is further contended that as to placer claim No. 3 the defendant is an innocent purchaser for value. It in this respect claims that it had no notice that the Cederstroms had agreed to make the placer locations for the benefit of the plaintiff, and that there is no evidence to show that at least two of the locators of that claim, Ellen and Dolly Cederstrom, had made such an agree-



ment. There is no evidence that Ellen and Dolly Cederstrom made such an agreement; but they, with others, were locators of the lode claims, and with others conveyed them to the plaintiff. Though Oliver, Thor, and Cornelius Cederstrom denied it, yet there is evidence to show that they and Elsemann had agreed to locate the placer claims for the benefit of the plaintiff. They were the active participants in the making of such locations and controlled and directed the work in such particular. Neither Ellen nor Dolly Cederstrom appear to have been concerned in such transaction. They bore no part of the expenses of the locations, and neither contributed nor parted with anything, and apparently did not advise or direct the making of the locations, nor were they consulted with respect to them. They apparently were but volunteers, and their names, for mere convenience, were written in the notice by Oliver and Cornelius Cederstrom. The Cederstroms were the active and principal incorporators of the appellant. They held over three-fourths of the issued stock of that corporation. Accepting the findings of the court, as we do, that they, while directors of the plaintiff corporation, and for the purpose heretofore shown, had agreed to make the placer locations for its benefit, that they, in pursuance thereof, made the locations for such purpose, that the plaintiff paid the expenses thereof, and that they, while still directors of the plaintiff corporation, organized and became the principal stockholders of the defendant corporation, and conveyed and caused to be conveyed placer claim No. 3 to that corporation in violation of their agreement and in breach of trust with the plaintiff corporation, the defendant corporation, none of whose stockholders paid any substantial value for stock issued to them, can be regarded as but a convenient medium or cover to shield the Cederstroms from consequences of their breach. Under such circumstances the knowledge and notice of these incorporators constituted the knowledge and notice of the defendant corporation. *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. 239, 35 L. Ed. 1063; *National Conduit Mfg. Co. v. Connecticut Pipe Mfg. Co.* (C. C.) 73 Fed. 491.

We think the judgment should be affirmed, with costs. Such, therefore, is the order.

MCCARTY, C. J., and FRICK, J., concur.

49 Okl. Cr. 692)

RUSSELL v. STATE.

(Criminal Court of Appeals of Oklahoma.  
June 21, 1913.)

(Syllabus by the Court.)

1. HOMICIDE (§§ 85, 310\*) — ASSAULT WITH INTENT TO KILL—INSTRUCTIONS.

(a) On an information based on section 2307, Comp. Laws 1909 (section 2336, Rev.

Laws 1910), charging that the defendant "with a sharp and dangerous weapon did unlawfully, willfully and feloniously assault, cut and wound one Stony Lemons, with the intent, then and there on the part of the said Will Russell, to kill said Stony Lemons, contrary," etc., the accused may properly be convicted of the offense defined by section 2308, Comp. Laws 1909 (section 2337, Rev. Laws 1910), of "assault with intent to kill," or of the offense defined by section 2337, Comp. Laws 1909 (section 2344, Rev. Laws 1910), of "assault with any sharp or dangerous weapon with intent to do bodily harm," or of the offense of assault and battery as defined by section 2333, Comp. Laws 1909 (section 2341, Rev. Laws 1910), and the trial court should submit the case to the jury for consideration upon every degree of assault which the evidence in any reasonable view of it suggests.

(b) The proof on the part of the state on such charge must conform to the doctrine announced in *Clemons v. State*, 8 Okl. Cr. 452, 128 Pac. 739.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 111, 657-661; Dec. Dig. §§ 85, 310.\*]

## 2. CRIMINAL LAW (§ 1186\*) — APPEAL — GROUND FOR REVERSAL—INSTRUCTIONS.

When an information fails to charge an offense under a particular provision of the Penal Code, and the instructions of the court do not submit any other provision covered by the allegations in the information and the evidence, a conviction cannot be upheld.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. § 1186.\*]

Appeal from District Court, Love County; S. H. Russell, Judge.

Will Russell was convicted of felonious assault, and appeals. Reversed.

Eddleman & Graham, of Marietta, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

ARMSTRONG, P. J. The plaintiff in error, Will Russell, was tried and convicted at the June, 1911, term of the district court of Love county on a charge of assault with intent to kill, and his punishment fixed at imprisonment in the state penitentiary for one year and one day. The charging part of the information upon which this conviction is based is as follows: "That the above-named Will Russell did, in Love county, and in the state of Oklahoma, on the 25th day of December in the year of our Lord 1910, commit the crime of assault with intent to kill, in manner and form as follows: That in the state and county aforesaid, and on the day and year aforesaid, the said Will Russell with a sharp and dangerous weapon did unlawfully, willfully and feloniously assault, cut and wound one Stony Lemons, with the intent, then and there on the part of the said Will Russell, to kill the said Stony Lemons, contrary," etc. The facts in the record indicate that the difficulty out of which this prosecution grows was a mutual combat; that the prosecuting witness used a six-shooter, beating the accused; and that the accused



used a knife of some kind, inflicting wounds on the prosecuting witness.

[1, 2] In its instruction to the jury the court charged as follows: "Therefore, if you believe from the evidence beyond a reasonable doubt, that in the county of Love and state of Oklahoma, on or about the 25th day of December, 1910, the defendant, Will Russell, as charged in the information, did with a sharp and dangerous weapon, to wit, a knife, intentionally and wrongfully—that is, unlawfully, willfully, and feloniously—assault, cut, and wound Stony Lemons, with the intent on the part of him, the said Will Russell, to kill the said Stony Lemons, then in such case, if you so believe, it is your duty to find the defendant, Will Russell, guilty of an assault with the intent to kill, and assess his punishment by imprisonment in the state penitentiary for a term not to exceed ten years."

This instruction is based on section 2336, Revised Laws 1910 (section 2307, Comp. Laws 1909), which is as follows: "Any person who intentionally and wrongfully shoots, shoots at, or attempts to shoot at another, with any kind of a firearm, airgun or other means whatever, with intent to kill any person, or who commits any assault and battery upon another by means of any deadly weapon, or by such other means or force as is likely to produce death or in resisting the execution of any legal process, is punishable by imprisonment in the penitentiary not exceeding ten years." Section 2337, Revised Laws 1910 (section 2308, Comp. Laws 1909), is as follows: "Any person who is guilty of an assault with intent to kill any person, the punishment for which is not prescribed by the foregoing section, is punishable by imprisonment in the penitentiary for a term not exceeding five years, or in a county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment."

The information does not charge an offense under section 2336, Revised Laws, supra, but does charge an offense under section 2337. The court's instruction, however, submits only the first section supra, when it should have submitted every degree of assault which the information covers and which the evidence in any reasonable view of it suggests.

As said by this court in *Clemons v. State*, 8 Okl. Cr. 452, 128 Pac. 739: "The means prescribed in sections 2307 and 2308, Comp. Laws 1909 (sections 2337 and 2336, Rev. Laws 1910) by which the offense may be committed are in substance identical, and the material difference arises only in the punishment prescribed. In the first, punishment must be by imprisonment in the penitentiary, with ten years the maximum; in the second, the maximum is five years, and the punishment may be as for a misdemeanor. In the first, the

essential element is an assault and battery by means of a deadly weapon or by such other means or force as is likely to produce death. In the second, the assault must be with intent to kill. In section 2337, (Comp. Laws 1909 (section 2344, Rev. Laws 1910), the essential element is the intent to do bodily harm with any sharp or dangerous weapon. The offenses are all of the same character. An assault with intent to kill necessarily includes an assault with intent to do bodily harm; for a person cannot be killed without bodily harm being done, and an assault and battery by means of a deadly weapon necessarily includes an assault with any sharp or dangerous weapon. Section 6857, Procedure Criminal (Comp. Laws 1909), provides: 'In charging the jury the court must state to them all matters of law which it thinks necessary for their information in giving their verdict.' Section 6875 provides: 'The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit the offense.' Under the statute, the trial court should submit the case to the jury for consideration upon every degree of assault which the evidence in any reasonable view of it suggests, and the instructions must be applicable to the testimony introduced upon the trial."

Under the foregoing doctrine the issues were not properly submitted to the jury, and for that reason the judgment will have to be reversed. See *Collegenia v. State*, 9 Okl. Cr. —, 132 Pac. 875.

It is very evident that the county attorney in drawing the information in this case confused section 2307, Comp. Laws 1909, being section 2337, Revised Laws 1910, with section 2337, Comp. Laws 1909, being section 2344, Revised Laws 1910. In all probability this prosecution should have been under the latter section. That, however, is a matter of election with the county attorney, but the court should submit all these sections in its charge to the jury when the facts so warrant.

The judgment is reversed, and the cause remanded, with direction to the trial court to grant a new trial.

DOYLE and FURMAN, JJ., concur.

(38 Okl. 412)

PIONEER TELEPHONE & TELEGRAPH CO. v. STATE et al.

(Supreme Court of Oklahoma. June 30, 1913.)

(Syllabus by the Court.)

TELEGRAPHS AND TELEPHONES (§ 33\*)—REGULATION BY COMMISSION—VALIDITY OF ORDER.

Record examined, and held that, under the issues joined and the notice served, the only order the Commission is empowered to enter

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



is to the effect that from and after a certain date the patrons of the telephone company at Muskogee must have efficient services.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 21; Dec. Dig. § 33.\*]

Appeal from the State Corporation Commission.

Complaint was made by the State of Oklahoma and others before the Corporation Commission against the Pioneer Telephone & Telegraph Company, and from an order of the Commission the company appeals. Modified and cause remanded, with directions.

S. H. Harris and J. R. Spielman, both of Oklahoma City, for appellant. Chas. L. Moore, Asst. Atty. Gen., for appellees.

KANE, J. This appeal is prosecuted for the purpose of reversing part of the order of the Corporation Commission entered in the above-entitled cause. The order reads as follows: "It is therefore ordered that the Pioneer Telephone & Telegraph Company render at all times reasonable and adequate service at its exchange in the city of Muskogee, and that this order shall take effect thirty days from this date; that the bill presented to all subscribers of the exchange at Muskogee on the first day of November, 1911, shall be reduced one-third of the customary price charged." The part of the order appealed from is that part which requires a reduction of the "customary price charged." The proceeding in which the order was issued was based upon affidavits filed by some 52 different citizens of Muskogee, the general tenor of which was succinctly stated by Chairman Love, before whom the evidence was taken at Muskogee, as follows: "This is a general complaint against the Pioneer Telephone Company in regard to service. Some allege the reason of the poor service is on account of incompetent help, and some allege on account of the price paid the help. It is not necessary for the complainants to have attorneys in this case." Immediately following the foregoing statement of the chairman he proceeded to examine witnesses on behalf of the complainants, and after several witnesses had been examined by the chairman and cross-examined by counsel for the telephone company, the general trend of whose testimony clearly tended to support the complaints, the following occurred:

"Chairman Love: I don't see any use in prolonging this evidence along this line.

"Mr. Harris: I want to make this suggestion. I appreciate the weight of this testimony as much as your honor does, and, if the Commission will allow us 30 days on this exchange to bring things to perfection here, I want to take a transcript of this, I want to take it up with men that are competent to handle it, and see that this serv-

ice is put right, and at the expiration of that time, if it isn't right, some one must come to account. We don't want to trifle with these people and are not going to do it.

"Chairman Love: Here is the question before the Commission: The Commission wants something to make an order on. Now, they have the evidence here of a number of witnesses, general character of service; that is, individual service and enough individual complaints to make it general. Now, then, the only thing the Commission, the only thing I see you want to give them service. Now, if you are giving them service, and you are prepared to give them service, you don't want any more than the constitutional time, which will be ten days.

"Mr. Harris: Well, what I want was time to meet each and every one of these times where I want to introduce evidence and the postponement of the trial so we will have an opportunity to meet every issue raised.

"Chairman Love: Well, even if some of these things you say you could meet, then the proposition, the only thing the Commission could give an order in this case, say from a certain time the company must give reasonable service to the people, and you object to the Commission making an order of that kind.

"Mr. Harris: The only thing is, your honor, I would like to meet such things as I think unjust to the company before this Commission, before the order is made. And I would like to know more about the source of some things that I don't know about.

"Chairman Love: The way the Commission looks at it there is nothing for the Commission to do but make an order in this case.

"Mr. Harris: I would say this: If your honor felt disposed to make an order about that question within the time you considered this service must be a reasonable good service, I would say you could make that order now, if the order was going to cover some of these other matters.

"Chairman Love: Judge, you take in regard to the zone which was brought up, that question is not in the complaint. You take in regard to the cutting off of the phone because it was not paid; that you don't ask to meet because it wasn't in the complaint.

"Mr. Harris: That is what I wanted to know about.

"Chairman Love: What was your notice?

"Mr. Harris: I stated I would raise no technical objection.

"Chairman Love: Under this notice, the only thing the Commission can do, if they make an order, is that from and after a certain date the people of Muskogee must have reasonable phone service.

"Mr. Harris: Then, your honor, I see no reason why we should not have 30 days.

"Mr. Harris: By the suggestion of the Commission, this complaint is called a general complaint about the nature of the service

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



given in Muskogee, both long distance and local, and in view of that feature of the case I see no objection to an order being made now requiring the defendant telephone company that within 30 days from this date to have its service here, both local and long distance, in reasonable good and satisfactory condition.

"Chairman Love: Now this for the information of the complainants. If your service after the order is made, if your service is not reasonable, then you make a sworn affidavit to that effect to the Commission, then this company is subject to a fine of \$500 under the Constitution every time that they don't give service. Now, we can't fine them until after this order is made and in effect. But if this order is made and in effect, and they neglect to give the people service, then they are subject to a \$500 fine every time they fail, unless they can show that they have a reasonable excuse for it. Now, if you gentlemen would like to see it, we have a scale there, and I would like for you to see it. Now, the first thing, we require once a month that each telephone exchange in the state keep count of all the calls each hour. For instance, you see how many called at 12 o'clock noon, and at 1, 2, and 3, and so on for the day and night, and now Mr. Player will explain to you exactly how many calls each hour was reported from this office."

This cause was tried and the foregoing colloquy occurred on the 12th day of October, 1911. On the 17th day of the same month, the Commission rendered its formal opinion, order, and judgment, wherein, after finding that "the Pioneer Telephone Company has a good up to date plant in the town of Muskogee, there can be no reasons for the conditions as exist there in our judgment other than neglect or carelessness," it concludes that, "if the service is in such condition that it requires thirty days to put it in shape, the people of Muskogee should not be required to pay full price for telephone service during this time. At least rent for telephone service this next month should be reduced one-third. If the Pioneer Telephone Company charges the high telephone rents as were authorized by the Supreme Court at Enid, they should give service." Then follows the order, from the latter part of which the appeal is taken. The part of the order appealed from should be set aside. Chairman Love had a comprehensive grasp of the issues involved, as is disclosed by his statement made upon the opening of the case, and of the power of the Commission in the premises, as shown by the colloquy between him and counsel for the telephone company. The court agrees with the chairman in his summary of the issues and in his statement that: "Under this notice the only thing the Commission can do, if they make the order, is that from and after a certain date the people of Muskogee must have reasonable phone service." The record discloses no basis for

adding to or taking from the conclusion of the chairman.

The proceeding, as the Chairman says, "is a general complaint against the Pioneer Telephone Company in regard to service." It was not commenced for the purpose of inquiring into the reasonableness of the rates charged for the service rendered, and there were no witnesses called, and there was no evidence introduced with that in view. Not only was there no evidence upon which to base the part of the order appealed from, but the statement in the record to the effect that, if the Pioneer Telephone Company charges the high rents as were authorized by the Supreme Court at Enid, they should give service, upon which the objectionable part of the order obviously was based, is erroneous and misleading. There was no evidence that the Supreme Court authorized the telephone company to charge high telephone rents at Enid, or that the Telephone Company charged high rents at Muskogee. Indeed, the case is presented to this court on behalf of the state and the complainants upon the theory that the rates in force are those fixed by the Corporation Commission on October 12, 1908, by its general Order No. 101, applicable to all telephone companies. *Pioneer Tel. & Tel. Co. v. State and Burrows Oil Co.*, 33 Okl. 724, 127 Pac. 1073. "Any other rates or charges adopted by or acted upon by the appellant," says the Attorney General in his brief, "would have been unlawful and void, under the provisions of section 18, art. 9, of the State Constitution." Under the circumstances disclosed by the record, we are of the opinion that the part of the order appealed from is unjust and unreasonable. There is no doubt that the Corporation Commission and counsel for the telephone company proceeded upon the theory that the only question involved was the question of the efficiency of the service, and that the only relief that could, or would, be granted under the issues joined was "that from and after a certain date the people of Muskogee must have reasonable phone service." After the formal order was entered containing the part appealed from, counsel for the telephone company filed a motion to set aside said order and for further hearing, wherein they call attention to the nature of the proceeding which they were called to answer and the understanding of the Commission and of counsel as to its scope and the nature of the relief that would be rendered, which motion was supported by affidavits to the effect that, if the penalty imposed by the portion of the order appealed from is enforced, it will cause a reduction of the rentals due the defendants from the exchange subscribers and toll charges in the sum of \$4,233.72; wherefore, they pray "that said order be modified by striking out the portion complained of, or that said order be set aside, and said case opened for hearing and defendant given an opportunity to introduce evidence



In relation to said affidavits and complaints, or any part thereof, and that it may have notice of the complaint or complaints which it is expected to answer, and the nature of the order or orders proposed to be made upon the hearing, and consideration of such complaint or complaints." The motion should have been sustained. If the Corporation Commission or any of the patrons of the telephone company desire to have the reasonableness of the rates charged by the telephone company adjusted so as to approximate a reasonable charge for the service rendered, it should be done in a proceeding instituted for that purpose, or at least the parties should not be misled as to the nature and scope of the inquiry.

The order appealed from is therefore modified, as hereinbefore suggested, and the cause remanded to the Corporation Commission, with directions to take such further action in the premises not inconsistent with this opinion as may be required. All the Justices concur.

(165 Cal. 695)

**GIDDINGS v. BOARD OF TRUSTEES OF  
CITY OF SAN BUENAVENTURA et al.**  
(L. A. 3,371.)

(Supreme Court of California. June 23,  
1913.)

**1. INTOXICATING LIQUORS (§ 10\*)—POLICE  
POWER—REGULATION OR PROHIBITION OF  
LIQUOR TRAFFIC.**

The regulation or prohibition of the liquor traffic is within the police power conferred by the Constitution on cities, towns, and counties empowered to enforce within their limits all police regulations not in conflict with the general laws.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 7-12; Dec. Dig. § 10.\*]

**2. INTOXICATING LIQUORS (§ 40\*)—LOCAL OP-  
TION—POWERS OF BOARD OF TRUSTEES.**

Local Option Act (St. 1911, p. 599), authorizing local option elections and declaring that no election under the act shall be held within two years of any prior election held under the act, and that it shall not be construed as putting any limitations on the police powers possessed by cities, towns, and counties, does not interfere with the power of the board of trustees of a city to enact ordinances regulating or prohibiting the liquor traffic, notwithstanding an election resulting favorably to license, but, where the election results favorable to no license, the board of trustees are bound thereby.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 34; Dec. Dig. § 40.\*]

**3. INTOXICATING LIQUORS (§ 40\*)—ORDI-  
NANCES—INITIATIVE ORDINANCES.**

The initiative and referendum act (St. 1911, Ex. Sess. p. 131), providing for the manner of exercising the initiative and referendum powers in cities, towns, and counties, confers on the electors of a city authority to enact such ordinances as the board of trustees have the constitutional power to enact in the first instance, and an election under Local Option Act (St. 1911, p. 599), resulting in favor of license, does not impair the authority of the electors

to adopt at an initiative election an ordinance prohibiting the liquor traffic.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 34; Dec. Dig. § 40.\*]

In Bank. Application by H. A. Giddings against the Board of Trustees of the City of San Buena Ventura and others, members of the board, for a mandate to compel respondents either to adopt an ordinance proposed by the electors of the city or to call a special election to submit the proposed ordinance to the electors. Peremptory writ of mandate issued.

Don G. Bowker, Clay G. Knox, and Merle J. Rogers, all of Ventura, for petitioner. Frank Orr, James, Smith & McCarthy, of Los Angeles, for respondents.

ANGELLOTTI, J. This is an application for a writ of mandate requiring respondents either to adopt an ordinance proposed by electors of the city or to call a special election in said city and to submit such proposed ordinance to the electors thereof at such special election. The proposed ordinance is one in effect prohibiting the traffic in alcoholic liquors in said city. This application was originally made to the District Court of Appeal for the Second District, which issued an alternative writ of mandate. After hearing in such court, it was ordered that a writ of mandate issue as prayed for. Subsequently, upon petition therefor, it being made to appear that the questions involved were of very general interest throughout the state and that there was some conflict in the decisions of at least two of our District Courts of Appeal thereon, the judgment of the District Court of Appeal was vacated and the proceeding transferred to this court for determination. The following is a portion of the opinion of the District Court of Appeal, written by Presiding Justice Allen:

"The case is this: The electors of San Buena Ventura, a city of the fifth class, under the provisions of an act approved April 4, 1911 (Stats. 1911, p. 599), generally known as the local option act, determined at an election regularly called and held in August, 1911, that 'the sale of alcoholic liquors be licensed in the city.' Thereafter the board of trustees adopted an ordinance regulating the sale of alcoholic liquors and provided for the issuance of licenses therefor. On April 1, 1912, a petition was presented, signed by the requisite number of electors, requesting such board of trustees to enact, without alteration, a certain ordinance attached to such petition or to call an election and submit to the electors such ordinance; the same being, in effect, one prohibiting the traffic in alcoholic liquors in said city. This petition was presented, with the accompanying ordinance, and the request made under the provisions of an act approved January 2, 1912 (Stats. 1911, Ex. Session, p. 131), known as

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the initiative and referendum act. This last act was passed to provide by general law the manner of exercising the initiative and referendum powers in cities, counties, and towns of the state in obedience to the recent amendment to the Constitution. The board of trustees of San Buenaventura have refused to enact such ordinance so presented or to call an election and submit such proposed ordinance upon the theory that under the local option act the people had at a popular election once determined the question, and under the provisions of such act a second election should not be called until after the lapse of two years. It is true that this local option act provides that 'no election under this act shall be held within two years of any previous election held under the act.' It is also true that such act provides that 'it shall not be construed as putting any limitations, except such as are positively stated herein, upon the police powers now possessed by cities, town and counties.'

[1] "The Constitution of this state gives to cities, counties, and towns the power to enforce within their limits all police regulations not in conflict with general laws. It is settled law that the regulation or prohibition of the traffic in alcoholic liquors is a police regulation.

[2] "When the act of April 4, 1911, was enacted, the city of San Buenaventura, through its board of trustees, possessed the power to regulate or prohibit such traffic. This local option act only purports to wrest from such board of trustees the power to grant licenses after the electors shall have determined that such city shall be 'no-license territory.' It does not interfere with their power, in the event no election has been held under the act, nor where one has been held and the electors have determined not to make such city 'no-license territory.' In this latter event the board of trustees, in the exercise of their constitutional police power, may, notwithstanding such election, enact ordinances regulating or prohibiting the traffic in such alcoholic liquors, if in their opinion the same is necessary for the public welfare.

[3] "The initiative act only purports to confer and only confers upon the electors authority to enact such ordinances as the board of trustees have the constitutional power to enact in the first instance; and, when possessing such power, a refusal upon the part of the board to act warrants the electors, under the power reserved by the constitutional amendment, in proceeding under the initiative act. We are of opinion, therefore, that the election under the act of April 4, 1911, did not impair the authority of the board of trustees to exercise their police power, except in the single instance where through a vote such city was declared to be 'no-license territory'; and, the board of trustees having the power under the result of such election to enact ordinances

regulating or prohibiting the liquor traffic, the electors possess the authority under the initiative act and under the Constitution to exercise the same powers which the board of trustees may exercise. It follows, therefore, that the requisite number of electors may, by petition duly signed and filed, make it obligatory upon the board of trustees to pass the ordinance in question, attached to the petition, without alteration, within ten days after its presentation, or to call an election submitting such ordinance to the electors in the manner provided by the act of January 2, 1912."

This so clearly and accurately states the questions involved and the law applicable thereto, as we conceive it to be, that we cannot do better than to adopt it as part of our opinion, which we do.

Since the submission of this matter in this court, we have rendered our decision in a proceeding involving precisely similar questions. *Ex parte Ellsworth*, on Habeas Corpus, 133 Pac. 272 (Cr. No. 1,774) filed June 14, 1913. So far as the questions here involved are concerned, the opinion therein is entirely in accord with the views expressed by the District Court of Appeal in this proceeding. Following the views expressed in *Ex parte Beck*, 162 Cal. 701, 124 Pac. 543, as to the scope and effect of the local option law, or the Wyllie Act, as it is called, its application or rather its nonapplication under such circumstances as exist in this case was clearly shown.

It is ordered that a peremptory writ of mandate issue requiring the respondents either to pass and adopt the proposed ordinance as presented or to submit the same to a vote of the electors of the city of San Buenaventura in full accord with the provisions of the act entitled "An act to provide for direct legislation by cities and towns including initiative and referendum," approved January 2, 1912 (Stats. 1911, Ex. Sess., p. 131).

We concur: MELVIN, J.; SLOSS, J.; SHAW, J.; LORIGAN, J.

(165 Cal. 537)

OSMONT et al. v. ALL PERSONS, etc.  
(S. F. 5,967.)

(Supreme Court of California. June 12, 1913.  
Rehearing Denied July 12, 1913.)

1. JUDGMENT (§ 155\*)—DEFAULT—MOTION TO SET ASIDE.

A motion to set aside a default judgment, which motion was without notice, could not be decided.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 306, 307; Dec. Dig. § 155.\*]

2. JUDGMENT (§§ 145, 153, 172\*)—DEFAULT—VACATING.

To have a default vacated because defendant was not served with a summons, a motion to vacate must be made within the year,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



and defendant must show that he had a meritorious defense, and complied with all reasonable terms imposed by the court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 271, 292-295, 336; Dec. Dig. §§ 145, 153, 172.\*]

### 3. JUDGMENT (§ 137\*)—DEFAULT—VACATING.

Where a motion to vacate a default judgment was made and noticed within the year, the court did not lose jurisdiction to act thereon because the question was submitted to him for decision, and in fact decided after the lapse of the year, hearing having been continued to a day after the year had expired on the court's own motion and over the objection of the moving parties, so that the maxim, "*Actus curiæ neminem gravabit*," applies.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 262-264; Dec. Dig. § 137.\*]

### 4. JUDGMENT (§ 273\*)—ORDERS—NUNC PRO TUNC ORDERS.

The entry of nunc pro tunc orders, when no previous judgment or order has been made with reference to the matter, is proper to preserve the rights of litigants, and not merely for the purpose of supplying deficiencies in the record of previous judgments or orders.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 525-541; Dec. Dig. § 273.\*]

### 5. JUDGMENT (§ 165\*)—DEFAULT—MOTION TO VACATE.

Upon motion of two persons asserting an interest in property involved in an action to vacate a default judgment therein, the court could not open the default of all the others, or vacate the whole judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 325; Dec. Dig. § 165.\*]

### 6. JUDGMENT (§ 160\*)—DEFAULT VACATED—AFFIDAVITS OF MERITS.

An affidavit of merits supporting a motion to vacate a default judgment need not show the facts constituting the defense, if it avers that the facts constituting the defense have been submitted to the moving party's attorney, and that the latter has advised the moving party that he has a meritorious defense, but such rule does not apply where the facts constituting the defense are themselves stated.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 314-316; Dec. Dig. § 160.\*]

### 7. JUDGMENT (§ 160\*)—DEFAULT—VACATION—AFFIDAVIT OF MERITS.

An allegation in an affidavit of merits supporting a motion to vacate a default judgment that the alleged attorney of the moving party should have imparted knowledge possessed by him to all the parties and that he fraudulently suppressed such knowledge, was merely a conclusion of affiant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 314-316; Dec. Dig. § 160.\*]

### 8. LIMITATION OF ACTIONS (§ 100\*)—FRAUD—DISCOVERY—EQUITABLE RELIEF.

The right of a party to invoke equitable aid against fraud after the expiration of three years from the commission of the fraud is an exception under the statute, and plaintiff must bring himself within the exception by affirmatively showing that he did not discover the facts constituting the fraud until within three years immediately before the commencement of the action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480-493; Dec. Dig. § 100.\*]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Augusta C. Osmont and others against All Persons, etc. From an order refusing to vacate a default judgment for plaintiffs, Elizabeth A. Heydenfeldt and others appeal. Affirmed.

James G. McGuire and Lent & Humphrey, all of San Francisco, for appellants. R. P. Henshall and Luther Elkins, both of San Francisco, amici curiæ. Drown, Leicester & Drown, Smith & Pringle, James A. Ballentine, Frank Shay, Charles F. Hanlon, Campbell, Metson, Drew, Oatman & MacKenzie, and Percy V. Long, City Atty., all of San Francisco, for respondents.

HENSHAW, J. This action, brought under the McEnerney Act, was commenced in August, 1900. Plaintiffs pleaded their deraignment of title through and under the decree of distribution given in the estate of Solomon Heydenfeldt, deceased, by which decree the land involved in the action was distributed to one Mangels, by him deeded to Thomas M. Osmont, the husband of Augusta C. Osmont, and upon the death of Thomas M. Osmont, intestate, the vestiture of title in them as heirs. Trial was had, findings were signed on September 17, 1909, and filed on September 18, 1909, upon which last-named day the judgment was entered. This judgment decreed title in plaintiffs to certain specific interests in the properties. Upon the morning of September 16, 1910, appellants served their notice of motion to set aside the default of all persons who did not appear in the action, and to set aside and vacate the judgment and decree, and to permit the moving parties to answer. This motion was noticed for 1:45 p. m. of the same day on which the notice was served. At that time the notice and the affidavits annexed thereto were filed, and the moving parties asked the court to grant the motion. The hearing was continued by the court to September 23d. On that day the plaintiffs presented and filed written objections and grounds of opposition. On the 19th day of December, 1910, the court denied the motion in a written opinion, stating: "I am forced to conclude that inasmuch as more than one year has elapsed since the rendition of the judgment, this court has no power to set aside the judgment, or to permit an answer to be filed by the moving parties." At the hearing of this motion at 1:45 p. m. of September 26th, not only were the plaintiffs represented, but the city and county of San Francisco and the Southern Pacific Company, both parties in interest, appeared by their attorneys in opposition to the motion. Upon objection by these attorneys that the motion should be denied, since the moving parties had neglected to file an affidavit of merits, and after the hearing had been

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 133 P.—31



continued as above stated, the moving parties, without notice to any one, appeared in court at 4 o'clock of the afternoon of the same day, and presented a new motion to the same effect, which new motion was based upon the same grounds and supported by the same affidavits, orders, papers, records, and files, with the addition of affidavits of merit made by Elizabeth A. Heydenfeldt and Elfin O. Heydenfeldt, the moving parties. We will, however, treat these two motions as one, not only because they were so treated by the trial court, but because the second motion was without notice, and was made when the previous noticed motion covering the same subject-matter had been continued by the court.

[1] The second motion, being without notice, could not properly have been decided by the court at the time when appellants asked for the court's ruling. *Brownell v. Superior Court*, 157 Cal. 703, 109 Pac. 91; *Andreen v. Andreen*, 15 Cal. App. 728, 115 Pac. 761. The court therefore properly continued the hearing, and at the hearings that were subsequently had the two motions, if they can be called two motions, were treated as merged, and were decided as one. The motion is founded upon the oft-quoted language of section 473 of the Code of Civil Procedure, providing for the opening of defaults, and permission to answer within a year in cases where the summons in the action has not been personally served on the defendant—the moving party. The circumstances and conditions under which such an application should be granted, and the showing required of the moving party, have received such thorough consideration from this court, that it is unnecessary to do more than to refer to *Gray v. Lawlor*, 151 Cal. 352, 90 Pac. 691, 12 Ann. Cas. 990, and *Boland v. All Persons*, 160 Cal. 486, 117 Pac. 547.

[2] The right of a defendant, who has not been served with summons, to have his default opened is not absolute and unconditional. To secure the enjoyment of this right he must, first, make timely motion within the year; second, establish that he has a meritorious defense; and, third, comply with such reasonable terms as the court may impose in granting his motion. When all this has been satisfactorily shown and done, the right of the moving party does become absolute, and is not lost because the court postpones its decision upon the motion until the year has elapsed.

[3] The motion under consideration was made and noticed within the year, and the learned judge construed the statute too narrowly in holding that he had lost jurisdiction to act by virtue of the fact that, upon his own initiative, the matter was submitted to him for decision, and was, in fact, decided after the lapse of the year. For it appears that the decision of the motion was sought by the moving parties upon the day when it

was made, and that the hearing, over their objection, was by the court continued to a date after the year had expired. The familiar maxim, "*Actus curiæ neminem gravabit*," here becomes applicable. There was a period in our judicial history when terms of court were recognized. It was then the established law that a judgment could not be vacated after the adjournment of the term. When, however, a motion for such a vacation was made during the term, and not decided until after the adjournment, the reasoning and the rule was that the jurisdiction was preserved by such motion or other appropriate proceeding, that the decision of the motion could be made after the adjournment of a term, and, when made, it operated by relation as of the time when the motion was made. *Carpentier v. Hart*, 5 Cal. 406; *Shaw v. McGregor*, 8 Cal. 521; *De Castro v. Richardson*, 25 Cal. 51; *Brackett v. Banegas*, 99 Cal. 623. To the motion here under consideration these principles are applicable and the decisions apposite. The motion having been timely made, it was therefore within the jurisdiction of the trial court, if the motion was properly supported in other respects, to have granted it, and the order granting would take relation nunc pro tunc as of the date not of the submission of the motion, but as of the date of the making of the motion.

[4] As to nunc pro tunc orders, it is true that certain courts in treating of them feel themselves bound by narrow, technical, and rigid rules. Such courts hold that the sole office of a nunc pro tunc order is to supply a deficiency in the record under a previous order, judgment, or decree actually given, so as to make that previous order, judgment, or decree conform to verity. Such, indeed, is an important function performed by a nunc pro tunc order. But in the view of this court it is not its sole or exclusive function. Whenever justice requires it, if no express statute prohibiting it stands in the way, the courts of this state, under the guidance of this court, have always countenanced the entry of nunc pro tunc orders to preserve substantial rights, and such orders are made nunc pro tunc not alone to supply deficiencies in the record of previous orders or judgments, but they are ordered entered nunc pro tunc when no previous judgment or order upon the matter has been made, though always, as has been said, to preserve and never to impair the rights of litigants. This principle is enunciated in such cases as *Fox v. Hale & Norcross*, 108 Cal. 478, 41 Pac. 328, and *De Leonis v. Walsh*, 140 Cal. 178, 73 Pac. 813. And that it is a favored rule is recognized by the Supreme Court of the United States, which says: "The rule established by the general concurrence of the American and English courts is, that where the delay in rendering a judgment or a decree arises from the act of the court, that is, where the delay has been caused either for its con-



venience, or by the multiplicity or press of business, either the intricacy of the questions involved, or of any other cause not attributable to the laches of the parties," but within the control of the court, "the judgment or the decree may be entered retrospectively, as of a time when it should or might have been entered up." Whether a nunc pro tunc order should be made depends upon the circumstances of the particular case. It should be granted or refused, as the justice of the cause may require. *Mitchell v. Overman*, 103 U. S. 63, 26 L. Ed. 369.

The conclusion thus reached, that it was within the jurisdiction of the court to have passed upon the merits of the motion and to have decided accordingly, does not, however, make a final disposition of this appeal. There is still to be considered whether or not cause was shown which should have impelled the court to grant the motion upon its merits. Herein it is conceded that defendants were not personally served, and indeed were not personally named as defendants in the action.

[§] It is true that the motion itself seeks not only leave to answer for the moving parties, but for all other defaulting persons and defendants, and asks also that the judgment be vacated. But the fact that the moving parties asked for greater relief than the law entitles them to is, of course, no ground for denying them any relief to which they are entitled. The court could not, upon the motion of these two persons asserting an interest in the property, open the default of all others, nor vacate the whole judgment. *McKinley v. Tuttle*, 34 Cal. 235. The most that it would be warranted in doing would be the vacating of the default and the opening of the judgment, so far as it affected the rights of the moving parties so that they might answer to the merits.

We come thus to the defense of these moving parties, which it is said is valid, meritorious, and sufficient to demand that the court should have permitted them to answer in accordance with it. That defense, as shown by the affidavits, the decree of distribution in the estate of Solomon Heydenfeldt and the other papers filed with and made a part of the motion, is this: Of the moving parties, one, Elizabeth A. Heydenfeldt, is the widow, and the other, Elfin O. Heydenfeldt, is a daughter of Solomon O. Heydenfeldt, deceased. Solomon O. Heydenfeldt died testate, leaving a widow and many children. Those children were Sunshine O. Heydenfeldt (now Sunshine O. Love), Thor O. Heydenfeldt, Oxen O. Heydenfeldt, Elfin O. Heydenfeldt, Moody O. Heydenfeldt, Solomon Heydenfeldt, Jr., Thomas O. Heydenfeldt, Frederick O. Heydenfeldt, Zella O. Hellings, and Ine O. Heydenfeldt. Litigation arose within the estate between certain of the heirs and devisees, and there was further litigation instituted by others asserting rights

against the estate. In particular, Thomas O. Heydenfeldt and Zella O. Hellings, after a partial decree of distribution had been made to others interested in the estate, secured a judgment against the estate. This judgment was embarrassing for the other heirs and devisees to meet, as they were called upon to do, out of the property which they had received under partial distribution. These difficulties and all this litigation resulted in a compromise adjustment and settlement, joined in by all of the parties in interest, and adopted, acted upon, and embodied in the decree of final distribution which the court entered. As a part of this settlement it was necessary to pay the attorneys employed in the litigation. Thomas M. Osmont had been one of those attorneys. At the hearing all the parties in interest appeared or were represented, G. H. Mangels appearing by his attorney, T. M. Osmont. To Mangels was distributed the residuum of the estate "real, personal, and mixed, of whatever kind or nature, and wherever situated, now known or hereafter known or discovered," saving and excepting certain specified property, and it was further declared in the decree that "the properties hereinabove distributed to G. H. Mangels, and particularly the residuary interest distributed to him, are out of the interests of Thomas O. Heydenfeldt and Zella O. Hellings, and in payment of the indebtedness of said Thomas O. Heydenfeldt and Zella O. Hellings to the said G. H. Mangels." Mangels was a clerk in the law office of Thomas M. Osmont, and it is alleged that the decree of distribution was made in his favor at the instance and request of Osmont. Mangels in turn conveyed all of the property which he received from the decree to Osmont. Osmont, it is asserted, was at the time and previously had been "an attorney for some of the parties interested in said estate." The names of these parties are not given, though from the fact above appearing, that the property distributed to Mangels is declared to be taken "out of the interests of Thomas O. Heydenfeldt and Zella O. Hellings, in payment of the indebtedness of Thomas O. Heydenfeldt and Zella O. Hellings to the said G. H. Mangels," it would appear that Thomas O. Heydenfeldt and Zella O. Hellings were the parties interested in the estate whom Osmont represented. It is then asserted that the property here in controversy was not inventoried, nor by description distributed as a part of the estate; that the parties entitled to the residuum of the estate did not know that it was a part of the estate, and (so proceeds the affidavit): "The parties entitled to the residue of said estate would not have consented to the arrangement, if they knew it included the property described in said complaint; and none of the parties asking to have said order set aside would have consented to such arrangement, if they knew said property was an



asset of said estate, or that it passed by said decree." It is then declared: "That it was not agreed, or even contemplated, that the property described in said complaint in this action was to be distributed to him or to said Mangels for him, as no one, other than said Osmont, knew of its existence as an asset of this estate or otherwise, and this knowledge was never communicated by him to this affiant, or to his clients, or to the parties to the annexed motion, and the knowledge which he has concerning it, although it should have been imparted to the parties, was fraudulently suppressed by him." Then follow averments to the effect that the affiants have fairly stated the facts constituting their defense to their attorneys at law, and are by them advised that they have a good and sufficient defense to the action upon the merits thereof.

[6] We think it clear that these allegations do not establish the meritorious defense which alone justifies the court in opening the default. It is true that it has been held not essential that the affidavit of merits should disclose the facts constituting the defense, if the affidavit, as here, declares that the facts constituting it have been submitted to the moving party's attorney at law, and that the moving party is by such attorney advised that he has a good and meritorious defense. *Francis v. Cox*, 33 Cal. 323; *Tuttle v. Scott*, 119 Cal. 588, 51 Pac. 849; *Rauer Law, etc., Co. v. Gilleran*, 138 Cal. 354, 71 Pac. 445. Nevertheless this substitution of the judgment of the moving party and his counsel for that of the court does not and should not apply where the facts which are declared to constitute this defense are themselves stated. This would be a most illogical extension of the rule, in that it would force the court to accept as conclusive the judgment of the moving party and his attorney upon stated facts which the court itself believes to be insufficient and inconclusive. *Freeman, Judgments*, § 108.

[7] Thus, coming to a consideration of the sufficiency of the defense, it is at once apparent that the defense is attempted to be founded upon the fraud of plaintiffs' ancestor in his dealings with the Heydenfeldt estate, and with the interest of these moving parties therein, and that it seeks to establish against the plaintiffs and in favor of the moving parties some sort of resultant trust to all or some part of the real party growing out of such fraud. But even a brief analysis of the affidavits will disclose their insufficiency for this purpose. Thus it is not made to

appear that Osmont was the attorney for either of the moving parties, and thus it is not shown that he owed them any duty of disclosure, either in law or in equity. It is asserted that the moving parties did not know that the property was a part of the estate, but it is not even alleged that Osmont himself knew this fact, the allegation herein being inferential and evasive to the effect that "no one other than said Osmont knew of its existence as an asset of the estate." It is true that it is asserted that Osmont did not communicate this knowledge to the affiants or to his clients, but so far as his clients are concerned—and they are the only ones who would have a right to complain—they are not complaining. It is alleged that the knowledge, which only by inference can it be said it is asserted that Osmont possessed, "should have been imparted to all the parties and was fraudulently suppressed by him." But this is manifestly the mere conclusion of the affiant, and is a conclusion which is not warranted by the facts stated. And, finally, it is to be remembered that the decree of distribution was entered in 1901. The cause of action to set this aside for fraud then immediately arose, and was barred in three years from that date. The right of action upon the fraud of Osmont in procuring the decree, to the end that he might be charged as trustee, is itself barred in three years after the discovery of the fraud.

[8] The right of a party to invoke the aid of a court of equity for relief against fraud after the expiration of three years from the time when the fraud was committed is an exception to the general statute, and cannot be asserted unless the plaintiff brings himself within the terms of the exception. This can only be done by a showing that he did not discover the facts constituting the fraud until within the three years immediately prior to the commencement of his action. This showing is an essential element of the right of action, and must be affirmatively pleaded in order to authorize the court to entertain the action. *Sublette v. Tinney*, 9 Cal. 423; *Watkins v. Bryant*, 91 Cal. 492, 27 Pac. 775; *Castro v. Gell*, 110 Cal. 292, 42 Pac. 804, 52 Am. St. Rep. 84; *Lady Washington C. Co. v. Wood*, 113 Cal. 482, 45 Pac. 809. No such showing is here made.

It follows herefrom that the court's order refusing to vacate appellants' default was proper, and it is therefore affirmed.

We concur: LORIGAN, J.; MELVIN, J.



(165 Cal. 687)

**PACIFIC COAST SAVINGS SOCIETY v. STURDEVANT et al. (S. F. 6,005.)**

(Supreme Court of California. June 21, 1913.)

**1. BUILDING AND LOAN ASSOCIATIONS (§ 42\*)  
—INSOLVENCY—RIGHTS OF MEMBERS—DISTRIBUTION PRO RATA.**

A building and loan association issued class A, ordinary installment shares, on which monthly installments of not less than 60 cents a share were to be paid by the stockholder, the face value of the stock to become payable in cash when the amount paid in and the profit should equal \$100; class B prepaid shares upon which \$50 had been paid in advance in lieu of monthly installments drawing semiannual dividends payable when the face value of the payments and profits equaled \$100; class C stock issued to borrowers on mortgage security and maturing as other installment stock; class E installment stock, a class of fully paid-up interest coupon shares, payable on maturity of the last coupon and a class of stock permitting shareholders to make savings payments to the society credited on account of a certificate maturing when the payment and interest equaled \$100. The by-laws authorized withdrawal by investing members after one year upon 60 days notice, if required, such applications for withdrawal to be paid in the order filed, and matured shares to be paid in the order of maturity. Some class A stock had been entered for withdrawal prior to the association's adjudicated insolvency. *Held*, in an action by the trustees to determine the rights of the various claimants to the residue of its funds, that, in the absence of any by-law giving any of the stockholders a priority, the entries for withdrawal by holders of matured stock did not give them priority as creditors, and that the claims of all classes of stockholders represented by the parties defendant were entitled to share pro rata in the balance of the funds.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 80, 104-107; Dec. Dig. § 42.\*]

**2. BUILDING AND LOAN ASSOCIATIONS (§ 42\*)  
—INSOLVENCY—RIGHTS OF STOCKHOLDERS.**

Where the by-laws of a building and loan association did not give the holders of matured shares entitled to be paid on withdrawal applications any priority over other shareholders, the provision that such stock should be paid in the order of maturity merely declared the restrictive rights among themselves of the various holders of matured stock, and did not create a preference in the distribution of assets where the association was insolvent; the right of withdrawal being provided for in the by-laws only as to a going concern.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 80, 104-107; Dec. Dig. § 42.\*]

**3. BUILDING AND LOAN ASSOCIATIONS (§ 42\*)  
—INSOLVENCY—PRESUMPTIONS.**

Although solvency of a company is presumed, such presumption should not be indulged to overthrow a judgment, or to withdraw a case from the operation of the general rule of equality of distribution, and holders of matured stock in a building and loan association claiming the status of creditors and a priority over other classes of stockholders have the burden of showing that their status has been changed to that of a creditor by showing that the corporation was not insolvent when the alleged right of payment accrued, and, in the absence of such proof, it will be presumed in support of the adjudication of insolvency judgment that

the association was insolvent when such shareholders entered their shares for withdrawal.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 80, 104-107; Dec. Dig. § 42.\*]

**4. BUILDING AND LOAN ASSOCIATIONS (§ 42\*)  
—INSOLVENCY—DISTRIBUTION OF ASSETS—RIGHTS OF MEMBERS NOT PARTIES.**

In a suit by the trustees of an insolvent building and loan association for a decree determining the rights of the various classes of stockholders in the residue of its funds, making persons belonging to each class of stockholders parties defendant, but, on account of the destruction of its books, not attempting to bring in all the stockholders, those stockholders not made parties were also entitled to participate in the distribution.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 80, 104-107; Dec. Dig. § 42.\*]

Department 1. Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Suit by the Pacific Coast Savings Society by Barclay Henley and others, as directors of said corporation and its trustees in liquidation, against Nellie Sturdevant, D. E. Lane, and others with cross-complaint by defendants. Decree for defendants, and plaintiff and defendants Lane and others appeal. Affirmed.

Samuel Rosenheim and Barclay Henley, both of San Francisco, for appellants. George F. Hatton and Hartley F. Peart, both of San Francisco, Selvage & Cutten, of Eureka, Henry French, of San José, Wm. Hoff Cook, of San Francisco, Reed, Black & Reed, of Oakland, Bernard Silverstein and Thomas M. Diviny, both of San Francisco, and E. C. Farnsworth, of Visalia, for respondents.

**SLOSS, J.** The Pacific Coast Savings Society was incorporated in January, 1891. Its general purposes, as defined in the articles of incorporation, are described in the opinion of this court in the recent case of Groover v. Pacific Coast Savings Society, 127 Pac. 495. In the consideration of the questions presented by the appeals now before us, it may be assumed that the society is a building and loan association, as it has been treated by all of the parties to the litigation.

After its organization the society adopted a code of by-laws and commenced to transact business. On the 19th of February, 1905, the Attorney General commenced a suit in the name of the people against the society as defendant, and on the 1st day of March, 1905, a judgment was entered adjudging that the society was insolvent, and enjoining it from the further transaction of business. Ever since the entry of such judgment, which has become final, Barclay Henley and four others have been acting as directors and trustees in liquidation of such society.

The present action was instituted by said

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



trustees in the name of the society for the purpose of obtaining a decree determining the rights of the various claimants to the residue of the funds of the society remaining in the hands of said trustees. The books of the society had been destroyed in the conflagration of April, 1906, and the trustees were not, at the time of instituting their action, in a position to name all of the stockholders and others who might be interested in the distribution of the assets. They accordingly selected a certain number of persons belonging to each of the various classes affected, and sought in this action to have a determination of the rights of each class. The defendants appeared and filed their answers and cross-complaints, and the action was tried before the court. The court made its findings, and upon these reached the conclusion of law that claims of all classes represented by the various parties defendant were entitled to share pro rata in the balance remaining in the hands of the trustees. Judgment was entered accordingly. From this judgment the plaintiff appeals. An appeal was also taken by the defendants D. E. Lane and wife, J. M. Blodgett, A. M. Williams, and Daisy Farnsworth.

It appears that at the time of the judgment declaring the insolvency of the society certain mortgages and other property of the society were held by various creditors as security for their advances. The trustees have realized upon these securities, and out of the proceeds have paid the secured creditors. These creditors were unquestionably entitled to priority in the distribution of the funds resulting from the sale of their securities, and no question as to their rights now arises. In one of the briefs an attack is made upon the payment of these secured creditors, but such attack is not based upon anything appearing in the pleadings or the proof. The secured creditors were not made parties to this action, and we could not here consider any attack upon the proceedings resulting in the payment of their claims.

The questions before us have to do solely with the rights of the persons who dealt with the society as stockholders. Under the by-laws shares of stock were divided into five classes: Class A, ordinary installment shares; class B, prepaid shares; class D, definite contract loan shares; class E, installment shares; and a fifth class, not designated by any letter, but described in the by-laws as "fully paid-up coupon shares." Class A stock was the ordinary installment stock of a building and loan association. Under the by-laws monthly installments of not less than 60 cents a share were to be paid by the stockholders, and the face value of the stock was to become payable to the stockholder in cash when the amount paid in, and the pro rata share of profits in excess of expenses and membership fees and any losses which might occur should equal \$100. Class E stock

was the same, except that the monthly installments were to be not less than 50 cents a share instead of 60 cents as in the case of the class A stock. Class B stock was stock upon which \$50 per share was paid in advance in lieu of monthly installments. Dividends were payable on this stock semiannually at the rate of 5 per cent. per annum on the \$50 paid, and the stock was to mature and to be payable at the face value when the amount paid in, together with the profits in excess of dividends or advances and its portion of the losses, expenses and membership fees, should equal \$100. Class D stock was installment stock, maturing like other installment stock, but was to be issued only to borrowers on mortgage security. The "fully paid-up coupon shares" were issued upon payment of the face amount in full. Such shares had attached to them coupon warrants for interest, and the holder was entitled to receive the face value of his certificate, together with any profits accrued, upon the maturity of the last coupon. The society also issued, as the court finds, certificates known as class F stock, permitting the shareholder to make savings payments to the society, and have the same credited on account of the certificate, such certificate to mature when the payments made, together with earnings and interest, should equal \$100.

Section 13 of the by-laws authorized withdrawals by investing members after, one year from date of first payment, upon 60 days' notice, if such notice was required by the board of directors. Applications to withdraw were to be filed in the order received, and paid in the order filed. Matured shares were to be paid in the order of priority of maturity.

[1] The balance of money remaining in the hands of the trustees, after the payment of the claims of the preferred creditors was not sufficient to pay the demands of all the stockholders in full. Indeed, it was sufficient to pay only a small percentage of the claims. Among the claimants were holders of class A stock, of class B stock, of class E stock, of class F stock, and of coupon stock. None of this stock had matured except a portion of the class A stock, and of this matured class A stock a portion had matured and become payable prior to the 1st day of January, 1905, and demand for the payment thereof had been made. The appellants Lane, Blodgett, Williams, and Farnsworth are holders of such matured class A stock, which had been entered for withdrawal prior to the judgment declaring the insolvency of the society. These appellants claim that by the maturity of their stock, coupled with their demand for payment, their status had been changed from that of stockholders to that of creditors of the society, and that they are therefore entitled to priority over the holders of other stock in the distribution of the



assets. It is not to be doubted that holders of stock of the other classes, none of which had matured, all stood on an equal basis and should share in the proceeds pro rata. Endlich on Building Associations (2d Ed.) § 514. There was nothing in the by-laws giving any of such stockholders a priority over any other and the general rule of equality of distribution furnishes the guide for the division of the assets among them.

[1] But were the holders of the matured class A stock which had been entered for withdrawal prior to the judgment declaring the corporation insolvent in any better position than other stockholders? In other words, did they, by demanding payment of the value of their matured shares, cease to be stockholders and become creditors? The authorities on this question are somewhat in conflict, but we think the better view is that followed by the court below, namely, that when the corporation becomes insolvent all stockholders, including those who have given notice, pursuant to the by-laws, of withdrawal, stand upon an equal footing. The theory upon which this view is to be sustained is well stated in the following quotation from Endlich on Building Associations (2d Ed.) § 514: "The truth is that there is implied, in the very essence of the building association scheme, an agreement between the members of every association, in the light of which all other agreements and all rules and by-laws must be read, and to which they must be conformed; and that is the agreement that all burdens shall be equally borne, as well as all profits equally shared—that the whole enterprise shall be conducted and the rights and obligations of the participants in it shall be adjusted on a basis of strict mutuality, equality, and fairness. To permit one member, or one set of members, to be paid in full at the expense of others who get less, is not to carry out that scheme or agreement, unless there is something which gives the former an equity superior to the latter, whereby they have a better and stronger claim upon the property of the association. Where one has subscribed to and paid up stock upon a distinct understanding that it is to be preferred over others that have paid less, there is such a superior equity. But there is nothing in the mere fact that one has given a certain number of days' notice that he wants his money, whereby he is, ipso facto, invested with an equity to receive it superior to that of one who has not given such notice. There is therefore nothing to counterbalance, much less outweigh, the inequity, of permitting him to take the fund belonging to his fellows in order to pay himself." And the learned author goes on to quote with approval the following declaration of the Supreme Court of Pennsylvania in *Christian's Appeal*, 102 Pa. 184, 189: "When a building association has failed to fulfill the objects of its creation and has become hopelessly in-

solvent \* \* \* after expenses incident to the administration of its assets are deducted, the general creditors, if any, should be first paid in full, and the residue of the funds should be distributed, pro rata, among those whose claims are based upon stock of the association, whether they have withdrawn and hold orders for the withdrawal value thereof or not. Both classes are equally meritorious, and in marshaling the assets neither is entitled to priority over the other. The claims of each are alike based upon their relation to the association as members thereof." And, concluding the discussion, Mr. Endlich goes on to say: "It is but a logical carrying out of this principle that in cases of insolvency of associations in which a question of distribution can arise between holders of matured and holders of unmatured stock—e. g., in a serial association—no preference is to be accorded to the former, but both classes are to share pro rata in what is left after satisfying outside creditors, other preferred claimants being out of the way. In short, the order prescribed by the by-laws of a building association for the payment of money out of its treasury to the different classes of holders of ordinary stock in the regular course of its business does not apply to the distribution of its assets when insolvent. \* \* \* The basis of the distribution in such cases is not the rule of the association expressed in its by-laws, standing alone, but the supreme rule of equality and mutuality, and the controlling inquiry is the amount paid in by the member, not the date of the issue of his stock, nor that of its maturity or any notice to withdraw."

While these views are not universally held by the courts, they are supported by several well-considered cases. *Criswell's Appeal*, 100 Pa. 488; *Christian's Appeal*, supra; *Columbus B. & L. Ass'n v. Kriete*, 192 Ill. 128, 61 N. E. 510; *Mutual Union B. & L. Association v. Stolz*, 93 Ill. App. 164; *Coltrane v. Ass'n (C. C.)* 110 Fed. 281; *Hohenshell v. Home B. & L. Ass'n*, 140 Mo. 566, 41 S. W. 948; *Rabbits v. Wilcoxon*, 103 Iowa, 35, 72 N. W. 306, 38 L. R. A. 183, 64 Am. St. Rep. 152; *Leahy v. Natl. B. & L. Ass'n*, 100 Wis. 555, 76 N. W. 625, 69 Am. St. Rep. 945. Some of these cases dealt with the claims of holders of matured stock, some with those of holders of fully prepaid stock. Notice of withdrawal had not been given in all cases. But, where such notice had been given, it was held that no priority of right accrued to the stockholder in case of actual insolvency, even though his notice had been given before he had knowledge of the insolvency or before proceedings had actually been taken.

[2] The by-laws, in the case at bar, did not assume to give to the holders of matured shares any priority over other shareholders. All had a right to be paid upon withdrawal. The provision that "matured shares shall be



paid in the order of maturity" merely declares the respective rights, among themselves, of various holders of matured stock. But, if the clause may be given a broader meaning, it is not to be construed as creating a preference in the distribution of assets where the association is insolvent. The rights of withdrawal "are provided for with respect to going concerns only." *Reddick v. U. S. B. & L. Ass'n*, 106 Ky. 94, 49 S. W. 1075; *Hohenshell v. Home B. & L. Ass'n*, supra.

[3] It is contended that the notices given by Lane, Blodgett, Williams, and Farnsworth were given not only before the judgment declaring the society to be insolvent, but before in fact there was any insolvency. There is, however, no finding to this effect, and the pleadings of these appellants do not contain any such allegation. While it may be true as a general proposition that solvency is presumed, we think no such presumption should be indulged to overthrow a judgment or to withdraw a case from the operation of the general rule of equality of distribution. Assuming that a notice of withdrawal given and accepted while the society is actually solvent gives stockholders so withdrawing the status of creditors after the lapse of the time required for notice, we think the burden is upon a stockholder seeking to show that his status has been changed to that of a creditor to allege and prove the essential fact that the corporation, admittedly insolvent at the time the distribution is sought, was not insolvent when the alleged right of payment accrued. In the absence of a finding on this point or of an issue framed to invoke such finding, it must be presumed, in support of the judgment, that the association was insolvent when these appellants entered their matured shares for withdrawal, and that they accordingly stand in the same position as other shareholders. In this view the case is not distinguishable from *Hohenshell v. Home B. & L. Ass'n*, supra, *Criswell's Appeal*, supra, and *Christian's Appeal*, supra, and the court below made an equitable adjudication in ordering the remaining assets distributed pro rata among stockholders of all classes.

[4] It is suggested in one of the briefs that the distribution should be only among these stockholders who appeared in the action. But under the circumstances of this case such distribution would work a manifest injustice. On account of the destruction of the books, the trustees, in instituting the action, could not and did not undertake to bring in all the stockholders. The professed purpose of the suit was to obtain a decree declaring the rights of the various classes. The action was brought and adjudicated upon this theory, and the court would not have been justified in excluding from participation stockholders who had not been made parties

and who had not been called upon to assert their rights in this proceeding.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

(165 Cal. 688)

R. H. HERRON CO. v. SHAW et al.  
(L. A. 2,983.)

(Supreme Court of California. June 14, 1913.  
Rehearing Denied July 14, 1913.)

1. CORPORATIONS (§ 232\*)—STOCKHOLDERS' LIABILITY TO CREDITORS—AMOUNT OF UNPAID SUBSCRIPTIONS.

Where the stock of a corporation is issued without being fully paid up, the amount remaining unpaid is deemed to be money due to the corporation from the stockholders, which creditors, on its insolvency, may in equity have collected and applied upon their debts; and the fact that the stock is issued as fully paid up does not estop them, but in such case they may prove the fact and recover sufficient of the unpaid amount to satisfy their debts.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 879, 880, 883, 884, 937; Dec. Dig. § 232.\*]

2. CORPORATIONS (§ 99\*)—ISSUE OF STOCK—EXCHANGE FOR PROPERTY—CONCLUSIVENESS OF TRANSACTION.

Where stock of a corporation is issued in exchange for labor, services, or specific property, the transaction is conclusive so far as other stockholders are concerned, unless it is fraudulent as to them in purpose or in effect.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 444-446; Dec. Dig. § 99.\*]

3. CORPORATIONS (§ 232\*)—STOCKHOLDERS' LIABILITY TO CREDITORS—STOCK ISSUED ON EXCESSIVE VALUATION OF PROPERTY.

Where stock of a corporation is issued as fully paid in exchange for property at a known overvaluation, the creditors of the corporation, on its insolvency, may recover against each of such stockholders in a sum equal to the amount unpaid upon his subscription, not, however, exceeding the debts; the fact that the directors honestly believed that the market value of the property received would eventually exceed the stock issued therefor does not relieve the stockholders from such liability.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 879, 880, 883, 884, 937; Dec. Dig. § 232.\*]

In Bank. Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by the R. H. Herron Company against W. P. Shaw and others. Judgment for defendants, and plaintiff appeals. Reversed.

O'Melveny, Stevens & Millikin and Walter K. Tuller, all of Los Angeles, for appellant. Davis & Rush, Mark H. Slosson, Leonard B. Slosson, and Williams, Goudge & Chandler, all of Los Angeles, for respondents.

SHAW, J. This is an action against the several defendants, as stockholders of a corporation named Kern River Mining & Power Company, to recover a separate judgment against each of them in a sum equal to the amount unpaid upon his subscription for the stock of said company held by him, not

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



exceeding, however, the debt which it is alleged is due from said company to the plaintiff. The court below made its findings and thereupon rendered judgment for the defendants, from which plaintiff appeals.

The complaint is in three counts. Each count is based upon a judgment recovered by plaintiff against said Kern River Mining & Power Company. The first count is upon a judgment for \$2,380, rendered by the superior court of Los Angeles county on September 16, 1910. Two of the defendants in their answers aver that an appeal from said judgment is pending in the Supreme Court of California. Upon the hearing it was stipulated that upon said appeal said judgment had been reversed on the ground that no valid service of the summons had been made. We do not think this reversal can affect our decision on the present appeal. Plaintiff's standing as a creditor upon the other two judgments is admitted, and it is entitled, by virtue thereof, to contest the judgment below by this appeal. The question presented by the record affects all the debts alike. If a reversal of the case at bar is necessary, the appellant may amend the first count or file a supplemental pleading relating thereto, as the facts may warrant and as he may be advised.

The case turns upon the question whether or not the stock issued to and held by the several defendants was fully paid up. The authorized capital stock of the Kern River Mining & Power Company was \$1,000,000, divided into 1,000,000 shares of \$1 each. Of this the defendants held in the aggregate 537,635 shares. The complaint alleges that they had paid thereon only 10 cents per share. On this point the court found, in effect, that certain persons, not named, owned certain water rights, mining claims, and mining machinery; that solely in consideration of the transfer thereof by said owners to said company it issued to said owners 695,000 of its shares as fully paid nonassessable stock; that nothing further has ever been paid for or on account of said shares; that the market value of said property did not then exceed \$69,500; that the board of directors of said corporation did not then believe that the market value of said property was \$695,000, but did believe that it exceeded \$69,500 and believed that the property purchased could be developed to a value in excess of \$695,000; and that said directors "in issuing said stock for said property acted in good faith and in the honest belief that said property could and would be developed so that the said property would have a market value in excess of \$695,000." The stock owned by the defendants is a part of the \$695,000 shares above referred to.

[1] Where the stock of a corporation is issued without being fully paid up, the amount remaining unpaid is, so far as its creditors are concerned, deemed to be money due to the corporation from the stockholders.

Such creditor, if the corporation becomes insolvent, may apply in equity, as plaintiff sought to do here, to have the fund so deemed to be due to the corporation collected and applied upon his debt. The fact that the stock is issued as fully paid up does not estop or bind the creditor, and in such a case, if it is not fully paid up, the creditor may prove the fact and recover enough of the portion that is unpaid to satisfy his debt. No subterfuge or device by which it is made to appear as fully paid up when it is not will enable the stockholder to avoid this liability. Thus in *Vermont M. Co. v. Declez Granite Co.*, 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143, the par value of the stock was \$100,000, and it had all been issued to the stockholders as fully paid stock on payment of only \$20,000. This was done without any intent to defraud creditors. The case holds that the balance of \$80,000 not paid was a fund for the benefit of creditors, which they might collect from the stockholders if the corporation became insolvent. The court said: "The question concerns creditors only. As to them the corporation is presumed to have sought credit based upon its supposed capital of \$100,000 actually paid in or due from its stockholders. Public policy requires that the fact whether a particular creditor did trust the corporation on that basis should not be inquired into. The Constitution and laws require commercial corporations to have a capital stock, the amount of which shall be stated in the articles, and that this can be had of the corporation only for value." The language of the Constitution referred to is that stock can be issued only for "money paid, labor done, or property actually received." Art. 12, § 11.

It is proper to add that in the case just cited it was not claimed that the creditors, at the time of giving credit, knew that the stock had been issued at a cash price less than the par value. The part of the quotation declaring that "public policy requires that the fact whether a particular creditor did trust the corporation on that basis (that the par value had been paid) should not be inquired into" was not necessary to the decision of the case. The fact that par value had not been paid was admitted. The basis of the doctrine is that credit is given in reliance on the presumption that full par value has been received by the corporation for the stock it has issued as fully paid. We would not here say that this presumption is in all cases conclusive. Cases may arise in which the corporation, at the time of obtaining the credit, made full disclosure to the creditor, and the credit has been given with full knowledge by the creditor of the difference between the par value of the stock and the value of the property received for it. If such facts are properly pleaded and proved by the stockholder, we do not mean to declare that it might not be a complete defense to a suit by the creditor to recover such differ-



ence. Nothing of the sort appears here, either in the pleadings or findings, and it is unnecessary to consider the question.

The Vermont Marble Co. Case establishes the rule in this state as to creditor's rights, where the stock is an original issue and is issued as paid up at a price substantially less than the par value, where the price is paid in money.

[2] Where it is issued in exchange for labor, services, or specific property, the rule, so far as other stockholders are concerned, seems to be that the transaction is conclusive unless it is fraudulent as to them in purpose or in effect. With regard to creditors, we know of no decision in this state. In some jurisdictions, where the value of the property taken in exchange is less than the par value of the stock, it appears to be the rule that creditors can enforce their claims against stockholders to the extent of the difference between the par value of the stock and the actual market value of the property; the value being taken as of the time of the exchange, and the absence of fraud being regarded as immaterial. *Van Cleave v. Berkey*, 143 Mo. 109, 44 S. W. 743, 42 L. R. A. 593; *Cole v. Adams*, 19 Tex. Civ. App. 512, 49 S. W. 1052; *Libby v. Tobey*, 82 Me. 404, 19 Atl. 904; *Wetherbee v. Baker*, 35 N. J. Eq. 501. In other states if the exchange is made in good faith, both parties believing that the property is really worth as much as the par value of the stock taken in exchange for it, the transaction is valid as against the creditors; but if there is fraud, or bad faith, or if the property is taken at a valuation known or believed by the parties to be in excess of its real market value, the creditors may impeach the transaction and obtain the benefit of the difference between the par value of the stock and the reasonable value of the property at the time of the exchange. Where there is no fraud or bad faith but the property is knowingly overvalued, it is intimated in some of the cases that the stockholders would be liable only for the difference between the actual value of the property as known to them and the par value of the stock. *Douglass v. Ireland*, 73 N. Y. 100; *National Tube W. Co. v. Giffillan*, 124 N. Y. 302, 26 N. E. 538; *Clayton v. Ore K. Co.*, 109 N. C. 389, 14 S. E. 36; *Elyton Land Co. v. Birmingham W. & E. Co.*, 92 Ala. 407, 9 South. 129, 12 L. R. A. 307, 25 Am. St. Rep. 65; *Sprague v. Nat. Bank*, 172 Ill. 166, 50 N. E. 19, 42 L. R. A. 606, 64 Am. St. Rep. 17; *Young v. Erie I. Co.*, 65 Mich. 122, 31 N. W. 814; *Medler v. Hotel Co.*, 6 N. M. 345, 28 Pac. 551; *Allen v. Grant*, 122 Ga. 557, 50 S. E. 494; *Kelly v. Clark*, 21 Mont. 291, 53 Pac. 959, 42 L. R. A. 621, 69 Am. St. Rep. 668; *Gilkie & Anson Co. v. Dawson Town & Gas Co.*, 46 Neb. 333, 64 N. W. 978, 1097; *Osgood v. King*, 42 Iowa, 478. There are also cases where the fact of a known overvaluation was not established

or conceded, and the court, in discussing the effect of evidence of mere overvaluation as proof of fraud, declares that if the real value is substantial the overvaluation is not conclusive proof of fraud and does not overthrow a finding that there was no fraud or fraudulent intent.

[3] These cases do not affect the rule to be applied where the parties were at the time aware of the overvaluation. Parties may honestly mistake the value of property, and, if they do so, proof at the trial that they were mistaken, without proof, direct or circumstantial, that it was not an innocent mistake, will not render the stockholders liable under the rule we are now considering.

There are other decisions in some of the states holding that a creditor cannot rely on the issued capital stock of a corporation as evidence of its solvency, but must inquire as to its assets the same as when he is giving credit to a natural person, and therefore that an exchange of paid-up stock at less than par value for property does not make the stockholder liable for the difference, unless it is done to defraud creditors. We think the case of *Vermont Marble Co. v. Declez*, supra, establishes the opposite rule in this state, and hence we do not discuss those decisions.

On principle, we perceive no essential difference between an exchange of full-paid stock for property at a known overvaluation and a sale of such stock for money at less than par value, such as was considered in *Vermont M. Co. v. Declez*, supra. If, for example, the parties know or believe that certain property is actually worth only \$20,000, but nevertheless agree to exchange it for corporate stock of the par value of \$100,000, to be issued and considered as fully paid up, in what respect is the transaction less injurious to creditors than in a case of sale of full-paid stock of the par value of \$100,000 for \$20,000 in lawful money? Manifestly they are equally injurious and on principle each should be equally susceptible to impeachment in a court of equity for the benefit of the creditors. This being so, it is decisive of the case at bar. The parties here believed that the property was worth less than \$695,000, by which we understand a substantial amount less, yet they exchanged it for 695,000 shares of paid-up capital stock at \$1 a share. The numerous cases last cited hold that this is, as to the creditors, constructively fraudulent; that is, it is an evasion of the law which the law visits with the same consequences as if it were intentionally fraudulent.

The further fact found by the court that the directors acted in good faith and honestly believed that the property could and would be developed so that its market value would eventually exceed \$695,000 does not relieve or excuse the stockholders from such liability. As appellant's counsel well says, to hold that it would have that effect would be to sanction an arrangement to "throw the



risk of the venture from the shoulders of the stockholders to those of the creditors." It is the value of the property in the condition it is in at the time of the exchange, the value as known to the parties and as they honestly believe it to be, that determines the liability, at least where there is no subsequent increase in value nor any intentional fraud. The parties may believe that the property will eventually rise to a value far above that at which it is exchanged, and they may willingly accept the hazard in view of the expected gain, but they have no right to demand that the creditor shall share the risk with them, in effect become their partner with no share in the profits, and lose his recourse on them if their speculation proves a bad one. The case cannot be distinguished in principle from *Vermont M. Co. v. Declez*, where stock of the par value of \$100,000 was sold for less than par in money. The parties may believe, and doubtless frequently do believe, that the money can be invested in property which can be developed so as to make it worth the par value of the stock. Whether the stock is invested in the property by direct exchange, or by first selling it for money and then buying the property from third persons therewith, the effect is the same and the same principle should control. The creditor is presumed to rely on the fact that the company has received, or will receive, full par value for the stock issued. He is not a partner with the stockholder; he cannot participate in the profits of their venture; and he should not be required to assume their burden or hazard.

We have alluded to the rule that as to other stockholders the transaction cannot be impeached except for fraud or mistake. *Garterson v. Pacific C. Co.*, 146 Cal. 184, 79 Pac. 838, is an example of this class of cases. It is obvious that passages from the opinions in cases involving this rule are not applicable to suits by a creditor and are of no value in the decision of this case.

Respondent cites the decision of the United States Circuit Court in the *South Mountain C. M. Co. Case*, 7 Sawy. 30, 5 Fed. 403; *Id.*, 8 Sawy. 336, 14 Fed. 347, to the effect that the rule as stated in *Vermont M. Co. v. Declez* does not apply to corporations engaged in mining. The *South Mountain Case* is based on the assumed practice of mining companies to issue full-paid stock in exchange for mining claims, wholly undeveloped and of a value unknown and prospective only, at an estimated value far above their actual or known value and fixed by mere guess as to their probable value when developed. This practice, it is said, is so universal and so well known that no creditor can be supposed to have been ignorant of it or to have given credit on the belief that the issued stock represented the actual or real value of the assets, and that creditors of such companies must be presumed to have looked to and re-

lied upon the property of the company only in giving it credit. In the *Vermont Co. Case* the court said: "We are not inclined to extend the doctrine of *In re South Mountain Min. Co.*, 7 Sawy. 30, 5 Fed. 403, to this case, even if we were prepared to indorse the principle there announced. This is not such a mining corporation as is there described." This remark is applicable here. The name of the company is *Kern River Mining & Power Company*. The property transferred by the stock is described as "certain water rights, mining claims, and mining machinery." There is nothing in the record to show whether the company is or was engaged in or intended to engage in mining for precious metals, or whether it was intending to engage in using water to develop power. If the rule of the *South Mountain Case* is to be followed by this court in cases to which it is properly applicable, we think it should be done only where it appears from the record that the company concerned was a mining corporation of the class described in that case and that the property exchanged was of the kind there referred to.

We deem it proper to add that it is not expressly stated anywhere in the record that the defendants were parties to the exchange of the property for the stock mentioned, or that they were aware of the overvaluation when they bought the stock. The argument of both parties is made upon the theory that they either knew of the overvaluation or that they were chargeable to the same extent as if they did know. We have therefore not considered the rule applicable to an innocent purchaser of stock, or to a case where the directors of the corporation knew or believed that the property was worth less than the par value of the stock exchanged for it but the purchaser of the stock honestly believed that the values of the stock and of the property were equal.

The judgment is reversed.

We concur: HENSHAW, J.; LORIGAN, J.; MELVIN, J.; SLOSS, J.

(22 Cal. App. 99)

NEEDEL v. COFFEE. (Civ. 1,263.)

(District Court of Appeal, Second District, California. May 15, 1913. Rehearing Denied June 14, 1913; Denied by Supreme Court July 14, 1913.)

1. CONTRACTS (§ 279\*)—TENDER OF PERFORMANCE—SUFFICIENCY—"OFFER IN WRITING."

Where a purchaser, procuring title to real estate from a corporation under an agreement binding a third person to return the price with interest if the purchaser became dissatisfied, merely demanded of the third person the payment of the purchase money, and tendered to him the deed of conveyance and certificate of title received from the corporation, there was no "offer in writing," within Code Civ. Proc. § 2074, declaring that an offer in writing to pay a particular sum or deliver a written instrument is, if not accepted, equivalent to the actual production and tender of the money or in-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



strument, and he could not recover the money paid.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1233-1248; Dec. Dig. § 279.\*]

## 2. APPEAL AND ERROR (§ 886\*)—FINDINGS ON APPEAL.

The court, on appeal on the judgment roll, may not incorporate within the findings a material fact not found by the trial court, though the failure to find was the result of carelessness in preparing the findings.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 886.\*]

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by E. C. Needels against H. W. Coffee. From a judgment for plaintiff, defendant appeals. Reversed, and cause remanded.

A. J. Sberer, Arthur G. Baker, and Edward Winterer, all of Los Angeles, for appellant. Tanner, Taft & Odell, of Los Angeles, for respondent.

ALLEN, P. J. There is but one question presented upon this appeal possessing any merit, and that relates to the sufficiency of a finding of the court with reference to an offer of reconveyance before suit. Defendant had agreed in writing that if plaintiff was dissatisfied with the purchase of certain real estate, the title to which defendant had procured a certain corporation known as the Eucalyptus Timber Company to convey to plaintiff, that he (defendant) would return the purchase money, with interest, one year from the date of the contract. Due notification of dissatisfaction was given and found by the court.

[1] An issue was presented in the pleadings as to an offer of reconveyance on the part of plaintiff on or before the date fixed for repayment, or at any other date or time. The finding of the court is: "That September 10, 1911, was Sunday, and on September 11, 1911, plaintiff formally demanded of the defendant the payment of said money in accordance with said contract, and tendered to defendant the deed of conveyance and certificate of title received by him from the Eucalyptus Timber Company; that defendant did not object to said tender or the manner thereof, but has neglected to repay the said amount; that plaintiff has tendered in said court said deed and certificate of title." There was no offer in writing found sufficient under section 2074 of the Code of Civil Procedure. The tender of the title papers therefore received by plaintiff had no effect, and could not divest plaintiff of title, and under the finding plaintiff occupied the position of retaining title to that which he purchased and yet seeking to recover the money paid therefor. This he could not do.

[2] It may be and probably is true that the failure to find the offer of reconveyance was the result of carelessness or indifference in preparing the findings, but we cannot, upon an appeal upon the judgment roll, incorpo-

rate within the findings a material fact not found by the trial court. As the findings appear in the record, they are insufficient to support the judgment.

The judgment is reversed and cause remanded.

We concur: JAMES, J.; SHAW, J.

(22 Cal. App. 81)

JONES v. BAY CITIES ELECTRIC CO.  
et al. (Civ. 1,068.)

(District Court of Appeal, Third District, California. May 13, 1913.)

## 1. CONTRACTS (§ 28\*)—ACTIONS — CONSTRUCTION.

In an action for the rescission of a contract, evidence held to show that two contracts were entered into simultaneously; the same consideration being given in support of both.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 133-140, 1755, 1782-1784, 1785½, 1820, 1821; Dec. Dig. § 28.\*]

## 2. TRIAL (§ 165\*)—NONSUIT—INFERENCES.

Upon a motion for nonsuit, plaintiff's evidence must be accepted as true.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.\*]

## 3. CONTRACTS (§ 273\*)—RESCISSION — CONDITIONS PRECEDENT.

A party cannot rescind a contract unless he can and does restore the other party to the condition he would have been in but for the contract; and hence, where plaintiff purchased from defendant a garage business and also a demonstrating automobile, together with an exclusive automobile agency, there apparently being two contracts, plaintiff, having been given possession of the premises in which the garage business was carried on, cannot rescind the contract as to the agency and recover back the purchase price, without returning to defendant the garage business and possession of the premises wherein it was carried on.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1194; Dec. Dig. § 273.\*]

Appeal from Superior Court, Alameda County; J. D. Murphy, Judge.

Action by Edward L. Jones against the Bay Cities Electric Company and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Henry Conlin, W. H. Chamberlain, and Walter R. Bacon, all of San Francisco, for appellant. Ezra W. Decoto, of Oakland, for respondents.

CHIPMAN, P. J. This is an action for the rescission of a contract and for damages for its breach. Defendants had judgment on motion for a nonsuit.

The following facts are alleged in the complaint: That, on July 20, 1910, plaintiff and defendant, Bay Cities Electric Company (hereinafter referred to as Bay Cities Company) entered into the contract attached to the complaint as Exhibit A; that about October 9, 1910, defendant United Electric Vehicle Company (hereinafter referred to as the United Company) was incorporated and thereafter the Bay Cities Company transferred to its codefendant all its property of whatever nature, including all its interest in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the contracts made and entered into by the Bay Cities Company and plaintiff, and the said United Company "carried on and conducted with plaintiff all the business and transactions done and had with plaintiff under and pursuant to said contracts and agreements"; that, at the time of making said contract Exhibit A, said Bay Cities Company was engaged in the business of dealing in and handling automobiles, at No. 1554 Van Ness avenue, in the city of San Francisco, and at the time owned, in said place of business, certain personal property, referred to in the complaint, which it used in conducting and carrying on said business; "that as part of the contract \* \* \* Exhibit A, \* \* \* and as part of the consideration for making said contract Exhibit A, plaintiff made and entered into a further agreement with said defendant whereby plaintiff" purchased from said defendant said personal property and paid defendant therefor "as a consideration for said personal property and for the good will of the business so as aforesaid carried on and conducted by said defendant, and for the agency and exclusive right by plaintiff to sell and handle said Columbus electric automobiles, as in said contract Exhibit A provided, the sum of \$2,000"; that said contract for the purchase of said personal property was entered into on July 20, 1910, copy attached to the complaint as Exhibit B; that at said time defendant Bay Cities Company was occupying said premises on Van Ness avenue at a rental of \$40 per month, and as part of the consideration of said contract Exhibit A, "plaintiff agreed to assume and did assume the payment of said rentals after said date, and has paid therefor the sum of \$360; that in carrying out said contract Exhibit A plaintiff incurred expense in advertising said Columbus electric automobiles the sum of \$215.85"; that, relying upon the faithful performance by defendants of said contract Exhibit A, plaintiff has given his entire time to said business of selling and handling said automobiles, and that the reasonable value of said services is \$150 per month, amounting to \$1,350; that plaintiff has performed on his part all of the covenants of said contract Exhibit A; that, "on the 5th day of April, 1911, and ever since, the defendants without just or other reason \* \* \* have expressly refused \* \* \* to keep and perform any of the covenants \* \* \* of said contract Exhibit A, by reason whereof plaintiff has been prevented from continuing the performance, since said date, of said contract on his part and will continue to be so prevented and will be deprived of the profits of said contract." It is further alleged that on April 18, 1911, plaintiff notified defendants that because of said breach of said contract by defendants, as aforesaid, "plaintiff elected to and did rescind said contract, and offered to return to defendants all of the property and good will as aforesaid and ev-

erything of value received by plaintiff from defendants, pursuant to the terms of said contract, and duly tendered to said defendants the delivery and the possession of all of said property and everything of value received by plaintiff under said contract, and duly demanded of said defendants that defendants return to plaintiff said sum of \$2,000 and pay to plaintiff the aforesaid sums for expenses incurred by him, for his time, labor, and services as aforesaid, and plaintiff now offers to return said property and everything of value received by plaintiff from defendants pursuant to said contract Exhibit A, to said defendants." It is further averred that "by reason of the premises and of the wrongful acts and conduct of defendants in refusing to perform said contract as aforesaid, plaintiff is entitled to have and receive from defendants, and there is due and owing to plaintiff by defendants, the aforesaid sum of \$2,000," and that he has been otherwise damaged by the said wrongful conduct of defendants in the sums aforesaid, amounting in all to \$1,925.85; that plaintiff has received no benefits or profits from said contract other than the sum of \$447, received as commissions on the sale of automobiles, and plaintiff offers to credit said sum and deduct the same from said sum of \$1,925.85; that notwithstanding plaintiff's said offer to return said property and everything of value received by him, defendants have refused and still refuse to return to plaintiff said \$2,000 and said sums so expended by plaintiff and refuse to pay plaintiff the value of plaintiff's time and services as aforesaid. Plaintiff prays the decree of the court rescinding said contract Exhibit A, and that plaintiff have judgment for the sum of \$2,000, and also for the sum of \$1,925.85, less \$447, and for such further relief as to the court may seem meet.

Exhibit A, referred to in the complaint, is a contract dated July 20, 1910, between the Bay Cities Company, first party, and plaintiff, second party, in which it is recited that the Bay Cities Company has a contract with the Columbus Buggy Company, giving to the Bay Cities Company the exclusive right to sell Columbus electric automobiles in certain territory in California, including San Mateo county and the city and county of San Francisco; that under said contract the Bay Cities Company is authorized to contract with other parties giving to them the exclusive right to sell said automobiles in portions of said territory. "Now therefore, in consideration of one dollar to each of the parties thereto (hereto?) paid by the other party, receipt of which is hereby acknowledged, and in further consideration of the benefits and advantages moving from each of the parties hereto to the other, it is hereby mutually agreed:" (1) Grants to second party the exclusive right to sell in the counties named above; (2) first party is to deliver automo-



bills to second party, or to any purchaser, upon payment by second party the cash price or in installments as may be agreed upon, delivery to be within a reasonable time after notice; (3) second party is to have a 20 per cent. discount on regular factory list price, in consideration for sales made by him; (4) second party is not to sell automobiles in territory other than as above; (5) second party not to sell automobiles that may conflict in style or in price with the Columbus machines, except where taken in exchange; (6) price of machine as per list f. o. b. Columbus; (7) delivery subject to strikes and unavoidable delays; (8) contract expires November 1, 1911, but "may be terminated at any time for good, reasonable, and sufficient cause, or may be terminated otherwise by the second party giving to the first party written notice to that effect, such termination being effective at the end of twenty days after such notice is served upon the first party," but shall not affect any sales then made "or contracted to be made by the second party, or the liability of second party to first party for any automobile already ordered by second party from the first party"; (9) the "contract and agency is personal to second party," and cannot be assigned without written consent of first party.

Exhibit B is a bill of sale of the same date, July 20, 1910, between the same parties, by which the Bay Cities Company conveyed to plaintiff certain personal property, as per schedule attached, including "1 model 1,000" Columbus electric automobile, factory No. 1,328," and also a large number of articles used in conducting the garage business, and situated at the store on Van Ness avenue, as stated in the complaint, the consideration mentioned being \$10.

General and special demurrers were overruled, and defendants answered: Admit the execution of the two contracts set out in the complaint, but deny that the assignment of right therein to defendant United Company and deny that the United Company assumed or undertook to carry out said contract exhibit A, or any of its obligations, and deny that said company conducted any business with plaintiff; admit the execution of Exhibit B, but deny that "it was contemporaneous or in conjunction with the alleged contract Exhibit A," or was dependent thereon, or that it was part of the consideration for said contract Exhibit A, but was an independent and separate transaction "in no way connected with" contract Exhibit A; deny the averments of the complaint respecting the various payments and expenses therein alleged to have been made and incurred by plaintiff; deny that plaintiff has faithfully or at all kept and performed the covenants of said agreement Exhibit A, or that he has been prevented from so doing by any breach or default of defendants; and in this connection aver: "that plaintiff, ever since the 20th day

of July, 1910, has neglected and still neglects to perform said alleged contract in this, that said Columbus electric automobiles are machines readily sold by the use of reasonable effort, and that plaintiff has failed and neglected to use such effort, and that in the period after July 20, 1910, plaintiff has sold but two machines, whereas by reasonable effort he could have sold ten"; deny that, on April 5, 1911, or at any time, defendants or either of them has or have failed to perform any of the covenants of said contract, or have in any way prevented plaintiff from continuing in the performance of said contract; deny that plaintiff paid to defendants, or either of them, \$2,000, or any sum, "for any benefits or rights arising out of the alleged contract Exhibit A"; deny that plaintiff offered to return said property as set forth in the complaint or made demand on defendants as therein alleged; deny any indebtedness to plaintiff for damages as alleged, or otherwise in any sum whatever.

The grounds of the nonsuit were the following: (1) That Exhibit B, the bill of sale, is a contract fully executed, and has so stood for nine months, and rescission cannot be had of an executed contract; (2) plaintiff is not entitled to rescind without returning before suit all that he has received under it; (3) the proof does not correspond with the allegations of the complaint; (4) the testimony does not show that plaintiff complied with the contract between himself and defendants; (5) it does not appear that plaintiff has made a sufficient tender to defendants to entitle him to rescind.

[1] There is evidence tending to show: That the two contracts, Exhibits A and B, were parts of the same transaction, and that the consideration paid (\$2,000) entered into both. When these contracts were made the Bay Cities Company was conducting a garage business, and at the same time was engaged in selling electric automobiles, having its principal place of business at Oakland, with what might be called a branch at San Francisco on Van Ness avenue; the garage business here conducted consisted of receiving, caring for, and repairing electric automobiles; connected with it there was kept what was called a demonstration car, whose use was to explain the merits of the Columbus car and promote its sale; this machine was not necessary to the other branch of the business purchased by plaintiff, but was necessary, if not indispensable, to the successful management of the sales department of the business. Plaintiff testified that he paid the \$2,000 "for the agency of the sale of the Columbus automobiles in San Francisco and San Mateo counties," but it also appeared from his testimony that this sum was to include the consideration paid for the garage business and equipment. The bill of sale enumerates all the articles, but no value is carried out against the items. In the negotiation the seller estimated the value of the demon-



stration car at \$1,400, which is seven-tenths of the purchase price of the agency and the personal property, and plaintiff testified also that the sale included the good will of the Bay Cities Company, though not mentioned in the contracts. The articles, other than the demonstration car, of which there was a large number, consisted of tools and implements used in charging electric automobiles and in repairing them, also articles for daily consumption, also articles of diminishing value by use, some of them of small original cost, and these made up the equipment of the garage. Plaintiff's commission on sales of cars was 20 per cent. of the "regular factory list price," which is not shown, but, from bills rendered to plaintiff, it would seem was about \$2,000. But two cars were sold during plaintiff's agency, and in both cases the purchasers were found by Mr. Vance, the secretary and manager of both defendant companies. The first sale was closed about the latter part of March, 1911, and the other about the same time. It appeared that this second car had been sold to Alfred Marcus, at San Mateo, and was delivered by the United Company. On March 28, 1911, the United Company rendered a bill to plaintiff and requested payment. On April 5, 1911, the United Company wrote plaintiff as follows: "Not having any reply to our demand for the payment of the amount due on the model 1215 delivered to Mr. Marcus, we are compelled to collect the amount due from Mr. Marcus direct and we have asked him to hold the balance consisting of the amount due us for the rectifier, one new tube and your commission. This letter will be notice to you that you have already broken the terms of our contract with you in not paying for this car upon its delivery and we hereby serve notice that we are no longer considering you as the exclusive agent for Columbus Electrics for San Francisco and San Mateo counties. We would advise you further to straighten up the matter of the Marcus rectifier at a very early date and thus save yourself unnecessary trouble and expense. Very truly yours, United Electric Vehicle Co., per W. D. Vance." It appeared that a controversy arose, in the course of this Marcus sale, between Mr. Vance and plaintiff concerning a rectifier that was to be furnished with the car. Marcus refused to pay for the car without this rectifier, and it was finally furnished and set up by plaintiff, and Marcus paid for the car directly to United Company.

[2] We cannot go into the details of this dispute. Suffice it to say that plaintiff's explanation, which must be accepted as true on this motion for nonsuit, acquits him of blame for any delay in the matter, and shows that he received \$100 less than he was entitled to by reason of being compelled to furnish at his own cost a rectifier different from that which Vance represented to him would be satisfactory to Marcus. Following the letter of April 5, 1911, plaintiff, on the 18th

of that month, served his written notice of rescission, directed to United Electric Vehicle Company, and on April 28, 1911, filed the complaint in the action. No notice was served on the Bay Cities Company.

There was evidence sufficient to warrant the inference that the United Company, upon its organization, succeeded to the rights of the Bay Cities Company, and, so far as the duty to perform the obligations of the Bay Cities Company in respect of the contract Exhibit A is concerned, plaintiff had the right to look to the United Company. The premises on Van Ness avenue were, at the time of the sale, occupied by the Bay Cities Company, and by agreement with the agent plaintiff went into possession and thereafter paid the rentals. Plaintiff testified that after serving notice of rescission he continued to operate the garage and to demonstrate the Columbus automobile, and was at the time of the trial, September 28, 1911, in possession of the premises and carrying on the garage business the same as he had previously been doing. The evidence was that the garage business was earning about \$100 per month when plaintiff bought it, and continued to the day of the trial to bring in about that amount monthly. Plaintiff, however, sold no more automobiles, and there is no evidence or averment in the complaint that any more were sold or could have been sold, in the counties named, after April, 1911. In his notice of rescission plaintiff offered to deliver possession of the personal property embraced in contract B at the Van Ness avenue premises, and that he would hold the property subject to defendants' order and at their expense until delivery; he also made demand for the \$2,000 paid defendants as consideration; also demanded reimbursement for expenses in advertising and exhibiting said automobile, \$150 and \$65.85; also rent of building for nine months, \$360; also for time and labor, \$1,350—making in all \$3,925.85, "and I offer to credit you with and deduct from the above the sum of \$447 representing the net commissions received by me as the agent for the sale of said automobiles under the terms of said contract."

Appellant contends that the sale of the garage business and equipment had no relation to the agency contract, and that what ever he did in operating the garage "was a matter entirely outside of the scope of the agency contract, and wholly personal to the plaintiff." Defendants contend, on the other hand, that "the purchase of the garage business was the main contract and the agency only a side incident, valued by the Bay Cities Electric Company at nothing."

Plaintiff's conduct in seeking to rescind was inconsistent with his contention, for, if the garage business was a matter entirely distinct from the agency, why did he think it necessary to offer to return the property conveyed by that contract in his attempted



rescission? There must have been some relation between the two contracts. The testimony of plaintiff showed very clearly that the \$2,000 paid by him was the consideration entering into both contracts, and that they were parts of but one transaction.

[3] It is perhaps unnecessary to consider the relative value of the two contracts. The evidence was that the garage, during the nine months up to April 5, 1911, was earning about \$100 per month and in that time plaintiff's commission for the sale of automobiles, he states in his notice, amounted to \$447 net. But whatever the relative earnings were under the two contracts, if defendants' breach was such as to justify rescission, and the broken covenant could not be readily compensated in damages, or if defendants' default made performance by plaintiff impossible, it was plaintiff's duty first to place defendants "pretty nearly in the position" they were in "before the contract was entered into." *Fountain v. Semi-Tropic Co.*, 99 Cal. 677, 34 Pac. 497. Where a party cannot or does not restore the other party to the condition he would have been in but for the contract, rescission is not allowable. *Merrill v. Merrill*, 103 Cal. 287, 291, 35 Pac. 768, 37 Pac. 392.

It seems to us that the facts present a case where full compensation can be had in an action for damages. But if this be not true, we are of the opinion that the evidence fails to show that plaintiff offered to or in fact could restore defendants to the same or "pretty nearly the position" they were in before the contracts were entered into. His offer was to return the articles scheduled in contract Exhibit B, making no allowance for deterioration and loss in the nine months' use, which, as to the automobile, not to speak of other articles, must have been considerable, and plaintiff was not able to testify that he still had in his possession all the articles. His offer as to the \$447 commissions from the agency was to credit the net amount (not the full amount) on the damages, payment of which he demanded in his notice of rescission. He offered "to deliver up possession of the personal property at the Van Ness avenue premises, but did not offer to restore the possession of the premises to defendants as tenants. He made no offer to account to defendants for the earnings of the garage while at the same time demanding payment for his time, expenses, and rentals of the premises occupied by him. Regarding, as we do, both contracts as one transaction, plaintiff's duty was to make full restoration of everything of value received by him under both contracts. It was not sufficient to offer to return the personal property received by him. Plaintiff testified that he purchased the good will of the business, and, while it may be that such element of the contract was incapable of restoration and need not to

have been restored, it lends some force to defendants' contention that it was impossible for plaintiff to return a running business after plaintiff had retained it and carried it on for nine months. Then, too, there is reason in defendants' contention that plaintiff did not in fact rescind the contracts because he continued the garage business and was engaged in it at the time of the trial, and also, as he testified, he continued to solicit sales of the Columbus electric automobile. It was not necessary, for the preservation of the property, that this should have been done. The evidence was that the property could have been stored at a small cost.

It may be that the averments of the complaint are sufficient to constitute a cause of action at law for damages. But appellant makes no such suggestion. He relies entirely on the sufficiency of the evidence to constitute a prima facie case for rescission. In this we think appellant was not successful. The judgment is affirmed.

We concur: HART, J.; BURNETT, J.

(22 Cal. App. 54)  
PEOPLE v. SCOTT. (Cr. 200.)

(District Court of Appeal, Third District, California. May 9, 1913.)

1. FRAUD (§ 68\*)—CRIMINAL RESPONSIBILITY—CONVEYING REAL ESTATE TWICE.

To establish the offense of selling land twice in violation of Pen. Code, § 533, it must appear that the first sale was valid, so that by reason of the second sale the first purchaser may be deprived of some interest he acquired by virtue of the conveyance to him.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 76; Dec. Dig. § 68.\*]

2. DEEDS (§ 8\*)—TITLE OF GRANTOR.

Where the chief stockholder of a corporation was entitled to a conveyance of real estate, the legal title to which was held by the corporation to secure his indebtedness to a bank on his paying the indebtedness, and the bank had his stock as additional security, the stockholder's wife had no legal or equitable title in the land which could be conveyed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 13-18, 408-412; Dec. Dig. § 8.\*]

3. CRIMINAL LAW (§ 412\*)—EVIDENCE—DECLARATIONS—ADMISSIBILITY.

A declaration by a grantor on trial for the crime of selling land twice made to the first grantee that the deeds under which the grantor claimed were delivered in escrow before the grantor therein left Oregon is within Code Civ. Proc. § 1870, subd. 2, permitting evidence of an act, declaration, or omission of a party to an action.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 804-817, 919-935; Dec. Dig. § 412.\*]

4. ESCROWS (§ 8\*)—RELEASE—DELIVERY.

An instrument which purports to direct one holding a deed in escrow to cancel the deed and convey the real estate to a third person is without effect unless delivered.

[Ed. Note.—For other cases, see Escrows, Cent. Dig. §§ 9, 10; Dec. Dig. § 8.\*]

5. CRIMINAL LAW (§ 325\*)—EVIDENCE—PRESUMPTIONS.

The presumption of delivery of an instrument arising from the fact of possession by the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.



party to whom delivery must be made cannot be indulged in in opposition to the presumption of innocence, where a material element of a criminal charge is involved.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 729; Dec. Dig. § 325.\*]

**6. CRIMINAL LAW (§ 423\*)—EVIDENCE—DECLARATIONS OF CONSPIRATORS.**

A declaration by a wife, who conspired with her husband to convey real estate twice, in violation of law, to defraud the first purchaser, to the effect that the first purchaser had better look out, for all his property is in her name, and, if the husband should die, the purchaser could get nothing, unless she chose to give it to him, does not relate to the conspiracy within Code Civ. Proc. § 1870, subd. 6, and is inadmissible against the husband on his trial for the crime of selling land twice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 989-1001; Dec. Dig. § 423.\*]

**7. CRIMINAL LAW (§ 1169\*)—ORDER OF PROOF.**

The error, if any, in allowing proof of the mental attitude of a witness for accused toward prosecutor out of order, is harmless, where the question of her mental attitude subsequently becomes relevant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. § 1169.\*]

**8. CRIMINAL LAW (§§ 419, 420\*)—EVIDENCE—ADMISSIBILITY.**

On a trial for selling land twice to defraud the purchaser, the complaint in an action by the wife against accused for separate maintenance containing charges of acts of cruelty and gross indecency and immorality on the part of accused is inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. §§ 419, 420.\*]

**9. CRIMINAL LAW (§ 815\*)—INSTRUCTIONS — IGNORING ISSUES.**

An instruction on a trial for selling land twice, in violation of Pen. Code, § 533, which ignores the fact that the statute presupposes that accused must have some title, legal or equitable, which he can sell, and does sell, is erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1922, 1986; Dec. Dig. § 815.\*]

**10. FRAUD (§ 69\*)—CONVEYING LAND TWICE — CRIMINAL RESPONSIBILITY — EVIDENCE — INSTRUCTIONS.**

Any question as to what facts must be shown to constitute title in accused charged with selling land twice to defraud the first purchaser, in violation of Pen. Code, § 533, is for the court, but the ultimate fact of ownership or title is for the jury, as one of the elements of the crime.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 78; Dec. Dig. § 69.\*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Cary T. Scott was convicted of crime, and he appeals. Reversed.

W. P. Netherton, of Santa Cruz, and Geo. K. Ford, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, of Sacramento, for the People.

BURNETT, J. In the information filed against him defendant was charged with "selling land twice in violation of section 533 of the Penal Code of California." It was

particularly set forth that "on April 13, 1911, the defendant held in trust for one Victor E. Campbell the legal title in and to all of" certain lands situated in the state of Oregon; that thereafter, on said date, the defendant "bartered, agreed to sell, and executed an agreement for the sale of said lands and premises to one M. J. Humphrey," which agreement is set out in full, providing for the exchange of said Oregon lands designated as "Class No. 1," for certain lands in Santa Cruz county, Cal., which are described and designated as "Class No. 2," and also "that the party of the first part" (C. T. Scott) "is to give \$3,000"; that immediately after the execution of the agreement the defendant executed a conveyance of the lands of "Class No. 1," to said M. J. Humphrey and "a deed was duly executed in the county of Santa Cruz conveying unto the said Cary T. Scott all of the real estate set forth and described in 'Class No. 2' of said agreement," and that said deed to Scott "on or about the 13th day of April, 1911, was delivered in escrow in the county of Santa Cruz, to one J. J. Morey, cashier of the Pajaro Valley National Bank" of Watsonville in said county; "that said deed was to be subsequently delivered by the said J. J. Morey to the said defendant, Cary T. Scott; that thereafter, to wit, on or about the 13th day of April, 1911, the said Cary T. Scott, for a valuable consideration, granted, bargained, and sold, transferred, and conveyed, bartered, and disposed of unto the said Victor Campbell all of the right, title, and interest of the said defendant, Cary T. Scott, in and to said agreement entered into with the said M. J. Humphrey, and in and to all of the properties therein described and in which the said defendant then and there had any interest;" that said transfer and conveyance from the said Cary T. Scott to the said Victor E. Campbell was and is in the words and figures following, to wit: "Oakland, Cal., April 13th, 1911. For and in consideration of the sum of ten dollars, U. S. Gold Coin, to me in hand paid, I do hereby grant, bargain, transfer, sell and convey all my right, title, and interest of all the properties herein described in this document, to V. E. Campbell, or his assigns"—that on said date this conveyance was delivered to said Campbell, and he thereupon "became the absolute owner of all the right, title and interest of the said Cary T. Scott in and to said agreement with the said M. J. Humphrey, and in and to all of the real estate therein described in which the said defendant, Cary T. Scott, had any interest by virtue of said agreement;" that thereafter, while said conveyance was "in full force and effect, and while the said Victor E. Campbell was then and there the lawful owner and holder thereof, and without the knowledge or consent of said Victor E. Campbell, the said defendant, Cary T. Scott,



on or about the 19th day of September, A. D. 1911, at and in the county of Santa Cruz, \* \* \* willfully and unlawfully, fraudulently, and feloniously, and with intent then and there to defraud the said Victor E. Campbell of all of the rights acquired by him from the said Cary T. Scott, did sell, barter, and dispose of the same lands and premises \* \* \* for a valuable consideration, to another person, to wit, to one John Humphrey Sullivan," who is now the owner and holder thereof; "that the said Victor E. Campbell was thereby defrauded of his interest in said real estate aforesaid."

The Attorney General then relies for support of the verdict upon these facts which he claims the evidence established: "First, that Campbell placed the title to his real property in Scott for the purpose of exchange; second, that Scott consummated a deal for its exchange and reduced the agreement to writing; third, Scott then, by a written assignment, assigned and transferred all of his right, title, and interest in said exchange agreement to Campbell and delivered said agreement to Campbell; fourth, that subsequently, for a valuable consideration, and unknown to Campbell, and with intent to defraud Campbell, Scott again caused the same property to be conveyed to another; fifth, that Campbell was thereby defrauded."

The first, third, and fourth of these declared facts are admitted by appellant to be supported by evidence.

As to the second, it is asserted that: "If, by this general and somewhat ambiguous statement it is meant that Scott executed an agreement with Mary J. Humphrey to exchange the Oregon properties for the Watsonville properties, bearing in mind that she had no interest at all in the Watsonville properties then or at any other time, which were owned in their entirety by the Fruit Farm Company, this is admitted."

As to the fifth, it is said: "This is vehemently denied. Of course, we do not deny that, if the testimony of certain witnesses is admitted to be true, it shows Scott was guilty of a breach of trust, and by the breach of that trust Campbell was defrauded. But, of course, this fact is entirely beside the question. We take it, therefore, that counsel means by this statement that Campbell actually acquired an interest in the Watsonville properties from Scott, and that Scott, by this second conveyance, fraudulently deprived Campbell of this interest so acquired. This we emphatically deny."

The foregoing is probably sufficient for an understanding of the nature of the charge and of the main points of difference and discussion between counsel as to the sufficiency of the evidence to support the verdict.

[1] It cannot be disputed that one of the essential elements of the crime charged, a material averment to be established, is the sale by Scott to Campbell of the Watsonville property. If there were no first, there

could, of course, be no second, sale. It is equally clear that, if no interest in the property vested in Campbell by virtue of the alleged sale to him by Scott, Campbell could not have been defrauded by the transaction between Scott and Sullivan in relation to the same property. A necessary circumstance contemplated by the statute is that by reason of the second sale the first purchaser may be deprived of some interest that he acquired by virtue of the conveyance to him.

It is important, then, to inquire whether Scott, by his said conveyance executed on said April 13, 1911, transferred to Campbell any interest in the said property. The answer depends upon several considerations, one of which, manifestly, is whether he had any interest to convey. This, in view of the allegation of the information, must be regarded in a twofold aspect. The first relates to the agreement with M. J. Humphrey, and the theory in relation to that is that by its execution Scott became the equitable owner of the property and this interest thus acquired he conveyed to Campbell.

[2] This position, however, cannot be maintained for the reason that M. J. Humphrey is shown by the evidence to have had no title to the property either legal or equitable. Having no interest, her agreement with Scott could transfer none, and his assignment of said agreement or his conveyance of all the interest therein acquired would, of course, be equally ineffectual. According to the record, the legal title was in the Pajaro Fruit Farm Company and W. R. Humphreys was entitled to a conveyance on the payment of his indebtedness to the Pajaro Valley Bank, or, as stated by the cashier of said bank: "The Pajaro Fruit Farm Company had title to the property for Mr. Humphreys to secure Mr. Humphreys' indebtedness to the Pajaro Valley Bank." Mr. Humphreys, it may be remarked, was the principal owner of the stock of said company, which had been assigned to the bank as additional security for said indebtedness. The agreement with M. J. Humphreys may then be eliminated as the source of any title or interest in said property. The other phase of the question is presented by the allegation in the information that before said conveyance to Campbell a deed of the property to Scott was executed and delivered in escrow to the said cashier of the said bank to be subsequently delivered to defendant.

[3] Although the terms of the escrow agreement do not appear, we may assume that by the said delivery of the deed to the bank Scott became vested with the equitable title to the property. Upon this assumption, his conveyance to Campbell transferred the same title. The question then arises whether this constituted Campbell a "purchaser" within the contemplation of said section 533 of the Penal Code. Granting, however, that it did have that effect, it would be still a vital requirement for the people to prove that



the deed had been delivered in escrow before the alleged sale to Campbell. Therein the record falls short of the exaction of the law. In reply to this point, respondent declares: "On the contrary, Campbell testified that Scott told him the deeds were delivered in escrow before Humphreys left for Oregon, and that he left immediately after the execution of the exchange agreement." Appellant is mistaken in the contention that the testimony of Campbell as to the declaration of Scott was hearsay and inadmissible, since it clearly comes within the rule permitting evidence of the act, declaration, or omission of a party to an action. Subdivision 2, § 1870, Code Civ. Proc. Respondent is also mistaken in the contention that the time of said delivery was fixed by said statement of Scott. Mr. Campbell testified as to a conversation he had with Scott, but his testimony fails to point the time definitely. In reply to a question he answered: "Mr. Scott told me that the deeds had been made for this Watsonville property and left in escrow in the bank—he said that Humphreys— When I saw Mr. Scott, Mr. Humphreys had already gone to Oregon. Mr. Scott has given Mr. Humphreys an abstract of the property up there." As to the element of time, it is thus to be seen the only definite inference is that said delivery took place prior to said conversation and the conversation was subsequent to Humphreys' trip to Oregon. This important circumstance should not, of course, be left to mere surmise or suspicion.

The case, thus far considered, then appears as one requiring, in order to justify a conviction, the conveyance of the Watsonville property by Scott to Campbell, but presenting a failure of proof that the former actually did convey any title whatever to the latter.

[4] As to the second sale of the property, the case for the people depended upon proof of the execution by defendant and his wife of a written instrument purporting to "authorize and direct the Pajaro Valley Savings Bank to cancel and destroy that certain deed now held in escrow by said bank from Pajaro Fruit Farm Company to said C. T. Scott and Mildred Scott, \* \* \* and to convey said real property to John Humphrey Sullivan," and which instrument absolved said fruit company from any and all liability to convey the property to Scott or his wife. To be legally effectual, this instrument, of course, must have been signed by Scott, and delivered by him or under his authority to the bank or its agent. The evidence is undisputed that he affixed to it his signature. H. C. Wyckoff, who represented the bank and the fruit company, testified: "I requested Mr. Scott to sign an instrument which was prepared there, requesting or consenting to the transfer of this property to Mr. Sullivan, which he and his wife signed." He stated, in this connection, that Mr. Scott objected to signing it, saying that "he did

not want to sign it, didn't think it necessary," but that he afterwards signed it. No witness, however, testified that Scott delivered or authorized the delivery of the document. It would have been a simple matter to interrogate Wyckoff concerning it, but it was probably overlooked.

[5] This is a vital point in the case, and while it might be, if it were a civil action, that the presumption of delivery would follow from the fact of possession of the instrument, this cannot be indulged in opposition to the presumption of innocence, where a material element of a serious criminal charge is involved. Many rulings of the court as to the admissibility of evidence and the giving and refusing of certain instructions are challenged. Some of them we proceed to notice.

[6, 7] C. E. Hovey, a witness for the people, testified to a conversation that he overheard between defendant Scott and his wife on the telephone about the 1st of July, 1911. The witness stated that after the phone was hung up Mrs. Scott made a certain statement to him, and, being asked what she said, over objection, he replied: "Mrs. Scott said after returning to the parlor, in the presence of my wife and myself: 'The Campbells better look out which side their bread is buttered on, what they say about me, for every bit of their property is in my name, and, if Ted Scott should die to-day, the Campbells, could not get one penny of it unless I chose to give it to them.'" The only theory upon which the admissibility of the statement is urged is that she and her husband conspired to commit the crime, and therefore it was proper to invoke the rule that "after proof of a conspiracy evidence may be given of the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy." Subdivision 6, § 1870, Code Civ. Proc. But, granting that the record does contain evidence of a common design to commit the crime, and that it was not necessary to introduce this evidence before receiving said statement, we still think it was not admissible upon the theory contended for because it cannot be said that her declaration "related to the conspiracy." It disclosed rather her animus toward the Campbells and incidentally exhibited a resentful disposition that may have impressed the jury quite unfavorably. Mrs. Scott, however, on cross-examination, being asked if she did not make such a statement, denied it. In view of her direct examination, her mental attitude toward the Campbells became a relevant subject for inquiry, and the testimony objected to as evidence of her animus was admissible in rebuttal. It was received out of order, but this was to accommodate the witness, Hovey, and we think the ruling was not prejudicially erroneous.

[8] The ruling of the court on the admission of the complaint in the case of Mildred Scott v. Cary T. Scott, brought for separate



support and maintenance, was, we think, clearly erroneous. It was nothing more than the declaration of Mrs. Scott in an entirely different transaction from that before the jury. It was hearsay pure and simple. It was not receivable to impeach Mrs. Scott as she had not been called as a witness. Besides, assuming that her testimony might thus be anticipated, the record shows that no foundation was laid for its introduction. It was not admissible upon the theory of a conspiracy, as it was not in "furtherance of the fraud." That it was probably very damaging to appellant is a reasonable deduction from several allegations of said complaint setting forth various acts of cruelty and gross indecency and immorality on the part of appellant. Believing these statements, the jury would require little, if any additional evidence to convict the defendant of the crime charged.

[8] Among other instructions, the court directed the jury as follows:

"(2) If you believe from the evidence in this case to a moral certainty and beyond a reasonable doubt that the defendant, Cary T. Scott, transferred in writing to Victor E. Campbell all of his right, title, and interest in and to the lands and premises described in the agreement with Humphreys and which has been received in evidence, and that he, the said Scott, thereafter again willfully and with intent to defraud said Campbell and without his consent sold, bartered, or disposed of the same land or any part thereof to another for a valuable consideration, it is your duty to find the defendant guilty as charged.

"(3) If you believe from the evidence to a moral certainty and beyond a reasonable doubt that the defendant, Cary T. Scott, entered into an agreement with another for the exchange of certain lands, and that he thereafter assigned, transferred, and sold all of his right, title, and interest in and to said agreement and in and to the lands therein described to Victor E. Campbell, and that the said defendant did thereafter willfully and with intent to defraud the said Victor E. Campbell and without his consent sell, barter, or dispose of the same lands described in said agreement to another person for a valuable consideration, then it is your duty to find the defendant guilty as charged."

The vice of these instructions lies in the implication that it was immaterial whether Scott actually had any interest in the property to convey or to exchange. From instruction 2 the jury would readily conclude that, though the complete title were in another, yet, if Scott executed an instrument sufficient in form to transfer any interest that might belong to him, that would be sufficient to satisfy the requirement of the statute as to the first sale.

So also it would be reasonable inference

from instruction 3 that the offense would be made out though Humphreys had no interest whatever in the lands in question.

The instructions ignore the fact that the statute presupposes that the party charged with the fraud must have some title, legal or equitable, which he can and does sell.

[10] Nor can it be said that this is not an issue to be determined by the jury. It is one of the necessary facts to be established before a conviction is justified. Any question of law as to what facts must be shown to constitute title is a subject for the cognizance of the court and for specific directions to the jury, but the ultimate fact of ownership or title must be determined by the jury as one of the elements that make up the crime. If the evidence necessarily led to the conclusion that appellant was the owner of the property at the time, manifestly the said instructions would appear as without prejudice in accordance with the doctrine announced in *People v. Putnam*, 129 Cal. 258, 61 Pac. 961, that "An instruction which assumes a fact as proved will not warrant a reversal if the fact is admitted, or there is no shadow of conflict of evidence with respect to it."

The record here does not show such a case and the said instructions, as we view them, should not have been given without the suggested modification.

Many other errors are assigned, but we deem it unnecessary to discuss them at this time.

We believe that the interests of justice require that the conviction of appellant be set aside, and the judgment and the order denying his motion for a new trial are therefore reversed.

We concur: CHIPMAN, P. J.; HART, J.

(22 Cal. App. 137)

GISE v. MYERS, City Auditor. (Civ. 1,312.)  
(District Court of Appeal, Second District, California. May 17, 1913.)

# 1. STATUTES (§ 184\*)—CONSTRUCTION—LEGISLATIVE INTENT.

A statute must be construed with reference to the object to be accomplished by it, and the court to ascertain the object may consider the occasion and necessity for its enactment.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 262; Dec. Dig. § 184.\*]

# 2. MUNICIPAL CORPORATIONS (§ 1038\*)—ENFORCEMENT OF CLAIMS AGAINST CREDITORS OF MUNICIPALITY—STATUTES—CONSTRUCTION.

Code Civ. Proc. § 710, authorizing the filing of the transcript of a money judgment with the auditor of any city from which money is owing to the judgment debtor, and requiring the auditor to pay into court so much of the money, "if sufficient there be," and which is owing to the judgment debtor, as will cancel the judgment, does not apply only to those cases where the amount due from a city to the judgment debtor is sufficient to cancel the judgment, but directs the payment into court of a less sum if that sum is all that is due from the city; the quoted words limiting the amount

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



paid into court to a sum sufficient to cancel the judgment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2211; Dec. Dig. § 10:8.\*]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Mandamus by E. C. Glise against John S. Myers, Auditor of the City of Los Angeles, to compel the payment into court of money due from the city to Thomas F. Rico. From an order granting a peremptory writ of mandate, defendant appeals. Affirmed.

John W. Shenk, City Atty., and C. H. Tribbit, Jr., Deputy City Atty., both of Los Angeles, for appellant. Amend & Amend, of Los Angeles, for respondent.

SHAW, J. This is an appeal from an order of court granting a peremptory writ of mandate, directed to John S. Myers as auditor of the city of Los Angeles, commanding him to pay into court certain moneys due from the city to Thomas F. Rico, to be applied, pursuant to the provisions of section 710 of the Code of Civil Procedure, upon an existing judgment in favor of petitioner and against said Rico.

[1, 2] The amount due upon the judgment at the time of filing the transcript with the city auditor was upwards of \$200, and the amount due from the city to said Rico, who was a police officer, was \$150. Appellant contends that section 710, supra, directs the payment of money into court *only* in those cases where the amount due from the municipality to the judgment debtor, as shown by the transcript, is sufficient to cancel the judgment, and that inasmuch as the amount due from the city to Rico was less than the judgment, recourse cannot be had to the procedure prescribed by said section for the collection of money due upon the judgment. The claim is based upon the requirement that there shall be paid into court such sum of money due from the city to the judgment debtor, "if sufficient there be, \* \* \* as will cancel the judgment." A statute must be construed with reference to the object to be accomplished by it. In order to ascertain that object it is proper to consider the occasion and necessity for its enactment. Prior to the passage of the act in question no process existed whereby moneys due from the municipality to a judgment debtor could be applied upon the judgment. Even though such funds were not exempt from execution, they were nevertheless beyond the reach of the creditor. Under these conditions the statute, declared to be "a procedure by which moneys or credits of a judgment debtor in the hands of a \* \* \* municipal corporation \* \* \* may be obtained in satisfaction of judgment," was enacted. A construction restricting its application, as suggested by appellant, would in a large measure nullify rather than secure the benefits and objects clearly intended.

As we construed the statute, it directs the payment into court of the full sum required to cancel the judgment, if sufficient there be. The words "if sufficient there be" were not intended to restrict or limit payment to those cases only where the sum due from the city to the judgment debtor was sufficient to liquidate the judgment, but rather intended, where the amount due exceeded the judgment, to limit the amount paid into court to a sum sufficient only to cancel the judgment. Order affirmed.

We concur: ALLEN, P. J.; JAMES, J.

(22 Cal.-App. 103)

LUND v. GANAHL et al. (Civ. 1,116.)

(District Court of Appeal, First District, California. May 15, 1913. Rehearing Denied June 14, 1913.)

1. SALES (§ 61\*)—CONSTRUCTION OF CONTRACT—INTENTION OF PARTIES.

Whether a transaction amounted to a sale or merely to a contract to purchase is a question of intention.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 162-170; Dec. Dig. § 61.\*]

2. SALES (§ 199\*)—REQUISITES OF CONTRACT—PAYMENT OF PRICE.

The payment of price or delivery of a bill of sale is not essential to the transfer of an interest in personalty, and it is presumed that title passes without that, in absence of a contrary intention being shown.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 516-523; Dec. Dig. § 199.\*]

3. SALES (§ 52\*)—SUFFICIENCY OF EVIDENCE. Evidence held to show the sale of an interest in a ship to plaintiff's intestate.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 118-144, 1045; Dec. Dig. § 52.\*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Sarah Lund, administratrix of the estate of Charles R. Lund, deceased, against L. A. Ganahl and the Tillamook Navigation Company. From a judgment for plaintiff, the company appeals. Affirmed.

C. H. Wilson, of San Francisco, for appellant, Tillamook Navigation Co. L. S. Melsted and Fabius T. Finch, both of San Francisco (John J. West, of San Francisco, of counsel), for appellee Sarah Lund.

KERRIGAN, J. In January, 1907, Ganahl & Co., a copartnership, with certain individuals and a corporation agreed to form a shipping corporation to purchase several steamers, to be operated on the Pacific Coast in the lumber trade. In pursuance of the enterprise L. A. Ganahl, the authorized agent of the incorporators, went east and purchased two steamships, one of them being the Minnie E. Kelton, taking title thereto in the name of Ganahl & Co. Charles R. Lund, a marine engineer, proceeded from San Francisco to Milwaukee, and there arranged with L. A.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Ganahl that he would take employment as chief engineer of the Minnie E. Kelton, and he also agreed in writing to purchase a one thirty-second interest in that vessel, the purchase price to be one thirty-second part of her cost at San Francisco. Thereafter the prospective corporation was duly organized under the name Tillamook Navigation Company, and took over by assignment from Ganahl & Co. all right, title, and interest in and to said vessel. In February, 1908, and subsequent to the arrival of the vessel in San Francisco, it was found that, after deducting payments by Lund and certain credits to which he was entitled, he still owed on account of his purchase of a one thirty-second interest in the ship the sum of \$782.19. Lund was unable to pay this balance at the time agreed, and it was arranged that he should give his promissory note therefor to the Tillamook Navigation Company, which he did. Thereafter he made three payments aggregating \$140. No formal transfer of his interest was ever made to him, and on the records of the United States custom house the title remained in the name of the Tillamook Navigation Company. The agent of the proposed incorporators had insured the ship for its voyage from the place of purchase to San Francisco, and on the way she was damaged. The amount of the premium and the cost of repairs were charged against the ship, and formed part of the price which Lund was required to pay under his contract of purchase, and a proportion of the insurance was credited to his account.

Just before the ship began voyages on the Pacific Coast she was insured by the Tillamook Navigation Company for \$49,000. Subsequently the vessel was wrecked, and the Tillamook Navigation Company in writing abandoned the ship to the underwriters, and received \$49,000 as insurance. The testimony shows that the navigation company insured the whole of the vessel for this sum, and that at the time the insurance was placed the vessel was valued at \$78,500. The wreck of the vessel occurred on its second voyage on the Pacific coast, and at that time Lund, who was her chief engineer, was drowned. Thereafter Sarah Lund, his widow, the plaintiff herein, was appointed administratrix of his estate, and as such, having theretofore served the navigation company with notice for that purpose, brought the present action to enforce a rescission of the contract of purchase. Defendant Tillamook Navigation Company answered, and alleged a counterclaim for the balance due on Lund's promissory note, together with certain advances on account of Lund's one thirty-second interest in the ship, amounting in all to \$842.87. Just before the case was submitted for decision to the trial court, and after notice, the plaintiff filed an amended or supplemental complaint, wherein the fact of the insurance of said vessel for \$49,000 was recited, and it was alleged

that a one thirty-second part of that insurance was held for the use and benefit of plaintiff by the navigation company, and judgment for that amount was demanded. Defendant answered, denying the allegations of the supplemental complaint, and thereupon, the case having been submitted, the court gave judgment in favor of the plaintiff for the sum of \$687.38, consisting of said proportion of said insurance money less the amount due on Lund's promissory note and the proper costs and charges due from him. Both parties, being dissatisfied with the judgment, have appealed.

Plaintiff asserts that under the agreement of purchase title to the one thirty-second interest in the vessel was not to pass until Lund had fully paid therefor; that, the vessel having been wrecked before that time, there was a failure of consideration, and that plaintiff was entitled to a return of the amount paid by Lund on account of the purchase. If this be the correct construction of the contract the result as a proposition of law is as stated by counsel for plaintiff. 35 Cyc. 602. But under all the circumstances of the case we think the transaction between Lund and the defendants amounted to a sale, and not merely a contract of sale.

[1, 2] It is true that the price was not fully paid, and that no bill of sale passed between the parties, but as to whether or not there was a sale was a question of intention, and it is well settled that it is not essential to the transfer of an interest in personal property that either of those two things should have been done; and when, as here, no different intention is manifested, the presumption is that title does pass without payment of the price or delivery of a bill of sale. 35 Cyc. 27, 279, 322.

[3] Assuming that under the terms of the instrument it is doubtful whether or not the contract was one of sale, we are of the opinion that with the exception of the delivery of a bill of sale it would be difficult to conceive of a case in which, the price not being in full, the buyer more completely acted or was more completely treated as an owner than in this case. Lund by payments and agreed deductions from his salary had paid, by the time the vessel reached San Francisco, a large proportion of his share of the agreed purchase price of the vessel, and, being unable at that time to pay the balance as agreed, gave his promissory note therefor, and subsequently was charged and credited respectively with a one thirty-second part of the expenses and profits of the vessel. At various times different kinds of insurance were taken out on the ship by the Tillamook Navigation Company, the managing owner; and, while the record falls to show that in each instance Lund was charged with his share of the premiums, it does show that in all cases of loss except the last one, he was credited with his proportion of the amount collected.



When the vessel was last insured it is plain that it was intended by the parties that Lund was liable for his pro rata of the premiums, and would be entitled in the event of loss to his share of the insurance. This and other acts of the parties, as well as the terms of the contract, tend to show that title to a one thirty-second of the Minnie E. Kelton had passed to Lund prior to his death. It was upon this theory that the plaintiff acted in filing, as she did, near the conclusion of the trial, a supplemental complaint, demanding a share of the insurance money.

The conclusion reached in this case being in harmony with the position of the defendants, they certainly were not harmed by the filing of the supplemental complaint, and we need not therefore consider their point that the court erred in permitting it to be filed.

As to defendant's point that the insurance of \$49,000 was effected on its interest in the vessel exclusively, we have already sufficiently indicated our view that the circumstances tend to show otherwise, and warranted the trial court in awarding to plaintiff a pro rata corresponding with Lund's interest in the vessel.

Other points made have been considered, but do not require any special mention.

The judgment is affirmed; neither party to recover the costs of appeal.

We concur: LENNON, P. J.; HALL, J.

(22 Cal. App. 101)

TAYLOR v. DARLING. (Civ. 1,234.)

(District Court of Appeal, First District, California. May 15, 1913.)

1. APPEAL AND ERROR (§ 187\*)—OBJECTION BELOW—NECESSITY.

A plaintiff cannot complain on appeal that the trial court abused its discretion in entering judgment against her because the husband of defendant was not made a party defendant, when no application was ever made to the trial court to file an amended complaint making the husband a party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1184-1189; Dec. Dig. § 187.\*]

2. JUDGMENT (§ 649\*)—RES JUDICATA—FORM OF JUDGMENT.

If the record shows that a judgment is not based upon the merits, it cannot form the basis of a plea of res adjudicata in a subsequent action, regardless of its form.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1161; Dec. Dig. § 649.\*]

Appeal from Superior Court, City and County of San Francisco; N. A. Hawkins, Judge.

Action by Catherine M. Taylor, as administratrix, against Agnes Darling. Judgment for defendant, and plaintiff appeals. Affirmed.

Neal Power, of San Francisco, for appellant. George A. Connolly, of San Francisco, for respondent.

KERRIGAN, J. This case was heard in this court before. Taylor v. Darling, 19 Cal. App. 232, 125 Pac. 249. Plaintiff sued the defendant for the conversion of certain personal property. Defendant in her answer, in addition to denying the material allegations of the complaint, set forth that she was a married woman not living separate and apart from husband, and that her husband had not been made a party defendant to the action. The court found this allegation of the answer to be true, but nevertheless gave judgment against the defendant as prayed for in the complaint. On appeal to this court the judgment was reversed; and upon the going down of the remittitur the trial court, as directed by this court, vacated and set aside the judgment, and caused judgment to be entered against the plaintiff and in favor of the defendant for her costs. Plaintiff appeals from such judgment.

[1] The plaintiff made no application to the trial court at any time for permission to file an amended complaint making the defendant's husband a party defendant, and therefore cannot be heard in this court to complain, nor in fact does she complain, that the trial court abused its discretion in entering judgment against her. *Saddlemire v. Stockton Savings, etc.*, 144 Cal. 650, 655, 79 Pac. 381; *Durrell v. Dooner*, 119 Cal. 411, 51 Pac. 628; *Sutter v. City and County of San Francisco*, 36 Cal. 112; *Schaake v. Eagle, etc., Can Co.*, 135 Cal. 472, 480, 63 Pac. 1025, 67 Pac. 759; *Buckley v. Howe*, 86 Cal. 596, 605, 25 Pac. 132.

[2] Her contention is that the form of the judgment ought not to be generally in favor of the defendant, but merely that the action should abate; and she is apprehensive that the judgment in its present form may form the basis of a plea of res adjudicata in a subsequent action. The form of judgment is the one usually employed where the defendant is given judgment for costs; and as the record before us indicates that the judgment is not based on the merits, it cannot constitute a bar to another action. *Pyle v. Piercy*, 122 Cal. 383, 55 Pac. 141; *Browne v. Johnson*, 1 Doug. (Mich.) 185; 23 Cyc. 669; 1 Black on Judgments, § 27; 1 Freeman on Judgments, § 17; *Gray v. Dougherty*, 25 Cal. 266, 272; *Terry v. Hammonds*, 47 Cal. 32.

In the case of *Scott v. Burton*, 6 Tex. 322, 55 Am. Dec. 782, it was held that the form of the judgment was immaterial, and that unless the judgment showed intrinsically and distinctly, and not inferentially that the matters in the record had been adjudicated, it would not form the basis of a plea of res adjudicata, and that a mere judgment for defendant for costs does not show an adjudication on the merits of the case. To the same effect, see 11 Am. & Eng. Ency. of Pl. & Prac. 929. Greenleaf, in his work on Evidence, in volume 1, at section 530, says: "In



order to constitute the former judgment a complete bar, it must appear to have been a decision upon the merits; and this will be sufficient though the declaration were essentially defective, so that it would have been adjudged bad on demurrer. But if the trial went off on a technical defect, or because the debt was not yet due, or because the court had not jurisdiction, or because of a temporary disability of the plaintiff to sue, or the like, the judgment will be no bar to a future action."

The judgment is affirmed.

We concur: LENNON, P. J.; HALL, J.

(22 Cal. App. 144)

SKELTON v. SCHACHT MOTOR CAR CO.  
et al. (Civ. 1,309.)

(District Court of Appeal, Second District, California. May 19, 1913. Rehearing Denied by Supreme Court July 18, 1913.)

TRIAL (§ 162\*)—NONSUIT—ENTRY OF NONSUIT BEFORE CLOSE OF PLAINTIFF'S EVIDENCE.

Ordinarily a motion for nonsuit will not be entertained until all the evidence desired to be presented by plaintiff has been introduced; but where, on plaintiff's own testimony, no judgment can be entered for him, the making of the motion and an affirmative ruling thereon before plaintiff desires to rest his case are not error, especially where he did not claim that his other testimony would modify or explain that already introduced.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 370; Dec. Dig. § 162.\*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Ray Skelton against the Schacht Motor Car Company and others. From a judgment of nonsuit, plaintiff appeals. Affirmed.

M. I. Grossman, of Los Angeles, for appellant. Ingall W. Bull and H. A. Pierce, both of Los Angeles, for respondents.

JAMES, J. Plaintiff sued to recover damages which he alleged that he had sustained by reason of certain automobile parts of the value of \$177.20 having been converted by defendants, and for the further sum of \$600 for loss of time and money spent in hiring vehicles to use in the place of the automobile, the use of which he alleged he was deprived of by defendants. The case came on for trial, and it appeared by the evidence that plaintiff, after having purchased an automobile from defendants, became dissatisfied with it because of the improper working of the machine, and returned it to the agency of defendant corporation, which was managed by the individual defendants, except Dietz. Dietz was the factory representative of the Schacht Motor Car Company. At the time plaintiff delivered the automobile into the hands of defendants he delivered, also, certain extra equipment, the alleged value of which has already been stated. He testified

that the machine was never redelivered to him in satisfactory condition, that it was injured and damaged, and that for a considerable period of time he was obliged to hire other automobiles and vehicles to use in the prosecution of his business. It was then shown by plaintiff that after various negotiations respecting an adjustment of the matter had been had he entered into an agreement with the defendant corporation. The original of this agreement was introduced in evidence, and it appeared plainly to contemplate an adjustment of the entire controversy respecting the defective automobile and damages for the time during which plaintiff was deprived of the use of it. It was therein recited that the old car and "all equipment and extras belonging thereto" were then in the possession of the agency, and, in conclusion, it was provided that the title of the old car was to pass to the agency after a new car had been delivered. It was further provided that defendant corporation should pay \$100 cash, as indemnity for the use of the car which had been withheld.

Plaintiff, in his testimony, admitted that he had received the new car according to the terms of this agreement, and that he had accepted and used it since the day of its receipt. These things being shown to the court, defendants moved for a judgment of nonsuit. Plaintiff's counsel objected to the granting of the motion, and stated that there was other evidence to be introduced, but made no contention that by this other evidence any different state of facts could be shown than that already illustrated by the plaintiff's testimony and the documentary evidence. The court there said: "The contract has been executed, and they accepted it. The only thing is the failure of the Schacht Motor Car Company to pay the \$100 as they agreed, which would be a breach of the contract." Counsel for plaintiff responded: "We are suing for the conversion of our accessories. In other words, no title to those accessories ever passed to the Schacht Motor Car Company by virtue of these agreements. \* \* \* I think we are entitled to sue for their conversion."

Ordinarily the rule of practice is, as counsel for plaintiff insists, that motions for judgments of nonsuit are not entertained until all of the evidence desired to be presented by a plaintiff has been introduced, but where, upon plaintiff's own testimony, it appears that no judgment would be proper to be entered in his favor, then the making of the motion and an affirmative ruling upon it in advance of the time that plaintiff might have desired to rest his case, can constitute no error; for it then appears that whatever other evidence might be brought before the court the result would be the same. In this case the only real difference between the trial judge's position and that of plaintiff's coun-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



sel was as to whether, by the accepting of the contract of settlement and the new automobile agreed to be furnished thereunder, plaintiff adjusted all matters in controversy between him and the defendants. The trial court concluded that such was the legal result, and it must be said that the testimony of plaintiff and the document introduced by him clearly and completely sustained this view of the case. It would have been an idle thing to have permitted plaintiff to proceed and introduce other testimony; particularly as it was not insisted on his behalf that this testimony would have modified, qualified, or explained any of that already introduced by him.

The judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

(22 Cal. App. 135)

**BROWN v. BRASHEAR.** (Civ. 1,060.)

(District Court of Appeal, Second District, California. May 19, 1913. Rehearing Denied by Supreme Court July 18, 1913.)

**1. MUNICIPAL CORPORATIONS (§ 706\*)—INJURIES ON STREET—ACTIONS—JURY QUESTION—NEGLIGENCE.**

Evidence in an action against the owner of an automobile for injuries by being struck after plaintiff had alighted from a street car held to make defendant's negligence a question for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

**2. MUNICIPAL CORPORATIONS (§ 706\*)—INJURIES ON STREET—ACTIONS—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.**

Evidence in an action against the owner of an automobile for injuries by being struck after plaintiff had alighted from a street car held to make the question of contributory negligence one for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

**3. MUNICIPAL CORPORATIONS (§ 706\*) — INJURY ON STREET—ACTION—INSTRUCTIONS—DUTY OF AUTOMOBILE OWNER.**

In an action for injuries from being struck by defendant's automobile, in which defendant's evidence was that plaintiff jumped off of a moving street car shortly after it had stopped and started again, and ran directly in front of the automobile, it was error to refuse an instruction that defendant was not required to drive his car to protect passengers on the street car, who might jump from it while it was in motion, unless defendant had warning that the passenger intended to jump; an instruction that defendant was required to exercise ordinary care not being sufficient under the evidence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

**4. MUNICIPAL CORPORATIONS (§ 705\*) — USE OF STREETS.**

Pedestrians on streets where vehicles are constantly traveling must use ordinary care not to be run over, and vehicle drivers must, in turn, use ordinary care to prevent injuring

pedestrians; their rights and duties being equal and reciprocal.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.\*]

Appeal from Superior Court, Los Angeles County; W. M. Conley, Presiding Judge.

Action by Anna K. Brown, as executrix, substituted for D. R. Brown, against C. W. Brashear. From a judgment for plaintiff and an order denying a motion for new trial, defendant appeals. Reversed.

E. T. Sherer, Emmet H. Wilson, and Edwin A. Meserve, all of Los Angeles, for appellant. H. K. Norton, of Pasadena, and E. B. Drake, of Los Angeles, for respondent.

JAMES, J. Plaintiff was awarded a judgment for the sum of \$1,891 following the verdict of a jury as damages for personal injuries received by him through the alleged negligence of defendant. A motion was made for a new trial and denied, and this appeal was then taken from that order, and also from the judgment as entered.

About the 15th day of February, 1910, at about the hour of 6:30 p. m., plaintiff alighted from a trolley car on West Pico street at Elden avenue in the city of Los Angeles. Pico street at that point runs approximately east and west, and Elden avenue intersects it from the north at right angles. Plaintiff's home was located about one-half block north of Pico on the west side of Elden. On the evening in question the car traveling westerly on Pico was stopped by the operatives thereof at the usual point at the east side of Elden to discharge passengers. The car was brought to a complete stop, several passengers alighted, and it then started on its way. When it had progressed from one-half to two-thirds of the way across Elden, the plaintiff swung himself off from the moving car, and a moment afterwards was struck by an automobile which approached him from the east, and which was consequently traveling in the same direction as was the car from which he had just alighted. There was no dispute as to these facts. Plaintiff, however, contended that, before alighting from the moving car, he looked backward over his shoulder in the direction from which the automobile came, and that he saw no automobile, and that he could have seen it had one been within a distance of 100 feet; that he saw a team of horses and the outline of a wheel, but no automobile nor any headlights of an automobile; that he did not hear the sound of a horn or any signal of warning before he was struck. On the other hand, the defendant testified that he was driving a light automobile, and that he was traveling in the rear of the car; that, when the car stopped at Elden avenue, he stopped his machine also in order to allow passengers to reach the sidewalk in safety, and that after

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



all of the passengers had left the car and the car had started on its way he started up his automobile and proceeded to travel after the car and in the regular driveway between the right of the northerly track and the curb line; that, when he had about crossed Elden avenue, plaintiff swung himself down suddenly from the moving car, and ran directly in front of the automobile, where he was struck and knocked down. Defendant further testified that at the time his machine struck the plaintiff he was only traveling about six miles an hour, as he had not gained full headway after waiting for the passengers to clear the street. A passenger on the car testified to having seen the automobile following the car, and in general gave testimony corroborative of that of the defendant. As a result of being struck by the automobile, the plaintiff sustained serious physical injuries which incapacitated him from pursuing his regular employment for a long time.

[1, 2] While it is insisted on the part of appellant that the evidence was insufficient to show any negligent act committed by defendant, and that, on the contrary, it was shown that plaintiff's injuries were caused by his own negligence, the evidence as it is shown in the record presents a case where it may be said that there was some conflict, and that under all of the circumstances shown in testimony the questions as to defendant's negligence and as to plaintiff's contributory negligence were for the jury to determine. If, in the judgment of the trial court, the evidence was insufficient to warrant a verdict in favor of plaintiff, then the trial judge should have granted the motion for a new trial, but under the state of the record this court cannot substitute its judgment for either that of the jury or the trial judge. If the statement of the occurrence as contained in defendant's testimony was in accordance with the facts, then no negligence at all would be shown as chargeable against defendant, and a case would be presented where the automobile driver, having exercised ordinary care to avoid injuring passengers disembarking from a car, caused injury to a person who, without exercising due care for his own safety, planted himself in front of the moving automobile suddenly and in such a manner as to make it impossible for the defendant to avoid injuring him. Many of the circumstances shown in proof tended strongly to corroborate the claim of the defendant as to the manner in which the accident occurred. The jury, if they adopted plaintiff's statement, must necessarily have inferred that because plaintiff looked toward the rear and did not see the automobile before alighting from the moving car, that the automobile must have been traveling at a high rate of speed in order to have injured plaintiff. If the jury concluded that defendant should have sounded a horn or given an alarm announcing his approach, they must

have determined that defendant observed the plaintiff in the street in time to have made such warning of some avail.

[3] Under such a state of the case, it became important that the relative rights of the pedestrian and driver of the vehicle should have been clearly stated to the jury, and in this connection it would seem that the trial court erred in refusing an instruction offered by defendant and marked in the transcript as No. 3. The court did instruct generally to the effect that both the pedestrian and the driver of the vehicle were required to exercise ordinary care in their conduct while upon the street in order to avoid doing damage or injury to each other. The instruction which was refused was worded as follows: "The defendant was not called upon to drive his car so as to protect passengers on the street car who might see fit to jump from the car while it was in motion, unless and until he had warning that the passenger did intend to jump from the street car while in motion." While the jury were told that the defendant was required to exercise ordinary care in the management of his automobile, they were nowhere told, as defendant desired to have them instructed by the offered instruction, as to the defendant's right to assume that a passenger would not alight from a moving car (and especially a car which had just stopped to discharge passengers and was commencing to proceed upon its way). The instruction was directed to a point very important to the defendant in having the law properly applied to the facts by the jury, and it may have been that the jury in their own judgment concluded it to be the defendant's duty to so manage his car as to protect passengers who might jump from the street car between the regular stops, and that it was the duty of the defendant to anticipate such possible action on the part of the passengers. If the jury did so assume, they entertained a mistaken apprehension as to the law. The instruction offered by defendant seems to contain a proper statement of the law as applicable to the facts in dispute at the trial, and the defendant should have had whatever benefit its consideration by the jury might have furnished him.

[4] Persons alighting upon or walking across public streets where vehicles are constantly traveling to and fro must use ordinary care to see that they do not collide with or are run over by vehicles, and, in turn, it is the duty of the drivers of vehicles to exercise ordinary care to prevent any injury being caused to such foot passengers. It has been stated as the settled rule that the requirements as to the conduct of both the pedestrian and the driver of a vehicle are reciprocal and equal and that neither has any right of way superior to the other. See *Niosi v. Empire Steam Laundry*, 117 Cal. 257, 49 Pac. 185, and decisions therein referred to.

Because of the error of the court in re-



fusing to give the instruction hereinbefore referred to, the motion for a new trial should have been granted.

The judgment and order are reversed.

We concur: ALLEN, P. J.; SHAW, J.

(22 Cal. App. 139)

SECCOMBE v. ROE et al. (Civ. 1,302.)

(District Court of Appeal, Second District, California. May 19, 1913.)

**1. MORTGAGES (§ 356\*) — FORECLOSURE BY SALE — SUFFICIENCY OF NOTICE — "ONCE A WEEK FOR FOUR SUCCESSIVE WEEKS."**

A provision in a deed of trust that before sale the trustee should publish notice of the time and place of sale "at least once a week for four successive weeks" meant that the publication was to be once a week for four weeks of seven days each, requiring that 28 days should elapse from the date of the first publication to the date when authority was given to make the sale, so that, where publication was made on October 3d, 10th, 17th, and 24th, and the sale was made on October 25th, less than 28 days from the first publication, it was void.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1063-1067; Dec. Dig. § 356.\*]

**2. MORTGAGES (§ 372\*)—FORECLOSURE SALE—RIGHTS OF PURCHASER—DEFECT IN NOTICE.**

Where proper notice of a sale under a deed of trust is not given, the sale will not be allowed to stand, and while the trustee may convey the legal title in breach of the trust, and the purchaser will take a good title at law, yet in equity such purchaser will hold it upon the same trusts as the trustee held it, as the purchaser should be held to know the record title of his vendor; and, where in such case the payee of the note and the beneficiary of the trust is the purchaser, he holds the property upon the same trust as security for the debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1102, 1103, 1105-1117; Dec. Dig. § 372.\*]

**3. MORTGAGES (§ 372\*) — FORECLOSURE BY SALE — RIGHTS OF PURCHASER—PROVISIONS AS TO RECITALS IN DEED TO PURCHASER.**

A provision in a deed of trust that on sale of the premises the recitals in the deed to the purchaser as to any default payments, publication of notice of sale, demand, postponement, and terms of sale, and of any other fact confirming the regularity of the sale, should be conclusive proof of such matters against the mortgagor, would estop the mortgagor to claim irregularity in the sale as against an innocent purchaser from the trustee, but as between the mortgagor and the mortgagee taking the legal title under a sale void because of insufficient notice, the mortgagor would not be estopped to deny the regularity of the sale and obtain equitable relief by a redemption.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1102, 1103, 1105-1117; Dec. Dig. § 372.\*]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by A. H. Seccombe against A. J. Roe and others. From an order discharging his attachment, plaintiff appeals. Affirmed.

P. S. McNutt, of Los Angeles, for appellant. Wm. L. Jarrott and James S. Jarrott, both of Los Angeles, for respondents.

ALLEN, P. J. This action was to recover the balance due upon a promissory note originally secured by a deed of trust; it being alleged that upon default in the payment of the note by defendants the property described in the deed of trust was sold, and the net proceeds derived from said sale applied upon such note. An affidavit was filed with the complaint herein sufficient in form to authorize the issuance of a writ of attachment, which writ was issued and levied upon the property of defendants. Thereafter defendants moved to discharge the attachment, upon the ground that the statements contained in the affidavit for attachment were untrue. The court upon the hearing of such motion granted the same, and from the order discharging the attachment plaintiff appeals.

A determination of the controlling question presented upon this appeal depends upon the effect which should be given the stipulation in the deed of trust securing the obligation, which in terms provides that before sale said trustee should publish notice of the time and place of sale at least once a week for four successive weeks. It was stipulated upon the hearing of the motion to discharge the attachment that publication was made on October 3, 10, 17, and 24, and the sale was made October 25, 1912. It thus appears that the sale was made within less than four weeks from the time of the first publication, but that in fact four publications were had before sale. Appellant's contention is that the stipulation discloses a complete compliance by the trustee with the agreement as to the time of publication, which was made a condition precedent to sale. The trial court evidently acted upon the theory that once a week for four successive weeks must be construed as a stipulation that the first publication should be made at least 28 days before the time of sale; and this is respondents' contention, based upon section 3258 of the Political Code, which provides that a week consists of seven consecutive days, and that under the authority of *Townsend v. Tallant*, 33 Cal. 45, 91 Am. Dec. 617, *Williams v. Board of Supervisors of Sacramento Co.*, 58 Cal. 237, and *Reclamation Dist. v. McPhee*, 13 Cal. App. 384, 109 Pac. 1106, a sale is invalid where the interval between the date of the first publication and the sale did not exceed 28 days, and they cite a number of authorities upon the proposition that a publication for a certain number of weeks must be made for as many days before the date of sale as there are days in the number of weeks. All of the California cases relied upon by respondents deal with instances where the statute with reference to notice provided for a publication or a notice of four weeks preceding the performance of the act, and in most of the cases from other jurisdictions cited by respondents the court was dealing



with the same requirement. These authorities cited throw but little light upon the question presented, unless it be said that once a week for four successive weeks is the equivalent of a stipulation for four full weeks' publication. This construction was given to section 440 of the Code of Civil Procedure of New York in *Market National Bank v. Pacific National Bank*, 89 N. Y. 397. That section of the Code provided that publication shall be made for such length of time as may be deemed reasonable, but not less than once a week for six weeks. It was there said by the court: "It will be perceived that the publication must be made for a specified period of time, and when the statute provides for six weeks it is obvious that this period will not elapse prior to its expiration. It does not provide for a publication six times within six weeks, but for a time not less than once a week for six successive weeks. \* \* \* Its object is to give notice by means of the newspapers, and it cannot be claimed that such notice is given for six weeks before that time expires. Looking at the various provisions referred to, it is a reasonable construction that the law intended a full six-weeks publication, and not six times in six different weeks." Notice of a sale of real estate for taxes was published 12 successive weeks, the first insertion being 82 days prior to the sale, under a statute requiring the notice to be given by advertisement in a newspaper once a week for at least 12 successive weeks. The Supreme Court of the United States in *Early v. Doe*, 16 How. 610, 14 L. Ed. 1079, said: "The preposition 'for' means of itself 'duration,' when it is put in connection with time, and as all of us use it in that way, in our everyday conversation, it cannot be presumed that the legislator in making this statute did not mean to use it in the same way. Twelve successive weeks is as definite a designation of time, according to our division of it, as can be made. When we say that anything may be done in 12 weeks, or that it shall not be done for 12 weeks, after the happening of the fact which is to precede it, we mean that it may be done in 12 weeks or 84 days, or, as the case may be, that it shall not be done before." These authorities above mentioned are quoted with approval in *State v. Cherry County*, 58 Neb. 734, 79 N. W. 825, wherein significance is attached to the use of the word "for" as indicating duration of time.

[1] It seems to us that when the stipulation in the deed of trust was that the publication was to be once a week for four weeks, it meant four weeks of seven days each, or that 28 days shall elapse from the date of the first publication to the date when authority was given to make the sale, and that a sale made within less than 28 days from the first publication was without authority upon the part of the trustee.

[2] It must be conceded as a legal prop-

osition that if proper notices of a sale are not given, the sale will not be allowed to stand; and, while the trustee may convey the legal title in breach of the trust, and without complying with the power, yet the grantee will take a good title at law, but such purchaser, in equity, will hold the property upon the same trusts upon which the trustee held it, for the reason that the purchaser should be held to know the record title of his vendor. In this case the purchaser was the payee of the note and the beneficiary under the trust, and must be said, if the sale were invalid, to hold the legal title to this property upon the same trusts as those originally created, which were that he held the same as security for the payment of the debt sued upon.

[3] It is claimed by appellant, however, that, such deed of trust containing the provision that, in the event of a sale of said premises, or any part thereof, and the execution of a deed thereto under the trust, then the recitals therein of any default payments, publication of notice of sale, demand that such sale should be made, postponement of sale, terms of sale, purchaser, payment of purchase money, and of any other fact or facts confirming the regularity or validity of said sale, shall be conclusive proofs of such matters, and of all other facts recited therein against the said first parties, defendants are estopped to claim irregularity connected with the sale. That this would be the effect as to a purchase by a third party and a conveyance to him by the trustee must be conceded upon the authority of *Mersfelder v. Spring*, 139 Cal. 593, 73 Pac. 452. But are such recitals conclusive as between the parties to the deed? We think not. As said in the concluding part of the opinion in the case last cited: They are conclusive in a case involving only the legal title, as in ejectment, but will not preclude inquiry in an equitable proceeding into the fairness of the sale, or into other matters which on equitable principles might entitle the party injured to relief. We are of opinion that this stipulation as to conclusiveness, reading the whole deed and the various requirements together, was only intended, and only had the effect, to protect an innocent purchaser or a third party to the transaction, who acquired at such sale the legal title, but that as between the trustor and the beneficiary, when such beneficiary takes the legal title under a sale made in violation of the terms of the trust, the trustor is not estopped to deny the regularity of the sale and to obtain equitable relief through a redemption thereof, which is sought in this case under the pleadings. We conclude, therefore, that the trial court committed no error in its order dissolving the attachment.

The order appealed from is affirmed.

We concur: JAMES, J.; SHAW, J.



(22 Cal. App. 147)

CARROLL v. BOSTWICK. (Civ. 1,330.)

(District Court of Appeal, Second District, California. May 20, 1913.)

**1. TAXATION (§ 659\*)—TAX SALE—MAILING OF NOTICE.**

Under Pol. Code, § 3897, requiring the tax collector to cause notice of a tax sale to be published for three successive weeks prior to the date of the sale, and to mail a copy of the notice to the party to whom the land was last assessed, at his last known post office address, such copy must be mailed at least three weeks before the sale.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1336, 1337; Dec. Dig. § 659.\*]

**2. TAXATION (§ 760\*)—TAX SALE.**

A recital in a tax deed, which did not show that notice of the sale was mailed to the last known post office address of the party to whom the property was last assessed, which is required by Pol. Code, § 3897, was insufficient to show a valid sale.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1509; Dec. Dig. § 760.\*]

Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by John Carroll against E. E. Bostwick. From a judgment for plaintiff and an order denying a motion for new trial, defendant appeals. Affirmed.

C. A. Stice, of Los Angeles, for appellant. Carter, Kirby & Henderson, of Los Angeles, for respondent.

SHAW, J. Action to determine the validity of certain tax deeds purporting to have been made by the state to defendant, pursuant to the provisions of sections 3600-3900 of the Political Code for delinquent taxes for the year 1904, and under and by virtue of which defendant claims to have acquired plaintiff's title to the town lots described in the complaint. Judgment went for plaintiff, from which, and an order denying a motion for a new trial, defendant appeals.

[1] Without discussing other alleged defects in the deeds and proceedings, the order and judgment must be affirmed on account of noncompliance on the part of the tax collector with the provisions of section 3897 of the Political Code. This section requires that the tax collector, as a prerequisite to a valid sale by the state of property purchased by it for delinquent taxes shall cause a notice of such sale to be published for three successive weeks prior to the date fixed for the sale, and "shall mail a copy of said notice, postage thereon prepaid and registered, to the party to whom the land was last assessed next before the sale, at his last known post office address." The copy of the notice required to be published must, where the name of the party to whom the property was last assessed is known, be mailed at least three weeks before the sale. *Heaton v. Morrison*, 162 Cal. 668, 124 Pac. 240; *Brady v. Bostwick*, 132 Pac. 472; *Henderson v. Ward*, 132 Pac. 470.

[2] The sale of the land by the state was made on June 7, 1911, and the only evidence purporting to show a compliance with the provisions of said section claimed to constitute prima facie proof of compliance under the provisions of section 3898 of the Political Code was the recital in the deeds as follows: "And, whereas, on the 22d day of May, 1911, W. O. Welch, tax collector as aforesaid, did mail a copy of said notice, registered, postage thereon prepaid, to the party to whom the land was last assessed next before such sale." This recital is insufficient for the reason that it does not purport to state that the notice was mailed to the last known post office address of the party to whom the land was assessed, nor state any fact constituting an excuse for failure to comply with the requirement, but it also affirmatively shows that while the party to whom the land was assessed was known, the copies of the notice were mailed to him within a period of less than three weeks prior to the making of the sale.

Upon the authority of the cases above cited, the sales and deeds were void, and the judgment and order appealed from must be affirmed. It is so ordered.

We concur: ALLEN, P. J.; JAMES, J.

(22 Cal. App. 111)

DAVIS v. NATIONAL LUMBER CO.

(Civ. 1,301.)

(District Court of Appeal, Second District, California. May 16, 1913.)

**1. BAILMENT (§ 12\*)—EVIDENCE OF CONTRACT.**

Where plaintiff, the owner of a team, was hauling for defendant and was given the privilege of the use of defendant's barn for his team without charge, plaintiff to have the whole responsibility of the safety of the team, and the horses were lost in a fire which destroyed its stables, it was not liable to plaintiff therefor.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 37-41; Dec. Dig. § 12.\*]

**2. BAILMENT (§ 12\*)—GRATUITOUS BAILMENT—LIABILITY OF BAILEE.**

A bailee charged with the care of live stock without reward is within Civ. Code, § 1846, providing that a gratuitous depositary must use at least slight care for the preservation of the thing deposited, and at most he cannot be held liable for damages unless resulting from gross negligence on his part.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 37-41; Dec. Dig. § 12.\*]

Appeal from Superior Court, Los Angeles County; Franklin J. Cole, Judge.

Action by A. H. Davis against the National Lumber Company. From an order denying a new trial after judgment for plaintiff, defendant appeals. Reversed.

R. L. Horton, of Los Angeles, for appellant. Charles S. McKelvey, of Los Angeles, for respondent.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**SHAW, J.** Action to recover the value of two horses and one mule alleged to have been delivered by plaintiff to defendant as bailee. Plaintiff had judgment for the value of the mule. The appeal is from an order denying defendant's motion for a new trial.

The court found that plaintiff delivered to defendant, for its use and benefit, the two horses and mule upon agreement that defendant would care for the same and return them to plaintiff on demand; that plaintiff made such demand and defendant neglected and failed to comply therewith for the reason that the two horses were, without defendant's fault or negligence, lost in a fire which destroyed its stables wherein they were housed; that the mule was not delivered for the reason that, by direction of defendant, it, with another mule owned by plaintiff, was by him placed in an unsafe corral with other stock, and while there it was kicked by one of defendant's horses, as a result of which it died.

[1] There is no evidence whatever showing that defendant agreed to care for the stock or even that it had charge of them. On the contrary, the uncontradicted evidence is that plaintiff, who owned the team of horses and two mules, was engaged in hauling for defendant. Having trouble in keeping them where he lived, he arranged for stabling and caring for the same upon defendant's premises. Plaintiff states that it was agreed that defendant "would make no charge for the use of the stable and, besides my wages, I was to have a dollar a day for the use of one team. I was to take care of my own stock except the feeding; that is, I curried my own stock and watered them and otherwise attended to them, and drove my own stock. \* \* \* My stock had the same attention as the other stock; there was no difference." According to the testimony offered on behalf of defendant, plaintiff, when given the privilege of the use of defendant's premises, was told that, while no charge would be made for such use, "he would have to take the responsibility of the safety of his stock upon himself." It is unnecessary to quote other testimony to the same effect. It thus appears that the evidence is not only insufficient to show the existence of the contract as found by the court but that it does show a special contract between plaintiff and defendant whereby it was understood that the latter should charge nothing for the premises which it permitted plaintiff to use and incur no liability for damages in case of loss. *Fay v. The New World*, 1 Cal. 348.

[2] Neither is there any evidence in support of the finding that the injury to the mule was due to the fact that it was kicked by one of defendant's horses, or that it was kicked at all. The only evidence upon that point was that given by plaintiff, who says: "I don't know what horse kicked my mule, or whether the other mule, which belonged

to me and which was in the corral at the time, kicked my mule. I have no knowledge at all upon that because I was not present when the mule was kicked. I do not know whether it was a kick, except that the impression looked to me like the indentation of a calk from the shoe of a horse or a mule." It clearly appears that plaintiff had the care and charge of his own stock. If the corral was unsafe, it was his privilege to place them elsewhere. In the absence of any obligation to do so, he voluntarily placed the mules in the corral with other stock owned by defendant. Assuming that the facts are sufficient to show that defendant was a bailee charged with the care of the stock, such service was without reward, and under section 1846, Civil Code, only slight care for the preservation of the thing deposited was required. *Whitney v. Lee*, 8 Metc. (Mass.) 91. At most, defendant could not be held liable for damages unless the same resulted from gross negligence on its part. The record discloses no evidence of such negligence. Volume 9, Am. & Eng. Ency. of Law, p. 287.

For the reasons given, the order denying the motion must be reversed, and it is so ordered.

We concur: ALLEN, P. J.; JAMES, J.

(22 Cal. App. 96)

**MEYER et al. v. BUCKLEY.** (Civ. 1,225.)  
(District Court of Appeal, First District, California. May 15, 1913.)

1. **CONTRACTS (§ 175\*)—BUILDING CONTRACTS—ACTIONS—SUFFICIENCY OF EVIDENCE.**

Evidence, in an action for services as architect on a contract to pay plaintiff 5 per cent. of the total cost of the improvements as compensation, held not to show that the parties agreed to limit the cost of the work to a certain amount.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 766, 978, 1010, 1067–1069, 1786, 1803, 1810; Dec. Dig. § 175.\*]

2. **INTEREST (§ 13\*)—LIQUIDATED AMOUNT—DEFAULT IN PAYMENT.**

Where, under the contract, plaintiff was to receive a fixed percentage of the cost of the work superintended for his services as architect, payable upon completion of the work, and plaintiff certified to defendant the amount of work done on the building so that defendant knew or could have known the cost of the work at its completion, plaintiff was entitled to interest upon recovering under the contract, the account having been liquidated when the work was finished; the principle applying that a debtor who knows the exact amount he has to pay and when he has to pay it is chargeable with interest if he neglects to pay when due.

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. § 25; Dec. Dig. § 13.\*]

3. **INTEREST (§ 39\*)—LIQUIDATED CLAIM—REASONABLE VALUE OF SERVICES.**

A claim for the reasonable value of services rendered does not bear interest until rendition of judgment.

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. §§ 83–89; Dec. Dig. § 39.\*]



Appeal from Superior Court, City and County of San Francisco; Frank H. Smith, Judge.

Action by F. H. Meyer and another, partners doing business under the firm name of Meyer & O'Brien, against C. F. Buckley. From a judgment for plaintiffs, defendant appeals. Affirmed as modified.

Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for appellant. Myer Jacobs, of San Francisco, for respondents.

KERRIGAN, J. This is an action by plaintiffs against the defendant to recover for certain services as architects alleged to have been rendered by plaintiffs at the instance and request of defendant.

The first count is founded upon an express contract to recover 5 per cent. of the total cost of certain improvements, alterations, and additions to the Baltimore Hotel, situated in San Francisco, as compensation for their services as architects in superintending said work. It is alleged therein that said improvements, alterations, and additions cost the sum of \$11,713.08, and that 5 per cent. thereof is the sum of \$585.65. In the second count the sum of \$40 is prayed for as reasonable compensation for the services of said plaintiffs in superintending certain plumbing work in said Baltimore Hotel. The third count is for the purpose of recovering the sum of \$11.20 expended by said plaintiffs for the use and benefit of said defendant in procuring permits, etc.

The trial court refused to instruct the jury, in response to one of the issues framed by the pleadings, and as requested by the defendant, that, if they believed that defendant would not have entered into the contract agreeing to pay plaintiffs 5 per cent. of the costs of the improvements and additions to the Baltimore Hotel if the plaintiffs had not represented to him that the total cost of such work would not exceed the sum of \$3,000, their verdict should be in favor of the defendant. In refusing to thus instruct the jury, we think, under all the circumstances of the case, that the court did not commit error for which the judgment must be reversed.

[1] During the early negotiations between the parties some time in the latter part of July, 1903, the plaintiffs did suggest to the defendant that he limit the tenant at that time to the sum of \$2,500 or \$3,000 as the cost of improvements and additions to be made; but, according to the undisputed facts, weeks before the contract in question was executed both parties knew that the work contemplated would exceed the larger of those sums by over \$700; and just a few days before the contract between the parties was made, and long after the conversation about the limit of \$3,000, the defendant secured new tenants and agreed in writing

with them to make additional alterations and improvements in the building, the reasonable value of which it is not questioned was about \$8,000. The contract fixing the compensations does not limit the cost of the work; and any statement or suggestion in the case tending to support the issue referred to is too vague, slight, and indefinite to warrant a moment's serious consideration. Code Civ. Proc. § 1835; *Gustafson v. Stockton*, etc., 132 Cal. 619, 64 Pac. 995.

The plaintiffs introduced evidence tending to show the reasonable value of the services rendered under the second cause of action stated in the complaint. The court refused to instruct the jury, as requested by the defendant, that such evidence was not conclusive and binding upon them, and that they, in estimating the value of the services, had a right to exercise their own judgment. Conceding that this instruction should have been given (*Ehlers v. Wannack Bros.*, 118 Cal. 310, 312, 50 Pac. 433; *McLean v. Crow*, 88 Cal. 644, 26 Pac. 596; *Estate of Dorland*, 63 Cal. 281), and passing the point that at the trial defendant apparently did not dispute that if the plaintiffs rendered the particular service (concerning the plumbing referred to in the second count) they were entitled to the \$40 charged, we think that other instructions given by the court covered the subject.

The jury allowed interest on each of the three sums sued for from the time each fell due; and defendant claims that the value as to two of the counts was not capable of being made certain by calculation, as provided in section 3287 of the Civil Code; that therefore interest should have been allowed only from the rendition of the verdict.

[2] As to the first count, it is to be observed that the contract provided a fixed percentage of the cost of all the work to be superintended by the plaintiffs, and that the amount due would be paid upon the completion of the work. And it is not denied that during the progress of the work the plaintiffs, as was stipulated in the contract, certified weekly to the defendant the amount of work done on the building by the different contractors, and that the accounts thus audited were paid by the defendant. Furthermore, the defendant admitted in his answer that the cost price of the work done under the contract was the amount claimed by plaintiffs. In other words, the account was liquidated when the work was finished, the amount due was ascertained, and the defendant was apprised, or by a simple computation could have been apprised, of his liability. As was said in *People v. County of New York*, 5 Cow. (N. Y.) 331: "Whenever the debtor knows precisely what he is to pay, and when he is to pay, he shall be charged with interest if he neglects to pay." See, also, *Clark v. Dutton*, 69 Ill. 521; *Courteney v. Standard Box Co.*, 16 Cal. App. 600, 613,



117 Pac. 778; *Martyn v. Western Pacific Ry. Co.*, 132 Pac. 802.

In the case of *Robinson v. American Fish Co.*, 17 Cal. App. 212, 220, 119 Pac. 388, which was an action on an account for fish sold and delivered, the quantity of fish delivered was not disputed; the only question being as to whether the price agreed upon was one cent and a half or two cents per pound. The court held that, since the total amount due at either price was capable of ready ascertainment by mere computation, no accounting was required to reach the precise sum due.

[3] As to the second cause of action, it is sufficient to say that, it being for the reasonable value of the services rendered, it is well settled that the claim does not bear interest until the rendition of the judgment. *Cox v. McLaughlin*, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164; *Easterbrook v. Farquharson*, 110 Cal. 311, 42 Pac. 811; *Coghlan v. Quartararo*, 15 Cal. App. 662, 115 Pac. 664. The judgment should therefore be modified by striking therefrom the amount of interest allowed on this count.

As thus modified, the judgment is affirmed.

We concur: HALL, J.; LENNON, P. J.

(32 Cal. App. 129)

THOMPSON v. McKENNA et al. (Civ. 1,329.)

(District Court of Appeal, Second District, California. May 17, 1913. Rehearing Denied by Supreme Court July 16, 1913.)

1. DEEDS (§ 194\*)—EVIDENCE—DELIVERY—PRESUMPTION FROM POSSESSION OF DEED.

Possession of a deed by the grantee is prima facie evidence of its delivery.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 574-583, 623, 634; Dec. Dig. § 194.\*]

2. DEEDS (§ 208\*)—SUFFICIENCY OF EVIDENCE—DELIVERY.

Testimony of two witnesses who were present when a deed was executed that they did not see it delivered is not sufficient to overcome the presumption arising, either from the grantee's possession of the deed, or under Civ. Code, § 1055, providing that a grant duly executed is presumed to have been delivered at its date.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 625-632; Dec. Dig. § 208.\*]

3. EVIDENCE (§ 460\*)—PAROL EVIDENCE—IDENTIFYING LAND DESCRIBED BY DEED.

Where a deed, after naming a county in which the land conveyed was located, described it as a subdivision "of section 12, No. 31" without designating any plat, parol evidence is admissible to show that the description, which is prima facie insufficient, is in fact sufficient to identify the land.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2115-2128; Dec. Dig. § 460.\*]

4. APPEAL AND ERROR (§ 1010\*)—QUESTIONS OF FACT—CONCLUSIVENESS OF FINDINGS.

Whether such evidence is sufficient to show that the land can be identified with reasonable certainty is a question of fact for the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.\*]

5. DEEDS (§ 118\*)—SUFFICIENCY OF EVIDENCE—PAROL EVIDENCE IDENTIFYING SUBJECT-MATTER.

The rule for determining the sufficiency of such parol evidence as applied to a deed is less strict than the rule applied to proceedings which divest the title to land without the owner's consent.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 118.\*]

6. DEEDS (§ 118\*)—SUFFICIENCY OF EVIDENCE—PAROL EVIDENCE IDENTIFYING SUBJECT-MATTER.

Where a surveyor testified that he could identify the land described in the deed by reference to the county records, because there was only one plat recorded to which that combination of numbers and subdivisions could apply, the description is sufficient even though others testify that they could not identify the land from the description in the deed, since reference may be had to the records for identification.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 118.\*]

7. ADVERSE POSSESSION (§ 85\*)—HOSTILE POSSESSION—EVIDENCE—SUFFICIENCY.

In an action to quiet title where the defendant claimed exclusive ownership under a title adverse to the title of the mother of himself and plaintiff, evidence held sufficient to warrant a finding that his mother and defendant, as her administrator, had been in continuous and exclusive possession, hostile to the claim of defendant for more than 20 years.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 313, 493-503, 656, 657, 660, 668, 688-690; Dec. Dig. § 85.\*]

8. ADVERSE POSSESSION (§ 71\*)—HOSTILE CHARACTER OF POSSESSION—MISTAKE IN CONVEYANCE.

The fact that the defendant did not know during the time that his mother was in possession that the deed to her was defective does not affect the prescriptive right acquired by the adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 415-429; Dec. Dig. § 71.\*]

Appeal from Superior Court, Ventura County; S. E. Crow, Judge.

Action by Addie Norah Thompson against J. Irving McKenna. Judgment for plaintiff, and defendant appeals. Affirmed.

G. A. Gibbs, of Pasadena, and Catherine A. McKenna, of Los Angeles, for appellant. Joseph Scott and James L. Irwin, both of Los Angeles, for respondent.

SHAW, J. Action to quiet title to land. The facts of the case are as follows:

On November 10, 1890, John McKenna and Norah Anna McKenna were husband and wife. Plaintiff is the daughter of Norah Anna McKenna by a former husband, and half-sister to defendant, J. Irving McKenna, who is the son of John and Norah Anna McKenna. On November 10, 1890, John McKenna, who at the time resided with his family on a ranch in Ventura county, executed a deed of gift to his wife, Norah Anna McKenna, purporting to convey the property to her. On May 23, 1891, John McKenna died intestate.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



tate, leaving as his heirs his widow and son, the defendant, J. Irving McKenna. On July 9, 1909, Norah Anna McKenna died intestate, leaving as her sole heirs the plaintiff and defendant. The latter was appointed and qualified as administrator of her estate. About March, 1911, upon discovering that the description in the deed so made by his father to his mother was imperfect, and while acting as such administrator, he asserted exclusive claim, right, and ownership to the land described in the complaint in himself as the sole heir of his father, John McKenna, deceased, and on April 24, 1911, upon his petition therefor, letters of administration were issued to him as administrator of said estate. Thereupon plaintiff brought this action to have the title to the land quieted against the adverse claims of J. Irving McKenna, as administrator of the estate of John McKenna, deceased, as well as to him individually, other than as a joint heir with herself in her mother's estate.

The court found that at the time of her death Norah Anna McKenna was, and for a long time prior to her decease had been, the owner and in possession of the land described in the complaint; that neither J. Irving McKenna individually, other than as an heir at law of Norah Anna McKenna, deceased, nor as administrator of the estate of John McKenna, deceased, had any right, title, or interest in the property; but that, subject to the administration of the estate of Norah Anna McKenna, deceased, title to the land was vested in defendant individually and plaintiff as the heirs of deceased. Judgment followed in favor of plaintiff, from which defendant appeals.

[1] The contention of appellant is that the deed was never delivered; that if delivered the land could not be identified through the imperfect description therein contained, and that the evidence fails to establish facts sufficient to constitute a prescriptive title in the estate of Norah Anna McKenna, deceased, as found by the court. Norah Anna McKenna filed the deed for record on June 1, 1891. Her possession thereof was prima facie evidence of its delivery.

[2] Moreover, "a grant duly executed is presumed to have been delivered at its date." Section 1055, Civ. Code. There was no evidence tending to contradict the fact thus established, other than that defendant and one Nedrick, both of whom were present on November 10, 1890, when the deed was executed, testified that they did not see the grantor deliver it. This was insufficient to overcome the fact established by the possession of the deed and presumption arising under the section of the Code cited.

[3] A full and accurate description of the property, as alleged in the complaint and found by the court, is: "Situated in Ventura county, Cal., the west half of the southwest one-quarter of section twelve (12), and being

the west one-half of lot thirty-one (31), as the same is designated and delineated upon that certain map entitled 'Plat of the Rancho Santa Paula y Satcoy showing the subdivision lines as subdivided January, 1867, by W. H. Norway, County Surveyor of Santa Barbara County,' and recorded in the office of the county recorder of said Ventura county, Cal., of transcribed records of Santa Barbara county." The deed as executed by John McKenna described as "situate, lying, and being in the county of Ventura, state of Cal., and bounded and particularly described as follows, to wit: The west half of the southwest quarter of section 12, No. 31, containing 70 acres, more or less." This description standing alone is prima facie insufficient as a means of identifying the land intended to be conveyed. Notwithstanding this fact, plaintiff was entitled to show by extrinsic evidence that it was in fact sufficient as a means of such identification. "Any description by which the property may be identified by a competent surveyor, with reasonable certainty, either with or without the aid of extrinsic evidence, will be sufficient." *Law v. People*, 80 Ill. 268; *Best v. Wohlford*, 144 Cal. 733, 78 Pac. 293.

[4, 5] Parol evidence is admissible, not for the purpose of adding to or varying the description contained in the deed, but for applying the description to that part of the surface of the earth which is the subject-matter of the deed. Whether or not such evidence is sufficient to show that the land can be identified with reasonable certainty is a question of fact for the trial court. In addition to the cases cited, see *McLauchlan v. Bonyng*, 15 Cal. App. 239, 114 Pac. 798; *Fox v. Townsend*, 152 Cal. 51, 91 Pac. 1004, 1007; *Houghton v. Kern Valley Bank*, 157 Cal. 289, 107 Pac. 113. The rule applied in these cases, wherein it was sought to divest the owner of his title in proceedings in invitum, should be less stringent in its application to like questions arising in the transfer of real estate by deed in the ordinary way between individuals.

[6] It appeared that a survey of said rancho wherein the land was located was made in 1867 by W. H. Norway, at which time Ventura county was a part of Santa Barbara county, and that a plat of said survey, transcribed from the records of Santa Barbara county, was recorded in Ventura county; that this was the only map of subdivision of said rancho; that the description contained in the deed applied to this survey of the Rancho Santa Paula y Satcoy, and applied to no other land in Ventura county. Mr. Barnard, called as a witness on behalf of plaintiff, after stating that the property could be readily identified from the description in the deed, was asked how he could do so, and replied: "From the fact that the description used in Norway surveying the ranch in 1867, and that there is no other record,



there is no other map, there is no other reference where they used the same combination describing any property in this county, and the deed from Mr. McKenna to his wife describes the property as being in the county of Ventura, \* \* \* and my knowledge of all of the maps that are here of record, all of the surveys, it defines and describes the only property that is delineated upon the map of the Norway survey of the Rancho Santa Paula y Saticoy, the only possible combination." It further appeared that by this survey and plat the rancho was divided into sections designated by figures in consecutive number, and these sections divided into quarters which were likewise numbered numerically, and that as delineated thereon the southwest quarter of section 12 was designated No. 31; that while there were many sections in the county numbered 12, there was no subdivision of any lands in the county of Ventura other than section 12, as shown upon said map, any quarter of which was numbered 31 and to which the description applied, and that it was applicable to said land and to no other section, tract, or subdivision in said county. It thus appears that, while the description is incomplete and the identity of the land cannot be determined from the deed itself, its location can be readily determined by reference to the records of Ventura county. On behalf of defendant, witnesses, after qualifying as surveyors, testified that they could not identify the land from the description in the deed. This may be conceded, but they did not testify or undertake to say that the land could not be identified by reference to the records of Ventura county and a process of elimination, as shown by the testimony of Barnard. And while it was admitted that this Norway map of the rancho had delineated thereon the land as described in the deed, it was not claimed or shown that there was any other tract or subdivision of land to which the description was applicable. On the contrary, all of defendant's witnesses testified that they knew of no other map or subdivision of lands in the county to which the description in the deed applied. The parol evidence offered clearly identified the land described in the deed as being the identical property described in the complaint as having been conveyed by John McKenna to his wife Norah Anna McKenna on November 10, 1890.

[7] Moreover, we are of the opinion that the evidence is ample to support the finding of the court to the effect that at the time of the death of Norah Anna McKenna she had for more than 20 years next preceding, and that defendant as administrator of her estate at all times since her decease, had been in the open, notorious, exclusive, hos-

tile, and continuous possession of the real estate described in the complaint under a claim of ownership adversely to all the world. The evidence tends to show that after the death of John McKenna, which occurred May 23, 1891, Norah Anna McKenna with her children, the plaintiff and J. Irving McKenna, who at the time was 16 or 17 years of age, continued to reside upon the land for about three years, during which time J. Irving McKenna, as a boy under the control of his parent, worked upon and cultivated the farm; that the proceeds of the sale of the products thereof were appropriated by his mother, deposited in her name, and in every way controlled and checked out by her; that thereafter they removed from the ranch, and from thence continuously to the time of the death of Norah Anna McKenna she exercised absolute control and dominion over the property, claiming it as her own, and from time to time leasing the same, and appropriating and claiming as her own the rents, issues, and profits thereof, without accounting or offering to account therefor, during all of which time she paid the taxes thereon, under the belief and claim that she had absolute title to the property, which belief and claim were shared in and recognized by defendant, not only during the time that he was living with his mother upon the ranch, but for a period of some 15 years after he attained his majority, and that as administrator he returned the property in his inventory as belonging to the estate of his mother and out of the funds of the estate paid the taxes thereon.

[8] The fact that he labored under the belief that the deed from his father to his mother, of the existence of which he at all times had knowledge, was a sufficient deed of conveyance until March, 1911, when he discovered what he conceived to be the insufficiency of the same, does not affect the prescriptive right resulting from the adverse occupancy, claim, and possession of the mother. There is no ground for appellant's contention that he was a tenant in common of the property with his mother. There is no evidence of such cotenancy. The possession and dominion of his mother over the property for a period of over 20 years, as shown by the evidence, was not only absolute and exclusive, but so clearly and openly manifested by her acts as to leave no question as to the fact that notice of the hostile character of her possession was imparted to defendant. *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; *Feliz v. Feliz*, 105 Cal. 1, 38 Pac. 521.

The judgment is a righteous one, and should be and is affirmed.

We concur: ALLEN, P. J.; JAMES, J.



(22 Cal. App. 78)

BERTHIAUME v. DOE et al. (Civ. 1,215.)

(District Court of Appeal, First District, California. May 13, 1913. Rehearing Denied by Supreme Court July 12, 1913.)

## 1. REWARDS (§ 3\*)—OFFER—VALIDITY OF CONTRACT.

Where the loser of property, independently of Civ. Code, §§ 1865, 1867, requiring a finder of lost goods to return them within a reasonable time on payment of a reasonable charge and reward, expressly promises a reward either to a particular person or in general terms to any one who will return it, which is accepted and the property returned, such offer and acceptance constitute a valid contract.

[Ed. Note.—For other cases, see Rewards, Cent. Dig. §§ 3-5; Dec. Dig. § 3.\*]

## 2. REWARDS (§ 3\*)—OFFER—CONSIDERATION OF CONTRACT.

Such contract is not lacking in consideration; the return of the property being a sufficient consideration to support the promise.

[Ed. Note.—For other cases, see Rewards, Cent. Dig. §§ 3-5; Dec. Dig. § 3.\*]

## 3. REWARDS (§ 3\*)—OFFER—REVOCATION OF OFFER.

An offer of reward for the return of lost property may be revoked before it has been accepted and acted upon.

[Ed. Note.—For other cases, see Rewards, Cent. Dig. §§ 3-5; Dec. Dig. § 3.\*]

## 4. APPEAL AND ERROR (§ 172\*)—REVIEW—THEORY OF PLEADINGS.

In an action of claim and delivery for the return of lost property, where it was not pleaded that the reward offered was extorted from the plaintiff or that it was the result of duress of goods, or for any reason not plaintiff's voluntary act, such matters cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error. Cent. Dig. §§ 1070-1078; Dec. Dig. § 172.\*]

**Appeal from Superior Court, City and County of San Francisco; A. J. Buckles, Judge.**

Action by Frances C. Berthiaume against John Doe and others, with cross-complaint by defendant Warren C. Jones. Judgment for defendant Jones, and plaintiff appeals. Affirmed.

Ames & Manning, of San Francisco, for appellant. McGowan & Westlake, of San Francisco, for respondent.

**KERRIGAN, J.** This is an action of claim and delivery for the return of lost property. The defendant, in addition to his answer, set up a cross-complaint demanding payment of a reward of \$500, and that the same be declared to be a lien upon the property. The case was tried, and judgment went for defendant as demanded.

It is not disputed that the plaintiff lost the property in question, that the defendant found it, nor that the plaintiff offered a reward of \$500 for its return. It is denied, however, that the defendant, relying upon the promise of plaintiff to pay the reward, offered to return the property to plaintiff. The evidence shows that the next day after

the reward was advertised the defendant placed the property in the hands of his attorneys, and that shortly thereafter the parties hereto met to discuss and settle the question of the amount of the reward. The defendant, it seems, had demanded a larger amount than the sum advertised for the return of the property, which plaintiff declined to pay, but at no time withdrew the advertised offer. On the contrary, after some discussion she agreed to pay the \$500, provided a certain expert would say upon examination that the stones in the jewels had not been removed and replaced by imitations. There is no evidence nor claim that the jewels had been thus altered. The court found against the contention of plaintiff that the jewels had not been returned pursuant to the offered reward, and the evidence just narrated sustains that finding. Under the findings, which are supported by the evidence, the judgment of the trial court must be sustained.

[1, 2] Sections 1865 and 1867 of the Civil Code provide, in substance, that when the finder of a thing takes possession of it he must within a reasonable time inform the owner thereof and make restitution to him upon demand, and upon so doing is entitled to a reasonable charge for saving and caring for such property and to a reasonable reward for keeping it. These provisions, however, are independent of any offer of reward by the loser and acceptance of such offer by the finder. If the loser of property makes an express promise of a reward, either to a particular person or in general terms to any one who will return the property to him, and in consequence of such offer it is returned to him, there is thus constituted a valid and binding contract. In such a case there is an offer of terms on the one side and an assent to or acceptance of them upon the other, respectively communicated to each other by the parties, which necessarily constitutes a simple contract. Such contract is not lacking in consideration; the return of the property being a sufficient consideration to support the promise. From a very early period in the history of the law it has been held that the publication of an advertisement offering a reward is a general offer to any person, and the acceptance of it creates and constitutes a valid contract. *Williams v. Carwardine*, 4 B. & Ald. 621. See, also, note to *Ryer v. Stockwell*, 73 Am. Dec. 634; *Wilson v. Guyton*, 8 Gill (Md.) 214; *Wentworth v. Day*, 3 Metc. (Mass.) 352, 37 Am. Dec. 145; *Wood v. Pierson*, 45 Mich. 313, 7 N. W. 888; *Pierson v. Morch*, 82 N. Y. 503; *Grady v. Crook*, 2 Abb. N. C. (N. Y.) 53.

It may be conceded that the owner of the lost property was under no legal obligation to make an offer of reward, but having concluded to do so he could propose whatever terms he might consider as a sufficient in-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ducement to insure the return of the jewels; and having done so he became liable upon such offer upon its acceptance by the finder. *Reif v. Paige*, 55 Wis. 496, 13 N. W. 473, 42 Am. Rep. 731; *Amls v. Conner*, 43 Ark. 337.

[3] The offer of reward, however, could be revoked before it was acted upon. The facts of this case, however, show no retraction of the offer. While it may be true that defendant attempted to induce the plaintiff to pay a larger sum than that offered as a reward, yet all through the negotiations for the return of the property there was no attempt on the part of the plaintiff to withdraw the offer on that account. A requested modification of an offer does not constitute a rejection of it. 1 *Beach on Contracts*, § 45.

The evidence does not sustain the view contended for by plaintiff that defendant intended to appropriate the property to his own use and was thus guilty of larceny under the provisions of section 485 of the Penal Code.

[4] And if it should be suggested that the offered reward was extorted from the plaintiff, or that it was the result of duress of goods, or for any reason not the voluntary act of the plaintiff, it is sufficient to say: First, that the findings of the court negative such theory; and, second, if they do not, such matters, not having been pleaded, cannot now be considered.

The judgment and order are affirmed.

We concur: LENNON, P. J.; HALL, J.

(22 Cal. App. 10)

PEOPLE v. KIZER et al. (Cr. 274.)†

(District Court of Appeal, Second District, California. April 28, 1913. Rehearing Denied May 28, 1913. Denied by Supreme Court June 27, 1913.)

1. CONSPIRACY (§ 40\*)—EFFECT OF CONSPIRACY.

Any one who, after a conspiracy is formed, joins therein knowing of its existence, becomes as much a party thereto as if he had originally conspired.

[Ed. Note.—For other cases, see *Conspiracy*, Cent. Dig. §§ 73, 75-78; Dec. Dig. § 40.\*]

2. CONSPIRACY (§§ 24, 47\*)—PROSECUTION—EVIDENCE.

To establish a conspiracy, it is not necessary that there should be an explicit or formal agreement between the parties, nor is it essential that direct proof be made of such agreement; circumstantial evidence being sufficient.

[Ed. Note.—For other cases, see *Conspiracy*, Cent. Dig. §§ 33, 34, 105-107; Dec. Dig. §§ 24, 47.\*]

3. CONSPIRACY (§ 47\*)—PROSECUTION—EVIDENCE—SUFFICIENCY.

In a prosecution for criminal conspiracy to violate a municipal ordinance, evidence held sufficient to support a conviction.

[Ed. Note.—For other cases, see *Conspiracy*, Cent. Dig. §§ 105-107; Dec. Dig. § 47.\*]

4. CRIMINAL LAW (§ 371\*)—EVIDENCE—OTHER CRIMES.

In a criminal prosecution, evidence of another crime is admissible when tending logically and naturally to establish any fact, such as motive or intent, the burden of proof of which is upon the state.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 830-832; Dec. Dig. § 371.\*]

5. CONSPIRACY (§ 45\*)—PROSECUTION—EVIDENCE—ADMISSIBILITY.

In a prosecution for criminal conspiracy to violate the municipal ordinance against public speaking upon certain streets of a city, evidence that the defendants, before the adoption of the ordinance, threatened to violate it, is admissible, although their protests against its adoption and threats, being before the enactment of the ordinance, did not constitute any offense.

[Ed. Note.—For other cases, see *Conspiracy*, Cent. Dig. §§ 100-104; Dec. Dig. § 45.\*]

6. CRIMINAL LAW (§ 1169\*)—APPEAL—HARMLESS ERROR.

In a prosecution for a criminal conspiracy to violate an ordinance against street speaking, the improper admission of evidence of threats and protests by defendants before the enactment of the ordinance is cured where defendants offered evidence explaining their conduct, even though their evidence was in conflict with that of the state.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 754, 3083, 3130, 3137-3143; Dec. Dig. § 1169.\*]

7. CRIMINAL LAW (§ 1168\*)—APPEAL—HARMLESS ERROR.

In a prosecution for conspiracy to violate a municipal ordinance against street speaking, the improper refusal of the court to strike testimony that the defendants had considered the advisability of procuring buttons to be worn by the advocates of free speech with the intent to influence the city council is harmless, because such evidence could not have injured defendants.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3124, 3125, 3129-3136, 3144; Dec. Dig. § 1168.\*]

8. CRIMINAL LAW (§ 1036\*)—TRIAL—WAIVER OF OBJECTIONS TO EVIDENCE.

In a criminal prosecution, where defendants' counsel failed to object or except to incompetent evidence, he cannot complain of its admission on appeal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1631-1640, 2639-2641; Dec. Dig. § 1036.\*]

9. CRIMINAL LAW (§ 1168\*)—APPEAL—HARMLESS ERROR.

In a prosecution for conspiracy to violate a municipal ordinance against public speaking in certain streets, the refusal of the court to strike testimony as to the reason why the witness who participated in a public demonstration against the ordinance was bailed out is harmless; it appearing that defendants' counsel framed the question for the state, and that the evidence elicited was wholly immaterial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3124, 3125, 3129-3136, 3144; Dec. Dig. § 1168.\*]

10. CRIMINAL LAW (§ 1037\*)—APPEAL—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

In a criminal prosecution, where the prosecuting attorney made highly improper statements in his argument to the jury, the error cannot be taken advantage of on appeal, where defendants' counsel did not object, although the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† For opinion on petition for rehearing, see *People v. Kirk*, 134 Pac. 346.



court in answer to a previous objection had stated that, if there was anything material, it was proper to call the attention of the court to it at the time, but a mere disagreement as to what testimony had been introduced would not justify an interruption of the argument.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1691, 2645; Dec. Dig. § 1037.\*]

**11. CRIMINAL LAW (§ 1037\*) — REVIEW — IMPROPER ARGUMENT OF COUNSEL — OBJECTIONS — NECESSITY.**

Improper argument of counsel where he wrongfully charged that accused was guilty of other offenses and misconduct may be so flagrant that it will necessitate reversal, even though it was not objected to below, for such violations of the rights of defendants may be so prejudicial that a mere admonition to the jury would not be sufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1691, 2645; Dec. Dig. § 1037.\*]

**12. CRIMINAL LAW (§ 1171\*) — APPEAL — HARMLESS ERROR.**

Under Const. art. 6, § 4½, providing that no new trial shall be granted in any criminal case unless after an examination of the entire cause the court shall be of the opinion that the error resulted in a miscarriage of justice, highly improper argument of the district attorney will not necessitate a reversal, where the whole evidence showed that the defendants were guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.\*]

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

E. E. Kirk and Harry McKee and others were convicted of conspiracy to violate a municipal ordinance, and the named defendants appeal. Affirmed.

For denial of rehearing by Supreme Court, see 138 Pac. 521.

Kirk & Kirk, E. E. Kirk, and Harry McKee, all of San Diego, for appellants. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. Appellants and others were by the verdict of a jury found guilty of a criminal conspiracy to violate an ordinance of the city of San Diego, which ordinance, containing an emergency clause, was enacted January 8, 1912, and by its terms it was made unlawful to hold or conduct public meetings or make public speeches within certain defined limits of said city. Such conspiracy was alleged and found to have been formed between January 8 and February 8, 1912, and the violation of said ordinance occurred on February 8, 1912. From the judgment entered upon such verdict, and from an order denying a new trial, defendants Kirk and McKee appeal.

[1-3] No question is presented either as to the sufficiency of the indictment or the validity of the ordinance. There is, however, a general claim of appellants as to the insufficiency of the evidence to support the verdict.

Neither counsel in their briefs have specified any portions of the record from an examination of which this general claim can be determined. It has been left for this court to cull from 1,932 pages of typewritten transcript statements and matters in evidence affecting this general claim. This transcript contains arguments of counsel before the trial court and statements of the trial court upon innumerable questions, most of which are of no significance upon this appeal, imposing an unnecessary burden upon this court, as well as upon the taxpayers of San Diego county, for transcribing the same. After carefully going over the entire record, of which if properly prepared less than 100 pages would have been sufficient to illustrate the points raised, had a proper order been made as provided by statute for the preparation of such transcript, we are satisfied that there is found scattered therethrough competent evidence tending to establish a conspiracy between the various defendants named in the indictment to violate the ordinance in question, and that appellants were connected therewith, joined therein, and violated the ordinance pursuant to such conspiracy.

Summarizing that portion which affects appellant Kirk, we find that on February 7th Kirk, representing himself to be the spokesman of a committee opposed to the enactment and enforcement of the ordinance, applied to the city authorities for a permit authorizing what he denominated the Free Speech League to make a parade through the streets of the city, the effect of which permission, if granted, would have been a permit to violate the ordinance. He especially asked that the parade be permitted to end at Fifth and E streets, which seems to be a prominent point within the restricted area. When asked why such point was suggested he replied: "Because we understand that there will be public speaking at that point on the evening of February 8th." This permit was refused, but one given to conduct a parade through other streets not within the restricted area, and Kirk at the time was asked to see to it that the ordinance was not violated. He said he would make no promise, that he was only one of a number, "I will tell the committee what you say." This parade was so held on the 8th in violation of the permit and of the ordinance, and the parties participating therein, acting under the leadership of Kirk, who joined the parade and marched with the crowd, assembled at Fifth and E streets, and openly and defiantly violated the ordinance. There can be no question but that a conspiracy had been formed to violate the ordinance in question, that Kirk had knowledge of that fact, and that having such knowledge he joined the conspirators in its violation. "Any one who, after a conspiracy is formed, and who knows of its existence, joins therein, becomes

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



as much a party thereto from that time as if he had originally conspired." *United States v. Cassidy* (D. C.) 67 Fed. 698. It is true that Kirk's connection with the conspiracy is established only by circumstantial evidence. "To establish a conspiracy, it is not \* \* \* necessary that there should be an explicit or formal agreement for an unlawful scheme between the parties, nor is it essential that direct and positive proof be made of an express agreement to do the act forbidden by law. In such cases it is frequently impossible to produce such proof, because conspiracies are not usually meditated and planned in the presence of witnesses not parties thereto, nor in the terms of express stipulations. Hence it is competent to prove the alleged conspiracy by circumstances. The understanding, combination or agreement between the parties in a given case, to effect the unlawful purpose charged, must be proved, because without the corrupt agreement or understanding there is no conspiracy. \* \* \* But circumstantial evidence may be resorted to, to show the agreement or conspiracy." *United States v. Nunemacher*, 27 Fed. Cas. 197. "In order to establish a conspiracy, evidence must be produced from which a jury may reasonably infer the joint assent of the minds of two or more persons to the prosecution of the unlawful enterprise." *Drake v. Stewart*, 78 Fed. 140, 22 C. C. A. 104. Measured by these rules, the circumstantial evidence was such as to warrant the jury in determining that, whether Kirk was an original conspirator or not, he, with knowledge of the conspiracy, joined in the violation of the ordinance.

Considering the appeal of McKee, there is ample evidence showing his connection with the conspiracy. Before this parade, he busied himself in an effort to obtain pledges of parties that they would sign bonds required upon an arrest for violation of the ordinance, and thereafter joined in the parade mentioned, and, like Kirk, joined in the violation of the ordinance. These facts and circumstances were sufficient, if the jury believed them to have been established, to warrant a verdict of guilty against both appellants.

[4, 5] Upon the trial the court permitted the state to show that appellants and others appeared before the city council, orally and in writing protesting and objecting to the passage of such ordinance, or any ordinance, the effect of which would be to restrict public speaking upon the public streets of the city; that threats were made by certain of the defendants that, if such ordinance was adopted, its enforcement would be resisted, and the same would be violated by the protestants and others in sympathy with them upon the theory that such an ordinance would be unconstitutional and void as interfering with and restricting freedom of speech guaranteed to the citizen. It is appellants'

contention that at the time these protests, threats, and acts were shown no ordinance was in force and that the same constituted no offense; that the conspiracy charged was between certain fixed dates anterior to which these protests, threats, etc., were made; and that under the rule the evidence in conspiracy must be limited to the acts and declarations done and made while the conspiracy was pending and in furtherance of the design. It must be conceded that the acts, statements, and representations of defendants, or those of them participating in the remonstrance, the effect and purpose of which only was to accentuate their opposition to the proposed legislation, were in no sense a violation of the law, and in so protesting and petitioning the city council to refrain from such legislation the defendants were acting clearly within their guaranteed rights. But where, in connection therewith, parties indulge in threats, either open or covert, as to future conduct in the event of a disregard of their petition or remonstrance and subsequently participate in meetings called and held in furtherance of such threats, and one or more of their number carry such threats into execution, a different question is presented. The intent of such subsequent assemblage, the understanding and agreements arrived at—in other words, the fact of a conspiracy formed after the enactment of the law—are matters material and the establishment of which devolves upon the people. It is a familiar and established rule in this state that even evidence of another crime is pertinent, and will not be excluded if it tends logically, naturally, and by reasonable inference to establish any fact material for the people to overcome. *People v. Sanders*, 114 Cal. 230, 46 Pac. 153. Evidence of a material fact which tends to show intent or motive, even though it tends to establish another crime, is admissible. *People v. Craig*, 111 Cal. 468, 44 Pac. 186. If a subsequent offense committed before the one under investigation may be shown for the purposes suggested, no reason is apparent why other acts and statements not amounting to a crime, but connected with the transaction and tending to show intent, may not also be shown.

[6] Were it, however, assumed that all of this evidence was inadmissible and constituted error upon the part of the trial court, nevertheless it appears from the record that appellants, in connection with the testimony offered by them in defense of the charge, produced witnesses who were permitted to and who did go fully into and fully explain and state all of the matters and things so occurring prior to the passage of the ordinance, with reference to which objections had theretofore been made, the introduction of which testimony on the part of defendants had the effect to cure any error theretofore committed by the court in connection with



the conduct and acts of the parties anterior to the passage of the ordinance. *People v. O'Bryan* (App.) 130 Pac. 1042. Nor is this rule changed because a portion of the evidence introduced by defendants was in conflict with that offered by the people. The test to be applied as to the curative effect of the act of defendants testifying to the same transactions is not with reference to the confirmatory character, but as to whether or not the evidence so introduced by defendants covered the same field and the scope of which was identical with that offered by the people and objected to. Nor, in our opinion, is the effect of the rule confined to the individual defendants who testified, but covers as well any evidence of the character offered on behalf of all of the defendants and affects equally all of the defendants as well as the defendants so testifying.

[7] The next claimed error to which counsel for appellants direct the attention of the court is that involved in the denial of the motion to strike out the testimony of the witness De Ville. The testimony of this witness had reference only to certain meetings held in the office of defendant Kirk at which various of the defendants were present, and at which meetings opposition to the proposed ordinance was discussed, as was the propriety of procuring buttons to be worn by the advocates of free speech, with the intent to influence the city council in opposition to the enactment of the ordinance; that these meetings were held prior to the passage of the ordinance. As we have before said, there is and can be no criticism of the parties who earnestly and honestly oppose proposed legislation taking all legitimate steps necessary in their opinion to prevent its enactment; and, reading all of the evidence of De Ville, we are unable to see anything connected therewith which could in any wise prejudice defendants' case. It would have been better, would have shortened the record, and obviated criticism had the court stricken out the De Ville testimony, but a reviewing court must of necessity assume the intelligence of a jury, and from which it must follow that the recitation of acts harmless in themselves could have no influence with the jury in arriving at a verdict. As said by our Supreme Court in the case of *People v. O'Bryan*, supra: "Where error is shown, it is the duty of the court to examine the evidence and ascertain from such examination whether the error did or did not in fact work an injury. The mere fact of error does not make out a prima facie case for reversal which must be overcome by a clear showing that no injury could have resulted." Error is also claimed on account of the refusal of the court to strike out the evidence of one De Jarnette, with reference to which the same observations apply as in the case of the evidence of De Ville, and no prejudicial error is suggested by reason of the action of the court in denying the motion to strike out the testimony of this witness.

[8] Upon the trial the court below permitted evidence of statements made after the commission of the overt act by one Bauer, a defendant charged in the indictment, but by the verdict of the jury acquitted, the purport of which was that at a meeting called at the office of appellants and held after the enactment of the ordinance, in which appellants participated, it was agreed that a limited number should violate the law; that it was not the intention to have so many persons participate in the violation, but that "the thing had gotten away from them." It is contended that these statements of Bauer were a mere narrative of past events, and not declarations of a conspiracy made during the progress of the conspiracy; that such statements made in the absence of the codefendants after the transaction is over are incompetent to prove the conspiracy against any one except the party making them. We are of opinion that were this question properly before us we should hold that such evidence was incompetent as affecting appellants, but the record shows this state of facts: Capt. Sehon was upon the witness stand, and after stating that he was present in the office of the chief of police during a conversation to which Bauer was a party, and when questioned by the district attorney as to the date thereof, counsel for defendants said, "I have no objection to that particular question," whereupon the witness fixed the date as subsequent to February 8, 1912. Thereupon the district attorney proceeded to examine the witness in relation to the subject-matter of the conversation, and the witness proceeded to narrate what was said by Bauer, in which were included the matters herein specified as incompetent evidence. No objection was urged by counsel for the defense, and no exception saved in relation thereto, other than an exception with reference to a ruling of the court regarding the right to recall the witness at a future date if deemed necessary, together with the general statement of counsel for the defense that the questions theretofore propounded to the witness had been leading in form. "A defendant may waive the objection that evidence is incompetent, and a failure to object to it on that ground is such waiver." *People v. Smith*, 121 Cal. 357, 53 Pac. 803. We cannot, therefore, consider the question of the incompetency of this evidence raised as it is for the first time upon this appeal.

[9] Error is also claimed on account of the act of the court in admitting statements and admissions of Bauer made to the witness Bierman after the ordinance had been violated pursuant to the agreement. As to this evidence, it is somewhat difficult to determine from the record just what ruling was in fact made. The court, upon objection by counsel for defendants, had stricken from the record and the jury were told to disregard all statements of matters subsequent. Further along, however, the district attorney asked the following question: "Was anything said



in that conversation by defendant Bauer as to the reason how or why he happened to be out on bail?" Counsel for the defense, without objecting, said: "There is no necessity for counsel asking anything further than, 'Did Bauer say anything else?'" Whereupon the district attorney adopted the questions suggested, and counsel for defendants excepted to the ruling of the court. In the first place, there seems to have been no formal objection to the question and no ruling thereon. The question was framed by the suggestion of counsel for the defense; thereupon the witness stated that Bauer said the reason why he was bailed out was because only those who were not leaders were sent to jail; that the leaders had been bailed out so that they could conduct the fight. A motion to strike out this answer was made and denied, and an exception entered. It seems clear to us that the answer, while incompetent as tending to prove anything connected with the case, was, nevertheless, harmless, and no prejudice could result from the denial of the motion to strike out.

[10] It is further claimed by appellants that such misconduct on the part of the district attorney is shown by the record as to warrant a reversal. It appears from the transcript that the district attorney during the progress of his argument to the jury said the private boast of appellant was that he was connected with "the malodorous defense of the McNamara brothers as of counsel." There is nothing in the evidence touching appellants' relation to the McNamara trial. It is claimed by appellants that such trial was of such character that those connected with it as counsel were in the opinion of the general public believed to be guilty of jury bribing. Again, further along in his argument the district attorney, obviously referring to one of the alleged conspirators, said: "Who is he? Where do we first hear of him? We find him representing the band of cut-throats who committed arson; murder, and every sort of unmentionable and unpardonable crimes in your sister republic to the south." The record is silent as to any matters connected with troubles in Mexico. It must be said that the district attorney in his zeal seems to have forgotten the limitations upon legitimate argument imposed by law. Assuming as correct the inference claimed naturally following and arising from the unwarranted statement, and the probable effect thereof upon the minds of the jury conversant with the matters to which reference was so improperly made, nevertheless it is shown from the transcript that no objections were made at any time by defendants; that misconduct was not assigned nor remonstrance of any sort presented. While the record does show that earlier in the argument certain objections were made with reference to the district attorney's statement of the evidence of certain witnesses, the trial court in passing upon the matter and upon the necessity for

interruptions and objections during the progress of the argument, said: "Of course, if there is anything very material, or a glaring statement, I think it is proper to call the attention of the court to it at the time, but the fact that the recollection of one counsel does not agree with another as to what testimony has been introduced will not justify a review of the matter by the court or an interruption of counsel." After this admonition by the court, and the declaration that, if a glaring misstatement were made, objection should follow, we find that no objection of any kind was made to these statements heretofore referred to and assigned as prejudicial error, although they occurred long after the court had called attention to the necessity of objection with reference to improper statements not involving mere recollection as to what witnesses had said. It is essential, in order that such misconduct be reviewed, that the act be called to the attention of the court below at the time, that an opportunity may be afforded to correct the abuse, and, if possible, avoid error and a mistrial. It is settled law that a reviewing court will not entertain an objection of this kind first made therein. *People v. Shem Ah Fook*, 64 Cal. 381, 1 Pac. 347; *People v. Lane*, 101 Cal. 513, 36 Pac. 16; *People v. Kramer*, 117 Cal. 851, 49 Pac. 842; *People v. Ruef*, 14 Cal. App. 618, 114 Pac. 48, 54.

[11, 12] It is finally urged on behalf of defendant McKee that the conduct of the district attorney in his argument to the jury, wherein he called attention to the fact that certain matters involved had not been denied by McKee, was such prejudicial error as would warrant a reversal as to defendant McKee. As before stated, this conduct upon the part of the district attorney was such as should have brought upon him the censure of the trial court, but, like the other matters assigned as misconduct, no objection to it was made at the time by counsel for defendant. It is not, however, in every case that a reviewing court will restrict its examination to cases where objections are made. There are such flagrant violations of the rights of defendants that an admonition by the court, after objection, may not remove the prejudicial impression irresistibly made upon the minds of the jury by such unwarranted comment (*People v. Morris*, 3 Cal. App. 5, 84 Pac. 403); and, were the evidence as to McKee's guilt less convincing, this conduct upon the part of the district attorney would of itself, in the absence of section 4½ of article 6 of the Constitution of this state, be sufficient to warrant a reversal. But under said section 4½ reviewing courts are not permitted, even where matters prejudicial in their character appear in the record, to reverse such judgment, unless from the entire record it appears that there has been a miscarriage of justice. We are not prepared to say, nor do we feel warranted in concluding, that a miscarriage of justice, in so far as defendant



McKee is concerned, resulted from this unwarranted and flagrant action of the district attorney.

What is heretofore said, we think, covers all of the points raised, argued, or submitted, and a careful examination of the record satisfies us that no prejudicial error is shown warranting a reversal.

Judgment and order affirmed.

We concur: JAMES, J.; SHAW, J.

(22 Cal. App. 10)

PEOPLE v. KIZER et al. (Cr. 1,805.)

(Supreme Court of California. June 27, 1913.)

CRIMINAL LAW (§ 1169\*)—APPEAL—HARMLESS ERROR.

In a prosecution for conspiring to violate a municipal ordinance prohibiting public speech within certain defined limits in a municipality, any error in the admission of evidence of threats and protests made by defendants before the enactment of the ordinance would not be cured because defendants offered evidence explaining their conduct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. § 1169.\*]

In Bank. Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

H. Kizer, E. E. Kirk, and Harry McKee and others were convicted of conspiring to violate a municipal ordinance, and defendants Kirk and McKee appealed. The conviction being affirmed by the District Court of Appeal (133 Pac. 516), they moved for rehearing. Rehearing denied.

Kirk & Kirk, E. E. Kirk, and Harry McKee, all of San Diego, for appellants. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

PER CURIAM. The application for a hearing in this court after decision by the district court of appeal of the second appellate district is denied. In denying the application we deem it proper to say that we are not prepared to concur in the following portion of the opinion: "Were it, nowever, assumed that all of this evidence was inadmissible and constituted error upon the part of the trial court, nevertheless it appears from the record that appellants, in connection with the testimony offered by them in defense of the charge, produced witnesses who were permitted to and who did go fully into and fully explain and state all of the matters and things so occurring prior to the passage of the ordinance, with reference to which objections had theretofore been made; the introduction of which testimony on the part of defendants had the effect to cure any error theretofore committed by the court in connection with the conduct and acts of the parties anterior to the passage of the ordinance. People v. O'Bryan, 130 Pac. 1042. Nor is this rule changed because a portion

of the evidence introduced by defendants was in conflict with that offered by the people. The test to be applied as to the curative effect of the act of defendants testifying to the same transactions is not with reference to the confirmatory character, but as to whether or not the evidence so introduced by defendants covered the same field and the scope of which was identical with that offered by the people and objected to. Nor, in our opinion, is the effect of the rule confined to the individual defendants who testified, but covers as well any evidence of the character offered on behalf of all of the defendants and affects equally all of the defendants as well as the defendant so testifying." This portion of the opinion is, nowever, not necessary to the decision, as we consider that the views of the district court of appeal as to the admissibility of the evidence under consideration are correct.

(21 Wyo. 359)

STATE ex rel. JAMISON v. FORSYTH, State Auditor.

(Supreme Court of Wyoming. June 16, 1913.)

1. MANDAMUS (§ 102\*)—STATES (§ 137\*)—EXISTENCE OF DUTY.

Where there was a fund appropriated by the Legislature for the expenses of the office of state geologist, whether the Governor's attempt to veto only a part of the item appropriated for that purpose was valid or void, it would be the duty of the state auditor to allow a bill drawn on such fund and issue a warrant upon the treasurer in payment thereof, and he could be compelled by mandamus to do so.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 217-219, 221, 222; Dec. Dig. § 102.\* States, Cent. Dig. § 134; Dec. Dig. § 137.\*]

2. STATUTES (§ 26\*)—ENACTMENT—APPROVAL BY GOVERNOR.

Const. art. 4, § 8, providing that "every bill which has passed the Legislature" shall, before it becomes a law, be presented to the Governor, and that "any bill" not returned by him within three days after presentation shall become a law, applies to a general appropriation bill as well as to other statutes, so that the Governor would be required to expressly disapprove such a bill in order to defeat appropriation items contained therein.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 28, 34; Dec. Dig. § 26.\*]

3. STATUTES (§ 33\*)—VETO BY GOVERNOR.

The Governor stated over his official signature attached to an appropriation bill, "This act is approved save and except the item or parts of items specially noted herewith as being disapproved and as shown by accompanying communication," and on the margin of an item appropriating \$15,000 for the contingent expenses of the state geologist's office was noted: "\$10,000 of item approved. \$5,000 of item disapproved. J. M. C., Governor"—and in his communication to the secretary of state appended to the enrolled act the Governor stated that he approved so much of the item "as appropriates \$10,000" and withheld his approval from \$5,000, "leaving the appropriation \$10,000." Held that the Governor's action was not a disapproval of the entire appropriation of \$15,000, but only as to \$5,000 of the item.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 36; Dec. Dig. § 33.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



#### 4. STATUTES (§ 32\*)—VETO—"OBJECTIONS"—"DISAPPROVAL."

By the terms "objections" or "disapproval" by the Governor to a statute is meant objections or disapproval which is legal and expressed in the manner provided by law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 35; Dec. Dig. § 32.\*]

For other definitions, see Words and Phrases, vol. 6, p. 4877.]

#### 5. STATUTES (§ 32\*)—VETO—DISAPPROVAL—EFFECT OF UNAUTHORIZED DISAPPROVAL.

Under Const. art. 4, § 8, providing that if any bill is not returned by the Governor within three days after its presentation to him it shall become a law, unless the Legislature prevent its return by adjournment, when it shall become a law unless he file the same with his objections with the secretary of state within 15 days after adjournment, an unauthorized disapproval of a bill by the Governor would not defeat its enactment.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 35; Dec. Dig. § 32.\*]

Beard, J., dissenting.

Original proceedings in mandamus by the State on relation of Claude E. Jamison against Robert B. Forsyth, State Auditor. Writ issued.

C. L. Rigdon, of Cheyenne, for relator.  
D. A. Preston, Atty. Gen., for respondent.

POTTER, J. The original jurisdiction of this court is invoked in this case. It is an action seeking a peremptory writ of mandamus requiring the defendant as state auditor to allow the bill and voucher of the relator for the sum of \$5 and issue to the relator a warrant for that amount upon the state treasurer in payment of said bill. The case has been presented upon a demurrer to the petition, and it is conceded that all the facts have been fully and correctly set forth in the petition. The question involved is the effect of the action of the Governor in approving a part of an item in the general appropriation bill passed at the recent session of the Legislature and disapproving the remainder of that item.

The facts are, as set forth in the petition: That the relator, Claude E. Jamison, is the duly and regularly appointed, qualified, and acting state geologist of the state of Wyoming, and was such on the 1st day of April, 1913. That biennially there is appropriated by the Legislature out of funds in the state treasury not otherwise appropriated a certain sum of money to pay the necessary contingent expenses of the state geologist. That on the last day of the session, viz., February 22, 1913, the Twelfth Legislature passed an act making appropriations of money embracing distinct items, entitled: "An act making appropriations for salaries and contingent expenses of state and district officers and employes, and the various state boards and commissions, for the two years ending March 31st, 1915, including \* \* \*." That among the distinct items of appropriation enumerated in section 3 in said act to pay the neces-

sary contingent expenses of state and district officers and employes, and the various state boards and commissions from March 31, 1913, to and including March 31, 1915, is one which reads as follows: "For the office of state geologist, fifteen thousand dollars." That on the 8th day of March the Governor signed the said act and approved the said item of appropriation for the contingent expenses of the office of state geologist to the extent of \$10,000, and disapproved of \$5,000 thereof in words and figures, to wit: "This act is approved save and except the items or parts of items specially noted herewith as being disapproved and as shown by accompanying communication. March 8, 1913, 6 p. m. See also notations on margins. Joseph M. Carey, Governor." That on the margin of the item "for the office of state geologist, fifteen thousand dollars," is the following notation: "\$10,000 of item approved. \$5,000 of item disapproved. J. M. C., Governor." That the accompanying communication of the Governor appended to said act and explaining his action thereon is in words and figures as follows (omitting everything not pertaining to this particular item of appropriation): "March 8, 1913. Hon. Frank L. Houx, Secretary of State, Cheyenne, Wyo.—Sir: I herewith file with you Enrolled Act No. 93 (O. H. B. No. 266), House of Representatives, entitled: 'An act making appropriation for salaries and contingent expenses, \* \* \*' etc., etc., said act being what is known as the general appropriation act. I have approved this act except where specifically noted hereinafter. \* \* \* Section 3, the paragraph reading 'for the office of state geologist, fifteen thousand dollars.' I approve of so much of this item as appropriates \$10,000, and withhold my approval from \$5,000, leaving the appropriation \$10,000. The state geologist's office had an appropriation of \$5,000 for the biennial period just passing. I believe double this appropriation ought to be more than sufficient to carry on the work of his office for the next two years. \* \* \* Very truly yours, Joseph M. Carey, Governor." That on the 1st day of April, 1913, the relator presented to the defendant as state auditor his bill and voucher in due form against the state for the sum of \$5, an amount due and payable as an expenditure necessarily made by the relator in the performance of the duties imposed by law upon him as state geologist. That the auditor, questioning the legality of the said item of appropriation for the contingent expenses of the office of the state geologist, has refused a warrant for the said bill and voucher or any other amount. The petition, after setting forth the said facts, alleges: "That in and by said section 3 of said act the sum of \$10,000 or so much thereof as may be necessary, is appropriated by law to pay the necessary contingent expenses of the state geologist from March 31, 1913, to and



including March 31, 1915, and so said petitioner represents that an amount of money sufficient to pay said expenditure due to said relator as set forth in said bill and voucher is in the treasury of the state, and has been duly and regularly appropriated by law."

As above suggested the question presented by the demurrer is whether as a result of the Governor's approval of part and disapproval of part of the item appropriated for the contingent expenses of the state geologist's office there is an appropriation of any amount for that purpose.

Counsel for relator does not contend that the Governor is without authority to disapprove a part only of a distinct item in a general appropriation bill and approve the remainder of such item, but has assumed that the Governor possesses such authority, insisting, however, that whether the Governor is vested with that authority or not at least the sum of \$10,000 remains appropriated for the payment of the contingent expenses of the geologist's office. The position of the auditor, as explained by the Attorney General, is that the authority of the Governor to disapprove of a part of an item in an appropriation bill containing distinct items has been doubted, leaving the result of such action on his part also in doubt, that is to say, whether it has resulted in destroying the entire appropriation for said contingent expenses of the geologist's office or in an appropriation by law of the amount as reduced by the Governor or as passed by the Legislature.

The provisions of the Constitution applicable to the question thus submitted are as follows:

Article 3, § 24: "No bill, except general appropriation bills and bills for the codification and general revision of the laws, shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject is embraced in any act which is not expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."

Article 3, § 34: "The general appropriation bills shall embrace nothing but appropriations for the ordinary expenses of the legislative, executive and judicial departments of the state, interest on the public debt, and for public schools. All other appropriations shall be made by separate bills, each embracing but one subject."

Article 3, § 35: "Except for interest on public debt, money shall be paid out of the treasury only on appropriations made by the Legislature, and in no case otherwise than upon warrant drawn by the proper officer in pursuance of law."

Article 4, § 8: "Every bill which has passed the Legislature shall, before it becomes a law, be presented to the Governor. If he approve, he shall sign it; but if not, he shall return it with his objections to the house in

which it originated, which shall enter the objections at large upon the journal and proceed to reconsider it. If, after such reconsideration, two-thirds of the members elected agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if it be approved by two-thirds of the members elected, it shall become a law; but in all such cases the vote of both houses shall be determined by yeas and nays, and the names of the members voting for and against the bill shall be entered upon the journal of each house respectively. If any bill is not returned by the Governor within three days (Sundays excepted) after its presentation to him, the same shall be a law, unless the Legislature by its adjournment, prevent its return, in which case it shall be a law, unless he shall file the same with his objections in the office of the secretary of state within fifteen days after such adjournment."

Article 4, § 9: "The Governor shall have power to disapprove of any item or items or part or parts of any bill making appropriations of money or property embracing distinct items, and the part or parts of the bill approved shall be the law, and the item or items and part or parts disapproved shall be void unless enacted in the following manner: If the Legislature be in session he shall transmit to the house in which the bill originated a copy of the item or items or part or parts thereof disapproved, together with his objections thereto, and the items or parts objected to shall be separately reconsidered, and each item or part shall then take the same course as is prescribed for the passage of bills over the executive veto."

A provision similar to that contained in section 9 of article 4, allowing the Governor to disapprove of any item or part of a bill appropriating money containing distinct items is found in the Constitution of many of the states. See note to the case of *Commonwealth v. Barnett*, 55 L. R. A. 882. But the authority under such provision to disapprove of part only of an item and approve the remainder of the item does not seem to have been positively decided except in one case, where it was held, one justice dissenting, that the power to so act was conferred upon the Governor, so that he could, by approving a part and disapproving a part of an item, reduce the amount thereby appropriated for a specific purpose. *Commonwealth v. Barnett*, supra, reported in 199 Pa. 161, 48 Atl. 976, 55 L. R. A. 882. Expressions to the contrary are, however, to be found in at least two cases, the right to so reduce an item being distinctly denied in the opinion of one of the justices in the Texas case of *Fulmore v. Lane*, 140 S. W. 405, 423, although the other justices concurring in the disposition made of the case do not seem to have rested their conclusion upon that ground.

It appeared in the Pennsylvania case that



the general appropriation act, containing distinct items of appropriation, embraced one item of \$11,000,000 for the support of the public schools, and that the Governor approved such item of appropriation to the extent of \$10,000,000 and disapproved \$1,000,000 thereof. The veto message explaining the reasons for the disapproval of the item in part concluded as follows: "The authority of the Governor to disapprove part of an item is doubted, but several of my predecessors in office have established precedents by withholding their approval from a part of an item and approving other parts of the same item. Following these precedents, and believing that the authority which confers the right to approve the whole of an item necessarily includes the power to approve part of the same item, I, therefore, approve of so much of this item which appropriates \$5,000,000 annually, making \$10,000,000 for the two years beginning June 1, 1899, and withhold my approval from \$500,000 annually, making \$1,000,000 for the two school years beginning June 1, 1899." The provisions of the Constitution of Pennsylvania which were considered in the case cited are very much like our own. It provides that where a bill which has been presented to the Governor cannot be returned to the house in which it originated with the Governor's objections thereto because of the adjournment of the Legislature, it shall become a law unless the Governor shall file the same with his objections in the office of the secretary of the commonwealth, and give notice thereof by public proclamation within 30 days after such adjournment. The Governor is also given "power to disapprove of any item or items of any bill making appropriations of money, embracing distinct items," and it is declared in the same section that "the part or parts of the bill approved shall be the law, and the item or items of the appropriation disapproved shall be void, unless repassed according to the rules and limitations prescribed for the passage of other bills over the executive veto."

The reasons given by the court, in the opinion delivered by Mr. Justice Mitchell, for declaring the power conferred upon the Governor to disapprove of part and approve part of the same item are substantially as follows: That the disapproval by the Governor, commonly known as a veto, is essentially a legislative act; and that the fact that the Governor is limited to negation or concurrence, and cannot affirmatively initiate or amend legislation, does not take away the legislative character of his act. That the presumption is that within its limited sphere of negation the power applies to every branch and subject of the bill to which the legislative powers of the two houses apply. That the veto power as originally confined to approval or disapproval of an entire bill as presented was found to be inadequate to the accomplishment of its

full purpose, and that the Legislature in framing and passing a bill had full control over every subject and every provision that it contained, and the Governor as a co-ordinate branch of the lawmaking power was entitled to at least a negative of the same extent. That by joining a number of different subjects in one bill, the Governor was compelled to accept some enactments that he could not approve, or defeat the whole, including some that he thought desirable, or even necessary. That such bills, popularly called "omnibus" bills became an evil which the later changes in the Constitution were intended to remedy. That omnibus bills were done away with by the amendment to the Constitution that no bill shall contain more than one subject which shall be clearly expressed in its title, but excepting appropriation bills, as to which it seems to be convenient or necessary that distinct items may be contained therein, although the various items may be so diverse as to come within the description of different subjects. That the Constitution meets that difficulty by providing that the general appropriation bill shall embrace nothing but appropriations for the ordinary expenses of the executive, legislative, and judicial departments of the commonwealth, interest on the public debt, and for public schools; and that all other appropriations shall be made by separate bills each embracing but one subject, and granting to the Governor the power to disapprove of any item or items of any bill making appropriations of money embracing distinct items. That such provisions distinctly recognize the legislative character of the Governor's part in the passage of bills, and show a purpose to increase the power and scope of his veto. That "item" and "part" are used interchangeably in the same sense in the section granting the power to disapprove of any item or items of the bill, and declaring that the part or parts of the bill approved shall be law, and the item or items disapproved shall be void; that "if any special or different meaning was attached to the word 'item' the natural mode of expression would have been to use that word throughout the section, but for the sake of euphony and to avoid the repetition of the same word three times in the same sentence, the draughtsman used the word 'parts' as an evident synonym." That in ordinary bills the single subject is a unit which admits of approval or disapproval as a whole, without serious inconvenience, even though some of the details may not be acceptable; but that every appropriation, though it be for a single purpose, "necessarily presents two considerations almost equally material, viz., the subject and the amount. The subject may be approved on its merits, and yet the amount disapproved as out of proportion to the requirements of the case, or as beyond the prudent use of the state's income." That



the Legislature has full control of the appropriation in both its aspects, and the plain intent of the Constitution was to give the Governor the same control as to disapproval over each subject and each amount; that a contrary construction would destroy the usefulness of the constitutional provision; and that "if the Legislature by putting purpose, subject, and amount inseparably together and calling them an item can coerce the Governor to approve the whole or none, then the old evil is revived which this section was intended to destroy." That the practice adopted by the Governor was not new in the state, but that in a number of instances parts of appropriation bills had been vetoed by other Governors. As to that practice and its effects the court say: "Appellant has argued at some length that none of these instances was actually like the present, and as to the details that much may be conceded. But they all rest on the same principle, the right of the Governor in the exercise of his independent legislative judgment to approve an appropriation in part by reducing the amount fixed by the Legislature. As to that principle the executive practice must be considered as settled. While the executive interpretation of his own powers is not binding on the judiciary, it has always been considered as persuasive and entitled to great respect. And where, as in this instance, the practice has been frequent and acquiesced in without objection for a number of years, it should be very clearly shown to be unconstitutional to justify the courts in declaring against it."

The majority of the court appear to have entertained the view that if the Constitution should be construed as not authorizing the disapproval of a part of the item, then there would be no appropriation at all for the support of public schools, and thereby the express provision of the Constitution would be defeated or violated which requires that the Legislature "shall appropriate at least one million dollars each year" for that purpose, for it is said in the opinion of the court, after referring to that constitutional provision: "The appellants have entirely overlooked or misconceived the effect of a partial veto such as was given in the present case. If the disapproval of part and the approval of the rest were not valid acts, then there was no appropriation at all, and the money already received by the schools was illegally paid. For there was no executive approval of an appropriation of \$11,000,000." And we suppose that to have been one of the grounds, locally applicable to that state, upon which the provision for the disapproval of an item was construed to authorize the disapproval of part of an item.

Mr. Justice Mestrezat, in a dissenting opinion, referred to the reason for the adoption of the section in question as follows: "Prior to the adoption of the present Con-

stitution, the Governor was compelled to approve or disapprove the entire appropriation bill, and could not give his consent to some of the items and withhold it from others embraced in the bill. This frequently led to the executive being coerced to approve many unwise and improper appropriations, as public necessity would not permit him to disapprove the whole bill. To remedy this evil, the veto power was extended by section 16 of article 4 so that he might strike out such items of an appropriation as were improper and permit the others to become effective. The section must be construed in the light of the purpose for which it was adopted, and the people did not intend to go further than was necessary to effect that object when they made it a part of the Constitution. Whatever veto authority the Governor possesses, be it legislative or executive in its character, is, as has been said, conferred upon him by the Constitution, and when he claims the right to exercise this power, it is incumbent upon him to show that the people have clearly delegated it to him. The grant of the power must be strictly construed."

Discussing the meaning of the section it was said in the dissenting opinion: "Section 16 confines the use of the veto power to bills making appropriations of money containing more than one item. Such bills are the only ones that may contain 'more than one subject.' As the school appropriation is, by the Constitution, required to be embraced in the general appropriation bill, it is 'one subject' of the many that the bill may contain. This could not be reached by the general veto power conferred on the Governor. \* \* \* That would authorize him to veto the whole bill, but not a single item of the bill. He must, therefore, resort to the power given him in section 16. The bill of 1899 'embraces distinct items,' and therefore this provision of the Constitution applies to it. The Governor could under this authority disapprove of 'any item or items' of the bill. By reference to the act it appears that the appropriations made for the several departments of the government, except that for the support of the public schools, are each divided into, and composed of, several items. The executive may, therefore, in his discretion, disapprove one or more of the items in each or all of the several appropriations. The part or parts of the bill composed of entire items, and not the part or parts of entire items, he may approve and thus make them the law. In other words, the executive has authority to select such of the many items contained in a general appropriation bill as he may desire and disapprove them, and the parts of the bill embracing separate and entire items, which he approves, shall be the law. Item, as used in the constitutional provision, signifies a specific sum appropriated to a specific purpose, and not a fractional part of



said sum thus appropriated. Such is the plain language of the instrument, and in its interpretation there is no necessity for resorting to any technical rules of construction, or to the exposition of it by former executives. \* \* \* The executive, however, maintains that his authority to veto is not confined to 'any item or items' of the bill, but that he may disapprove a 'part of an item,' and such is the argument here by the Attorney General for the respondent. This, as we have seen, is not the plain obvious meaning of the language used in the instrument itself. To sustain the position it is argued for the respondent that, unless his construction be given the section, and the executive be thereby permitted to annul its requirements, the Governor cannot obey the 4th section of article 9 and keep the appropriations within the revenues of the state. This interpretation may appeal strongly to the lay mind and convince the over-burdened taxpayer that the executive is enforcing the Constitution by violating it, but it will find no support in the well-established canons of constitutional construction. \* \* \* But is such power necessary to prevent the state from becoming involved beyond its revenues? Clearly not. The executive has the authority to veto the whole of any item of, or an entire bill making, an appropriation. Aside from the school fund, he could therefore have destroyed the entire appropriations if he had so desired and the emergency had required it. But it may be suggested that this would have stopped the wheels of the government, and would have been a violation of the Constitution. Concede it. The executive would then have been placed in a position of violating another part of the Constitution instead of infringing article 4, § 16. The difference is only as to what part of the instrument shall be violated, and in bestowing upon the Governor the authority to determine which part of the organic law he will enforce and what part he will annul. Such a construction is not in consonance with any rule in the books. It is contended by the respondent that because the Governor may disapprove of a distinct item of an appropriation bill he may reduce that item to any sum he may desire to approve. The practical operation of such a construction of his veto power would be to annul section 1 of article 2 of the Constitution which provides: 'The legislative power of this commonwealth shall be vested in a General Assembly.' It is well known that most of the appropriation bills are passed upon by the Governor after the Legislature has adjourned. \* \* \* He could, therefore, under the authority claimed by respondent, determine the amount of every appropriation by reducing the various items embraced in general appropriation bills. This is solely a legislative function under the Constitution which in no form is granted to him in that instrument. It plac-

es the Legislature in the position of being able to fix the maximum of an appropriation to any object, subject, however, to the will of the Governor whether he will permit the members of that body to exercise their judgment as to the amount of the item appropriated. Such was clearly not the intention of the people who adopted the Constitution. The executive may, for any reason deemed sufficient by him, deprive the beneficiary of the item of appropriation, unless subsequently passed over his veto, but he is not empowered to take from the Legislature its constitutional prerogative of fixing the amount of the item to be appropriated. That is purely a legislative, and not an executive, function under the Constitution of Pennsylvania."

Referring to the proposition that former Governors had interpreted the Constitution as conferring authority to veto a part of a single item of an appropriation, the dissenting justice further said: "When the language is plain and the intent of the provision is clearly deducible, extrinsic circumstances and practical construction are not permitted to have any force in its interpretation. Story on Const. § 407; Cooley's Const. Lim. 84. The rule, therefore, cannot be invoked to aid in the construction of this section of the Constitution. I think the section in question is not ambiguous nor susceptible of two interpretations, and hence its language is the sole guide to its construction. However, an examination of the veto messages referred to in the respondent's brief shows that all of them do not support his construction of the constitutional provision in question. Some have no application by reason of dissimilar facts, others suggest necessity as the basis of their action and interpretation, while others distinctly recognize the lack of authority in the executive to disapprove of a part of an item. Such construction is worthless as a precedent to a court of justice in the interpretation of a constitutional provision."

We have referred to and quoted from the opinions in the Pennsylvania case so fully for the reason that it is the only one in which the question as to the authority of the executive to veto a part of a distinct item in a general appropriation bill has been directly decided by any court of last resort, and for the further reason that the opinions forcibly present the arguments for and against a construction of the constitutional provision so as to include such authority, and the grounds upon which the power was maintained and upheld.

In the Texas case of *Fulmore v. Lane*, supra, Mr. Justice Ramsey, dissenting in part, but concurring in the result, said: "An effort was made in argument to sustain the Governor on the theory that under the Constitution he has the right to reduce any part of an item. To this contention and claim we



can never give our assent. If this were conceded, then it would be within the power of the Governor to reduce any appropriation, where the amount sought to be appropriated was not fixed in the Constitution. It would authorize, in respect to the health department, to the comptroller's department, our educational institutions, our eleemosynary institutions, and every department of the state government, that the Governor, when the Legislature had properly passed on the matter and probably adjourned, might reduce and tear down the appropriations made for the administration of the affairs of the state in such a way as to beggar and bankrupt all of them and to deny the representatives of the people, of the state, the Legislature duly assembled, any authority or participation whatever in the money mills of the commonwealth. Such a proposition involves such intolerable tyranny and hurtful usurpation as not to be entertained for one moment. Nor, it should be said, was the action of the Governor based on this theory, nor does he seem to entertain this belief."

The provision of the Constitution of Texas, considered in the case cited, as quoted in the opinion of Mr. Justice Dibrell is as follows: "If any bill presented to the Governor contains several items of appropriation, he may object to one or more of such items, and approve the other portion of the bill. In such case he shall append to the bill, at the time of signing it, a statement of the items to which he objects, and no item so objected to shall take effect. If the Legislature be in session, he shall transmit to the house in which the bill originated a copy of such statement, and the items objected to shall be separately considered. If, on reconsideration, one or more of such items be approved by two-thirds of the members present of each house, the same shall be a part of the law, notwithstanding the objection of the Governor." After quoting that provision Judge Dibrell proceeds to say: "As provided for in the foregoing section of the Constitution, where any bill providing for several items of appropriation is presented to the Governor for his approval, he may object to one or more of such items, which items shall not take effect, unless passed by both houses by two-thirds of the members thereof. If the appropriation for the Attorney General's department contained one item of appropriation only, then the Governor's veto struck out the whole of the appropriation: but, if the appropriation contained more than one item, the veto struck out only a part of such appropriation. It will therefore be necessary to determine, as a matter of law, whether the appropriation contains one or more items. Having determined that issue, we will then proceed to determine whether the veto of the Governor struck out the whole or a part of the appropriation."

The case involved an objection by the Gov-

ernor to an appropriation made for the Attorney General's department for two years, viz., the sum of \$83,160, or, as stated in the appropriation act, \$41,580 for each of the two years. The Governor vetoed the lump sum of \$83,160 appropriated for the two years, and also the appropriation of one-half of that sum for the second year, leaving or intending to leave untouched by the veto the sum of \$41,580 for the first year. In the veto message the Governor stated that the amount which he had not objected to would be subject to the use of the Attorney General for the two fiscal years named. It was held by a majority of the court that the appropriation for the Attorney General's department, notwithstanding the mention in the act of the aggregate appropriation for the two years, contained two distinct items, viz., \$41,580 for each year, authorizing the Governor to disapprove of one of them as a separate and distinct item, and allowing the other item to remain appropriated; and that the amount so appropriated was sufficient for the payment of the amount alleged to be due, for which a writ of mandamus was asked against the comptroller.

It is provided in the Constitution of Mississippi as follows: "The Governor may veto parts of any appropriation bill, and approve parts of the same, and the portions approved shall be law." Referring to that provision it was said in *State v. Holder*, 76 Miss. 158, 23 South. 643, that it relates to general appropriation bills, or those containing several items of distinct appropriations, and that it applies to such as are made up of parts and consists of portions separable from each other as appropriations; and, further, that it was framed with a view of guarding against the evils of omnibus appropriation bills, securing unrighteous support from diverse interests, and to enable the Governor to approve and make law some appropriations, and to put others to the test of securing a two-thirds vote of the Legislature as the condition of becoming law. And the true meaning of the section was said to be that "an appropriation bill made up of several parts—that is, distinct appropriations, different, separable, each complete without the others, which may be taken from the bill without affecting the others, which may be separated into different parts complete in themselves—may be approved and become law in accordance with the legislative will, while others of like character may be disapproved and put before the Legislature again, dissociated from the other appropriations." Again, in the same connection, the court said: "To allow a single bill entire, inseparable, relating to one thing, containing several provisions, all complementary of each other and constituting one whole, to be picked to pieces and some of the pieces approved and others vetoed, is to divide the indivisible, to make one of several, to distort and pervert legis-



lative action, and, by veto, make a two-thirds vote necessary to preserve what a majority passed allowable as to the entire bill, but inapplicable to a unit composed of diverse complementary parts, the whole passed because of each." The particular question as to the power to disapprove of a part of a distinct item of appropriation and approve the remainder was not presented in that case, but it involved the disapproval of certain provisions in a bill appropriating money for a college, to be complied with as conditions before the money appropriated would become available for some of the purposes for which the appropriation was made, and such disapproval was held not to be authorized by the constitutional provision above quoted. But the court's explanation of the true meaning of the provision seems to conflict with the decision in the Pennsylvania case construing words of similar import, and might be held, we think, to deny the power to split a distinct item by disapproving a part of it, for a part of the item would not be "different, separable," and "complete" which could "be taken from the bill without affecting" any other part.

It will thus be observed that there is not a concurrence of judicial opinion respecting the power of the Governor to disapprove part of an item under a constitutional provision authorizing him to disapprove an item or items, or part or parts, of an act appropriating money. Some of the grounds of the decision in the Pennsylvania case would not be applicable here. We do not have the practice of former executives showing an interpretation of the Constitution favoring the right to disapprove part of an item, but, so far as we are advised, the practice has been the reverse of that, and it has not been suggested that any executive has heretofore assumed the power of reducing an item by approving a part and disapproving a part thereof. Not only is there a conflict in the authorities respecting the interpretation of such a constitutional provision, but judicial opinions differ concerning the effect, as an aid to interpretation, of the former practice of executives, no matter how long continued, in assuming and exercising a veto power, when the right is once questioned. That was considered in the case of *May v. Topping*, 65 W. Va. 656, 64 S. E. 848, where it was held, under the Constitution of West Virginia, that after the Legislature had adjourned the Governor is without authority to disapprove of an appropriation bill, or of items therein, but must so act, if at all, before adjournment, and communicate his disapproval, with his reasons therefor, to the house in which the bill originated. Answering the argument that it had been the custom to approve appropriation bills, or to disapprove some item therein, within five days after an adjournment of the Legislature, and that such custom had never been questioned the court said: "Such custom, if it has existed as alleged, has been

directly contrary to the constitutional provision. No affirmative approval of a general appropriation bill is required, and no disapproval of such bill, or any item therein, is effective, if expressed after adjournment. The rule of contemporaneous or practical construction is sought to be invoked. We are cited to *Lewis' Sutherland on Statutory Construction*, § 472 et seq. This celebrated authority does not justify the position, nor does any authority, in this case. The rule applies only where there is ambiguity and doubt. \* \* \* The rule cannot be applied to overthrow an unambiguous mandate of the law. \* \* \* It was reasonably supposed when these provisions were adopted that they would be fairly dealt with, appropriately and usefully applied, and quite as fairly, appropriately, and usefully interpreted by those to whom direction is given thereby. That the section has not hitherto received such interpretation and use is no reason why it should not in the future. "Two wrongs cannot make a right." Again, the statement in the court's opinion in the Pennsylvania case to the effect that if the acts of the Governor in disapproving a part and approving the rest of the item were not valid, then they destroyed the entire appropriation, is contrary to the other decisions and judicial expressions on the subject, where an absolute approval is not essential to the bill becoming a law.

[1] So far, therefore, as a determination of the right of the Governor to disapprove part of a distinct item may depend upon authorities, the question appears to be at least a doubtful one. But the conclusion we have reached in this case renders it unnecessary to determine that matter, and, hence, we ought not to assume the delicate responsibility of deciding whether the Governor, in this instance, has or has not acted, or attempted to act, in excess of the authority conferred by the Constitution. It is clear that if the Governor possesses the power, then there is at least the sum of \$10,000 appropriated for the contingent expenses of the office of the state geologist for the two years beginning April 1, 1913, and ending March 31, 1915, and we understand it to be conceded that the expenditure here involved is the first, if not the only one, which has been presented to the auditor for allowance and the issuance of a warrant. And we think it equally clear that, if the power is not conferred upon the Governor to thus disapprove of a part of an item and approve a part, the action of the Governor would be invalid and a nullity, and the entire amount of the appropriation as passed by the Legislature for such contingent expenses would be appropriated and available. Hence in either case it would be the duty of the respondent, as state auditor, to allow the bill of the relator, if otherwise proper and regular, and issue a warrant upon the treasurer for the payment thereof.



The appropriation bill in question might have become a law without the affirmative approval of the Governor, under the provision found in section 8 of article 4, that any bill not returned by the Governor within three days (Sundays excepted) after its presentation to him shall be a law, unless the Legislature by its adjournment, prevent its return, in which case it shall be a law, unless he shall file the same with his objections in the office of the secretary of state within 15 days after such adjournment. The bill was presented to the Governor on the last day of the session, and to prevent it, or any of the items therein contained, from becoming law, he would be required to expressly disapprove the same in the manner provided by the Constitution, viz., by filing the bill with his objections in the office of the secretary of state within said period. Any item not so disapproved, therefore, became part of the law.

[2] We think it clear that the above-mentioned provision of section 8 applies as well to the general appropriation bill as to other bills, for the section provides that "*every bill*" which has passed the Legislature" shall, before it becomes a law, be presented to the Governor; and the latter part of the section, referring to "any bill" not returned by the Governor, must be given the same inclusive effect, for it cannot be doubted that it refers to and is intended to include every bill which is required to be presented to the Governor.

[3] It is evident that the Governor did not intend to veto or disapprove of the entire item of the appropriation made for the contingent expenses of the office of the state geologist, and that he did not by his indorsement upon the bill, or his communication appended to it, express a disapproval of the entire item. Over his official signature attached to the bill it is stated: "This act is approved save and except the *item or parts of items* specially noted herewith as being disapproved and as shown by accompanying communication." Opposite and on the margin of the item appropriating the sum of \$15,000 for the contingent expenses of the office of the state geologist the following is noted: "\$10,000 of item approved, \$5,000 of item disapproved. J. M. C., Governor." And in the communication addressed to the secretary of state and appended to the enrolled act it is stated by the Governor that he approves of so much of the item referring to the contingent expenses of the geologist's office "as appropriates \$10,000," and withholds his approval from \$5,000, "leaving the appropriation \$10,000." The mere fact that he considered the amount of \$15,000 appropriated by the act to be excessive, or beyond the needs of the office of the state geologist for the ensuing two years, does not amount to a disapproval of the item. Notwithstanding that fact he might have approved the item, explaining, however, in his communication

that he considered it to be excessive. We find it impossible to construe the action of the Governor with reference to that item as an objection to or a disapproval of the entire item, but, on the contrary, it seems to us that to hold his act to amount to a disapproval of the entire item would distort his language used in explaining his approval and disapproval and in noting upon the margin of the item his approval of part and disapproval of part. Further, if he was without authority to thus split the amount appropriated by that item in the act, then to say that by doing so he has disapproved the entire item would be to give effect to an invalid act and permit it to accomplish the purpose of a disapproval, without which the appropriation would become law. If the authority to disapprove an item in part and approve it in part is not conferred upon the Governor his act in attempting to do so would be a nullity, and necessarily ineffectual for the purpose intended, or any other purpose, for, being unauthorized, it would be void, and entitled to no consideration whatever. The effect would be the same, necessarily, we think, as if no such partial disapproval, or other disapproval, had been attempted. Either the Governor's signature to the bill would stand without any qualification as to such an item, or the item would have force as law without approval because not disapproved.

[4] By "objections" or "disapproval" is meant lawful objections or disapproval—objections or disapproval within the authority of the Governor, and expressed in the manner provided by the organic law. By "objections" to a bill when returned to the house in which it originated, or when filed with the secretary of state after adjournment is meant an expression of disapproval. The word is used in the sense of disapproval. That the Governor did not intend or propose to object to, disapprove of, or veto the entire item seems to us to be unquestionable. He stated, indeed, that he approved of the larger part of the amount appropriated for the purpose, and expressly confined his disapproval to a part only of the amount. If it be assumed that the power of such a disapproval is not conferred upon him, then it would be no disapproval at all. The principle thus stated, seems to us not only to be sound, but we believe it to be well settled by the authorities.

In the case of *Porter v. Hughes*, 4 Ariz. 1, 32 Pac. 165, a case cited perhaps more than any other upon this question, it appeared that an item in the general appropriation act appropriating money for "territorial salaries of the district judges, as provided by law," was attempted to be disapproved by the Governor by stating in signing the act that the same was approved, "except as to subdivision 17 of section 1, which applies to appropriations for salaries of judges of the district



court." And the veto was sustained by the body in which the act originated. The question considered in the case was whether said item became a law at the time the Governor affixed his signature to the act, notwithstanding his attempt to except the item from his approval of the bill as a whole. The court said: "What is commonly known as the 'veto power' was conferred upon the Governor of the territory by the act of Congress of July 19, 1876. By the terms of this act the Governor, in exercising the power, is limited to one of the following courses of action: First, if he approve a bill, he shall sign it; second, if he shall not approve it, he shall return it, together with his objections, to the house in which it originated; third, he may retain a bill presented to him for his approval until it becomes a law by the expiration of ten days after said presentation, provided the assembly shall not have adjourned sine die during the ten days, in which case it shall not become a law. By the organic act referred to, whatever the Governor may do in the premises has reference to a bill in its entirety and not to any of its parts. A bill is approved as a whole. \* \* \* The signature of the Governor affixed to a bill is the evidence of his approval. In the case of the act in question, it being admitted that the Governor affixed his signature to the same, this action of the Governor, being in full compliance with the organic act, must be taken, therefore, as an approval of the whole bill as passed by the assembly, and as presented to him for his official action. It becomes immaterial what the Governor may have done thereafter in the way of adding his objections to any part of said bill, for he had already exercised the full measure of his power in respect thereto." The court held that the item in question was valid, and that the plaintiff, one of the parties for whose benefit the appropriation was made, was entitled to a peremptory mandamus upon the auditor to issue a warrant for the amount so appropriated and at the time payable. The same comments might be made with reference to the item involved in this case should the Governor be without authority to disapprove it in part, for each of the distinct items in the bill, as to approval and disapproval, by reason of section 9 of article 4, could be separately considered, the same as though each constituted a separate bill. More than that, under our Constitution, the disapproval of part being unauthorized, it would be ineffective, and the item would become law without the Governor's signature approving the act or any part of it. In the dissenting opinion in *Commonwealth v. Barnett*, supra, after declaring the executive to have been without authority to disapprove a part of the item appropriated by the Legislature for the support of the public schools, it was said: "The bill having been approved by the Governor, and the exception therefrom

of a part of the school fund item being void, the entire amount became effective for the purpose for which it was appropriated."

In *May v. Topping*, supra, wherein it was held that the Governor was without authority to disapprove an item in an appropriation bill after the adjournment of the Legislature, as he had attempted to do, it was said that disapproval in any other form or manner than that authorized by the Constitution would not affect an appropriation act or an item therein. And again: "No disapproval of such bill, or any item therein, is effective if expressed after adjournment." And concluding the court said: "It appearing that the Governor did not disapprove the item \* \* \* within the time prescribed by the Constitution, and in the manner therein directed, the writ will be awarded." The case was one for a peremptory mandamus to compel the certification of a copy of the act, and to include in such copy the item which the Governor had attempted to veto. It appears that the Constitution permitted the Governor in the case of a bill making appropriation of money, embracing distinct items, to disapprove the bill, or any item or appropriation therein, and it required him to communicate such disapproval with his reasons therefor to the house in which the bill originated, and that "all items not disapproved shall have the force and effect of law according to the original provisions of the bill," and that "any item or items so disapproved shall be void unless repassed by a majority of each house according to the rules and limitations prescribed in the preceding section in reference to other bills." The court said that it was the action in communicating such disapproval, with the reasons therefor to the house in which the bill originated, that consummates and effects a veto of the item, and that the communication of the Governor's disapproval, with his reasons therefor, is the disapproval itself. Discussing the meaning of the words "so disapproved" in the provision that an item so disapproved shall be void unless repassed, etc., the court say: "Clearly they relate not simply to disapproval in the mind of the Governor, but to some act of disapproval, some manner of disapproval. That act or manner of disapproval, provided for just above those words, and to which 'so disapproved' clearly relates, is by communication with reasons to the house in which the bill originated." The same principle was again announced in *Woodall v. Darst* (W. Va.) 77 S. E. 264, the court saying, in conclusion: "The veto in the present case was ineffectual to defeat the passage of the special appropriation in favor of relator."

In the Texas case of *Fulmore v. Lane*, supra, it appeared that, following the statement in the act of the total amount appropriated for the Attorney General's department for two years, and the amount appropriated for



each year, was a paragraph referred to in the opinion as the "guidance clause" making certain provisions concerning the expenditure of the sum or sums appropriated. This paragraph or clause was stricken out by the Governor and he stated in his communication to the secretary of state explaining his action upon the bill that he disapproved the said paragraph, giving the reasons therefor. It was held that the Governor was without authority to veto that part of the bill which directed the method of the expenditure of the money appropriated, and, further, that, since the disapproval was unauthorized, it was not effective for any purpose, and that the paragraph so attempted to be stricken out remained as a part of the act. In the opinion of Mr. Justice Dibrell it is said: "It follows conclusively that where the veto power is attempted to be exercised to object to a paragraph or portion of a bill other than an item or items, or to language qualifying an appropriation or directing the method of its uses, he exceeds the constitutional authority vested in him, and his objection to such paragraph, or portion of a bill, or language qualifying an appropriation, or directing the method of its use, becomes noneffective. So that we are constrained to hold that that portion of the veto message contained in subdivision 3 of the statement of objections appended to the appropriation bill and filed in the office of the secretary of state was unauthorized, and therefore noneffective, and the paragraph so attempted to be stricken out will remain as a part of the appropriation bill." In the opinion of Mr. Justice Ramsey, who stated his judgment to be that the appropriation in question consisted of a single item, and, therefore, beyond executive veto, unless vetoed in its entirety, it was said that all of the justices had agreed that the "guidance clause" must remain as a part of the law.

In the Mississippi case of *State v. Holder*, supra, it appeared that the Governor had expressed his approval of that part of the bill which included the appropriation, but had disapproved part of the section declaring certain conditions upon the expenditure of the money. The Constitution provided: "If any bill shall not be returned by the Governor within five days (Sundays excepted) after it has been presented to him, it shall become a law in like manner as if he had signed it, unless the Legislature, by adjournment, prevent its return, in which case it shall be a law unless sent back within three days after the beginning of the next session of the Legislature. No bill shall be approved when the Legislature is not in session." It was held that the bill in question was an entire thing, inseparable in its provisions, and to be approved or disapproved as such, and, not having been signed as a whole, was not made law by the partial and qualified approval which it received. It will be observed that

by the constitutional provision above quoted a bill would not become a law when not signed by the Governor, and its return was prevented by adjournment, until there was an opportunity to return it within three days after the beginning of the next session of the Legislature, but that such a bill would become a law "unless sent back within three days after the beginning of the next session." Since, in order to make a bill a law immediately, it was necessary that it be lawfully approved, the court held that as the bill had not been approved as a whole it did not become a law even in part, and that "the bill, in legal contemplation, must be held to be yet in the hands of the Governor, and may become law unless sent back by him within three days after the beginning of the next session of the Legislature." As we understand the decision, therefore, the court held not only that the qualified approval was not an approval authorized by the Constitution, but that the disapproval was not authorized or lawful, for which reason the bill would become law unless sent back within three days after the beginning of the next legislative session.

[5] Applying that principle to the case in hand it would follow under our Constitution, which provides that a bill received too late to be returned to the Legislature within the specified time will become a law unless disapproved within the period limited for that purpose after adjournment, an unauthorized disapproval would not defeat the bill.

The same principle, or one controlled by the same reasons, was announced in Oklahoma in the case of *Regents of the State University v. Trapp, Auditor*, 28 Okl. 83, 113 Pac. 910. It appears from the opinion in that case that the Constitution of Oklahoma provides that: "If any bill or resolution shall not be returned by the Governor within five days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the Legislature shall, by their adjournment, prevent its return, in which case it shall not become a law without the approval of the Governor. No bill shall become a law after the final adjournment of the Legislature, unless approved by the Governor within fifteen days after such adjournment." And the court say: "By reason of that section, no bill which is sent to the Governor less than five days before the adjournment of the Legislature can become a law without the approval of the Governor, unless passed over his veto; and it cannot become a law with his approval, unless approved by him within fifteen days after such adjournment." It appears also that the Constitution contains a provision authorizing the Governor to disapprove any item contained in a bill making appropriations of money embracing distinct items. The bill there un-



der consideration, in the first section thereof, appropriated a certain sum for the support and maintenance of the State University for the ensuing two years. In section 2 the amount so appropriated was apportioned for the various purposes of the university. The Governor approved the bill except as to certain items\* contained in section 2, each of which, with a single exception, he reduced. The court held that the bill did not embrace distinct items of appropriation, but a single item, with direction how that item shall be expended, together with direction as to how other items of appropriation made by other acts of the Legislature shall be apportioned and expended; that, therefore, the bill did not come within the section permitting the Governor to disapprove of a distinct item in an appropriation bill; and that having approved the bill in part and disapproved it in part, without authority so to do, his sanction of the parts of the bill approved was ineffectual to give those parts the force of a law. There, an affirmative approval was essential to the bill becoming a law, and the approval being a qualified one, and unauthorized in that form, it was held not to amount to an approval at all within the meaning of the Constitution, and not effectual for any purpose. If that be true, we think the same reasons require it to be held that where an affirmative approval is not required, but the bill or the items contained therein will become law unless disapproved, an unauthorized disapproval will be ineffectual. Conceding that where an approval is required to give the act force as law, words qualifying the approval showing a purpose to approve it only in part will nullify the approval and render it ineffectual, it does not, we think, reasonably follow that similar words qualifying an approval and showing a purpose to disapprove in part will amount to a disapproval of the entire bill, or of an item in it affected by the attempted disapproval, where such partial disapproval is unauthorized by the Constitution, and the bill or the particular item would become a law unless disapproved.

We conclude for the above reasons that there is at least \$10,000 appropriated for the contingent expenses of the office of the state geologist for the two years ending March 31, 1915, and a peremptory writ will be awarded requiring the allowance of the claim of the relator and the issuance of a warrant upon the state treasurer for the payment thereof. Whether or not the entire amount as passed by the Legislature is appropriated we find it unnecessary to decide, and therefore refrain from doing so.

SCOTT, C. J., concurs.

BEARD, J. (dissenting). There are three ways and only three ways by which any bill can become law: (1) By being passed by the

vote of a majority of the members elected to each house and the approval of the Governor. (2) By being passed by the Legislature over the Governor's veto. (3) By being passed by the Legislature and retained by the Governor without action thereon for the length of time prescribed in the Constitution. On the other hand, no bill becomes a law which has been returned by the Governor with objections thereto to the house in which it originated, without further action by the Legislature; or when he has filed it in the office of the secretary of state, with objections thereto, within 15 days after the adjournment of the Legislature. It is the same identical bill, in the same language, and containing the same terms and conditions, which, to become law, must be adopted by each house and be either expressly approved by the Governor, or to which he has waived his right to object by retaining it without action thereon beyond the time fixed by the Constitution. It appears clear to my mind that no bill can become law to which the Governor has filed objections, whether those objections are sent to the house in which the bill originated, or are filed with the bill in the office of the secretary (unless in the former case the bill is reconsidered and passed over the veto), any more than it can become law by the concurrence of one house and the Governor, without the assent or over the objection of the other house. In the present case it is conceded that the part or item of the general appropriation bill under consideration, making an appropriation for the office of state geologist, is a "distinct item" within the meaning of the Constitution, and as such could be vetoed by the Governor without disturbing the other items of appropriation embraced in the bill. And I think it must also be conceded that the Governor has the power to veto a bill appropriating money, or a distinct item of the general appropriation bill, for the reason that in his judgment the amount appropriated is too large, as well as for any other reason. We must then look to the action taken by the Governor on this item and determine its effect; and in so doing must consider what he wrote on the bill itself and what he said in his communication to the secretary of state. In signing the general bill he expressly excepted certain "items or parts of items specially noted herewith as being disapproved," so that it cannot be said that in so signing the general bill he intended to, or did in fact, approve the excepted items, among which was the one here in question. On the margin opposite this item he wrote "\$10,000 of item approved. \$5,000 of item disapproved." There is but one construction in my opinion that can be put upon that language, and that is, that it was a disapproval of the item as it was written and passed by the Legislature. In his communication accompanying the bill he says: "I approve so much of this item as appropriates \$10,000, and withhold my ap-



proval from \$5,000, leaving the appropriation \$10,000." That was also clearly a disapproval of the item as written and passed by the Legislature, and a positive objection to the item becoming law in form and substance as it was presented to him, and to which both houses had agreed. The reason for the objection and why he would not permit it to become law was that the amount appropriated was, in his judgment, too large—a good and valid objection if standing alone. But how did the statement that it was \$5,000 too much lessen or remove the force of the objection to the item as presented to him? It is true, he undertook to approve or make an appropriation of \$10,000; but such a bill never passed either house. In this instance the amount of the appropriation was the principal question for consideration by the Legislature. The office was created by the Constitution and the salary of the officer had been fixed by law, so that the amount to be appropriated for the contingent expenses of the office was the chief matter to be determined and fixed in the item. If any other amount either greater or less than \$15,000 was considered at any time during the pendency of the bill in either house it was not agreed to; but \$15,000 was the amount that received the vote of a majority of the members elected to each house. No other amount ever received such vote, and could not therefore become law under the plain provisions of section 25, article 3, of the Constitution, which provides: "No bill shall become a law, except by a vote of a majority of all the members elected to each house," etc. And in section 1 of the same article it is written: "The legislative power shall be vested in a senate and house of representatives," etc. These measures the people of the state in their sovereign capacity adopted and declared to be the supreme law of the state, binding upon and to be observed and obeyed by all and by every department of the state government. The Constitution is a limitation upon the powers of the Legislature; but the authority therein given to the Governor to veto an act of the Legislature is a grant of power. It is negative, not affirmative; destructive, not creative. He can by virtue of the power so granted prevent an act of the Legislature becoming law except by the vote of an increased majority of each house; but he cannot alter the language or terms of an act and make that law to which the Legislature has not given its assent. He cannot make that conditional which the Legislature has declared shall be unconditional, or the converse. Either would be legislation by the Governor without the consent of the Legislature. Let us suppose that the general appropriation bill embracing the item in question had been passed and presented to the Governor more than three days (Sundays excepted) before its adjourn-

ment and he had returned a copy of this item to the house in which it originated with exactly the same indorsements thereon and the same objection contained in his communication transmitting it to the secretary of state. Would it have become the law appropriating \$10,000 or \$15,000 or at all without further action by the Legislature? I think not. The effect of the objection is the same in each case, and I am unable to discover any provision of the Constitution to the contrary. As I understand it, a veto is an objection by the Governor to a bill as written and passed by the Legislature becoming law, whatever his objection or the reasons therefor may be. As above stated, it is the bill as written and presented to him that is or is not to become law, and no other. If it is permissible for him to change the amount of an appropriation, why may he not by the same authority change the object, terms or conditions of the bill and make it a valid enactment without further action by the Legislature? The provisions of section 8, art. 4, of the Constitution were evidently intended to and do give to the Governor exactly the same right, neither greater nor less, to object to any "distinct item" of the general appropriation bill that is granted to him by section 8 of the same article with respect to a separate bill; and that is to approve it in its entirety or to object to it. The objection may go only to some condition or term contained in the bill which causes him to withhold his approval of it in its entirety; but whatever the objection may be, if made, it prevents the bill from becoming law until passed over the objection, or it is changed to conform to the wishes of the Governor by the Legislature—the only body empowered by the Constitution to make or change the statute law. To construe the Constitution as granting to the Governor the power to reduce the amount of an appropriation made by the Legislature and make it valid for the reduced amount, is to limit the powers of the Legislature to determining the purposes for which public funds shall be appropriated and fixing the maximum amount of such appropriations, leaving the amount to be fixed by the Governor, and thus substituting his judgment for that of the Legislature. In the present case the Governor objected to the appropriation as made by the Legislature because in his judgment it was too large. That in my opinion was an objection to the item *as it was written* becoming law, and constituted a veto of the item; and the attempt of the Governor to make an appropriation for a different amount without the consent of the Legislature was beyond his constitutional authority and void. With all due respect for the opinion of my Associates, I am constrained to differ from them, and believe the writ should be denied.



(90 Kan. 252)

**BURNETT v. TOPEKA RY. CO.**

(Supreme Court of Kansas. July 5, 1913.)

*(Syllabus by the Court.)***NEW TRIAL (§ 60\*)—GROUNDS—VERDICT AND FINDINGS.**

The rule that when the special findings are inconsistent with one another and some of them with the general verdict, the case has not really been decided, and a new trial should be granted, followed.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 126; Dec. Dig. § 60.\*]

Appeal from District Court, Shawnee County.

Action by E. B. Burnett against the Topeka Railway Company. From an order granting a new trial, defendant appeals. Affirmed.

Ferry, Doran & Dean, of Topeka, for appellant. W. R. Hazen, of Topeka, for appellee.

**WEST, J.** The plaintiff sued for damages alleged to have been caused by a sudden starting of a car while he was in the act of alighting. The jury found that according to the evidence he suffered external injuries as a result of the alleged accident, and that they consisted of "bruises on neck, shoulder, and side, duration about one week," and that the injury was caused by starting the car before the plaintiff got off. They allowed nothing for pain and suffering or for permanent injuries, but awarded \$30 for treatment and \$20 for medicine. Plaintiff filed a motion for new trial based, among other things, upon misconduct of the jury, passion and prejudice, misunderstanding or misconstruction of the instructions, and upon the grounds that the verdict was contrary to the evidence and inconsistent with the findings. The defendant moved for judgment on the findings, which motion was denied and a new trial was granted. The defendant appeals, and contends that the court invaded the province of the jury in granting a new trial and erred in denying the motion for judgment.

It is argued that the jury did not believe, or have evidential grounds to believe, that the plaintiff was physically injured. There was testimony, however, that while in the act of getting off the car the plaintiff was suddenly thrown against the iron railing, striking on his left side, was then pitched out on the platform, where he struck his left side, hip, and shoulder, that when he became conscious he was led to a seat until he could take a car for his home, that he was confined to the house five days, suffered great pain and that various remedies were used as prescribed by a physician, who called about five times, and who testified that he examined him several times and prescribed for him about two or three months, but regarded the injury as temporary. There was

considerable evidence showing that he was treated by other physicians some time afterwards for difficulties which he did not attribute to the accident, which apparently left no permanent result. There is no complaint about the instructions and the verdict and findings are so inconsistent as to indicate that the jury did not understand or perform their duties properly. The trial court evidently deemed the plaintiff entitled to a trial in which intelligent and consistent verdict and answers might be returned, and, being unable to approve the verdict rendered, acted in exact compliance with the Civil Code, § 307 (Gen. St. 1909, § 5901) which provides that a new trial shall not be granted "unless on the pleadings and all the evidence offered at the trial and on the motion for a new trial the court shall be of the opinion that the verdict or decision is wrong in whole or in some material part."

The defendant urges that according to the findings the jury regarded the bruises so slight that no damage resulted therefrom, and therefore they must have been too slight to justify an allowance for medicine or treatment. The fact remains, however, that the jury expressly found that by the negligence of the defendant plaintiff, according to the evidence, suffered external injuries consisting of bruises on neck, shoulder, and side of about one week's duration. The failure to allow anything for pain and suffering was as inexplicable as the allowance for treatment and medicine; and, had the defendant asked for a new trial instead of a judgment on the findings, it might well have been granted. As said in *Willis v. Skinner*, 89 Kan. 145, 130 Pac. 673, when the special findings are inconsistent with one another, some showing a right to a verdict and others the contrary, the case is left in the condition of being really undecided. Here the answers are not only inconsistent with one another, but some of them with the general verdict, showing that the case has not in any real or proper sense been actually decided.

The order granting a new trial is therefore affirmed. All the Justices concurring.

(90 Kan. 173)

**RICHARDSON v. SIMPSON et al., State Board of Dental Examiners.**

(Supreme Court of Kansas. July 5, 1913.)

On petition for rehearing. Denied.

For former opinion, see 88 Kan. 684, 129 Pac. 1128.

**MASON, J.** The state board of dental examiners revoked the license of W. S. Richardson to practice dentistry. He obtained an injunction restraining the board from enforcing its order. On appeal to this court the injunction was set aside. 88 Kan. 684, 129 Pac. 1128. The trial court found that



the dentistry board, in hearing and deciding the case, "acted honestly and impartially, and not arbitrarily, but \* \* \* that its act was oppressive." From the entire record this court was of the opinion that the trial court had used the term "oppressive" in the sense of unduly severe. It has been brought to our attention in a petition for a rehearing that in the course of further proceedings it was stated by the judge of the district court that this court had misconceived his meaning in this regard. In view of this, we withdraw so much of the original opinion as undertook to place an interpretation on the word "oppressive" as used in the findings.

The decision of the case, however, is adhered to. In our judgment the charge made against the accused dentist was sufficient, if true, to warrant the board in revoking his license, and was supported by substantial evidence. The board, acting (as found by the trial court) honestly, impartially, and not arbitrarily, decided against him. There may be various senses in which the result of its action could be said to be oppressive, notwithstanding these facts; but we do not think that, consistently with them, it could be oppressive in such sense as to justify a court in setting aside the order of revocation. In *Meffert v. Medical Board*, 66 Kan. 710, 72 Pac. 247, 1 L. R. A. (N. S.) 811, it was said that the order of a similar board was final, "in the absence of fraud, corruption, or oppression." There the term "oppression" had a wider field of possible operation than here. It might have denoted arbitrary conduct, or perhaps prejudice.

These meanings are cut out of the present case by the finding that the board acted honestly, impartially, and not arbitrarily. This necessarily implies good faith and the absence of any wrongful intention. In this situation we regard the question whether the conduct of the board was oppressive in such sense as to authorize a court to set it aside as essentially one of law, which must be answered in the negative. In the exercise of the large powers given it, the board may upon occasion do an injustice; but if it is at present subjected to too little restraint the remedy lies in legislation.

The petition for rehearing is denied. All the Justices concurring.

(90 Kan. 292)

RICHARDSON et al. v. MISSOURI PAC. RY. CO.

(Supreme Court of Kansas. July 5, 1913.)

(Syllabus by the Court.)

1. RAILROADS (§ 276\*)—TRESPASSER ON CAR—DUTY OF CONDUCTOR—"WANTONNESS."

If the conductor of a freight train know that a trespasser riding upon one of the cars is in a situation in which his safety would be imperiled by the continued movement of the

train, and that he is not able to protect himself, it is the conductor's duty to take reasonable precautions to avoid the threatened injury, and an omission to do so indicates that indifference to consequences which is designated as "wantonness."

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 878-886; Dec. Dig. § 276.\*

For other definitions, see *Words and Phrases*, vol. 8, pp. 7386, 7387.]

2. RAILROADS (§ 282\*)—INJURIES TO TRESPASSERS—WANTON ACTS OF CONDUCTOR.

The evidence examined, and held that the conductor of one of the defendant's freight trains did not act wantonly in failing to stop the train to remove a boy nearly 16 years old, who was riding upon the ladder of one of the cars.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 910-923; Dec. Dig. § 282.\*]

Appeal from District Court, Montgomery County.

Action by W. P. Richardson and another against the Missouri Pacific Railway Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Walter L. McVey and O. L. O'Brien, both of Independence, for appellants. C. E. Benton and W. P. Dillard, both of Ft. Scott, and S. H. Piper, of Independence, for appellee.

BURCH, J. The plaintiffs sued for damages resulting from the death of their son, who was killed while trespassing on one of the defendant's trains. A demurrer was sustained to their evidence, judgment was rendered against them, and they appeal.

It is conceded that the defendant owed no duty to the deceased except not to injure him wantonly. The boy was nearly 16 years old, intelligent, strong, in good health, used to outdoor work, and able to earn \$1.50 per day during harvesting and threshing. He lived with his parents 2½ miles from the Le Hunt spur, which is a little more than three miles from Independence. The night before the casualty he went to the Air Dome in Independence with some of the neighbor boys, and then stayed all night with his grandmother, who lived in Independence. Had he taken the passenger train home the next day he would have gotten off at Le Hunt. Instead of this he climbed on the ladder of a freight car in a train of 31 cars, which left Independence at about 7 o'clock in the morning. From Independence to Le Hunt the grade is upgrade for 1½ miles, and then downgrade for 1½ miles. The boy's body was found a few rail lengths from the Le Hunt station house. The track at this point was somewhat rough and out of repair and would cause freight trains to wobble when passing over it, and there were some cars standing on the siding. The conductor saw some one climb on the side of a car about the middle of the train just as it was leaving Independence. After the train passed over the grade, and while it was rounding a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



curve, the conductor again saw the same person hanging to the side of the car. The train was then going at the average speed of 20 or 25 miles per hour. The ladder was of the standard size and construction. It is a common occurrence for men to climb on freight trains at Independence and ride to the top of the grade, where they can get off and on at any time, and they often get on and ride out there going to Le Hunt and get off at the top of the grade. The conductor testified that the person he saw catch the train looked like a grown man to him; that he did not see the boy in any position of peril or danger; that there was nothing to prevent the boy from holding to the ladder and riding to the next stop; and that he did not know that the boy wanted to get off. This is the substance of the evidence.

[1, 2] The occurrence is greatly to be deplored, and all favorable inferences which can be deduced from the evidence must be indulged for the plaintiffs' benefit, but recklessness or wantonness or a willful disposition to injure the boy cannot be imputed to the conductor of the train without injecting into the evidence facts which cannot be found there. There was no evidence as to the boy's size and weight, and consequently nothing to indicate that the conductor's impression that he was a man was not natural. The time which elapsed while the train moved a little more than three miles was at most not long. There was no evidence that the boy displayed physical weakness or exhaustion, or inability to carry out any design he had in riding the car. Consequently there was no evidence that the conductor saw him in a position of peril, imminent unless the train were stopped and he were removed, and from which he could not extricate himself. There was positive testimony to the contrary. There was no evidence as to the distance to the next stop, nor as to the speed of the train when passing the place where the boy's body was found. There is no basis upon which to affirm or to deny that the train was going faster than he anticipated. The presumption, based upon the instinct of self-preservation and the natural disposition to avoid injury, does not apply to the conduct of one who deliberately represses the instinctive promptings, and needlessly takes his chances in doing an unsafe thing, and it would be neither fair nor candid to infer as a solemn fact that the boy collapsed or was jolted off at the very point nearest his father's house where he would have alighted had he taken the passenger train.

There is no dispute between the parties as to the rules of law which govern the case, and which are well understood. Little aid

can be derived from decisions in other cases, since each one depends upon its own facts. Perhaps one of the most apposite of those cited by the plaintiffs is that of *Demerany v. Great Northern Ry. Co.*, 114 Minn. 496, 497, 131 N. W. 634, 635. The plaintiff was the manager of an elevator which stood adjacent to a switch track of the defendant's road. An engine to which box cars were attached ran upon the switch track for the purpose of placing a car opposite the elevator. The plaintiff climbed upon one of the cars and stood on top of it about three feet from the end. A brakeman stood on the same car a few feet away. While the engine and cars were backing at the rate of about eight miles per hour, the brakeman left the top of the car and uncoupled those in the rear of the plaintiff. The brakes were then set and the engine reversed so that the uncoupled cars were kicked back. The sudden stop threw the plaintiff to the ground. In holding a complaint which stated these facts good as against a demurrer, the court said: "The sole question involved is whether the allegations of the complaint, fairly construed, make out a case of willful negligence. Plaintiff was a trespasser, and the duty owed him by defendant, if it had notice of his presence, and that he was in a position of danger, was to use reasonable care to avoid injuring him. The allegations that the acts of defendant's servants were willful and in reckless disregard of plaintiff's safety add nothing to the facts. But the complaint plainly states that the brakeman who had control of the movements of the engine and cars knew his position, and knew that he was ignorant of their intention to stop the cars. The complaint alleges a sudden stop when running at eight miles per hour, and we are not justified in saying that it was not negligence to fail to notify or warn plaintiff. The facts pleaded make out a case of the failure to exercise ordinary care after discovering plaintiff in a position of peril. This constitutes in law willful or wanton negligence." The inevitable result of suddenly stopping the engine would be to pitch the plaintiff off the car. The brakeman knew the plaintiff's situation, knew the plaintiff was ignorant of the action about to be taken, and although he had control of the movements of the engine and car, left the plaintiff to his certain fate. The ground of liability, indifference to consequences despite knowledge that the plaintiff was in a position where he was certain to be injured by the contemplated movement of the train, is wholly absent from the present case.

The judgment of the district court is affirmed. All the Justices concurring.



(90 Kan. 426)

ROBINSON v. CHICAGO, R. I. & P. RY. CO.  
(Supreme Court of Kansas. July 5, 1913.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS (§ 123\*)—COMMENCEMENT OF ACTION—SUFFICIENCY OF PETITION—ACTION FOR WRONGFUL DEATH.

In an action brought in time, by a widow to recover damages for the negligent killing of her husband in the operation of a railway train, the omission to allege in the petition that the deceased was a nonresident of Kansas but was a resident of another state, and that by the laws of such other state the widow was the only person authorized to bring the action, does not render such action a nullity.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 539; Dec. Dig. § 123.\*]

2. LIMITATION OF ACTIONS (§ 127\*)—COMPUTATION OF PERIOD—COMMENCEMENT OF ACTION—AMENDMENT TO PETITION.

Where in such case the plaintiff, more than two years after the death of her husband, on leave of court files an amended petition in the action and recites therein substantially the same facts as in her original petition and adds the omitted allegations with reference to the nonresidence of the deceased, the authority to bring the action under the laws of the other state, etc., her action is not barred by the two-year statute of limitations relating to actions of this class.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.\*]

Appeal from District Court, Phillips County.

Action by Hattie Robinson against the Chicago, Rock Island & Pacific Railway Company. From an order overruling demurrer to the petition, defendant appeals. Affirmed.

M. A. Low, Paul E. Walker, and Luther Burns, all of Topeka, and R. Frank Stinson, of Phillipsburg, for appellant. McCormick & Countryman and W. A. Barron, all of Phillipsburg, and Mahin & Mahin, of Smith Center, for appellee.

SMITH, J. [1, 2] This action was brought by appellee to recover damages against appellant for the killing of her husband at Phillipsburg, Kan., by the negligent operation of a train upon which the deceased was riding and in which he was shipping an emigrant car loaded with "emigrant freight," consisting of live stock, household goods, farm implements, and such other goods as are usually shipped and transported in emigrant cars. It was alleged that the deceased loaded the car at Brush, Colo., to be transported to Apache, Okl., and his contract for the transportation thereof included his own transportation. In the original petition the plaintiff did not specifically allege that the deceased was a nonresident of Kansas. She alleged that her residence at the time of filing the petition and at all times referred to therein was at Brush, Colo., and that the deceased was her husband. The appellant answered this petition but raised no question of appellee's right to maintain the ac-

tion. The case was not brought to trial for more than two years after the death alleged, when the appellant withdrew its answer and filed a demurrer to the petition raising the question of appellee's capacity to sue. This demurrer was sustained, and, on leave of court, appellee filed an amended petition specifically alleging, with other necessary facts, that the deceased was at the time of his death a resident of Brush, Colo., and that by the laws of the state of Colorado the plaintiff, and not an administrator, was the only person authorized to bring the action. The appellant thereupon filed a demurrer to the petition as amended, which demurrer was, upon hearing, overruled. From this order the appeal is taken. It is contended that no cause of action was stated in the original petition because the plaintiff therein did not sue as the personal representative of the deceased and it did not appear that she had the right to bring the action in her own name until the nonresidence of the deceased at the time of the accident, and the laws of the state of Colorado were pleaded in the amended petition.

This court has recently passed upon this question in *Eldson v. Railway Co.*, 85 Kan. 329, 116 Pac. 485; *Cunningham v. Patterson*, 89 Kan. —, 132 Pac. 198, and *Mott v. Long et al.*, 132 Pac. 998 (filed June, 1913), adversely to the contentions of the appellant. The question has been differently decided in other states. In the *Cunningham* Case, supra, the authorities on the question are collated, and we are satisfied with the conclusion reached therein and in the other cases cited.

The order overruling the demurrer is sustained. All the Justices concurring.

(90 Kan. 296)

ENNIS v. NUSBAUM.

(Supreme Court of Kansas. July 5, 1913.)

(Syllabus by the Court.)

HUSBAND AND WIFE (§ 207\*)—ACTION BY WIFE—RECOVERY OF BOARD.

Where one lives with a family consisting of a husband and wife under such circumstances as to incur an obligation to pay for his board, no express contract being made, a recovery thereon in the name of the wife cannot be denied upon the ground that the right of action was in the husband, where the husband gives testimony in support of the wife's claim.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 756-758; Dec. Dig. § 207.\*]

Appeal from District Court, Marion County.

Action by Annie Ennis against Charles M. Nusbaum, administrator of Obed Christ. Judgment for plaintiff, and defendant appeals. Affirmed.

C. M. Clark, of Peabody, for appellant. Hock & King, of Marion, for appellee.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.



MASON, J. Annie Ennis, a married woman, presented to the administrator of Obed Christ an account for board and washing furnished the intestate. The probate court allowed the claim. An appeal was taken to the district court, where a jury trial resulted in a judgment for Mrs. Ennis, from which the administrator appeals.

The plaintiff's husband, testifying in her behalf, said that Christ had boarded for eight months at the Ennis home, adding: "My wife furnished the meals and did the cooking and washing for him during that time. \* \* \* While Obed Christ was at our house no one else except myself and wife stayed there. \* \* \* My wife and I were living together in my own home." He also testified that the board and washing were reasonably worth the amount asked. The other evidence was merely corroborative. A reversal is sought on the ground that inasmuch as the wife was not engaged in business on her separate account, and there was no express agreement for payment to her, the legal liability (if any) accrued in favor of the husband, and no one else can maintain an action upon it.

It is said that: "Generally, \* \* \* under the husband's right to the services of his wife, when a boarder is taken into the family, and the supplies are furnished by the husband, in the absence of proof of any special agreement, the money for board belongs to the husband; and when husband and wife are living together it is the presumption that the provisions are furnished by the husband." 21 Cyc. 1395, 1396. Cases bearing upon the subject are often affected by local statutes and by the rights of creditors. A decision that, under the circumstances stated, the husband can maintain an action, does not necessarily imply that the wife cannot. Each has presumptively a substantial interest in the claim, and the question in whose name it shall be prosecuted does not concern the defendant, provided he is not hampered in his defense and is protected from a second judgment. *Rullman v. Rullman*, 81 Kan. 521, 524, 106 Pac. 52. In the present case, even if originally the husband had the sole right to maintain an action, his testimony in his wife's behalf could be regarded as affecting a virtual assignment to her. *Id.* In *Stamp v. Franklin*, 144 N. Y. 607, at page 611, 39 N. E. 634, at page 635, a husband recovered a judgment upon a claim for board, which had been unsuccessfully prosecuted by his wife, although he had given testimony in support of her action. But the suit brought in the name of the wife failed because under the evidence the demand was held to belong to the husband. In the opinion it was said: "There may be cases not coming within the strict rule of estoppel by judgment, where a person not a party will be bound. The hus-

band was a witness for the wife in her action and by his testimony sought to establish her claim to the ownership of the demand for board. If the wife had finally prevailed upon this contention and recovered judgment for the board bill, there would be strong reason for holding him estopped in equity from subsequently asserting an independent right to recover the same demand, in repudiation of his own act and conduct in a former suit. It would be not only an imposition upon the court, but a detriment to the defendant, if he could be permitted subsequently to recover again the same demand which he had aided his wife to establish in the first action." In the New York case, if the defendant had established a meritorious defense in the action brought by the wife, the husband would clearly have been estopped from afterwards asserting the demand in his own name. See, also, *Edwards v. Sourbeer*, 73 Kan. 224, 84 Pac. 1033; *Carver v. Wagner*, 51 App. Div. 47, 64 N. Y. Supp. 747; *Folger v. Palmer*, 35 La. Ann. 743; *Nelson v. Claybrooke*, 72 Tenn. (4 Lea) 687; *Hoyt v. Hoyt*, 68 Iowa, 703, 28 N. W. 27; *Lasher v. Colton*, 225 Ill. 234, 80 N. E. 122, 8 Ann. Cas. 367.

The judgment is affirmed. All the Justices concurring.

(90 Kan. 423)

# COMMERCIAL STATE BANK OF WAVERLY v. ROSS.

(Supreme Court of Kansas. July 5, 1913.)

## (Syllabus by the Court.)

### 1. EXECUTORS AND ADMINISTRATORS (§ 262\*)—CORRECTION OF JUDGMENT—MISTAKE.

Where a demand against an estate, upon allowance by the probate court, is inadvertently assigned to a different class from that to which it rightfully belongs, the court may, even at a subsequent term, correct the classification to correspond to the fact, upon due application and notice.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 929; Dec. Dig. § 262.\*]

### 2. EXECUTORS AND ADMINISTRATORS (§ 261\*)—CLASSIFICATION OF DEMANDS—NATURE.

A demand against the estate of a decedent, founded upon a note given by him to raise money to pay his doctor's bill, cannot be classified as a part of the expenses of his last sickness.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 944-974; Dec. Dig. § 261.\*]

### 3. EXECUTORS AND ADMINISTRATORS (§ 481\*)—ACCOUNTING—PAYMENT OF CLAIMS.

Where an executor or administrator has allowed and paid a just claim against the estate of less than \$50, he is not to be denied credit therefor upon an accounting, because of his failure to require from the claimant the statutory affidavit of its correctness.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2065; Dec. Dig. § 481.\*]

Appeal from District Court, Coffey County.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Action by the Commercial State Bank of Waverly, Kan., against Letitia C. Ross, as executrix, etc. From a judgment for defendant, plaintiff appeals. Modified.

El. J. Crego, of Burlington, for appellant. Joe Rolston, of Burlington, for appellee.

MASON, J. George W. Ross died August 9, 1909. Letitia C. Ross was appointed executrix September 20, 1909. She filed an annual report October 3, 1910, showing the estate to be insolvent, all the assets having been devoted to the payment of claims. The Commercial State Bank of Waverly, a general creditor of the intestate, filed a motion attacking the report, and in effect asking that the executrix be denied credit for some of the payments made by her, so that a fund would be provided for the payment of the bank's claim. Before a final hearing of this motion the probate court reclassified several demands which had been allowed as claims of the fifth class, changing their rating to the second class. With these changes the report was approved, the result being that the bank was denied relief. It appealed to the district court, where the ruling was affirmed, and it now appeals to this court.

[1] The principal contention of the appellant is that the order of the probate court allowing each of the demands referred to, and classifying it as a claim of the fifth class, was in effect a judgment, which became final because not appealed from, leaving the court without power to make any change in the amount or classification. The probate court must be deemed to have found that the first classification was the result of an inadvertence. Under the provision of the Code (Civ. Code, § 596; Gen. St. 1909, § 6191) authorizing a judgment to be set aside "for mistake neglect or omission of the clerk, or irregularity in obtaining" it, the district court may vacate a judgment which was the result of a misapprehension on the part of the judge. *Cooper v. Rhea*, 82 Kan. 109, 107 Pac. 799, 29 L. R. A. (N. S.) 930, 136 Am. St. Rep. 100, 20 Ann. Cas. 43. The provision applies equally to the probate court. Civ. Code, § 605 (Gen. St. 1909, § 620); *Wolfley v. McPherson*, 61 Kan. 492, 495, 59 Pac. 1054. Therefore, if by inadvertence a demand was assigned to a lower class than that to which it rightfully belonged, the probate court had jurisdiction to correct the error even at a subsequent term, and justice required such correction to be made.

[2] Whether the disputed claims in fact belonged in the second or in the fifth class is a question which has not been argued in this court, and which therefore we are not in a position to decide. The largest of the claims, however, appears to have been one presented by the First National Bank of Waverly, based upon a note executed to it

by the testator May 20, 1909. The executrix stated that this claim, with others, was for the doctor's bill. Probably her meaning was that the money borrowed from the bank by the decedent was used to pay the doctor, but this would not give any preference to the bank's claim against the estate upon the note. The ruling upholding the authority of the probate court to correct errors in the classification of claims is approved, but, owing to the condition noted, the cause will be remanded with directions that the district court take whatever evidence may be necessary to determine to which class each of the claims in fact belongs, and conform the final order to such determination.

[3] The appellant also complains that in a number of instances a claim of less than \$50 was allowed and paid by the executrix without an affidavit of its correctness having been made, as required by law. Gen. Stat. 1909, § 3525. Such allowance and payment was irregular, but not important in an attack upon the account of the executrix, if the claims were in fact just, which seems to have been the case. An executor or administrator who pays a valid demand against the estate is entitled to reimbursement out of its funds. 18 Cyc. 570.

The judgment is modified as indicated. All the Justices concurring.

(90 Kan. 5)

OREGON R. & NAVIGATION CO. v.  
THISLER.

(Supreme Court of Kansas. June 7, 1913.)

(Syllabus by the Court.)

1. CARRIERS (§ 30\*)—SCHEDULE OF RATES—  
DISTRIBUTION.

Under the interstate commerce act (Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3156]), the carrier is required to file with the Commission its schedules of rates and also to promulgate and distribute them in order that the shipper may have access to them and ascertain their terms.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 81; Dec. Dig. § 30.\*]

2. CARRIERS (§ 128\*)—INJURIES TO FREIGHT—  
INTERSTATE COMMERCE ACT.

The provisions of that act do not preclude the shipper, after payment of the legal rates, from receiving or recovering for injuries to the property transported caused by the carrier's negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 565-567; Dec. Dig. § 128.\*]

3. LIMITATION OF ACTIONS (§ 84\*)—FOREIGN  
CORPORATIONS—RECOVERY OF FREIGHT  
CHARGES—COUNTERCLAIM—DAMAGES.

A foreign corporation which sues a Kansas shipper here to recover for an alleged balance due according to the legal rates cannot to a counterclaim for damages negligently caused to the property transported successfully interpose the statute of limitations.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 439-448; Dec. Dig. § 84.\*]



#### 4. CARRIERS (§ 196\*)—BALANCE OF FREIGHT DUE—ACTION TO RECOVER—COUNTERCLAIM.

Such action to recover for a claimed balance still due according to the legal tariff rates in force when the shipment was made is not one upon the contract of shipment, but is one to recover regardless thereof, and hence the plaintiff cannot use such contract to defeat such counterclaim.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 879-887; Dec. Dig. § 196.\*]

Appeal from District Court, Dickinson County.

Action by the Oregon Railroad & Navigation Company against O. L. Thisler. Judgment for defendant, and plaintiff appeals. Affirmed in part and remanded.

R. W. Blair, C. A. Magaw, and B. W. Scandrett, all of Topeka, and Hurd & Hurd, of Abilene, for appellant. O. L. Moore and H. L. Humphrey, both of Abilene, for appellee.

WEST, J. This is an action to recover a claimed balance of freight charges for a shipment of property from Enterprise, Kan., to Oaksdale, Wash. In March, 1907, the defendant desired to ship four stallions and a jack with certain personal property, and after communicating with the agent of the Rock Island at Enterprise, and being assured that the proper rate for an emigrant car had been ascertained, such a car was set out for him, and the property was shipped and delivered to the defendant at Oaksdale, where the freight charge of \$150 was paid. It is claimed that, as the defendant was not an emigrant, he was not entitled to this rate, and that the proper and lawful charge was \$306. In December, 1909, the plaintiff sued in Dickinson county, Kan., to recover \$156, the alleged amount still due, averring that the defendant represented to the agent that he desired to ship emigrant movables, "and by misrepresenting the character of the articles loaded he induced the agent to issue to him a bill of lading for a car load of emigrant movables." It was alleged that prior to this time all the carriers over whose line the shipment went "had filed schedules of rates for interstate shipments with the Interstate Commerce Commission as required by law." An answer was filed, alleging that to permit the plaintiff to recover would be equivalent to a recovery for its own violation of the federal statute. The alleged fraud was denied, and the representations of the Enterprise agent set forth, and it was expressly denied that any of the railroads concerned had at the time of the shipment filed schedules of rates as required by law and expressly denied that they had caused any schedules to be printed and copies for the use of the public posted or kept accessible to the public as required by law. As a counterclaim the defendant alleged that the plaintiff had by its negligence so injured the jack in question as to damage the defendant in the

sum of \$500. A general denial by way of reply and an amendment to the petition setting up the contract of shipment and a denial thereof closed the pleadings. The contract provided that the liability in case of loss of the jack should not exceed \$100, and that as a condition precedent after any damages written notice must be given to some general officer or to the nearest station agent before the injured stock was removed. Also that no action should be begun for recovery of damages after six months from the time a cause of action accrued. The jury returned a verdict in favor of the defendant for \$200, and found that the rate on a 40-foot car of emigrant movables was \$150, that the rate for such car loaded like the one in controversy was \$306, that the defendant gave no notice in writing of any claim of damages to the jack. The jury were instructed that if they should find that the defendant had not paid all the freight required by the tariff or schedule of rates in force under the interstate commerce act at the time of making such shipment, "which rates being on file with the Interstate Commerce Commission and approved by the same and applying to such shipments," the plaintiff would be entitled to recover amount found due. A motion for a new trial was overruled.

The plaintiff appeals, and contends that under the Carmack amendment to the interstate commerce act the contract of shipment furnished its own and only legal provisions, and that the limitation of \$100 for loss of the animal in question was valid and binding. Also that the counterclaim could not properly be considered as a set-off against the plaintiff's demand, for the reason that this would amount to changing the rate required by federal legislation which precludes the carrier from charging a greater or less or different compensation than the amount specified in the proper tariff schedule. That the defendant's cause of action is based upon a fraudulent transaction and the courts will not aid him, and that the defendant's cause of action is barred by the statute of limitations. This was raised by reply to the defendant's answer to the amended petition.

The testimony showed that the defendant was a resident of Kansas, that the plaintiff is a corporation, and hence the cause of action did not arise between nonresidents of this state, and, the plaintiff being a foreign corporation, the statute could not run in its favor. Bank v. Wykes, 88 Kan. 750, 129 Pac. 1131; Williams v. Railway Co., 68 Kan. 17, 74 Pac. 600, 64 L. R. A. 794, 104 Am. St. Rep. 377, 1 Ann. Cas. 6; Civil Code, § 21 (Gen. Stat. 1909, § 5614). Each party charged the other with attempting to obtain relief from a situation which their mutual fraud brought about. We prefer, however, to regard the matter as one of mistake rather than fraud, and think the evidence warrants this view.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



It is insisted by the defendant that the plaintiff is not suing upon the contract, but is compelled to abandon the contract which was entered into by the shipper and the initial carrier, and therefore cannot be heard to demand that the shipper be limited to the \$100 claim for damages to the jack. Aside from the technicalities of pleading, it appears clearly enough that the plaintiff was really suing to recover the difference between the \$150 charged and the \$306 which it alleged ought to have been charged, and in order to nullify the counterclaim the contract was set up. The jury in answer to special questions found that the rate on a 40-foot car of emigrant movables was \$150, but on such car loaded like the one in controversy \$306. The testimony showed that the agent at Oaksdale saw the injured jack repeatedly, and stated to the defendant that he would make a report to the company, which manifestly avoided the necessity of a written demand by the owner, even if the terms of the contract should be deemed essential under the peculiar circumstances of this case. *Railway Co. v. Wright*, 78 Kan. 94, 95 Pac. 1132. The testimony showed a serious injury to the animal occasioned by the negligence of the plaintiff's employees. The jury allowed for such injury \$200, and by their general verdict found for defendant in the same sum which had the necessary effect of allowing the plaintiff nothing for the \$156 difference between the rate found and the freight paid. The instructions made it the duty of the jury to find for the plaintiff for whatever remained of the freight as required by the tariff or schedule of rates "in force under the interstate commerce act at the time of making such shipment, which rates being on file with the Interstate Commerce Commission and approved by the same, and applying to such shipments." The defendant took no exception to this instruction and offered none in its stead; but now urges that, as there was no evidence of rates established and published as required by the federal statute, the findings must be construed as simply meaning that the shipper charged the two rates for the same car depending upon the character of the shipper and the shipment, whether emigrant or not, and not that such were the legally controlling rates.

The requirements were clearly set forth in *United States v. Miller*, 223 U. S. 599, at page 604, 32 Sup. Ct. 323, at page 325 (56 L. Ed. 568), wherein it was held that, while posting is not an essential condition of making the tariff legally operative, nevertheless "the publication intended consists in promulgating and distributing the tariff in printed form preparatory to putting it into effect, while the posting is a continuing act enjoined upon the carrier, while the tariff remains operative, as a means of affording special facilities to the public for ascertaining the rates in force thereunder. In other words, publication is a step in establishing rates,

while posting is a duty arising out of the fact that they have been established."

[1] Section 6 of the act thus construed requires that the carrier shall "file with the commission" and "print and keep open to public inspection" and the schedules must be plainly printed in large type, "and copies for the use of the public shall be kept posted," etc., and carriers are prohibited from engaging in transportation of passengers or property "unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act." Certainly the mere filing with the commission could give the shipper no practical means of ascertaining the rates, and hence their promulgation and distribution were by force of necessity as well as by force of the statute made necessary. In ruling on the plaintiff's motion for a new trial the court below said that the jury had to pass on the question "whether those rates were on file and approved by the Interstate Commerce Commission. \* \* \* I think the jury didn't allow anything for freight in this case. That is my view of it. And it was their province to say whether from a preponderance of the evidence you were entitled to anything or not." It is thus demonstrated that the trial court thought the jury had failed to find that any rate was in force under the federal statute, and that the evidence did not compel such finding. Counsel say in their brief that "the undisputed evidence shows that the plaintiff had filed its schedules with the commission as required by law, and that the rates specified therein were as claimed by the plaintiff, and the jury so found." They also say that there was no evidence tending to show that these rates had been "approved by the commission," and they urge that it was error to include this requirement in the instruction. We have examined the transcript, and find no evidence showing that the rates contended for were promulgated and distributed as required by the terms of the act, and, as the petition alleged only a filing with the commission, it would be quite natural that no evidence should be offered to prove anything more than that. It was alleged that the "legal rate" was \$306. But it does not appear to have been deemed necessary by the pleader that promulgation and distribution be had in order to make a rate legal.

[3, 4] Recent federal decisions that the limitations of the contract as to time, notice, and amount are binding regardless of state legislation are referred to. We are familiar with these decisions, and have recently recognized their binding force (*Nursery Co. v. Nursery Co.*, 132 Pac. 149), but we do not regard this action as one on the contract, and the attempt to set it up to defeat the counterclaim we do not deem sufficient for the accomplishment of the purpose.

Neither do we deem the permission to re-



cover on a counterclaim productive of a possible violation of the nondiscriminating provisions of the interstate commerce act. The shipper must pay whatever the law requires for the transportation, and the carrier must pay for what it has damaged the property transported. The obligations are different, and arise, the one out of contract and the other out of negligence, and neither the letter nor the spirit of the statute precludes the parties from discharging their obligations either voluntarily or by the compulsion of litigation. If the rate found by the jury was in fact the legally established and controlling rate, then, as it was the duty of the carrier to charge it, a corresponding right exists to collect it.

The legality, depending upon the previous promulgation and distribution, does not appear to have been properly presented to the jury and, affirming the judgment in other respects, the cause is remanded for a new trial upon the sole question as to whether the \$306 rate was at the time of the shipment legally in force in accordance with the requirements of the interstate commerce act. All the Justices concurring.

(89 Kan. 855)

**KANSAS MILLING CO. v. KANSAS FLOUR MILLS CO.**

(Supreme Court of Kansas. June 7, 1913.)

*(Syllabus by the Court.)*

**1. TRADE-MARKS AND TRADE-NAMES (§ 69\*)—INJUNCTION—GROUNDS—INTENT TO DEFRAUD.**

In order for a corporation which has built up a business under its name, which includes a descriptive geographical term, to be entitled to enjoin a new company from engaging in the same business in the same locality under a name so similar that reasonably intelligent and careful customers will naturally be misled, it is not necessary that an intent to defraud shall exist.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 80; Dec. Dig. § 69.\*]

**2. TRADE-MARKS AND TRADE-NAMES (§ 70\*)—INJUNCTION—GROUNDS—DESCRIPTIVE GEOGRAPHICAL TERM.**

Whether the name adopted by a new corporation, embodying a descriptive geographical term, is so similar to one under which a business has already been established as to warrant an injunction against its use depends upon the character of the business and its relation to the geographical term, but when these are determined the question becomes one of law, turning upon the likelihood of deception resulting to persons exercising reasonable care.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.\*]

**3. TRADE-MARKS AND TRADE-NAMES (§ 70\*)—INJUNCTION—GROUNDS—DESCRIPTIVE GEOGRAPHICAL TERM.**

Although the "Kansas Milling Company," engaged at Wichita in the manufacture and sale of flour, has built up under that name a business extending throughout the Union and to foreign countries, it is not entitled to restrain a new corporation, owning flour mills in several other cities, from engaging in the same

business, with general offices at Wichita, under the name "The Kansas Flour Mills Company," where no steps have been taken by the new company to increase such confusion as might naturally result from the similarity of the names.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.\*]

**4. TRADE-MARKS AND TRADE-NAMES (§ 70\*)—INJUNCTION—MISREPRESENTATION—EVIDENCE.**

In that situation the printing by the new company upon the sacks in which its flour is sold of its name, followed by the words, "General Offices, Wichita, Kansas," does not amount to an implied representation that its product is manufactured there.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.\*]

Appeal from District Court, Sedgwick County.

Action by the Kansas Milling Company against the Kansas Flour Mills Company. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

T. A. Nofztger, of Wichita, Vernon I. Day, of Anthony, and George Gardner, of Wichita, for appellant. Dale, Amidon, Madalene & Hegler, of Wichita, for appellee.

MASON, J. The Kansas Milling Company, a Kansas corporation organized in 1906, has since that time been engaged at Wichita in the manufacture and sale of flour; its business extending throughout the Union and to foreign countries. About January 1, 1912, another Kansas corporation was formed under the name "The Kansas Flour Mills Company," which owns and operates flour mills in seven different cities, one of them at Kansas City, Kan., the others in the southwestern part of the state, none of them being in Wichita, where its general offices are established. The first-named company brought action against the other, asking that it be restrained from conducting its business under the name adopted, upon the ground that by so doing it had engaged in unfair competition. A temporary injunction was granted, and the defendant appeals.

The court made findings of fact, the more important of which may be thus summarized: The plaintiff has at great expense built up a large trade in this and foreign countries, selling about 300,000 barrels of flour annually, and has established a reputation for the excellence of its product. It has branded and advertised its flour as manufactured by the Kansas Milling Company of Wichita, Kan., and thereby has made its name a valuable asset. Mail matter and telegrams intended for the plaintiff have continually been delivered to the defendant, and vice versa. There has also been confusion in telephone calls. The similarity of names, under the circumstances, is likely to give the defendant the benefit of the plaintiff's advertising



and prestige, and to mislead buyers into the belief that the product offered by the defendant is that manufactured by the plaintiff.

It is obvious that the use of names so similar, by two companies engaged in the same business, in the same city, may produce some confusion and result in some disadvantages. Whether the interference of a court is justified is a question of considerable difficulty. The ruling of the trial court is not based upon the theory that the plaintiff has acquired or can acquire an exclusive right to the use of the word "Kansas" as a part of the name of a corporation engaged in the manufacture of flour. The order granted runs only against the use of the particular title employed, in connection with a business conducted at Wichita. The defendant's right to establish its general offices in a place of its own choosing is as clear as its right to employ the word "Kansas." The statute requires the name of a corporation to begin with the word "the" and to end with the word "corporation," "company," "association," or "society," and to indicate the character of its business. Gen. Stat. 1909, § 1701 "Company" is the word usually employed. "Corporation" and "association" are so similar that their employment might not mend matters greatly. The phrase "flour mills" doubtless differs as much from "milling" as any term that could be selected to indicate the character of the business. Probably the least radical change that would satisfy the injunction would be the insertion of another word after "Kansas," such, for illustration, as "United" or "Consolidated." The amount of inconvenience that might result therefrom cannot well be determined, but it cannot be said that reasonable grounds of objection to such a change may not exist.

The cases bearing upon the right of one who has made use of a descriptive geographical name in his business to be protected therein upon the ground of unfair competition are fully collected in notes in 10 Ann. Cas. 71, and 26 L. R. A. (N. S.) 73. See, also, 38 Cyc. 802-805. Obviously a right to prevent others from using in a similar manner a word which a manufacturer or dealer has given to his business or goods may be more readily acquired where the term selected is arbitrary or fanciful, than where it is descriptive, especially where it embodies some geographical term having a real relation to the matter involved. Where long or extensive use has given to a geographical term a secondary significance in connection with a business, so that it has become descriptive of the goods produced or handled, the user is held to have acquired what amounts to a proprietary right to it, so that he may prevent a competitor from using it. Note 26 L. R. A. (N. S.) 77. The plaintiff, of course, does not contend that the word "Kansas" has acquired such a secondary meaning; but, on the other hand, it is not seeking to

prevent the use of that word by the defendant. What it complains of is the adoption of a corporate name so similar to its own that the two are likely to be confused in the minds of customers.

[1-3] There seems to be a conflict of authority as to whether, in order that the use of a geographical name may be enjoined on the ground of unfair competition, an actual intention to defraud must be shown. Note 26 L. R. A. (N. S.) 77; Nims on Unfair Business Competition, §§ 25, 26. Perhaps the decisions can be reconciled by a careful consideration of the precise facts of each case, but we do not deem it necessary to review them in detail. Doubtless in many particular instances an injunction might well be awarded or refused according to whether an intentional wrong has been done. But we do not think it should be said broadly that proof of intentional fraud is essential to the granting of such relief. While the existence of a wrongful intent might justify the interference of a court of equity upon a less showing of injury than would otherwise be required, the absence of such specific intent ought not to stay the hand of the court where a name is adopted so similar to that already in use by a business rival that injury to the first user will obviously and inevitably result. Here the plaintiff does not plead that the defendant was actuated by a purpose to defraud, but it contends that buyers would naturally be deceived by the similarity in names, and that it would suffer in consequence.

The trial court concluded that "the corporate name of defendant is so similar to that of plaintiff as to be likely to deceive a person of ordinary intelligence in the exercise of usual care in dealing with the defendant." The degree to which the similarity of names will naturally tend to deceive a reasonably intelligent and careful person is undoubtedly the vital question on which the controversy turns. That question, however, is essentially one of law rather than of fact. It cannot be conclusively determined by evidence of whether confusion has or has not resulted, just as the actual conduct of individuals is not proof of what constitutes reasonable diligence. Under the subtitle "What is similarity of corporate names," it is said, in Nims on Unfair Business Competition: "What names are 'calculated to deceive' and what names are so 'different,' or 'dissimilar,' or 'conflicting,' as not to tend to cause confusion or deceit? What standard can be applied to measure names, to discover whether or not they are conflicting? The House of Lords has said that no witness is entitled to express an opinion as to this. The names may be put in evidence, together with the facts as to their use, and the circumstances surrounding the choosing of them; but there is no standard, except what the court in each particular case believes has



worked fraud, or may work fraud or loss to the plaintiff. The probability of injury resulting from the use of the two names is the test to be applied by the court for the purpose of deciding whether or not the name will conflict." Section 108.

The decision of the case must be affected by the character of the names, as well as by their degree of resemblance. A court might readily refuse to enjoin the use of a descriptive corporate name under circumstances that would justify an injunction if the name were purely arbitrary. In either case some likelihood of confusion would have to be shown in order to obtain relief, but the probability would have to be stronger in the one case than in the other. So a distinction must be recognized between different geographical terms, according to their descriptive quality, the desirability of their use, and their connection with the subject to which they are applied. One who selects the name of a state as a part of a business designation must anticipate that more people will be moved by the same impulse, and that the resulting titles will be less readily distinguished than if, for instance, the name of a township had been selected. Buyers of flour, at home or abroad, must be presumed to know that "Kansas" is a word likely to be used by different manufacturers, and on that account to pay closer attention than they otherwise would to the precise words of a corporate name in which it occurs. Upon these considerations this court is of the opinion that the name taken by the defendant is not sufficiently similar to that of the plaintiff to justify an injunction against its use.

[4] If the defendant had imitated the plaintiff's brands, or taken other steps likely to increase the confusion between the two names, relief could be granted. A finding was made to the effect that the defendant intends branding and advertising the product of its various mills as "manufactured by the Kansas Flour Mills Company, Wichita, Kansas." The defendant maintains that this finding is not supported by the evidence. The plaintiff says in its brief: "It is our contention that the labeling of all of the flour of defendant in the name of Kansas Flour Mills Company, Wichita, Kansas, or the Kansas Flour Mills Company, General Offices, Wichita, Kansas, and not placing any words upon it to indicate that it is manufactured elsewhere than at Wichita, is sufficient to sustain the finding." The defendant should not be allowed to use brands or advertisements expressly or inferentially representing that its flour is manufactured in Wichita. The sacks produced in evidence, however, show the words "Wichita, Kansas," to be preceded in each instance by the phrase "General Offices." They also bear a device giving the names of the seven cities in which the defendant's mills are situated. We do

not think this employment of the name of the city in which the headquarters of the company are located is misleading.

A detailed review of the authorities is not thought to be desirable. Each case necessarily depends upon its own peculiar facts, and in several instances decisions seemingly in point are influenced by considerations not here present. In *Elgin Butter Co. v. Creamery Co.*, 155 Ill. 127, 40 N. E. 616, the court refused to enjoin a corporation called "Elgin Creamery Company" from competing at Elgin with a company having as established business under the name the "Elgin Butter Company." The facts are somewhat similar to those of the present case, but the opinion contains an intimation that the use of a corporate name similar to one already in use can only be enjoined where a fraudulent intent exists—a length to which we do not feel justified in going. In *Nebraska Loan & Trust Co. v. Nine et al.*, 27 Neb. 507, 43 N. W. 348, 20 Am. St. Rep. 686, injunction against the use by a new company of a name already employed by an older one was refused; the companies being located in different cities, but operating in the same territory. *Northwestern Knitting Co. v. Garon*, 112 Minn. 321, 128 N. W. 288, is perhaps as strong a case as any cited in support of the plaintiff's contention. There the operation of the "Northwestern Knitting Mill" located at Duluth was enjoined because of interference with the business of the "Northwestern Knitting Company" of Minneapolis. The case seems an extreme one. The word "Northwestern" is so indefinite, however, that its classification as a descriptive term seems somewhat doubtful. In *Cady v. Schultz*, 19 R. I. 193, 32 Atl. 915, 29 L. R. A. 524, 61 Am. St. Rep. 763, the prior user of the words "United States" as a part of the style of a dental office was protected by injunction against their similar use by a competitor. But there the phrase was so broad that it clearly was not descriptive in any just sense. A prior decision of the Minnesota court forbade a new institution, having another and entirely different name, to describe itself in its advertising matter as "Minnesota's School of Business," in imitation of the name of an older school known as the "Minnesota School of Business." *Rickard v. Caton College Co.*, 88 Minn. 242, 92 N. W. 958. In the following cases in which injunctions were granted the two names involved were absolutely or practically identical: *Nesne v. Sundet*, 93 Minn. 299, 101 N. W. 490, 106 Am. St. Rep. 439, 3 Ann. Cas. 30; *Amer. Clay Mfg. Co. v. Amer. Clay Mfg. Co.*, 198 Pa. 189, 47 Atl. 936; *Philadelphia Trust, S. D. & I. Co. v. Philadelphia Trust Co. (C.)* 123 Fed. 534.

The judgment is reversed, with directions to deny the temporary injunction. All the Justices concurring.



(39 Kan. 863)

NESBITT et al. v. CHESEBRO et al.

(Supreme Court of Kansas. June 7, 1913.)

(Syllabus by the Court.)

**1. VENDOR AND PURCHASER (§ 79\*)—CONTRACT OF SALE—CONSTRUCTION.**

A fair interpretation of the contract of sale in this case is that the purchasers assumed payment of the interest on the Seaton mortgage only from the date of the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 7, 8, 127-131; Dec. Dig. § 79.\*]

**2. COSTS (§ 57\*)—TAXATION AGAINST PREVAILING PARTY—DISCRETION.**

Where a journal entry is placed of record which purports to be the record of a judgment that was in fact never rendered, and the party, appearing thereby to be the judgment debtor, files in the court to which the record pertains a motion to expunge the false record, which motion is resisted by the other party, but is sustained, it is not within the discretion of the court to tax the costs of the motion to the prevailing party.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 229-249, 257-260; Dec. Dig. § 57.\*]

**3. JUDGMENT (§ 252\*)—CONFORMITY TO PLEADINGS—PRAYER FOR RELIEF.**

An answer and cross-petition in which an answering defendant states facts which entitle him to a judgment for a certain sum of money, and in which answer is a prayer that his lien may be preserved and for such other relief as in equity he may be entitled to, is sufficient, if found to be true, to entitle him to such judgment as the facts stated warrant, although there is no prayer for a money judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 441, 442; Dec. Dig. § 252.\*]

**4. VENDOR AND PURCHASER (§ 259\*)—VENDOR'S LIEN—CONTRACT TO SELL REALTY AND PERSONALTY.**

Where a written contract is executed for the sale of a tract of land and a number of articles of personal property at an aggregate price and payments are made thereon, it is not error, in an action to foreclose the vendor's lien, for the court to award a lien on the land for the unpaid balance of the purchase price, provided there is any provision in the contract from which the court may fairly infer that the amount paid is equal to or exceeds the value of the personal property as contemplated by the parties when making the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 658-663; Dec. Dig. § 259.\*]

**5. VENDOR AND PURCHASER (§ 287\*)—FORECLOSURE OF VENDOR'S LIEN—JUDICIAL SALE—DISCRETION.**

The method of disposing at judicial sale of a tract of land embracing many quarter sections is within the judicial discretion of the trial court; and, where by the terms of the decree two unpaid liens will remain on the entire tract after the sale, it is not an abuse of such discretion to order the tract sold as a whole instead of in parcels.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 810-814; Dec. Dig. § 287.\*]

Appeal from District Court, Logan County.

Action by J. H. Nesbitt and another against Mary Chesebro and others. Judgment for plaintiffs, and defendants appeal. Modified and affirmed.

W. H. Wagner, of Russell Springs, and Stubbs & Stubbs, of Kansas City, Mo., for appellants. Monroe, Roark & Taylor, of Topeka, for appellees.

SMITH, J. [1] This is an action in equity brought to foreclose a written contract made August 28, 1909, between the appellees, J. H. and W. H. Nesbitt, and the appellants, by which the appellees sold to appellants about 8,000 acres of land, 21 head of horses and colts, 3 cows, 30 hogs, and all the fowls, implements and growing crops on the property for \$60,000. The appellants were to pay \$1,000 cash and to secure the payment of \$9,000 by their note for that amount and with collateral mortgages on real estate of equal amount; also, the purchasers were to assume payment of a mortgage to John Seaton on the land for \$15,000, and, besides the interest, to pay \$1,500 on the principal each year, and in case it was not paid by the appellants the appellees might pay it and recover for the same out of the land; that when all of such payments had been made, including the \$15,000 mortgage, the appellees were to deed the land to the appellants, who were to give a mortgage for the remainder of the purchase price due in 10 years, and bearing interest at 6 per cent. Deposits of collaterals to secure the payment of the \$9,000, balance of first payment, are acknowledged in the supplemental contract. The appellants agreed to pay the taxes of 1909, for which they were to get all crops on the land and also agreed to pay all taxes yearly. Further stipulations, not necessary to be considered on the issues presented, were embraced in this contract. On September 2d following a supplemental contract was made and acknowledged by the parties, to which the former was attached as an exhibit, which provided only the details for the performance of the previous contract.

These contracts were made a part of the petition which was filed June 5, 1911. The petition alleged that possession of the land was delivered to appellants, and was still retained by them. It was admitted therein that the \$10,000 had been paid as agreed; that the taxes for 1909, the interest on the \$35,000, and the balance due to appellees on the purchase price was paid April 10, 1910, and the installment of principal and interest on the Seaton mortgage (\$2,300) was paid at the same time. It is alleged therein that appellants failed to pay the interest on the \$35,000 on April 20, 1911, and failed to pay the taxes for 1910 before May 25, 1911, on which date appellees paid them, amounting to \$564.61, and appellants failed to pay the \$1,500 installment of principal and the interest due on the Seaton mortgage in April, 1911. In a supplemental petition appellees alleged another default of payment of interest due on the \$35,000 debt, the taxes of 1911, and the in-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



terest and installment due on the Seaton mortgage in April, 1912. Also, that by reason of the defaults the whole of the \$35,000 debt was due and payable. No provision, however, appears in the contract for accelerating the maturity of the \$35,000 debt. The Seaton mortgage has such a provision, but it is only available to the holder thereof, which appellees did not claim to be. John Seaton being dead, the administratrix of his estate answered, and alleged that \$1,500 and one year's interest on the mortgage were due and unpaid, but asked for no judgment by reason thereof and expressly declined to declare the whole debt due. The administratrix, however, prayed that the priority of her lien be adjudged, and "for such other and further relief as he (she) may in equity be entitled to."

The appellants, in answer, admitted that two years' interest was due on the \$35,000 debt, and that appellees paid the taxes of 1910 on May 25, 1911, but alleged that it was a voluntary payment made without their knowledge or consent, and that they were not liable therefor; also, that the land consisted of 50 quarter sections, any one or more of which could be sold without prejudice to any of the parties, and that all of the lands were of the reasonable cash value of \$15 per acre; also, that appellants had paid no part of the Seaton mortgage; also, they alleged as a set-off that they were compelled to pay \$325 on account of interest which had accrued on the Seaton mortgage prior to September 1, 1909, and which by the terms of the contract appellees agreed, but refused, to pay. The court required this allegation to be stricken out as a condition precedent to filing the amended answer. The answer also denied all allegations of the petition not expressly admitted; it also prayed for an accounting of the amount due appellees, and, if a decree of foreclosure be entered, that only so much of the land be sold as should be necessary to pay the amount found due from appellants, with costs. No reply was filed.

There is little or no controversy as to the facts of this case, a résumé of which is given as pleaded. The parties agreed to submit the case upon the pleadings and evidence which had been given upon the motion to vacate a recorded journal entry of judgment and a sale had thereunder. No other evidence was produced. That evidence is abstracted, and is conflicting. The findings of the court thereon are therefore conclusive. As abstracted, the findings of the court are as follows: " \* \* \* The court finds, as the trial docket shows, that no judgment had been in fact rendered or pronounced in this case at that term; finds that defendants Chesebro had not authorized their then attorney (Kagey & Anderson) to sign or agree to the journal entry of purported judgment of said term; that the said journal entry

had been signed by the judge out of court, without any judgment ever having been pronounced in court; that the journal entry had never been agreed to in court, nor consented to when court was in session; but in setting such judgment aside and the sale made thereon the court taxed the costs to defendants Chesebro to which assessments of costs they except; the court did not find that either Mary or Earle Chesebro had been guilty of any negligence or misconduct or other act for which they should be charged with such costs."

[2] The amount of costs for which judgment was rendered against the appellants does not appear, but so far as they were made by appellees in entering and attempting to enforce a judgment that never was rendered, with the costs of the hearing, the judgment is reversed. Such costs should be taxed to appellees. Ordinarily the taxation of costs upon motions is within the discretion of the court, but it is not within the discretion of the court to impose upon the prevailing party the costs incurred in removing from the record a false entry of judgment, the costs in attempting to enforce such judgment or incurred on a motion to rectify the record, especially when such motion is resisted as it was in this case. The agreed price of the property sold under the contract was \$60,000, and such price was fully accounted for in the provisions of the contract by counting the Seaton mortgage \$15,000 at the date of the contract, but the appellants were compelled to pay interest thereon from April 20, 1909, to the date of the contract, about September 1, 1909, and appellants claimed credit therefor against appellees which claim was not allowed by the court. The judgment is modified by allowing such credit with interest from the time of payment. The appellees paid the taxes on the land (for 1910) on May 25, 1911. Appellants claim this was a voluntary payment, but this is not so in a legal sense. The taxes were due and payable November 1, 1910, and it is presumed that as required by law a penalty had been placed thereon soon after December 20, 1910, and that another penalty would be incurred June 20, 1911, less than a month after the payment, if the taxes were not sooner paid. The appellees had the right to make the payment and recover therefor with interest at 12 per cent. per annum. This is expressly authorized by section 9494 of the General Statutes of 1909.

[3] The court rendered judgment in favor of the administratrix for \$2,447.84 on an installment of the principal and interest due and unpaid. The facts stated in the answer of the administratrix and the prayer for relief therein are sufficient to warrant the judgment in her favor, although there was no prayer for the specific judgment which was rendered. *Walker v. Fleming*, 37 Kan. 171, 14 Pac. 470; *Smith v. Smith*, 67 Kan. 841, 73 Pac. 56.



[4] That the appellees had a vendor's lien on the land for the purchase price thereof is not denied or controverted by the appellants, but they contend, which seems to be correct, that the appellants neither pleaded nor offered evidence of the contract price for the sale of the land separate from the personal property, and that appellants have no lien on the land for the purchase price of the latter or for the interest thereon. There was, however, a stipulation in the supplemental contract that appellants should not sell or dispose of any of the personal property until the full payment of the \$9,000 balance of the first payment. The full amount of that payment is credited, and hence it may fairly be inferred that the parties regarded the purchase price, whatever it may be, of the personal property as fully paid, and that the \$35,000 debt remaining is for the land only.

The trial court rendered judgment for appellees for two installments of interest, with interest thereon from the respective times when due, for \$4,333.70, for \$627.40 for taxes paid, and for \$50 costs, and ordered the land sold in bulk subject to the Seaton mortgage and appellees' lien for the \$35,000 balance unpaid purchase price. Also the court ordered that the case be left open for further supplemental decrees in case of further defaults of payments on the contract or on the Seaton mortgage. To all of which the appellants object as inequitable. They protest that their pleading alleges and the uncontroverted evidence shows that all the land is worth \$15 per acre, \$120,000 in the aggregate, and that it is inequitable that they should be deprived of the title to so valuable property to satisfy a judgment which should be less than \$4,000. On the other hand, it is apparent that no sale of the land or any part of it under the judgment could be made which would release it from the lien of the Seaton mortgage or from appellees' lien for the balance of the purchase price thereof. Moreover, it is improbable that any purchaser could be found for a part of the land, considerably less than the whole tract subject to nearly \$50,000 incumbrances, who would pay a sum sufficient to satisfy the judgment to which appellants are entitled and to pay the proper costs. As said in *Town v. Lombard*, 57 Kan. 625, at page 628, 47 Pac. 532, at page 533: " \* \* \* Each purchaser would be subjected to the danger of a sale of his tract to satisfy the prior incumbrance, and it might be a matter of much difficulty, if not of impossibility, to obtain an apportionment of the lien."

[5] The method of selling the land in part or as a whole was a matter resting in the judicial discretion of the court. In view of the large incumbrances to different parties remaining upon the land after proper judgments in this case should be satisfied, it would have been unreasonable, even if the

court had the power, to order any portion thereof free from such liens. Assuming, contrary to our view, that the court had the power to do so, it would appear very inequitable to so use it. The order to sell the whole tract subject to existing liens, not included in the judgment, is approved.

Again, it is contended that the court erred in limiting the period of redemption to six months. Appellants deny that it appears from the evidence that not more than one-third of the purchase price of the land had been paid. As we have seen, the appellees retained some control over the sale of the personal property until \$10,000 was paid on the contract. It is then fair to assume that in the estimation of the parties the personal property did not exceed \$10,000 in value. Assuming, then, that the purchase price of the land was \$50,000 and that the \$11,500 which has been paid on the contract, besides interest, should be applied only to the purchase price of the land, and no part thereof to the price of the personal property, still it cannot be said that one-third of the price of the land has been paid.

It is ordered that the judgment be modified and credits be deducted therefrom as herein specified. Subject thereto, the judgment is affirmed. The appellants having been compelled to resort to this court to preserve valuable rights, it is ordered that the costs here be taxed to appellees. All the Justices concurring.

(90 Kan. 95)

#### In re WILCOX.†

(Supreme Court of Kansas. June 7, 1913.  
Rehearing Denied July 5, 1913.)

(Syllabus by the Court.)

#### 1. ATTORNEY AND CLIENT (§ 53\*)—PROCEEDINGS FOR DISBARMENT—SUFFICIENCY OF EVIDENCE.

The evidence in original proceedings for disbarment examined, and held insufficient to sustain certain of the charges in the accusation, but sufficient to sustain two charges of misconduct, one of which it is held relates to the administration of justice and seriously affects the professional and personal integrity of the accused.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 74, 75; Dec. Dig. § 53.\*]

#### 2. ATTORNEY AND CLIENT (§ 53\*)—DISBARMENT PROCEEDINGS—EVIDENCE—SUFFICIENCY.

While an original proceeding brought in this court to disbar an attorney was pending and undetermined, an information was filed against the attorney in a district court charging him with criminal libel. On a trial of the criminal action he was acquitted. Thereafter a supplemental accusation was filed in this court setting up as an additional ground for his disbarment that he was guilty of the criminal libel of which he had been acquitted and that the object and purpose of the libel was to induce the libelee to use his influence to have the disbarment proceedings dismissed. The court finds that the evidence sustains the supplemental accusation, that the purpose of the libel was to defeat the administration of justice, and that the charge seriously affects the pro-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† See, also, 123 Pac. 922.



professional and personal integrity of the accused, for which reasons judgment of disbarment is ordered.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 74, 75; Dec. Dig. § 53.\*]

Application for disbarment of E. C. Wilcox. Judgment of disbarment.

J. N. Tincher, Seward I. Field, and Samuel Griffin, all of Medicine Lodge, for appellant. Earle W. Evans, R. R. Vermillion, and C. L. Long, all of Wichita, and John Marshall, of Topeka, for appellee.

PORTER, J. This is an original proceeding brought to disbar E. C. Wilcox. The first accusation was filed August 17, 1911. It was signed by T. W. Blake as accuser. A motion to make more definite resulted in the filing on January 3, 1912, of a verified accusation consisting of six distinct charges of misconduct. After the accused had answered with a denial of the charges, a supplemental accusation was filed June 11, 1912, setting forth as an additional ground for disbarment that the accused was guilty of criminal libel as charged against him in the case of *State v. Wilcox et al.*, 132 Pac. 982. He filed his denial of this charge.

The commissioner appointed to take the evidence, find the facts, and recommend such final judgment as he deemed proper, has made a very full report, in which he has found in favor of the accused on three of the charges, against him on four, and has recommended that judgment of disbarment be entered. The parties have each filed exceptions to the findings both of fact and of law. Able counsel have submitted elaborate arguments orally and in briefs upon the questions raised by the exceptions and upon the motion of the accuser for judgment of disbarment upon the findings.

E. C. Wilcox, the accused, has resided at Anthony in Harper county since 1888. He was born in Ohio in 1870 and was admitted to the bar of this state in 1890. He was elected county attorney of Harper county in 1910 and was holding that office when this proceeding was begun. He is a lawyer of ability, and by diligence and attention to the business of his clients he has built up a successful and lucrative practice in the courts of this and adjoining states. He has frequently appeared for his clients in the Supreme Court, and at this time has a number of cases pending here. It is to his credit as a lawyer that no charge or accusation of any kind has been brought against him or testified to in this proceeding by a former client. It is perhaps significant that the commissioner has acquitted him upon the only charge which the accuser has sworn to otherwise than upon information and belief.

Both parties have excepted to the findings and conclusions as to charge No. 1, involving alleged unprofessional conduct in the Cullison divorce case. The commissioner finds

that the explanation of the accused is a fair and reasonable one with respect to the circumstances in connection with the bringing of the first action for divorce, and also finds in his favor respecting his conduct in filing the second action. We have examined the evidence and approve these findings. The commissioner finds against the accused as to part of the charge. It appears that after the second action was brought the husband of Katherine Cullison paid her \$200, whereupon, without consulting her attorney, the accused, she dismissed her action and returned to Arkansas where she formerly resided. She was an ignorant, uneducated woman, and the second wife of Cullison who owned property worth about \$7,000. Shortly after her return to Arkansas the husband died. The accused wrote letters informing her that she had an interest in the property, and offering to assist her in securing it and in protecting her rights. Receiving no reply, he sent his stenographer to Arkansas with \$2,000 with directions to obtain a power of attorney from her authorizing him to represent her interests in the estate, and, failing in this, to purchase her interest at a sum not in excess of \$2,000.

When the stenographer reached Arkansas, it was found that the Cullison children by the first wife had already procured a conveyance of Katherine's interest in the estate for the sum of \$500. The accused thereafter brought suit against her for \$350 attorney's fees in the divorce case and levied an attachment upon her interest in the lands of her deceased husband. The action was afterwards dismissed upon the payment to accused of \$100. The commissioner finds that there was nothing unfair in the children of D. Cullison purchasing the interest of Katherine Cullison for the sum of \$500 because she had not assisted in acquiring the property; but finds the accused guilty of unprofessional conduct in attempting while acting as her attorney to purchase the same interest for \$2,000. The commissioner also finds him guilty of reprehensible conduct in bringing suit for \$350, because he was aware that he was not entitled to any such fee for the services performed, and because, in the opinion of the commissioner, the suit for fees was the result of failure to purchase the interest of the client.

In our opinion the conclusions are not supported by the facts found. In the first place, it does not appear that the accused was acting as attorney for Katherine Cullison at the time he offered to purchase her interest. An offer of \$2,000 cash for property estimated to be worth from \$3,000 to \$3,500, the purchase of which involved possible litigation and time necessary before it could be realized upon, does not seem under the circumstances to be reprehensible. Before the offer was made the accused had twice written

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Mrs. Cullison informing her of her interest in the estate, and there is no suggestion that she was not acquainted with its value. No reason is suggested why he might not offer to purchase her interest, if in fact he was not her attorney; and the only possible construction we can give to the evidence and the other findings is that the offer to purchase was not to be made at all, unless she refused to retain him to represent her interests in the estate.

In regard to the suit to collect a fee for his services as an attorney in the divorce case which she had settled and compromised without consulting him, involving, as it seems, a claim for a share in the property of the husband, we cannot say that the amount was so excessive as to warrant a finding of unprofessional conduct. Nor do we think it necessarily follows that an attorney is guilty of reprehensible conduct because, in a suit upon quantum meruit against a client to recover attorney's fees for services rendered, where there is no agreement or understanding fixing the amount, he asks judgment for more than he is willing to settle for, or for a larger sum than the proof may show him to be entitled to recover. The circumstances might be such as to render such conduct discreditable and even reprehensible; but nothing appears in the evidence to justify the finding made. The clear inference from the evidence is that the accused was entitled to a fee for his services which the former client refused to pay. He had a right therefore to sue the client and to attach her property, and the exercise of this right should not be regarded as reprehensible or ground for disbarment. We find nothing in the evidence to justify the finding that the action was brought for any purpose other than to recover an attorney's fee. It perhaps would not have been brought in the event the accused had succeeded in purchasing the property; but, having a legitimate cause of action, his failure to purchase the property neither deprived him of the right to sue, nor can it be said to render his conduct in bringing suit worthy of reprehension.

Therefore, upon charge No. 1, involving his conduct in the Cullison case, we find in favor of the accused.

[1] Charge No. 2 is that in 1906 the accused while reading to the court a deposition in a divorce case willfully interpolated certain words which tended to render the evidence of the deposing witness "even more revolting than it was." The deposition in question was read in a case in which the accused appeared for the wife. The deposing witness purported to state verbatim certain expressions said to have been addressed to the wife by the husband. The deposition seems to have literally overflowed with foul and obscene expressions. The commissioner finds that the accused in reading to the court willfully interpolated two words. The testimony given before the commissioner by the

trial judge and the opposing counsel is that the interpolations were made. The accused denies the charge and his client, who was present at the divorce trial, testified that she was familiar with the contents of the deposition and that no interpolation was made. It is significant that there is no evidence that the attention of the accused was called to the circumstance at the time it is said to have occurred or at any other time until this accusation was filed. The opposing counsel, it seems, informed the court of the matter privately before the case was decided; but the failure to challenge attention to the circumstance in open court at the time would indicate that it was not regarded as of much importance. We are unable to discover how the words interpolated could materially affect the testimony of the witness or make the expressions testified to more revolting than they actually were. It is our experience that interpolations in the reading of legal documents by attorneys in this court, due wholly to carelessness, occur very frequently where the real meaning is affected far more seriously than it could possibly have been in this instance, and where the interpolations are made unconsciously and with no purpose to mislead. We are not inclined to attach importance to this charge, and in view of the lapse of time that has occurred, and the circumstances to which we have referred, we must disapprove of the commissioner's finding, and upon charge No. 2 we find in favor of the accused.

On charges Nos. 3 and 4 the findings are in favor of the accused. The exceptions taken by the accuser are overruled, and the findings are approved.

Charge No. 5 the commissioner finds was not sustained in any particular, and we approve the finding.

The commissioner separates his findings under charge 6 into seven subdivisions, on five of which he finds in favor of the accused, and the findings are approved. For the most part they appear to amount to nothing more than that accused indulged freely in criticism of the courts, and of the action of the county board, and that of the city council upon public matters. If the charges in these respects are true, they furnish no grounds for disbarment or of a charge of unprofessional conduct.

The evidence as to subdivisions 1 and 2 of charge No. 6 appears to justify the findings of the commissioner against the accused as to the facts and to that extent the findings are approved. These charges are that the accused on different occasions uttered slanderous words against certain persons. The fact that one of the persons against whom the slanderous charges were made occupied at the time a judicial position does not affect the matter. The conduct of the accused was discreditable and reprehensible as a citizen, aside from any obligations resting upon him as a member of the bar.



If the foregoing comprised all the charges against the accused, and the only one sustained by the evidence were the charge of having uttered a slander, the court in all likelihood would not feel justified in imposing a sentence so severe as a judgment of disbarment. But unfortunately there remains the more serious charge set forth in the supplemental accusation that the accused is guilty of criminal libel. By consent of the parties all the evidence taken in the district court of Shawnee county in the criminal action of *State v. E. C. Wilcox, H. C. Ericsson, and Cory Black* was admitted as evidence in this proceeding. Upon the trial of the criminal action *Wilcox*, though present, did not testify. The jury acquitted him and returned a verdict of guilty against *Ericsson* and *Black*. The judgment has just been affirmed. See 132 Pac. 982. The accused was a witness in the disbarment proceedings, and we have carefully considered his evidence in which he denies all knowledge of any conspiracy or plan to bring a false charge against the libelee in that case, and denies that he had any knowledge of the fact that his friend *Cory Black* had employed a detective for any purpose or of the fact of the writing by *Black* of the letter to the libelee until May 4, 1912. From all the evidence we are unable to come to any other conclusion than that reached by the commissioner, and we therefore approve his finding that the accused is guilty of the charge set forth in the supplemental accusation, which in substance is the same charge for which he was tried in the criminal action and acquitted. The evidence aside from that of the accused here being the same in both cases, it is not deemed necessary to refer to it again in detail.

On the questions of law raised by the accused, it is first contended that his acquittal in the criminal action should be considered as an end to the charge. The rules of evidence in the two cases are not the same. The accused as a defendant in the criminal action could not be convicted except upon evidence which satisfied the jury of his guilt beyond a reasonable doubt. While a preponderance of evidence is sufficient in this proceeding we do not in any sense rest our finding upon that rule of evidence. The acquittal in the criminal action, while properly a subject to be given due consideration, is not conclusive. Counsel for the accused say in the briefs: "After a careful review of all the authorities, we have been unable to find a single case where an attorney has been disbarred for an indictable offense not committed in his character as an attorney, except where some unusual circumstances existed, or where the evidence was undisputed."

In the opinion in the case of *In re Smith*, 73 Kan. 743, 750, 85 Pac. 584, 586, this court, while commenting upon the various grounds upon which courts have disbarred attorneys

for conduct involving moral turpitude, used this language: "Even an acquittal upon a criminal charge does not prevent the disbarment of an attorney, where it clearly appears that the misconduct under investigation rendered him unfit to be intrusted with the powers and duties of his profession"—citing with approval the case of *People v. Mead*, 29 Colo. 344, 68 Pac. 241.

The same case, *In re Smith*, supra, may be cited in answer to the contention that the crime charged against the accused was not connected with his professional duties. In the opinion Chief Justice Johnston said: "The nature of the office, the trust relation which exists between attorney and client, as well as between court and attorney, and the statutory rule prescribing the qualifications of attorneys, uniformly require that an attorney shall be a person of good moral character. If that qualification is a condition precedent to a license or privilege to enter upon the practice of the law, it would seem to be equally essential during the continuance of the practice and the exercise of the privilege. So it is held that an attorney will be removed not only for malpractice and dishonesty in his profession, but also for gross misconduct not connected with his professional duties which shows him to be unfit for the office and unworthy of the privileges which his license and the law confer upon him." 73 Kan. 749, 85 Pac. 586.

Moreover, the sole purpose of the libel and the unlawful conspiracy in which the accused is found to have participated was to defeat the administration of justice by bringing a false and unjust charge against an innocent person, in order that he might be induced to use his influence to have this disbarment proceeding abandoned. In the *Smith* Case, supra, the accused was disbarred because of misconduct not directly connected with his professional duties; but it was stated in the opinion that "all of the charges related to the administration of justice, and seriously affected his professional and personal integrity." 73 Kan. 749, 85 Pac. 586.

In arriving at his conclusions, the commissioner lays stress upon the fact that the individual against whom the libel was directed was the judge of a court. In our opinion, the acts of the accused and those who participated in the conspiracy would have been fully as reprehensible if directed against the individual who filed the accusations in this proceeding, and the object and purpose had been to defeat or obstruct the administration of justice.

The other legal questions raised by the accused to the effect that the communications made to the county attorney of Shawnee county were privileged, and the questions arising upon the objections to evidence, have all been considered in the criminal action of *State v. Wilcox et al.*, post, in which the questions were determined adversely to the



defendants in that action; and therefore further comment is deemed unnecessary.

[2] From our view of the evidence there are no new questions of law to be determined. If the accused is guilty as charged in the supplemental accusation, the offense might well be said to involve such moral turpitude as to justify the court in ordering his name stricken from the rolls; but it becomes unnecessary to rest the decision upon that ground, when it is considered that the offense was committed as part of a scheme, the purpose of which was to defeat the administration of justice, and that it likewise necessarily involved subornation of perjury. When this is said, it is manifest that the charge seriously affected his professional and personal integrity.

The court has not failed to keep in mind the importance of this proceeding to the state and to the accused. It fully appreciates the effect of a judgment which deprives him of the right to practice his profession—a judgment the hardships of which cannot be measured by financial loss. The evidence, however, in support of the supplemental accusation, leaves the court no alternative, and the judgment of disbarment must be entered. All the Justices concurring.

(90 Kan. 379)

ROMAN v. CITY OF LEAVENWORTH.  
(Supreme Court of Kansas. July 5, 1913.)

(Syllabus by the Court.)

**1. TRIAL (§ 296\*)—INSTRUCTIONS—EFFECT OF ERRONEOUS AND CORRECT INSTRUCTIONS.**

In an action for damages alleged to have been sustained by a boy 11 years old while playing on a city dump, by falling into a smoldering fire—such dump being clearly an attractive nuisance—the court gave correct instructions at the request of the plaintiff, but also gave several at the request of the defendant which were erroneous. *Held*, that as the jury which found for the defendant were as likely to be influenced by the wrong as by the right instructions, the plaintiff has not had his case presented under a proper interpretation of the law, and a new trial should be granted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.\*]

**2. NEGLIGENCE (§ 23\*)—ATTRACTIVE NUISANCE—CHILDREN.**

In such a case the maintenance of the dump by the city, and not its establishment, was material, and the city was required to use reasonable care to keep children away and from being injured there.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 33, 34, 129; Dec. Dig. § 23.\*]

**3. MUNICIPAL CORPORATIONS (§ 736\*)—NEGLIGENCE (§ 23\*)—ATTRACTIVE NUISANCE—INJURY TO CHILD—NEGLIGENCE OF EMPLOYE—CONTRIBUTORY NEGLIGENCE—WARNING.**

Such dump being in charge of a boss employed by the city, it was material whether or not he with the knowledge and acquiescence of the city exercised control over the whole dump, rather than whether or not he had express au-

thority so to do. A mere warning to the plaintiff to be careful, uttered by a private person engaged in unloading spoiled fruit at such dump, would not relieve the city from liability, even if the plaintiff was sufficiently intelligent to appreciate the danger of going over the embankment, which formed a part of the dump, after spoiled fruit, but proceeded and sustained injuries "at a place where a prudent person would not anticipate any one would go," if the testimony should show that the place where the injury occurred was a smoldering fire of some weeks' probable duration over the embankment, of which fire the plaintiff had no knowledge.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1552; Dec. Dig. § 736;\* Negligence, Cent. Dig. §§ 33, 34, 129; Dec. Dig. § 23.\*]

Appeal from District Court, Leavenworth County.

Action by Wladyslaus Roman, etc., against the City of Leavenworth. From judgment for defendant, plaintiff appeals. Reversed and remanded.

Arthur M. Jackson, of Leavenworth, for appellant. C. P. Rutherford, of Leavenworth, for appellee.

WEST, J. The plaintiff, by his next friend, sued to recover damages for injuries sustained while playing on the city dump. The jury returned a verdict in favor of the defendant, and the plaintiff appeals and complains principally of certain instructions given over his objection.

[1] The defendant appears to contend that the dump in question was not an attractive nuisance within the principles of former decisions by this court. The testimony of various little boys who played about the place furnishes a most graphic and unmistakable picture of an attractive nuisance within the principles of all the decisions which recognize such a thing. It appears that the dump is located at the foot of Second street, and a man named Haley, known as boss of the dump, is employed by the city at a monthly salary, and his duties require him to be at the place from 8 o'clock until 5, and he testified that: "The whole city comes out there with stuff. The city carts haul garbage and rubbish there to dump it. There is no other place of that kind in the city. I have a little shanty on the dump. It was built by the city."

The superintendent of streets testified that one of the duties of the man in charge of the dump was to keep the stuff pushed back into the river. "There are railroad tracks on the west side of the dump. Nearly all the dump is on the right of the track. The chute is located near the center of the dump. There is also a butting board about 12 or 14 feet north of the chute. When manure or anything of that kind accumulates on the dump it catches fire, and during last summer it was on fire several times. \* \* \* We never had a guard or fence on either side of the chute or dumping board. \* \* \* I cannot say just how long the fire was burning be-



fore the little boy got burned. Fire would catch along there, and as a rule we would shove manure and other stuff into it and let it catch fire. The fire that burned the little boy might have been burning three or four weeks before that time, or it might have been burning longer. The fire was usually a smoldering one. There was never a visible blaze. \* \* \* There are no fences or guards on the railway tracks and the boys or any person could walk right in there."

Sylvester Kozmin, age 9, testified that he knew the plaintiff, and was at the dump the morning he got burned. Two others were with him. "I was there when Jimmie got into the fire. He was going after a watermelon when he fell into the fire. Mrs. Palka helped to get him out of the fire. I saw her pull him out. \* \* \* I went out there nearly every day for about a month before this happened. I saw other boys there. They got slop down there. \* \* \* There was a man there unloading watermelons. He threw out a watermelon, and Jimmie tried to get down after it. He was trying to beat me to it. The watermelon rolled down into the river, and Jimmie fell into the fire hole."

The plaintiff testified that he was 11 years old, was at the dump on July 10, 1911. His mother had told him to go to the store, and when he got there some of the boys told him they had found some money on the dump, "so I was going there to find some money. \* \* \* I was running around on the dump, and I saw a watermelon down there and I was going after it. I seen nothing of the fire and I jumped into the fire. The fire was on the north side of the chute about half way between the top and the water. I didn't see any fire. It didn't even smoke. I didn't know there was any fire there. I had never been around there more than once before that time. I could not get out of the fire. I was yelling for somebody to get me out, and Mrs. Palka came up and helped pull me out. I got burned above my ankles. I saw Mr. Haley there that day. He never told me to stay away. I didn't know it was dangerous to play there." He testified that after the doctor put oil on his feet he put cotton on them, and when he took the bandages off the skin came off. "The soles of my feet came off. They hurt me all the time. I cannot bend the toes on my left foot, but can bend them on the right one. I cannot walk on my feet except with crutches. I have not been able to walk on them since I was burned. I didn't walk on them at all for about four months after I was burned. I cannot go to school, but I went to school before I was burned. I cannot sleep at nights. I don't feel as well since I was burned; my head hurts me and I have pains in my stomach."

The court appointed certain physicians to examine the plaintiff's injuries and one of them testified that when he entered the

room where the plaintiff was the boy was sitting with his feet on the first round of a chair with rather a cheerful smile upon his face and looking rather contented. He further advised the court, however, that when he asked the boy to undress his feet he did so, "and the moment he got the rags off his feet he commenced to squeal. I could not make an examination. When I approached to touch him he would holler, and when I took hold of his feet he would jerk them away from me. The feet themselves showed a recent burn that had been very well treated by some doctor."

It was sought to show by another physician that judging from the general healthy appearance and sparkling black eyes and the apparent jovial condition of the plaintiff he was probably not suffering from insomnia. It appears from the testimony of another witness that the two physicians who examined the boy proceeded to blindfold him, and one of them "grabbed hold of his leg right underneath and tried to press his bare finger in there," with the somewhat natural result that the boy began to scream and said that it hurt. It would seem quite clear, therefore, whether or not the apparent cheerfulness of this 11 year old boy, several months after receiving the injury, was sufficient to overcome his statement of inability to sleep nights, that he was certainly suffering from exactly the sort of burn he had testified about.

[2] One of the instructions complained of was to the effect that if the city did not establish the entire place in question as a dump, but only so much thereof as was occupied by the chute, it was under no legal duty to keep the whole place in a safe condition, and if the place where the plaintiff was injured was not established by the city then the verdict must be for the defendant. It was a question not of establishment, but one of maintenance, and if the place where the plaintiff was injured was a part of the dump maintained and operated by the city it could make no difference as to who established that portion of the place.

[3] Another was to the effect that if the dump boss assumed control of the whole of the dumping ground without express authority from the proper officials of the city the defendant could not be held liable for any act of negligence on his part in caring or failing to care for the whole of the dumping place, including the point at which the plaintiff was alleged to have been injured. On the contrary, if the dump boss without express authority from the proper officials assumed control of the whole dump and exercised it for a long period of time with their knowledge and acquiescence it would not be necessary to show express authority. *Roberts v. St. Marys*, 78 Kan. 707, 98 Pac. 211. Another was to the effect that if, when the plaintiff went upon the dump, the person in charge was engaged in the performance of



his duties, and that a wagon not in the employ of the city was unloading spoiled fruit and throwing it over the embankment into the river, and while this was being done the plaintiff, with others, assembled about the wagon near the top of the embankment and proceeded to pick up spoiled fruit, and the person in charge of the wagon warned the plaintiff to be careful, and the plaintiff possessed sufficient intelligence to know and appreciate the danger of going over the embankment after spoiled fruit, but proceeded down the embankment and sustained the injuries "at a place where a prudent person would not anticipate any one would go, then I instruct you that the plaintiff cannot recover and your verdict must be for the defendant." This instruction apparently loses sight of the city's duty to use reasonable care to keep young boys away from the dump. It can hardly be said that if the driver of a private wagon should simply warn a boy 11 years old to be careful, and the boy nevertheless should go over the bank and step into a smoldering fire that the city would be relieved from liability, merely because the boy sustained injuries "at a place where a prudent person would not anticipate any one would go."

The court gave the law properly in instruction No. 4, wherein the jury were told that if for several weeks or more immediately before the date of the injury different fires had been burning in the dump, and because of the existence of such fires the dump was a dangerous place for plaintiff and other children of tender years to play or venture upon, and the defendant with knowledge of these facts and with knowledge that the plaintiff and other children of tender years had for a period of several weeks or more been in the habit of playing or venturing thereon or thereabout, and took no reasonable precaution to keep the plaintiff away from the dump or fire in question or to prevent injury to him or to prevent him from falling into the fire while engaged in play or adventure thereon or thereabout, then defendant would be liable for injuries by reason of such negligence without any contributory negligence on the part of the plaintiff. And in instruction No. 5, in which the jury were told substantially the same, and that the defendant would be liable if the plaintiff, because of his tender years and immature judgment, did not know that it was dangerous for him to play or venture near the dump or fire hole, or was not guilty of contributory negligence in so doing.

Other alleged errors occurring upon the trial are complained of, but we do not deem them of sufficient materiality to require consideration. While the instructions given at the request of the plaintiff were correct, the errors already referred to in those given at the request of the defendant were as likely to

influence the jury as the former, and having been given it cannot be said that the plaintiff has had his case presented to the jury under a proper interpretation of the law.

The judgment is therefore reversed, and the cause remanded with directions to grant a new trial. All the Justices concurring.

(90 Kan. 390)

RAMBO v. EMPIRE DIST. ELECTRIC CO.  
(Supreme Court of Kansas. July 5, 1913.)

*(Syllabus by the Court.)*

1. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

An employé of a telephone company, whose duty required him to pass between defectively insulated, high-tension electric light wires in climbing a telephone pole, and who was killed in doing so, cannot be charged with contributory negligence as a matter of law merely because he failed to ask that the electric current be turned off, which would have been done at his request.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.\*]

2. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

If the danger in ascending the pole was not so great and so apparent that a person of ordinary prudence would not encounter it, the deceased would not of necessity be negligent in undertaking to do so, and whether or not he was negligent was a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.\*]

3. APPEAL AND ERROR (§ 216\*)—NECESSITY OF REQUEST FOR INSTRUCTIONS.

In an action for damages for the death of the deceased, brought by his widow against the electric light company, the court instructed the jury that the plaintiff's recovery should be for pecuniary loss only for a time not exceeding the deceased's expectancy, and in a sum not to exceed \$10,000. The defendant made no request for further instructions regarding the measure of damages, and the verdict was for a moderate amount. *Held*, the defendant was not prejudiced because the instruction was not more full or specific.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216.\*]

4. TRIAL (§ 315\*)—QUOTIENT VERDICT.

The principle announced in the case of *City of Kinsley v. Morse*, 40 Kan. 588, 20 Pac. 222, applied to a verdict the amount of which was arrived at by the quotient method.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 740-742; Dec. Dig. § 315.\*]

Appeal from District Court, Cherokee County.

Action by Grace Rambo against the Empire District Electric Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Spencer, Grayston & Spencer, of Joplin, Mo., and Sapp & Wilson, of Galena, for appellant. Skidmore & Walker and Tracewell & Moore, all of Columbus, for appellee.

BURCH, J. The Galena Home Telephone Company maintains a telephone exchange in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the city of Columbus and the defendant, the Empire District Electric Company, supplies the inhabitants of the city with electric light and power. At a certain point in the city midway between two poles carrying six electric light wires the telephone company erected a pole, which passed between the electric light wires, leaving three on one side and three on the other. On this pole and above the electric light wires were placed a telephone cable, a cable box, and a number of telephone wires. Below the cable box a small platform was constructed for the support of employes while at work about the top of the pole. One of the electric light wires was supported by a bracket attached to the telephone pole some 18 inches below and on the side opposite the platform. It carried 2,200 volts of electricity, and its insulation was obviously defective. The insulation upon the other electric light wires on the same side of the pole was practically new. The insulation upon two of the electric light wires on the other side of the pole was worn. The third wire on that side was a heavy one well insulated. A space of about two feet between the electric light wires on opposite sides of the pole was afforded to employes of the telephone company who were obliged to climb to the platform. In the course of his duty Harry Rambo, an experienced man in the service of the telephone company, was obliged to ascend the pole in question. In doing so he came in contact with the defectively insulated, high-tension wire and was killed. It is likely that his left arm came in contact with the wire while his extended right hand touched a depending loop of the telephone cable above him. Just what happened cannot be known. His widow sued the electric company for damages, and recovered a verdict and judgment for \$4,467.50. The defendant appeals.

The defendant was clearly guilty of negligence. Indeed no serious effort was made to justify its conduct, and the action was defended upon the ground that the deceased assumed the risk and was guilty of contributory negligence. Assumption of risk, being a matter of contract between an employe and his employer, could be involved only in an action against the telephone company, and the question presented is whether or not this court can declare, as a matter of law, that the deceased was guilty of contributory negligence. The jury and the trial judge concur in the opinion that in the discharge of his duty to his employer the deceased might, without fault, undertake to pass between the electric light wires in an ascent of the telephone pole. The most that can be said is that fair-minded men might disagree upon the subject, and, such being the case, the propriety of his conduct was a matter for the jury to determine.

[1,2] The defendant pleaded and offered evidence to prove that some months before the casualty occurred its manager notified

the deceased that whenever he desired to work above the electric light wires the current would be turned off at his request, and that no such request was made. An instruction was asked and refused to the effect that if the jury found the facts to be as the defendant claimed, the plaintiff could not recover. A person in the situation of the deceased cannot be charged with contributory negligence merely because he failed to take available measures to insure safety beyond all doubt. The question still remains whether or not a reasonably prudent man would, under all the circumstances, act as he did. If the danger was not so great and so apparent that a person of ordinary prudence would not encounter it, he was not negligent as a matter of law. *Brinkmeier v. Railway Co.*, 69 Kan. 738, 77 Pac. 586; *Railroad Co. v. Morris*, 76 Kan. 836, 845, 93 Pac. 153, 13 L. R. A. (N. S.) 1100; *Lewis v. Barton*, 82 Kan. 163, 107 Pac. 783; *Bailey v. Spelter Co.*, 83 Kan. 230, 109 Pac. 791; *Delmore v. Flooring Co.*, 90 Kan. 29, 133 Pac. 151 (opinion filed June 7, 1913). Therefore the requested instruction was properly refused. The facts upon which the instruction was based were included, however, in an instruction upon the subject of contributory negligence, so that the jury's attention was directed to them as constituting a portion of the defense to the action.

[3] It is claimed that the court erred in that it did not make a detailed statement to the jury of the elements which might be taken into consideration in fixing the amount of damages if the verdict were for the plaintiff. The court did limit recovery to pecuniary damages for a period not exceeding the deceased's expectancy, and to a sum not exceeding \$10,000. The defendant was willing to go to the jury upon these instructions, without requesting more definite directions, and consequently cannot now complain of their insufficiency. If it were apparent that an injustice had been done because the instructions were not specific enough to meet the needs of the jury, this court might interfere, but such is not the case. The deceased was 35 years old and had an expectancy of 31.76 years. His widow was 31 years old, and had an expectancy of 34.62 years. He had good health, was able-bodied and strong, did not use intoxicating liquor, and had good habits. He had worked for the telephone company for six or seven years. That company had exchanges in the cities of Columbus, Galena, Scammon, and Weir. For three years previous to his death he had been in charge of the Columbus plant and of the toll lines in each direction for some distance outside the city. To some extent he had control of the Columbus office, having authority to employ office help. No one was over him locally. He was the man in charge of the Columbus plant. He was industrious, competent, and experienced. He earned at the time of his death from \$2 to \$2.50 per day,



all of which he used in providing for his family, consisting of his wife and a child eight months old, who were without other means of support. Such was the undisputed evidence. If the court had chosen to elaborate its instructions, it could have done little more than summarize these facts, and upon these facts the jury might well have based a much more liberal award.

[4] The defendant insists that the judgment should be reversed because the verdict is a quotient verdict. The sum named in the verdict was obtained by the quotient method. This was done, however, by way of a straw vote to see what the result would be, and without any agreement to abide by the result. Afterwards the discussion as to the proper amount to be allowed to the plaintiff continued, other sums were voted on, and finally an agreement was reached to allow the amount named to stand. There was some conflict in the testimony of the jurors, but the finding of the trial court resolves it in favor of the validity of the verdict. The case is identical in principle with that of the city of Kinsley v. Morse, 40 Kan. 588, 20 Pac. 222, and besides, for reasons already stated, the defendant suffered no prejudice because of the size of the verdict.

The judgment of the district court is affirmed. All the Justices concurring.

(90 Kan. 70)

CORLEY v. ATCHISON, T. & S. F. RY. CO.†

(Supreme Court of Kansas. June 7, 1913.)

*(Syllabus by the Court.)*

1. RAILROADS (§ 304\*)—CROSSING ACCIDENT—NEGLIGENCE—UNNECESSARY OBSTRUCTION OF VIEW.

Liability of a railway company for injuries occasioned by a collision at a highway crossing may be founded upon its negligence in allowing unnecessary obstructions to vision to exist upon the right of way.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 869; Dec. Dig. § 304.\*]

2. NEGLIGENCE (§ 93\*)—COLLISION WITH AUTOMOBILE—NEGLIGENCE OF DRIVER.

One who, while riding in an automobile as the guest of the driver, is injured by a collision at a railroad crossing, caused by the negligence of the company, is not precluded from recovering damages therefor by the fact that the failure of the driver to exercise due caution was a contributing cause of the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 147-150; Dec. Dig. § 93.\*]

3. TRIAL (§ 356\*)—FAILURE TO ANSWER SPECIAL QUESTIONS.

The failure of the jury to return sufficient answers to certain special questions held to require a new trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 849-854; Dec. Dig. § 356.\*]

Appeal from District Court, Greenwood County.

Action by Agnes Hart Corley against the Atchison, Topeka & Santa Fé Railway Com-

pany. From judgment for plaintiff, defendant appeals. Reversed and remanded.

Wm. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, for appellant. Howard J. Hodgson, of Eureka, for appellee.

MASON, J. Charles F. Corley, the plaintiff's husband, was riding in an automobile as the guest of a friend, who was driving it. At a crossing it was struck by a train of the Atchison, Topeka & Santa Fé Railway Company, and all the occupants were killed. The plaintiff sued the company and recovered a judgment, from which it appeals.

The petition alleged that the accident was due to the fact that the view of the track from the highway was interfered with by unnecessary obstructions maintained or permitted by the company on the right of way. This was the matter chiefly relied upon by the plaintiff as constituting negligence on the part of the defendant. Want of due care in other respects was alleged, but in answer to a question requiring them to state of what the defendant's negligence consisted, and what employes were guilty of it, the jury answered: "Of obstructions consisting of embankments, hedge, weeds, and foliage neglected by roadmaster and section foreman." This is fairly to be regarded as implying that the defendant was not negligent in any other respect. The situation is the same as though a distinct finding had been made to that effect. Creamery Co. v. Daniels, 72 Kan. 418, 419, 83 Pac. 986.

[1] The defendant maintains that the allowance of objects on the right of way cannot of itself constitute actionable negligence, although their presence may impose upon the company an obligation to take greater precautions against collisions than would otherwise be necessary. The contention is unquestionably sound as applied to objects which serve some necessary or useful purpose. But there is a conflict of judicial opinion as to whether the existence of wholly unnecessary obstructions may not in and of itself constitute an independent ground of negligence. The cases bearing on the question are collected in notes in 12 L. R. A. (N. S.) 1067, and 10 Ann. Cas. 485. Bearing in mind the distinction between necessary and unnecessary obstructions we think the weight of authority is against the view here contended for by the railway company. But the question cannot be regarded as an open one in this state. In A., T. & S. F. Co. v. Hawkins, 42 Kan. 355, 22 Pac. 322, a judgment was reversed because it was based solely upon a claim of negligence on account of a hedge growing on the right of way. But there the injury was to cattle while being driven across the track; the plaintiff pleaded that if the whistle had been sounded the injury could have been prevented; the hedge approached the track no nearer than

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied July 5, 1913.



25 to 35 feet; and it was said that the person in charge of the stock, being on horseback, could have ridden ahead and ascertained whether a train was coming. In *A. T. & S. F. Rld. Co. v. Bell*, 52 Kan. 134, 34 Pac. 350, there was no evidence of the existence of a hedge on the right of way, and an instruction that the company might be found negligent in that regard was therefore held to be erroneous. It was said in passing that the instruction would have been erroneous even if there had been such evidence, but this was upon the authority of the *Hawkins Case*, the doctrine of which was not extended. In *C., R. I. & P. Rly. Co. v. Williams*, 56 Kan. 333, page 337, 43 Pac. 246, 248, the question under consideration was definitely determined in these words: "The railroad company should not allow any unnecessary obstructions upon its right of way near a public crossing which would obstruct the view of an approaching traveler nor of those in charge of the approaching engine and train. If it unnecessarily and negligently permits brush, trees, or other obstructions to grow or stand upon its right of way near a public crossing, it must be held responsible for injuries resulting to others from such negligence, providing such others are free from fault. In the conduct of the business of the company, however, it is necessary to place buildings and other structures and things upon the right of way, and therefore it cannot be arbitrarily said by the trial court that it is the duty of the company to keep its right of way at the crossing in question open and free from any obstruction which would obscure the vision of a traveler and prevent him from seeing an approaching train. Whether it is necessary or negligent to place an obstruction upon the right of way is another matter to be left with the jury."

In *C., R. I. & P. Rly. Co. v. Hinds*, 56 Kan. 758, 44 Pac. 993, the trial court had instructed that where a railway company permits needless obstructions near the track it must operate its trains with reference thereto. This instruction was approved on appeal, nothing more being decided in that connection because nothing more was involved. In *Railroad Co. v. Willey*, 57 Kan. 764, 48 Pac. 25, the rule of the *Williams Case* was applied, but it was further declared that whether the allowance of particular obstructions upon the right of way—in that instance a grove and a hedge—constituted negligence was a question of fact to be submitted to the jury, and not one of law to be decided by the court. See, also, *Railway Co. v. Griffith*, 60 Kan. 130, 132, 76 Pac. 436.

It follows that it was proper in the present case to submit to the jury the question whether the defendant permitted the crossing to be rendered unnecessarily dangerous by allowing needless obstructions to the

view, and that a finding of negligence in that regard is sufficient to support a judgment.

[2] The defendant further maintains that a judgment in its favor on the issue of contributory negligence is required by the findings. These show that at a distance of 20 feet from the track the train could have been seen by the deceased. This would doubtless preclude a recovery if he had been managing the automobile. Reasonable prudence required the driver to approach the crossing with his car under control, to look for the train as soon as he was in a position to see it, and to stop as soon as he knew of its approach. What the deceased actually did is not shown, and there is no ground for attributing to him personally any want of care. The question presented is whether he is to be deemed chargeable with the negligence of the driver. The doctrine that one who voluntarily becomes a passenger in a conveyance thereby so far identifies himself with the driver that he cannot recover for an injury negligently inflicted by a third person, if the driver's negligence was a contributing cause, never gained much of a foothold in this country, and is now repudiated in England, where it originated. The history of its rise and decline is traced in a note in 8 L. R. A. (N. S.) 597, where cases are gathered illustrating all phases of the subject. Save in a few jurisdictions the negligence of a driver cannot be imputed to a passenger who in fact has no control over him. Note, 9 Ann. Cas. 408; note, 19 Ann. Cas. 1225; note, Ann. Cas. 1913B, 684. See, also, *Denton v. Railway Co.*, 90 Kan. 51, 133 Pac. 558, decided at this sitting. This rule applies in the case of a guest who is riding with the driver for their mutual pleasure. 29 Cyc. 548-550; note, 8 L. R. A. (N. S.) 648; 7 A. & E. Encycl. of L. 447, 448. Where two persons are engaged in a common enterprise, using a conveyance for their purpose, each is said to be responsible for the acts of the other, but for this situation to arise each must have an equal right of control. 29 Cyc. 543; note, 8 L. R. A. (N. S.) 628. In the present case the jury found that the deceased was riding with the owner of the automobile as an invited guest on a pleasure trip. The defendant, therefore, cannot successfully invoke the doctrine of imputed negligence.

In *Bush v. Railroad Co.*, 62 Kan. 709, 64 Pac. 624, and also in *Railway Co. v. Bussey*, 66 Kan. 735, 71 Pac. 261, contributory negligence was held to preclude a recovery by the occupant of a conveyance, other than the driver, who was injured in a crossing accident, but in each case the negligence was that of the plaintiff in person, in failing to keep an outlook to observe the approach of a train. The distinction was noted in each of the opinions, as appears from the following extracts: "Their attention was attracted to a freight train on the Union Pacific Rail-



road coming from the east. They stopped for this train to pass. They then proceeded, and, as they started, both of them looked down the track to ascertain if another train was coming, and none was in sight. In driving from the point where they stopped for the train to pass until they arrived within 50 feet of the crossing, they were driving in a westerly direction paralled with the track. At this point the road turned at a right angle to the right to cross the track. From this point either could have seen the approaching train at least 1,300 feet. From the time they started from the point where they had stopped for the freight train, neither of them looked again until the front feet of the horse were upon the first rail of the track. \* \* \* The case of Reading Township v. Telfer, 57 Kan. 798, 48 Pac. 134 [57 Am. St. Rep. 355], relied upon by counsel for plaintiff in error, is easily distinguishable. In that case there was no charge made that Mrs. Telfer was guilty of contributory negligence. The only question was whether or not the contributory negligence of the husband was imputable to her. In this case, the direct charge is made that plaintiff in error was herself guilty of contributory negligence." *Bush v. Railroad Co.*, 62 Kan. 709, 710, 717, 64 Pac. 624, 626. "Again, in harmony with the special finding that she had no control over the vehicle, the horse, or the driver, in the absence of other findings, it might be presumed, in support of the general verdict, that she looked and saw the train after crossing the second track, but that the time was too short in which to warn her companion and cause the horse to be stopped before the collision occurred. But this presumption cannot be indulged in the light of the finding that she did not see the train until immediately before the occurrence of the accident, and the further finding that she did nothing to avoid the collision. \* \* \* The only consistent and harmonious construction which may be placed upon the findings made is that the plaintiff was guilty of contributory negligence in not looking, and, notwithstanding the fact she was not driving or controlling the vehicle in which she was riding, she should have seen the train and taken steps to avoid the collision, which she did not do." *Railway Co. v. Bussey*, 66 Kan. 735, 745, 746, 71 Pac. 261, 264.

Complaint is made of the instructions with reference to contributory negligence, but they conform substantially to the rules just stated. An objection to an instruction concerning the presumption of due care is not thought to have been prejudicial.

[3] A final claim of error we regard as well founded. The answers given by the jury to several of the special questions submitted to them gave no real information. The questions related to important matters, concerning which evidence had been introduced. A request that the jury be required to make more definite answers was refused. The questions and answers read:

"How far can a train, approaching from the northeast, be seen at a point in the highway by one standing 15 to 20 feet from the crossing? No satisfactory evidence, by reason of no approaching train having been seen by any witness.

"How far can a train approaching from the northeast be seen by one standing 8 feet south of the crossing in question? No satisfactory evidence, by reason of no approaching train having been seen by any witness.

"How far can a train, approaching from the northeast, be heard by one standing at a point where the highway enters upon the right of way of the railway company? Depends upon the conditions both as to the train, whether drifting or not, or of the direction from which the wind is blowing.

"How fast was said automobile traveling as it entered upon defendant's right of way? No satisfactory evidence given, as said automobile could not be seen from said point.

"Did said automobile slacken its speed as it approached the track? No satisfactory evidence given, because of conflicting testimony of the only witness.

"How far was said automobile from the track at the time it was at its slowest speed? No satisfactory evidence given, because of conflicting testimony regarding speed of said automobile."

Some of these answers seem to show a capitious spirit. Those which state that the evidence is conflicting are insufficient; the province of the jury being to settle such conflicts. The defendant was entitled to have the questions fairly answered, and the failure of the jury to meet this requirement is ground for reversal. *K. P. Rly. Co. v. Peavey*, 34 Kan. 472, 8 Pac. 780; *Railway Co. v. Hale*, 64 Kan. 751, 68 Pac. 612; *Elevator Co. v. Railway Co.*, 59 Kan. 38, 130 Pac. 686. As there seems no reason why the decision with regard to other forms of negligence should be set aside, upon a new trial the plaintiff's claim should be confined to the allegations with respect to obstructions to view allowed upon the right of way.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith. All the Justices concurring.



(90 Kan. 51)

**DENTON v. MISSOURI, K. & T. RY. CO.**†  
(Supreme Court of Kansas. June 7, 1913.)*(Syllabus by the Court.)***1. NEGLIGENCE (§ 6\*)—VIOLATION OF CRIMINAL STATUTE—"ACTIONABLE NEGLIGENCE."**

In order for the violation of a criminal statute to constitute actionable negligence the injury complained of must be of the sort the legislation was intended to prevent.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 8; Dec. Dig. § 6.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 148, 149; vol. 8, p. 7563.]

**2. RAILROADS (§ 304\*)—CROSSING ACCIDENT—ACTIONABLE NEGLIGENCE—WHAT CONSTITUTES.**

The statute making it a misdemeanor for a railway company to allow cars to stand upon a street for more than 10 minutes at a time, in such a way as to reduce the opening in the traveled part thereof to less than 30 feet, is intended to prevent obstructions to travel, and acts in violation thereof do not necessarily constitute negligence for the purposes of an action in which the plaintiff relies upon the fact that the position of the cars, by obscuring his view of the track, prevented his seeing an approaching engine in time to avoid a collision.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 964; Dec. Dig. § 304.\*]

**3. MUNICIPAL CORPORATIONS (§ 120\*)—ORDINANCE—RAILROADS.**

An ordinance requiring a railway company to provide a flagman at a street crossing which purports to take effect upon publication is in force from that time, irrespective of whether the company had actual notice, or in the exercise of reasonable diligence ought to have learned of it.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 274-280; Dec. Dig. § 120.\*]

**4. NEGLIGENCE (§ 93\*)—IMPUTED NEGLIGENCE.**

Where a woman is injured through the negligence of a railway company, she is not precluded from recovery by the fact that a contributing cause of her injury was the failure of her husband to exercise due care in the management of the automobile in which they were riding.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 147-150; Dec. Dig. § 93.\*]

**5. APPEAL AND ERROR (§ 1194\*)—PROCEEDINGS AFTER REMAND—ISSUES DETERMINED.**

A special finding that the defendant is not guilty of one of several acts of negligence charged against him, which is not affected by any erroneous ruling, may be treated as a final determination of that question, notwithstanding a new trial is granted upon other issues.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4648-4656, 4660; Dec. Dig. § 1194.\*]

Appeal from District Court, Labette County.

Action by Mollie J. Denton against the Missouri, Kansas & Texas Railway Company, a corporation. From a judgment for defendant, plaintiff appeals. Reversed.

C. E. Pile, of Parsons, for appellant. John Madden and W. W. Brown, both of Parsons, for appellee.

MASON, J. Mollie J. Denton was riding in an automobile, driven by her husband, across a street in Parsons crossed by 24 tracks of the Missouri, Kansas & Texas Railroad. As it was crossing one of the tracks the automobile was struck by a switch engine, and Mrs. Denton received injuries on account of which she sued the railway company. A general verdict was returned in her favor. The jury were asked to state upon what acts of negligence the verdict was based, and answered by the word "Obstructions." The trial court rendered judgment for the defendant upon the special findings, first setting this one aside. The plaintiff appeals.

The petition charged the defendant with negligence in three respects: (1) In failing to give any signal of the approach of the engine; (2) in allowing two of its freight cars to stand upon the street for more than 10 minutes at a time in such a way as to reduce the opening in the traveled portion to less than 30 feet, in violation of the statute making such conduct a misdemeanor; and (3) in failing to provide a flagman, as an ordinance required. The case was tried by the plaintiff largely upon the theory that the violation of the statute referred to was the proximate cause of the injury because one of the cars prevented the employes of the company on the engine from seeing the automobile, and prevented the driver of the automobile from seeing the engine, until the collision was imminent. An instruction was given that a finding to this effect would authorize a verdict for the plaintiff. We do not think a recovery could be sustained on that theory.

[1] In order for the violation of a statute to constitute actionable negligence the injury complained of must be of the sort the legislation was intended to guard against. "It is believed that as a general rule evidence of the violation of a statute or ordinance can tend to show actionable negligence only where the consequence particularly or generally contemplated by the provision in question have ensued from its violation." 21 A. & E. Encycl. of L. 481-482. "In order to render the violation of a statute or ordinance actionable negligence, the consequences which resulted from such negligence must have been those contemplated by the provision." 29 Cyc. 438. "When a statute creates a duty with the object of preventing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind, is not entitled to maintain an action in respect of such loss." Headnote to *Gorris v. Scott*, L. R. 9 Exch. 125. "Negligence" is a breach of a duty. Those only to whom that duty is due and who have sustained injuries of the character its discharge was designed to prevent can maintain actions upon it." Chicago

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied July 5, 1913.



G. W. Ry. Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., 100 C. C. A. 41, 45, 176 Fed. 237, 241 (20 Ann. Cas. 1200).

The rule referred to results from a special application of the broader principle that the object of the statute must be looked to in order to determine who may invoke its benefit. The test whether an individual injured by the violation of a penal statute may recover damages from the wrongdoer is whether the Legislature intended to give such right. 1 Cyc. 679; Harrod v. Latham, 77 Kan. 466, 471, 94 Pac. 11. A matter necessarily to be considered in applying that test is whether the lawmakers had similar injuries in mind and designed to prevent them. The cases holding that the violation of a statute constitutes actionable negligence only in favor of a person belonging to the class intended to be benefited are fully collected in notes in 9 Ann. Cas. 427; Ann. Cas. 1912D, 1106; 9 L. R. A. (N. S.) 338, 343; and 36 Am. St. Rep. 817.

[2] The statute here invoked was clearly intended to prevent the impeding of traffic by providing that, except for limited periods, a strip 30 feet wide should be kept open for travel. The title describes the act as one "to prohibit railroads from obstructing public highways and streets." The prohibition in full reads: "Each and every railroad company or any corporation leasing or otherwise operating a railroad in Kansas is hereby prohibited from allowing its trains, engines or cars to stand upon any public road within one-half mile of any incorporated or unincorporated city or town, station or flag station, or upon any crossing or street, to exceed ten minutes at any one time without leaving an opening in the traveled portion of the public road, street or crossing of at least thirty feet in width." Gen. Stat. 1909, § 7142.

Evidently the purpose of the statute was to prevent obstacles to travel not to sight; the injury in the mind of the Legislature was that resulting from delay in crossing, not from collisions with a moving train. In Corley v. Railway Co., 90 Kan. 70, 133 Pac. 555, decided at this sitting, it is decided that a railway company may be liable for injuries due to the obstruction of vision by objects unnecessarily allowed near the track. The principle has been applied where cars have been so left upon a side track as to produce that effect. Reed v. Chicago, St. P., M. & O. Ry. Co., 74 Iowa, 188, 37 N. W. 149. See, however, Bruggeman v. Illinois Cent. R. Co. (Iowa) 134 N. W. 1079; C. & A. R. R. Co. v. Pearson, 184 Ill. 386, 56 N. E. 633; Chicago, B. & Q. R. Co. v. Roberts, 3 Neb. (Unof.) 425, 21 N. W. 707; Selleck v. Railway Co., 93 Mich. 375, 53 N. W. 556, 18 L. R. A. 154; Railroad Co. v. Witherspoon, 112 Tenn. 128, 78 S. W. 1052. The violation of a law may be evidence of negligence, even in a situation where it could not actually constitute negli-

gence. Union Pacific Railway Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434; note, 9 Ann. Cas. 431. Thus upon an issue whether or not cars so placed as to obstruct vision at a crossing were necessarily and properly there, the fact of the violation of the statute here involved might have evidential value. Here, however, no question was presented of negligence in the obstruction of the view, apart from the statute. The plaintiff relied upon the violation of the law as constituting negligence in and of itself.

[3] The jury were instructed that the failure to maintain a flagman was negligence, if the company had actual notice of the passage of the ordinance, or in the exercise of ordinary care should have known of it, prior to the accident. The injury occurred November 8, 1910. The ordinance was published November 2, 1910, and purported to take effect at that time. The jury found that the defendant first had actual notice of it on November 12, 1910. The statute imposes no restriction, and it rests with the body passing the ordinance to determine the time of its taking effect. 21 A. & E. Encycl. of L. 997. There is some conflict in the authorities regarding the necessity for publishing an ordinance except when, as in this state, it is required by statute (28 Cyc. 359, 391, 392), but apparently none as to the power of the municipality to make it effective immediately upon publication. Such an ordinance as that here involved has the force of law, and, like a statute, imposes an obligation regardless of any question of actual notice, or of constructive notice based upon opportunity for information, notwithstanding the hardship that may sometimes result.

[4] Findings were made to the effect that the position of one of the freight cars obscured the view of the track so that the front of the automobile was on the track before the driver was able to see the engine. In somewhat similar situations it has been held that the question whether the exercise of due diligence required the traveler to stop, as well as to look and listen, is a question for the jury. A. T. & S. F. Rld. Co. v. Hague, 54 Kan. 284, 38 Pac. 257, 45 Am. St. Rep. 278; C., R. I. & P. Ry. Co. v. Williams, 56 Kan. 333, 43 Pac. 246; C., R. I. & P. Ry. Co. v. Hinds, 56 Kan. 758, 44 Pac. 993. In exceptional cases the court has declared the failure to stop to be negligence as a matter of law. Railroad Co. v. Willey, 60 Kan. 819, 58 Pac. 472; Railway Co. v. Palmer, 61 Kan. 860, 60 Pac. 736; Railway Co. v. Jenkins, 74 Kan. 487, 87 Pac. 702; Id., 79 Kan. 17, 98 Pac. 208. Even if it should be held that the findings show that the driver was negligent as a matter of law, a judgment for the defendant would not necessarily result; no

<sup>1</sup> Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 61 Kan. 860.



personal negligence on the part of the plaintiff is found, and she is not responsible for the manner in which her husband handled the car. *Williams v. Withington*, 88 Kan. 809, 129 Pac. 1148.

[6] We conclude that the findings did not require a judgment for the defendant. It filed a motion for a new trial, which was not passed upon because judgment was rendered in its favor, but which it is entitled to have allowed for reasons already stated. The plaintiff filed no motion for a new trial, but has argued questions regarding the rulings made against her; these have been passed upon because they will necessarily arise again in the further proceedings. Moreover in the unusual situation presented, one of the special findings having been set aside, it seems proper that a new trial should be ordered by this court. The finding of the jury that the bell was rung as the engine approached the crossing covers a distinct issue and is not affected by any ruling held to be erroneous. It should therefore stand as an established fact of the case. Civ. Code, § 307 (Gen. St. 1909, § 5901); *McCullough v. Hayde*, 82 Kan. 734, 738, 109 Pac. 176. The plaintiff complains of an instruction regarding the weight of testimony with reference to this matter, but as it stated a proposition of law which has been approved, and was applicable to a part of the evidence, and as no amplification was asked, we do not think it can be regarded as a ground for setting aside the finding.

The judgment is reversed and the cause remanded for further proceedings herewith. All the Justices concurring.

(90 Kan. 194)

**BURGIN v. MISSOURI, K. & T. RY. CO.**  
(Supreme Court of Kansas. July 5, 1913.)

(*Syllabus by the Court.*)

**1. COURTS (§ 95\*)—STATUTES OF OTHER STATE—CONSTRUCTION.**

While the statute enacted to protect the health and safety of mine workers embodies subjects covered by the mining act of the state of Pennsylvania, such act was not adopted as the law of Kansas, and the decisions of the Supreme Court of Pennsylvania interpreting it are persuasive only and not controlling.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 322, 323; Dec. Dig. § 95.\*]

**2. CONSTITUTIONAL LAW (§ 245\*) — UNJUST DISCRIMINATION — MINING ACT — ABOLISHMENT OF DEFENSES.**

The statute referred to is not unconstitutional as discriminating against mine owners and operators because it abolishes the defenses of assumption of risk and contributory negligence in certain actions which it authorizes.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 702; Dec. Dig. § 245.\*]

**3. MASTER AND SERVANT (§ 11\*) — MINING ACT—VALIDITY.**

The statute referred to is the result of a valid exercise of the police power of the state

and is not in contravention of the provisions of the Constitution of the United States or the amendments thereto.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 11.\*]

**4. DECISION FOLLOWED.**

The decision in the case of *Cheek v. Railway Co.*, 89 Kan. 247, 131 Pac. 617, approved and followed.

Appeal from District Court, Cherokee County.

Action by Sadie Burgin against the Missouri, Kansas & Texas Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

See, also, *Cheek v. Railway Co.*, 89 Kan. 247, 131 Pac. 617.

John Madden and W. W. Brown, both of Parsons, and Al F. Williams, of Columbus, for appellant. McNeill & McNeill, of Columbus, and W. H. Lucas, of West Mineral, for appellee.

**BURCH, J.** This case is a companion of that of *Cheek v. Railway Co.*, 89 Kan. 247, 131 Pac. 617. The plaintiff is the widow of John Burgin, who was a shot firer in the defendant's coal mine No. 16 and who was killed by an explosion of fire damp under the circumstances related in the opinion in the *Cheek Case*. In this case the jury rested liability on the fact that the defendant willfully failed to maintain bore holes in advance of the work, as the statute required, when approaching and in dangerous proximity to abandoned mine No. 7, which the defendant's superintendent and mine foreman suspected of containing inflammable gases.

The facts are reargued to this court as they were in the *Cheek Case*, but the verdict and the special findings of the essential facts upon which liability depends are abundantly sustained by the evidence. No trial errors were committed which prejudicially affected the defendant's substantial rights, and the motion for a new trial was properly denied. The proceedings were so nearly like those in the former case that a discussion of them in detail is unnecessary. Some observations upon the law of the case additional to those contained in the opinion in the *Cheek Case* may be pertinent in view of certain arguments contained in the defendant's brief.

The declaration in the *Cheek Case* that the courts may take judicial knowledge of the fact that abandoned coal mines in Kansas generate inflammable gases and of the fact that such as do so may accumulate such gases was made in response to a specific contention of the defendant who went so far as to claim that such things were without precedent. The trial court listened to considerable evidence on the subject, although the Legislature had felt called upon to enact a highly penal statute for the protection of mine workers based upon the existence of such facts. Hereafter, should occasion arise,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.



judicial notice may be taken of them. As pointed out in the former opinion, however, one mine may be no criterion by which to judge of another, and the question whether a particular mine was suspected of containing inflammable gas must always be determined as a question of fact from all the circumstances and conditions which may be found to exist.

[1] Many features of coal mining operations will necessarily be identical wherever such operations are conducted, and the Legislatures of different states, when dealing with the same subjects, are likely to prescribe identical regulations. The statute of this state (Gen. St. 1909, §§ 4975-5059) embraces some of the matters covered by the mining act of the state of Pennsylvania, but the Pennsylvania statute was not adopted as the law of Kansas, and the decisions of the Supreme Court of Pennsylvania interpreting that statute are persuasive only and not controlling.

[2] The defendant refers to the case of *K. C., Ft. S. & G. Rld. Co. v. McHenry*, 24 Kan. 501, in which it is said that a statute would be unconstitutional as discriminating against railroads if they were liable in every case of negligence, however slight, even though the plaintiff's negligence contributed equally or more to the injury. The mining statute does not make the mine owner or operator liable, in every case of negligence, however slight, although the employe's negligence contributed equally or more to his injury. Indeed, the mine owner or operator is not made liable for negligence in the proper sense of the term at all. He is liable only for willful misconduct consisting of the intentional doing of something prohibited or intentional inaction when specific action is required. The statute relates to an extra hazardous employment. The requirement respecting bore holes applies only when danger is suspected as being imminent, and under the common-law rules the willful refusal to take those precautions which duty imposes when in the face of threatened danger amounts to wantonness, to which assumption of risk and contributory negligence are not defenses. This court has not held that either the factory act or the mining act will allow a plaintiff to recover when his own conduct amounts to a willful, reckless, or wanton disregard of conditions and of consequences to himself. There is no evidence whatever which the court would have been authorized to submit to the jury that either Cheek or Burgin was guilty of such conduct, and consequently the question is not directly before the court for decision, but, since the scope and meaning of the statute are involved, it is not quite dictum to say that the court would not so hold. The result is that the classification made by the statute is abundantly justified, and the *McHenry* Case is not in conflict with

either *Caspar v. Lewin*, 82 Kan. 604, 109 Pac. 857, or with the *Cheek* Case.

In this connection it may be observed that there need be no necessary inconsistency between a decision rendered 30 or 50 years ago holding that assumption of risk and contributory negligence in a given employment are defenses to an ordinary action by a servant against his master, based on the latter's negligence, and a decision to the contrary at the present time. The doctrines of assumption of risk and contributory negligence are not the creatures of any Constitution or of any legislative enactment. They are court-made rules invented to meet certain ideals of justice respecting certain social and economic conditions and relations. Should the conditions and relations be completely changed and those ideals wholly fail of realization, the reason for the rules, which is the life of all rules of the common law, would then be wanting, and the court which would go on enforcing them would be a conscious minister of injustice and not of justice. It is not always easy to say just when a rule of the common law completely fails to accomplish the purpose of its adoption, but in the present instance the Legislature has intervened. It has given an injured mine worker a right of action against his employer conditioned upon the existence of certain specified elements, and the court has no power to change those conditions by the specification of exceptions such as assumption of risk and contributory negligence.

[3, 4] Sufficient reasons for the constitutionality of the statute as an exercise of the police power of the state were given in the opinion in the *Cheek* Case. The supposed delinquency of the shot firers who met death on March 18, 1911, consisted in going into the mine and performing their ordinary duties in the usual way, although the defendant has willfully failed to keep bore holes in advance of the work when in dangerous proximity to an abandoned mine suspected of containing inflammable gases. As already observed, mining is a hazardous employment, and the occupation of a shot firer is the most hazardous of all. The Legislature understood the general character, habits, customs, and conduct of the men who find their livelihood by daily toil in the bowels of the earth and understood perfectly well the pressure which constrains them to keep on until the uncertain and shadowy boundary which marks the limit of ordinary prudence is sometimes overlooked and passed. The burning, crushing, mangling, and entombment of such men, singly and in groups, and the long trains of consequences which follow in the wake of such events, can be largely prevented if certain precautions be taken, such as inspections for inflammable gases and the boring of test holes in advance of the working



places. It is within the power of the mine-owner to adopt and enforce protective regulations of this character while the driller and shot firer and others whose safety is at stake cannot do so. Consequently the Legislature has taken away from the mine owner or operator the defenses of assumption of risk and contributory negligence and obliges him to employ workmen at his own risk and not at their risk if he willfully disobey the command of the statute. Because of the willful nature of the transgression, a double sanction is provided consisting of an action for pecuniary damages resulting from injury to persons or property and a prosecution for a misdemeanor. The Constitution of this state permits such legislation, and in the opinion of this court the Constitution of the United States does not prohibit it.

The judgment of the district court is affirmed. All the Justices concurring.

'90 Kan. 200)

STROUPE et al. v. HEWITT.

(Supreme Court of Kansas. July 5, 1913.)

(Syllabus by the Court.)

PLEADING (§ 365\*)—ANSWER—ORDER TO STRIKE.

An order striking out parts of an answer, but which leaves it sufficient to present all proper defenses and counterclaims, is not prejudicially erroneous.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1163-1172; Dec. Dig. § 365.\*]

2. EVIDENCE (§ 444\*)—PAROL—CONTRACTS.

Evidence of a parol agreement is admissible to prove that a written contract for the sale and exchange of property signed and deposited in a bank should not take effect until one of the parties has had an opportunity for five days to test the truthfulness of representations made concerning the property of the other to be exchanged, when such oral agreement does not contradict any stipulation in the writing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1929-1944, 2049; Dec. Dig. § 444.\*]

3. APPEAL AND ERROR (§ 1058\*)—FRAUD (§ 52\*)—HARMLESS ERROR—ACTION FOR DAMAGES—EVIDENCE.

Rulings upon testimony are reviewed, and held not to prejudice substantial rights.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4204, 4206; Dec. Dig. § 1058; Fraud, Cent. Dig. § 48; Dec. Dig. § 52.\*]

4. TRIAL (§ 260\*)—REFUSAL OF INSTRUCTIONS COVERED—VENDOR AND PURCHASER.

Instructions are examined, and held to fairly state the theories of the parties and to clearly submit the issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

5. FRAUD (§ 59\*)—MEASURE OF DAMAGES—SALE OF PROPERTY.

The measure of damages in actions for fraud and deceit in the sale of property, as held in *Speed v. Hollingsworth*, 54 Kan. 436, 38 Pac. 496, is followed.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 60-62, 64; Dec. Dig. § 59.\*]

Appeal from District Court, Sedgwick County.

Action by W. W. Stroupe and another against Mary Lee Hewitt. From judgment for plaintiffs, defendant appeals. Affirmed.

Foulke & Matson, of Wichita, for appellant. S. B. Amidon and Kos & V. Harris, all of Wichita, for appellees.

BENSON, J. This is an action for an assessment of damages, and for the cancellation of a note and mortgage for alleged fraud and deceit in the sale and exchange of property. The defendant denied the fraud, and pleaded the note and mortgage in a counterclaim, and sought recovery against the plaintiffs thereon. The jury found for the plaintiffs, and assessed damages exceeding the amount of the counterclaim.

At the time of the exchange referred to the plaintiffs owned a grocery stock and store building and other real estate in Bartlesville, Okl., and the defendant's husband, E. J. Hewitt, owned the horses, carriages, and other equipment of a livery business which he was carrying on at Wichita. The parties, E. J. Hewitt and the plaintiffs, met at Wichita where the plaintiffs looked over the livery stock. They then went to Bartlesville and looked over the grocery and other property there, and on October 22, 1909, signed a written agreement for the exchange, and deposited it with forfeit money in a bank. The evidence tended to prove, and in view of the verdict it must be taken as true, that to induce the plaintiffs to enter into the agreement Hewitt made false and fraudulent representations, as alleged, concerning the receipts from the livery business for the preceding three months, and of the daily income from the business. On the trial the plaintiffs were allowed to show that before the contract was signed, and as a condition upon which it should take effect, it was agreed that the plaintiffs should have an opportunity for five days to test the truth of the representations concerning the livery business, and for that purpose one of them went to Wichita to make observations. While this investigation was being made, Mr. Hewitt caused his drivers and other employees to make untrue and exaggerated reports of receipts from hack and livery service. Rigs were sent out on the streets that were not ordered, and were returned without having been put to service, and fictitious entries were made upon the books. By such devices the returns of the business were padded, and a false showing of business was made, culminating in a false memorandum of receipts presented to Mr. Stroupe, who was taking the observations. By these fraudulent means the plaintiffs were induced to believe that the previous representations were true, and relying thereon they caused their

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



deeds, which had been deposited with the agreement, to be delivered, and then on October 28th or 29th made and delivered their promissory note for \$3,000, which was the difference agreed upon in the exchange, together with a mortgage upon the livery stock to secure it. By request of Mr. Hewitt these securities and the deeds to the Bartlesville real estate were made to Mrs. Hewitt, the defendant. Mr. Hewitt was joined as a defendant with his wife in the petition, but was out of the state, and was not served with summons. Mrs. Hewitt alone made the defense, and pleaded the counterclaim on the \$3,000 note.

[1] A motion was made to make the answer more definite and certain, which was sustained by striking out certain parts. Complaint is made of this ruling. The answer as amended, however, was sufficient to present Mrs. Hewitt's defense and her claim to a recovery on the note, and it does not appear that any evidence was excluded that would have been admissible to prove any material allegations stricken out except proof of the value of the Oklahoma property. This evidence, however, was immaterial, since no fraud on the part of the plaintiffs was alleged, and it was not competent under the rule of damages in such cases, which will be again referred to.

[2] Error is assigned upon the admission of testimony of the oral agreement for the five days' test. It is argued that its admission was in violation of the rule which excludes parol evidence to vary or contradict a written agreement. The contract, as before stated, was deposited in a bank, and the conditions of the deposit were not stated in the writing. A contract cannot be varied until there is a contract, and there is none until it takes effect. Evidence that a writing purporting to be an agreement is not to take effect until the happening of some event or the ascertainment of some fact may be received, not to contradict the writing, but to show when it took effect, or that it never took effect. *State ex rel. Jones v. Chamber of Commerce*, 121 Wis. 110, 98 N. W. 930. *Ware v. Allen*, 128 U. S. 590, 9 Sup. Ct. 174, 32 L. Ed. 563; *Benton v. Martin*, 52 N. Y. 573; *Stiebel v. Grosberg*, 202 N. Y. 266, 96 N. E. 692, 36 L. R. A. (N. S.) 1147; and note *Ann. Cas.* 1912D, 1305. This subject is elucidated in *Wigmore on Evidence*, vol. 4, §§ 2408, 2410, and 2435. The plaintiff's deeds were held in the bank with the contract until they could test the truth of Mr. Hewitt's representations. The mortgage in question had not yet been executed. The agreement for the test was a condition upon which the writing should take effect, and was not contradictory of its terms.

[3] The defendant offered the testimony of Mr. Hewitt to prove the circumstances attending the transfer to her of the \$3,000 note by the witness. The witness was allowed to

testify that the plaintiffs told him they wanted to borrow the \$3,000 they were to pay in the exchange, and that he told them he would get it from his wife, and that he considered it a safe loan; that they did get it from her on the note and mortgage in suit, which he sold to her; and that she had no interest in the livery business, and knew nothing of the trade until after the transaction was completed. He was then asked why he advised his wife to loan the money, but was not allowed to answer. The defendant complains of this ruling, but without good grounds. His reason for advising her to loan the money, if she did loan it, was immaterial. Upon the same subject Mrs. Hewitt was allowed to testify that she owned the \$3,000 note, and received it from her husband a few days after it was made; that she first learned that the deeds to the Bartlesville property were taken in her name when her husband came home from that place and told her. She was not allowed to answer a question inquiring what she had paid for the note, or whether she had paid anything for it. An objection was sustained on the ground that the question called for a communication between husband and wife. Concerning the same subject another witness testified that she had heard a conversation between Mr. and Mrs. Hewitt, in which Mr. Hewitt told his wife that the loan was a good one bearing good interest, with good security, and that she told him she would take it. Conceding that the question objected to was proper, and that the answer did not call for a communication between husband and wife, the error in rejecting it was not prejudicial. The substance of the transaction was stated by both of them, and their conversation was also testified to by a witness produced by the wife. Considering all the evidence relating to this transaction, and the instructions relating to her rights as a holder of the note and mortgage, it appears that the excluded testimony was relatively unimportant. As a ground of error the ruling referred to must be disregarded. *Civil Code*, § 581 (*Gen. St.* 1909, § 6176). Other minor objections relating to evidence have been considered, but do not require comment.

[4] Complaint of the refusal to give instructions requested will be briefly referred to. One of them was that no representations made by Mr. Hewitt after the parties reached an agreement at Bartlesville could be considered. If the purpose of this request was to exclude evidence of the conduct of Mr. Hewitt during the time of the test it was rightfully refused, for that evidence was competent for reasons already stated. Besides, the representations relied upon were made before the agreement was placed in the bank. What was said and done by Hewitt afterwards related to the investigation, and the condition upon which the contract was signed and deposited, and the court careful-



ly informed the jury that representations to be considered as the basis of the action were those made before the delivery of the contract. Other proposed instructions were to the effect that Mrs. Hewitt must have had notice of the fraud of her husband, if any, before the plaintiffs could recover. These requests suggest the defendant's theory of the case, which was that she stands in the relation of an innocent holder for value. The court submitted that theory in the following instruction:

"If you find that the defendant, Mary Lee Hewitt, loaned to the plaintiffs the sum of \$3,000, as evidenced by the note for \$3,000, and the chattel mortgage made to secure the same, then you are instructed that as to the said note for \$3,000 you should find for the defendant, Mary Lee Hewitt, regardless of the fact as to whether any fraudulent representations were made by E. J. Hewitt to the plaintiffs for the purpose of inducing the plaintiffs and E. J. Hewitt to exchange properties as alleged in the petition. The fact as to whether or not Mrs. Hewitt loaned the plaintiffs the sum of \$3,000 may be proven by the circumstances appearing in evidence in the case."

The court also instructed the jury in substance that if they found that the false representations were made as alleged, and the exchange was effected in reliance upon their truthfulness; that plaintiffs had thereby suffered damages; that Mrs. Hewitt had no part in the trade; and that the plaintiffs received no consideration from her, but that the securities and conveyances were made to her at her husband's request in furtherance of his design to defraud, and that he acted as her agent in taking them in her name, then the plaintiffs were entitled to recover. The two instructions in connection with others fully and fairly covered all aspects of the case, and clearly presented the respective claims of the parties, submitting to the jury the issue upon which the defendant relies. The defendant did not fail from any omission of the court in properly submitting the issues, but because of the adverse finding of facts by the jury.

[5] The defendant contends that an erroneous measure of damages was adopted, which excluded testimony that ought to have been received, and resulted in an unjust verdict. The rule adopted, and declared in the instructions was that announced by this court in *Speed v. Hollingsworth*, 54 Kan. 436, 38 Pac. 496; that is, the difference between the real value of the property received and what it would have been worth had the representations been true. It is argued that this rule should not be applied here because this was not a sale but an exchange of property. It was both. In the exchange the plaintiffs agreed to pay \$3,000 excess in value of the Hewitt property over that of the

plaintiffs. In *Linscott v. Moseman*, 84 Kan. 541, 114 Pac. 1088, cited by the defendant, the vendor of real estate sought reparation for the refusal of the vendee to comply with his contract. He had two remedies. He might compel specific performance, or claim damages for the breach. Had he sold for cash he could have received the purchase money, but the contract was wholly executory, and it was held that he should recover the difference in value in his favor of the property to be exchanged. Here the contract was executed. Hewitt had received the property that the contract provided he should receive, and neither he nor the plaintiffs claimed it was not as represented. The plaintiffs had received the property they were to receive, but it was not of the value that it would have been had Hewitt's representations, upon the faith of which it was taken, been true. There was no issue in the pleadings as to the condition or value of the property conveyed by the plaintiffs. Having received just what he agreed to receive, Hewitt, or one standing in his shoes, should credit upon the note any damages suffered by the plaintiffs from his false representations concerning the property given in exchange. In deciding the *Linscott* Case it was not intended to overrule the *Speed* Case, or to disturb the settled rule of damages in actions for deceit.

It is contended that this is not an action for damages, but an equitable action for cancellation of the note and mortgage. All necessary averments for the recovery of damages, however, were contained in the petition. The alleged wrongdoer was out of the state, but the note was here in the hands of the defendant. Although cancellation was prayed for, the real object of the action was to ascertain the damages, and have the amount applied upon or in satisfaction of that note. In the answer the note was pleaded, and a recovery sought upon it. The issue thus tendered by the defendant authorized the application of the damages against the amount otherwise due upon it independently of the petition. The plaintiffs did not seek to rescind the contract. They sought an assessment of damages upon the executed contract, to be applied upon the note and mortgage. Looking through the forms to the substance of this controversy the district court so treated the case, and this appears to be in accordance with the spirit of the Code and in furtherance of justice. Regarded in this light the correct measure of damages was applied.

The evidence was ample to sustain the allegations of fraud. The relation of the defendant to the securities which he sought to enforce was fairly submitted to the jury, no prejudicial error appears, and the judgment is affirmed. All the Justices concurring.



(90 Kan. 824)

**KEMPER GRAIN CO. v. HARBOUR et al.**  
(Supreme Court of Kansas. June 7, 1913.)*(Syllabus by the Court.)***1. CARRIERS (§ 59\*)—TRANSFER OF BILL OF LADING—REMEDY OF SELLER—RIGHT TO RECLAIM.**

In an action by the seller of a quantity of wheat to reclaim it against subvendees because of the failure of the buyer to pay for it, *held*, that a finding against the plaintiff is supported by evidence tending to show the following facts: The plaintiff acquired title to the wheat while in the hands of the railroad company by paying a draft to which the bill of lading was attached; it then made a bargain for its sale, surrendered the bill of lading to the railroad company, and directed the cars to be set out at the elevator of the buyer; at the same time it drew upon the buyer for the price through a bank in another city, so that two days' time would necessarily pass before the presentation of the draft; the buyer rebilled the wheat and sold it by transfer of the bill of lading.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 170-190; Dec. Dig. § 59.\*]

*(Additional Syllabus by Editorial Staff.)***2. APPEAL AND ERROR (§ 1011\*)—FINDING—EVIDENCE.**

That the evidence was sufficient to have warranted a contrary finding was not ground for reversal; the question being whether the evidence sustains the finding made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

Appeal from District Court, Wyandotte County.

Action by the Kemper Grain Company against Alvin Harbour, doing business as the Harbour Grain Company, and others. From judgment for defendants, plaintiff appeals. Affirmed.

The precise contents of the memoranda exchanged by the Kemper Grain Company and Alvin Harbour, doing business as Harbour Grain Company, referred to in the following opinion, are shown by these copies:

Harbour Grain Company, 209 Board of Trade,  
Wichita, Kansas.

Member Wichita Board of Trade.  
Codes: Robinson's Riverside.

No. 296. 12/13/1 —.

Kemper Grain Co., City—Gentlemen: This confirms purchase of you today by person (Johns) of one car 2/60 hard wheat, at 95c per bu., basis Kansas City, subject to sample inspection and our weights, shipment at once, via Santa Fe.

Car 23549 AT applies.

To be ordered to our elevator.

Harbour Grain Co.,

cw J. Alvin Harbour.

Attach memorandum to your drafts showing your weights.

The Kemper Grain Co.,  
103-4 Board of Trade, Kansas City, Mo.;  
323 Sedgwick Bldg., Wichita, Kans.;  
Coffeyville, Kans.

This contract is subject in all respects to the rules and regulations of the Board of Trade of the issuing office.

Wichita, Kans. 12/13/10.

Harbour Grain Co., City: We confirm sale to you by sample of one car cap. bushels No. 2 hard 60-pound wheat, at 95 cents f. o. b., Kansas City

basis, Wichita weights, Wichita grades, spot shipment. Bill cars: Car 23549 A. T. ordered to your elevator.

Accepted:

[Sign here].....

It is understood and agreed that this confirmation is a part of the contract and that if the grain mentioned above is not shipped within the specified time, we reserve the right at our option to cancel, extend time or buy in for sellers' account, and that this contract is not performed until destination, weights and grades mentioned above are obtained.

Cars to be loaded to capacity.

We urge you to take up with us immediately by wire any objections to this contract, failing to hear from you immediately we will consider the same fully accepted. The Kemper Grain Co., by Johns.

The receipts for bills of lading, to which reference is made, were in the following form (the italicized portion being filled in, the remainder constituting a printed blank):

Received of Kemper Grain Co.

Original Bill of Lading covering shipment described as follows:

Shippers' Order. Notify Kemper Grain Co. Destination, Wichita, Ka.

Origin.	Date.	Car No. and Initial.	Contents.	Weight.	Shipper.
Lewis, Ka.	12/7/10.	17518 A. T.	Wht.	55,000	

Wichita, Kansas 12/13/10.

Time Ordered 2:00 p. m.

Set for unloading to J. R. Neas, Agent,  
Harbour Elevator. Santa Fe R. R.

By REJ—12/13/10.

Ross B. Gilluly, of Kansas City, Mo., for appellant. W. R. Smith, of Topeka, C. Angeline, of Kansas City, Kan., Ball & Ryland, of Kansas City, Mo., McAnany & Alden, of Kansas City, Kan., Jos. G. Carey, of Wichita, Miller & Miller, of Kansas City, Kan., W. H. H. Platt, of Kansas City, Mo., and Vermillion & Evans, of Wichita, for appellees.

MASON, J. (after stating the facts as above). The Kemper Grain Company owned several cars of wheat upon the tracks of the Santa Fé Railway Company at Wichita. It made a bargain with Alvin Harbour, doing business as Harbour Grain Company, for the sale to him of the wheat. Without having paid for it, Harbour obtained possession, or such color of possession as enabled him to reship it in his own name to his own order, and to procure bills of lading from the railway company. Upon the strength of these bills of lading he sold the wheat to different persons, receiving payment. The Kemper Grain Company, not having been paid, and claiming still to be the owner of the wheat, brought replevin for it while it was physically in the control of the railway company, making the various claimants parties. Upon a trial the court found generally against the plaintiff, and rendered judgment accordingly. The plaintiff appeals.

The transactions with reference to the several cars of wheat were not precisely the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes



same, but the differences were not such as substantially to affect the questions of law involved. For convenience the facts will be stated regarding two cars of wheat claimed by B. C. Christopher & Co., and the discussion will be confined to the controversy with respect to them. These defendants maintain: First, that the deal between the Kemper Company and Harbour amounted to an actual sale of the wheat on credit; that the title passed to Harbour; that he sold to B. C. Christopher & Co., who thereby became the owners; and that Harbour's failure to pay the Kemper Company cannot affect their rights. As a second proposition they contend that, even if there was not a completed sale and passing of title to Harbour from the Kemper Company, the Kemper Company, in the course of the negotiations for a sale, voluntarily gave Harbour possession of the wheat, intending thereby a complete and unrestricted delivery, not merely for some temporary purpose, as for examination of its quality; that even if a sale for cash were in contemplation, and even if the Kemper Company had the right as between itself and Harbour to reclaim the wheat on account of the nonpayment of the price, it cannot assert title against the Christophers, who in good faith bought and paid for it, believing, and being justified in believing, that Harbour owned it.

The trial court made no special findings and must be deemed to have resolved every conflict of evidence and every question of the credibility of a witness against the plaintiff, and to have made every permissible inference in favor of the defendants. Therefore the first question of law to be determined is this: Is there any evidence to support a finding that the Kemper Company sold the wheat to Harbour on credit? We are constrained to answer this in the affirmative. For simplicity in statement we shall at times speak of matters which there is some evidence to support, as though they were established facts. The plaintiff's manager at Wichita testified that he sold the wheat to Harbour, having no special arrangement as to payment different from that in the case of other cars sold to him; the sale being made under the rules of the Wichita board of trade, and the terms cash. Confirmations of the sale were exchanged, forms of which are given in the preliminary statement. The body of Harbour's confirmation as to one car (the others being substantially the same) read:

"This confirms purchase of you today by person (Johns) of one car 2/60 hard wheat, at 95c per bu., basis Kansas City, subject to sample inspection and our weights, shipment at once, via Santa Fe.

"Car 23549 AT applies.

"To be ordered to our elevator."

The body of the corresponding confirmation by the Kemper Company read:

"We confirm sale to you by sample of one

car cap. bushels No. 2 hard 60-pound wheat, at 95 cents f. o. b., Kansas City basis, Wichita weights, Wichita grades, spot shipment. Bill cars: Car 23549 A. T. ordered to your elevator."

The precise character of the transaction is not definitely determined by the face of these writings. Such determination may be affected not only by evidence of the meaning of any technical terms used, but especially by the conduct of the parties in relation to delivery and by the provisions made for collecting payment. The actual manner in which business between the Kemper Company and Harbour was conducted becomes, therefore, of the greatest importance. The wheat was bought by the Kemper Company at a point on the Santa Fé Railway near Wichita. The original owner shipped it to his own order at Wichita, and drew upon the Kemper Company at Kansas City for his pay, attaching the bill of lading to his draft. The draft was paid, and the bill of lading was sent to the company's manager at Wichita. The company therefore had the two cars of wheat upon the track at Wichita, and had the bills of lading as evidence of its ownership. It could, of course, reship the wheat if it desired. Under the rules and practice of the railway company it had the privilege of having the cars delivered without further charge, by means of a belt line, to any one of a considerable number of local industries. But before the Santa Fé Railway would set out a car for unloading at any siding on the belt line, it required the surrender to it of the bill of lading. In exchange it would give the owner a receipt for the bill of lading, a form of which is shown in the preliminary statement. A copy or duplicate of this receipt would be given to the employees operating the belt line, who would place the car in conformity with the disposition there indicated.

In the present case the Kemper Company, having the two cars of wheat thus subject to its control, negotiated the sale to Harbour. It then delivered the bill of lading to the railway company and received a receipt containing the words: "Set for unloading to Harbour elevator." It attached this receipt to a draft upon Harbour for the price, and in accordance with its custom sent the draft for collection to a Kansas City bank. The draft was sent by the bank to its correspondent at Wichita, and on presentation Harbour failed to pay it. The forwarding of the draft to Kansas City and its return to Wichita had taken up, as usual, about two days time. In the meanwhile the railway company had delivered the bill of lading and the duplicate receipt to the employees operating the belt line, and they had set out the cars on the siding at the Harbour elevator. Harbour negotiated a sale of the wheat to B. C. Christopher & Co., shipped it to his own order at Kansas City, drew upon Christopher & Co., for the price, attaching the bill of lad-



ing. The draft was paid, and while matters stood in this situation the Kemper Company brought its action.

The plaintiff contends that there was no intentional or valid delivery of the wheat to Harbour; that in the ordinary course of business the car would not have been set out to the Harbour elevator at once, but would have reached there about the time of the return of the draft from Kansas City; that Harbour had no right to exercise any control over the wheat until he had paid the price and obtained the receipt (for the bill of lading) which was attached to the draft; that with a fraudulent purpose he procured the cars to be placed on his siding at once and wrongfully took possession of the wheat. These contentions involve a number of propositions which we must regard as questions of fact, to be determined by the trial court upon all the evidence.

Did the Kemper Company intend a delivery of the wheat to Harbour? While it had the bill of lading in its possession, it was absolutely secure. The fact that the railway company required the bill of lading to be delivered up before it would set out the car at the Harbour elevator, and that the Kemper Company acquiesced in this requirement, is some evidence that both parties regarded the direction placed upon the duplicate receipt, to set the cars for unloading at the Harbour elevator, as contemplating an actual delivery. The receipt cannot be said, as a matter of law, to be the equivalent of a bill of lading. The evidence does not conclusively establish that it was so regarded.

Did the Kemper Company intend to exact payment of the price as a condition of the passing of the title? It could have made the delivery unquestionably contingent upon payment and chose not to exercise the power. It could have caused its draft to be presented to Harbour at once, but it voluntarily elected to collect it through Kansas City, thereby necessarily causing a delay of two days. We do not think it can be said, as a matter of law, that a literal cash on delivery payment was intended, or that the evidence conclusively establishes that intention. The trial court had a basis for finding, and must be deemed to have found, that the Kemper Company contemplated a delay of payment for two days, and was content to give credit for that time. This view is strengthened by the fact that for a period of substantially six months Harbour had succeeded in doing business upon the capital of the Kemper Company. He would buy wheat from the company, have delivery made at his elevator, and find a buyer, upon whom he would draw for the price with the bill of lading attached. He would then cash the draft and with the proceeds take up the Kemper draft when it arrived at the end of its two days' trip. If the sale by the Kemper Company to Harbour was made upon

credit, as the court must be deemed to have found upon what we regard as sufficient evidence, the Christopher firm acquired a good title to the wheat, and the debatable questions of law argued on behalf of the plaintiff do not require decision.

If it should be conceded that the Kemper Company, while intending an actual delivery of the wheat to Harbour, intended at the same time an immediate payment of the purchase price, or intended that the title should not pass without payment, the question whether it could, by reason of the non-payment, reclaim the property after it had passed into the hands of an innocent purchaser is one upon which there is a sharp conflict of judicial opinion. In *Bank v. Brown*, 80 Kan. 520, 103 Pac. 102, 23 L. R. A. (N. S.) 824, this court went very far in upholding the right of a seller, who intended no extension of credit, to reclaim his property after a considerable interval, where it was held by an attaching creditor of the buyer. If the property had reached an innocent purchaser, a very different question would have been presented. The cases bearing on that question are collected in a note in 13 L. R. A. (N. S.) 697. A typical case supporting the right of the seller to retake his goods, even as against an innocent purchaser, is *National Bank of Commerce v. Railroad Co.*, 44 Minn. 224, 48 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566, where it was held that one who had sold goods for cash, taking a check from the buyer, was entitled, upon the dishonor of the check, to reclaim the goods even from an innocent subvendee for value. In the note referred to it is said: "While the Massachusetts court has gone as far, perhaps, as any of the courts in protecting the original vendor, yet that court will refuse to extend its protection to him where it appears that he makes an unconditional delivery of the property to the vendee. Thus, in *Goodwin v. Boston & L. R. Co.*, 111 Mass. 487, the vendor of a large quantity of grain sold without any special agreement as to payment caused the delivery of the same to be made to the buyer by giving an order to him on a warehouse for the amount sold. It appears that it was the usage of the grain trade, under which this grain was sold, to consider a sale such as the one mentioned a cash sale, and to give to the buyer an order for delivery before payment was made, and to allow him not exceeding ten days before calling on him for payment. Before the expiration of the ten days, the buyer had transferred the property to a third person under replevin of the original vendor. It was held that he had waived the right to insist upon payment as a condition precedent to the passing of title; the court saying: 'Upon such contracts the seller is not bound to deliver without payment of the price at the same time. But, if he does make an unqualified delivery, he waives his advan-



tage, and the title passes, and his lien for the price is discharged.' " 13 L. R. A. (N. S.) 697.

A valuable discussion of the question is found in a recent text-book; the author's conclusions, with the reasoning upon which they are based, being shown by these excerpts, the portions thought to be especially to the purpose being italicized: "Whether a sale is complete with a lien retained by the seller, or whether the property has not passed, and will not pass until the buyer pays the price, is a question that has some importance when merely the rights of the buyer and the seller are concerned. \* \* \* The greatest importance of the question arises, however, when the rights of third persons are concerned. If the property does not pass till payment, a purchaser from the buyer gets no title. \* \* \* The cases which present difficulty are where the seller has voluntarily parted with possession and for a purpose other than the temporary one of examination or the like. *It is universally admitted in the decisions that delivery is at least evidence of a waiver, but it is also generally said that it is only evidence, and that the seller's intent not to waive the benefit of his condition may be shown.* An analysis of the situation upon principle makes it evident that the real question is, Does the seller assent to the transfer of the property? and in order to answer this question the original bargain and what it subsequently done must both be considered. If the original bargain was for a cash sale, that must mean that the buyer was to have neither the title nor the use and enjoyment of the goods until the price was paid. If the buyer was to have the use and enjoyment of the property, though not the title, before payment of the price, the transaction is a conditional sale, not a cash sale. Accordingly, if after bargaining for a cash sale the seller subsequently, voluntarily, delivers to the buyer the goods with the intent that the buyer may immediately use them as his own, and without insisting upon contemporaneous payment, this action is absolutely inconsistent with the original bargain. *Such a delivery is not only evidence of the waiver of the condition of cash payment; it should be conclusive evidence.* \* \* \* Sometimes after a bargain for a cash sale the buyer gives in payment of the price a worthless check, and it has been held that such a false check is no payment; and that not only does no title pass to the fraudulent buyer, but that the seller may assert his title against an innocent purchaser from the buyer. It is submitted that such decisions are unsound. The reasoning upon which they rest is that a worthless check is no payment of the price, and the condition has not happened upon which the property was to pass. But the real question is, Did the seller assent to transfer the ownership in the goods? and it can hardly be

doubted that he did. If a seller should say, 'You must not deal with these goods, though I have put them in your hands, until I collect the check,' that would show an intent not to transfer the property to the buyer. *But, where the goods are put into the buyer's hands without more, it can hardly be doubted that the seller means to allow him to deal with them as his own; to resell them immediately if he feels inclined.* It is true that this assent to the transfer of the property to the buyer has been procured by fraud; therefore, the seller may reclaim the goods from the fraudulent buyer. But, as in other cases where the seller is induced to part with his property by fraud, the voidable title of the fraudulent buyer becomes an indefeasible title upon a bona fide purchaser from the fraudulent buyer. The matter may be thus summarized: If the goods are delivered without any permission, express or implied, to the buyer to deal with them as his own until the price is paid, the condition that payment shall be simultaneous with the transfer of title is not waived; but if the seller on delivering the goods does so without restriction, so that the buyer is violating the terms of no bargain if he uses the goods as his own, it is a conclusion of law that the transaction is not properly a cash sale. At most, it is what has been commonly called a conditional sale; and the natural inference is that the transaction is not even a conditional sale. *A delivery to the buyer with authority to use the goods immediately should be a conclusive evidence of transfer of the property in the absence of pretty clear evidence showing an intention to reserve the title.*" Williston on Sales, § 346.

The conclusion of the trial court not only finds support in the evidence; it accords with the principle that when one of two persons, equally entitled to consideration so far as their purposes are concerned, must suffer from the delinquency of a third, the loss more properly falls upon him who having readily at hand the means of protection has failed to avail himself of them.

It is argued that some of the provisions of the memoranda confirming the bargain between the Kemper Company and Harbour, regarding inspection and weights, require a finding that title did not pass. We think, however, these provisions are not conclusive, but merely matters to be taken into account in determining the real intentions of the parties. The contention is made that the defendants were not innocent purchasers from Harbour, but had knowledge of facts which, by imposing upon them a duty of inquiry, charged them at least with constructive notice of the plaintiff's rights. This question also was one fairly to be determined by the court under all the evidence.

[2] As already stated, the issues between the plaintiff and the other defendants are



controlled by the same considerations. Various phases of the evidence favorable to the plaintiff have not been touched upon, because the question before us is not whether the court might have found in its favor, but whether there was any evidence warranting a contrary finding.

The judgment is affirmed. All the Justices concurring.

(90 Kan. 329)

OW v. DALHOFF.

(Supreme Court of Kansas. July 5, 1913.)

(Syllabus by the Court.)

1. JUDGMENT (§ 868\*)—REVIVOR—NOTICE.

Section 437 of the Code of Civil Procedure (section 6032, Gen. St. 1909), in effect, provides for the revivor of a judgment in the manner prescribed by section 427 of the Code of Civil Procedure (section 6022, Gen. St. 1909) for the revivor of an action before judgment, and that service of the notice may be made by publication.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1608; Dec. Dig. § 868.\*]

2. JUDGMENT (§ 868\*)—REVIVOR—NOTICE BY PUBLICATION.

Where the judgment debtor is alive, the word "defendant" in the affidavit for publication should be substituted for "the representatives of the defendant," and such other changes as are necessary to show that the proceeding is against a live defendant, instead of against the representatives of a deceased defendant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1608; Dec. Dig. § 868.\*]

Appeal from District Court, Butler County.

Action by D. W. Ow against Ella R. Dalhoff. From judgment for defendant, plaintiff appeals. Reversed and remanded.

T. A. Kramer, Geo. J. Benson, and H. W. Schumacher, all of El Dorado, for appellant. C. L. Aikman, of El Dorado, for appellee.

SMITH, J. In 1887 one Conley obtained a judgment on a note and order of foreclosure of a real estate mortgage, given to secure the note, against the appellee and her husband. An order for the sale of the mortgaged premises was issued, and a sale was had, but after paying prior liens and costs a sufficient amount was not obtained to satisfy the judgment. The deficiency judgment was afterwards assigned to the appellant. The appellee and her husband removed to the state of Arkansas, and during all the time involved in this proceeding were residents of that state. The judgment became dormant in August, 1893. Within one year thereafter the judgment creditor filed a motion in the district court of Butler county to revive the judgment. No notice was personally served upon the appellee or her husband, and no notice whatever was given except by publication of the notice in a newspaper in Butler county. The judgment creditor knew that the appellee and her husband resided at a certain place in

Arkansas. Whether or not the appellant was entitled to a judgment in this case depends upon whether the order of revivor, made upon such publication notice, was valid. If the service was in such case authorized by the statute, the judgment was properly revived, and this action should have been sustained thereon. The court held that the service of notice by publication in such case is not authorized, and rendered judgment for the judgment debtor.

[1, 2] Section 437 of the Code of Civil Procedure (section 6032 of the General Statutes of 1909) provides for the revivor of judgments in the same manner as is prescribed for reviving actions before judgment. Section 427 (section 6022 of the General Statutes of 1909) provides for the revivor of actions before judgment, and provides for service of notice by publication, and also prescribes what facts must be shown by affidavit to entitle a party seeking such revivor to make service of notice by publication. The notice runs to the personal representatives of the party opposed to the one who seeks the revivor. Now, an action becomes dormant before judgment only upon the death of a party or his power as personal representative ceases; while a judgment may become dormant by the death, insanity, or other loss of power by the party to represent himself, or by the failure of the judgment creditor to cause successive executions to be issued on the judgment within the time prescribed by statute. In this case the judgment became dormant by reason of the failure to issue an execution within time. Section 437, supra, plainly authorizes the revivor of such a judgment in the manner prescribed by section 427, supra; but, in this case, and others like it, service cannot be made upon the representatives of the judgment debtor because the judgment debtor is alive and presumably competent to represent himself, yet it is plainly indicated that notice of an application to revive a dormant judgment may be made by publication. Hence we hold, to give force to the plain intent of the Legislature, that a party, seeking to revive a dormant judgment, which became dormant by reason of the failure to issue execution, may obtain service of notice by publication, and modify the notice prescribed by the statute to conform to the facts of his case; that is, to give notice to the living judgment debtor.

The appellee contends that service by publication could not be made in this case because section 427, supra, is not adapted to the facts of this case. The trial court must have adopted this theory in deciding that the order reviving the judgment was void. To avoid the evident injustice of the construction of the various provisions of the statute, which would deny to the judgment creditor the right to serve the notice by publication of the application to revive the judgment be-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



cause the debtor had become a nonresident of the state, while if the debtor were dead the notice could be given to the personal representatives by publication, the appellee suggests that notice might be personally served upon the judgment debtor in another state. Conceding that service might be made in this manner, it seems apparent that section 437 of the Code authorizes service by publication upon any party liable as provided in section 427 of the Code. The appellant followed the provisions of section 427 of the Code as nearly as the facts in the case would permit, and the court erred in holding such service insufficient, and that the order of revivor made thereon was void.

We are not unmindful of the numerous authorities cited by the appellee, but we think that the question involved in this case was not decided in any of such authorities, and it is held that the order reviving the judgment was not void, and, if not, that it should have been held effective by the court in this case.

Some other questions are raised and argued, but we think the determination of this one question determines our decision.

The judgment is reversed, and the case is remanded for further proceedings. All the Justices concurring.

(90 Kan. 386)

LEONARD v. HARTZLER et al.

(Supreme Court of Kansas. July 5, 1913.)

(Syllabus by the Court.)

1. CORPORATIONS (§ 559\*)—INSOLVENCY—APPOINTMENT OF RECEIVER—DISSOLUTION.

Insolvency of a corporation and the appointment of a receiver to manage its business and wind up its affairs do not work a dissolution of the corporation, nor will these things of themselves impair its capacity to sue or to enforce judgments previously obtained.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2241-2252, 2259; Dec. Dig. § 559.\*]

2. APPEAL AND ERROR (§ 1032\*)—HARMLESS ERROR—BURDEN OF PROOF.

It devolves upon the appellant who alleges that a ruling is erroneous to show affirmatively from the record that prejudicial error was committed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047-4051; Dec. Dig. § 1032.\*]

Appeal from District Court, Sherman County.

Action by Thomas P. Leonard against John Hartzler and others. Judgment for plaintiff, and defendants appeal. Affirmed.

John Hartzler and C. C. Perdieu, both of Goodland, for appellants. E. F. Murphy, of Goodland, for appellee.

JOHNSTON, C. J. This was an action by the appellee to recover from appellants

real property in the vicinity of the city of Goodland. At one time B. F. Sparr owned an 80-acre tract of land adjoining Goodland, and in 1889 he platted a part of it under the designation of West View addition. Prior to that time, Sparr and his wife had given a mortgage upon a part of the tract to the American Investment Company, which was subsequently foreclosed, and the appellee has acquired his title to it through the purchaser at the sale under the mortgage. In 1890 the Sparrs mortgaged the greater part of the tract to the Beatrice Savings Bank, and, default being made upon that mortgage, the bank brought an action in January, 1895, to foreclose the same. On November 18, 1895, a judgment of foreclosure was entered, and a sale of the property ordered. Before the sale was made, a proceeding was brought in the state of Nebraska against the Beatrice Savings Bank in one of the courts of that state, in which it was found that the bank was insolvent, and that a receiver for the bank should be appointed. Accordingly two receivers were at first appointed, who gave bond and took possession of the business and assets of the bank, being vested with authority to sell and dispose of its assets upon such terms as the court should direct. After the appointment of the receivers, and in March, 1897, a sale of the property was made under the judgment of foreclosure in favor of the bank by the sheriff to the bank itself, and shortly afterwards the sale was confirmed, and the sheriff was directed to execute a deed to the bank. No further steps were taken as to the transfer of the mortgaged property until 1906, when the sheriff's deed was issued, and the appellee acquired title to the property through the grantee in that conveyance. Appellee claimed title to this as well as some other property through tax deeds and other conveyances and proceedings. Appellants rest their claim of title to the property upon the quitclaim deed executed by Sparr and wife on January 29, 1907, for a consideration of \$25. They took possession of the property in April, 1907, by placing a fence around it, after which they used it as a pasture until the time of the trial.

[1] The principal contention in this appeal is that the judgment in favor of the Beatrice Savings Bank under which most of the property was sold was dormant at the time of the sale and the subsequent proceedings connected with it. If the life of the bank had been extinguished by dissolution when the order of sale was issued, and the sale made to the bank, there would be ground for appellants' contention. Nothing in the record, however, shows that the bank had been dissolved when the sale proceedings were had, nor does it appear that dissolution has since taken place. The only basis for the contention made by appellants is that the Nebraska court found



the bank to be insolvent, and that the appointment of a receiver was a necessity. Insolvency is not equivalent to dissolution. It may be ground for adjudging the forfeiture of corporate rights, but neither insolvency nor the appointment of a receiver ends corporate existence. It may turn out that the assets of the corporation will be sufficient to pay the corporate debts and justify the discharge of the receiver and the resumption of corporate business. Even the lack of assets and the failure to transact business for a considerable time added to insolvency does not terminate corporate life. So it was held in *Bank v. Sewing Society*, 28 Kan. 423, that: "The statements in a petition that an incorporated bank has long since ceased to transact business, is insolvent, and has no property or assets of any description out of which the money alleged to be due can be collected by execution or other process of law are not equivalent to an allegation that the corporation is dissolved." Syllabus, par. 1. See, also, *State ex rel. v. Pipher*, 28 Kan. 127; *Plow Co. v. Rude*, 60 Kan. 145, 55 Pac. 848. In 10 Cyc. 1297, the same rule is stated in the following language: "Neither the insolvency of a corporation nor the circumstances which usually attend an insolvency, such as the appointment of a receiver, work a dissolution of the corporation, so as to disable it from exercising its corporate powers and using its corporate name for the purpose of protecting the rights of those beneficially interested in its assets and business, since the possession of property is not essential to the existence of a corporation." It does not appear that the court which appointed the receiver enjoined the bank from enforcing obligations due to it, nor from carrying to a finality judicial proceedings in which the bank was interested or to which it was a party. Since it was not shown that the charter of the bank had expired or that a decree of dissolution was entered, or that it had become dissolved in any of the modes known to the law, there is no reason why it could

not enforce the judgment of foreclosure which it had obtained or legally purchase the property at the judicial sale. The sale to the bank was confirmed, establishing that all the steps were legal, and the fact that there was delay in the issuance of the deed by the sheriff did not impair the validity of the sale, nor weaken the title taken by the purchaser. *Bell v. Diesen*, 86 Kan. 364, 121 Pac. 335.

[2] A few lots and blocks involved in this action were not included in that mortgage and sale, but are covered by tax sales and other proceedings, and it is contended that the statute of limitations has run against appellee's title under the tax deeds. It is impossible to determine the status of these lots and blocks from the record before us. All of the testimony pertaining to the proceedings affecting them is not found in the abstract, nor yet in the transcript of the testimony which we have procured and examined. The transcript refers to the introduction of deeds and other instruments, stating that they were read to the court, but what they contained was not reproduced nor the purport of them transcribed. The trial court decided against the contention of appellants, and it must be presumed upon sufficient evidence. As the appellants are alleging error, it devolved upon them to show affirmatively that the finding and rulings of the court on their contention were erroneous, and upon all the evidence preserved we are unable to say that there was error in the judgment of the court. In so far as a part of the lots are concerned, it appears that in another foreclosure proceeding all the right and interest of the Sparrs was foreclosed and conveyed, and also that they were barred from claiming any interest or right in them. As to these they had no title or interest to convey to appellants.

On the record, it must be held that there was no error, and therefore the judgment of the district court will be affirmed. All the Justices concurring.



(94 Kan. 309)

**DISNEY v. LANG et al.**

(Supreme Court of Kansas. July 5, 1913.)

*(Syllabus by the Court.)***1. FRAUD (§ 23\*)—FRAUDULENT REPRESENTATIONS—KNOWLEDGE.**

Fraudulent representations made by the grantor of land as to the number of acres taken and occupied as the right of way of a railroad through the tract sold and upon which the grantee relied to his injury entitles him to a recovery of damages for the loss actually sustained, although he learned from the instrument of conveyance and other sources that the railroad company had a right of way over the land but did not know the extent of the same.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 20, 23; Dec. Dig. § 23.\*]

**2. FRAUD (§ 64\*)—ACTION—DEMURRER TO EVIDENCE.**

On the testimony in the record it is held that there was a question of fact for the determination of the jury as to the fraudulent representations of the grantor and the reliance of the grantee thereon to his damage, and therefore a demurrer to the evidence offered by the grantee in support of his defense should have been overruled.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 65½, 67-71; Dec. Dig. § 64.\*]

*(Additional Syllabus by Editorial Staff.)***3. FRAUD (§ 59\*)—MEASURE OF DAMAGES—QUANTITY OF LAND.**

Where the purchaser buys in reliance upon fraudulent representations of the vendor as to the amount of the land occupied by a railroad right of way, the damages recoverable by the purchaser cannot exceed the value of the interest or right of which he has been deprived by the vendor's fraud, taking into consideration the fact that the railroad company has only an easement and that the fee remains in the abutting owner.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 60-62, 64; Dec. Dig. § 59.\*]

Appeal from District Court, Ellis County.

Action by Kepple Disney against Michael Lang and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

James T. Nolan, of Ellis, and J. H. Simminger, of Hays, for appellants. E. C. Flood, of Ellis, and E. A. Rea, of Hays, for appellee.

**JOHNSTON, C. J.** This was an action to recover upon a number of promissory notes and to foreclose a mortgage given to secure their payment. On April 2, 1909, Michael Lang purchased a half section of land from Kepple Disney, the appellee, for \$11,119, taking it subject to an existing mortgage for \$1,119 and paying \$3,500 in cash and executing to Disney notes aggregating \$6,500. At the same time Lang and his wife executed a mortgage upon the tract purchased to secure the payment of the notes. The Union Pacific Railway passed through the tract purchased, and in the deed of conveyance it was recited that the tract contained "three hundred twenty (320) acres, more or less, and less the Union Pacific right of way." The first note for \$500, which became due

October 1, 1909, was paid by Lang, but the notes accruing October 1, 1910, and October 1, 1911, were not paid and on October 26, 1911, this action was begun. In his answer Lang defended upon the ground that Disney had fraudulently misrepresented the facts to him as to the quantity of land in the tract, or rather that he had falsely represented at the time of the sale that only 12 acres of the tract had been taken as right of way for the railroad when as a matter of fact the right of way was 400 feet wide and occupied about 50 acres of the half section. He therefore insisted that there was a deficiency of about 38 acres which, according to the purchase price per acre, would amount to \$1,320.12, and this sum he contended should be credited on the notes executed by him. He also claimed that he was entitled under the facts to a rescission and the cancellation of the obligations which he had given. Many questions were raised by appellant on preliminary rulings on the trial, but we find nothing substantial in them.

After proof of the execution of the notes and mortgage had been given by appellee, the appellants offered testimony in support of their defense to the effect that, when Lang contracted to purchase the land from appellee, he inquired as to the extent of the right of way of the railroad, and appellee answered that only 12 acres were taken out of the tract for that purpose. Later, when the parties met for the execution of the title papers, including the deed and mortgage, appellant had the scrivener ask the appellee how many acres of the tract were included in the right of way and that appellee again represented that the easement only covered 12 acres of the land. Appellant testified that he relied on these representations and would not have paid the amount of money nor assumed the obligations which he had done if he had known that the representations were untrue and that he was receiving about 38 acres less than he was led to understand that there was in the tract. Other evidence of the same import was given with meager testimony as to the amount of the loss, after which the court sustained a demurrer to the evidence of appellants and directed a verdict in favor of the appellee for the amount due on the notes and at the same time entered a judgment foreclosing the mortgage. In this there was error. Under the authority of *Speed v. Hollingsworth*, 54 Kan. 436, 38 Pac. 496, false representations as to the quantity of land and the extent of the right of way were material facts rather than mere expressions of opinion, and, if fraudulently made and relied on by appellant to his injury, he is entitled to recover the actual loss sustained. See, also, *Abmeyer v. Bank*, 76 Kan. 877, 92 Pac. 1109; *Circle v. Potter*, 83 Kan. 303, 111 Pac. 479; *Morrow v. Bonebrake*, 84 Kan. 724, 115 Pac. 585, 34

\*For other cases see same topic and section NUMBER in Dec. Dig. & Ann. Dig. Key-No. Series & Rep'r Indexes



L. R. A. (N. S.) 1147; *Maffet v. Schaar*, 89 Kan. 408, 131 Pac. 589.

[1] The trial court proceeded on the theory that as appellant knew from the deed given him that there was a right of way of some width across the tract, and that as he had an opportunity while working on the railroad to observe the extent of the right of way, he could not have been deceived as to the acreage, and further that there was nothing in his testimony proving fraudulent misrepresentation. While he was aware that there was a right of way over the land, it was not easy for him to ascertain its extent, and, even if its boundaries were known to him, it was not easy for him to have learned, by ordinary inspection, the acreage included in the right of way. Anything like an accurate estimate could not have been made by an ordinary inspection nor without considerable trouble and expense. In *Speed v. Hollingsworth*, supra, it was contended that the buyer could not rely on representations of the seller as to the quantity as the buyer was on the land and therefore could, by inquiry and inspection, have ascertained the real truth of the matter. The court, however, said that one who makes false representations with intent to deceive and which are relied on by the other party to his injury cannot defend an action for damages for the deceit on the ground that the injured party could, by inquiry and inspection, have discovered the fraud, and quoting from *Bigelow on Fraud* it was said: "It matters not" \* \* \* that a person misled may be said in some loose sense to have been negligent. \* \* \* For it is not just that a man who has deceived another should be permitted to say to him, 'You ought not to have believed or trusted me,' or 'You were yourself guilty of negligence.'" 54 Kan. 440, 38 Pac. 498.

[2] There was proof sufficient, we think, to make a prima facie case that the false and fraudulent representations were made. Some of the testimony in behalf of appellee tended to show that Lang was not misled by the false statements as to the extent of the right of way. If the representations were in fact false and appellant himself knew them to be false at the time, or if, from any source, he learned of the acreage of the right of way prior to the purchase and therefore did not rely upon the representations made by appellee to him, he cannot

recover damages. Another circumstance which tends to discredit his claim is that he made a payment on the land after he had been told that the right of way exceeded 12 acres. However, he was not concluded by that testimony, and, having offered testimony tending to show that the false representations were made and some as to his reliance on these representations, it became a question of fact for the jury, and the court was not warranted in taking the case from the jury on the demurrer to the evidence and practically determining that there was no evidence tending to sustain the claim of fraudulent representation.

[3] It is also said that there is a lack of testimony as to the damages sustained, and it is true that counsel for appellants were not very successful in getting testimony before the jury as to the extent of appellants' damages. Most of the evidence related to the value of the land at the time of the trial instead of at the time the alleged fraud was practiced; but we are of the opinion that at least enough sifted in to overcome the demurrer to the evidence. It may be said too that if the false representations were made as testified to by appellant, and that they were relied upon by appellants, the value of the land at the time of the transaction is not the measure of damages. The railroad company only has an easement over the land; the fee remaining in the abutting owner. The railroad, of course, is entitled to the exclusive use of the right of way while it is used for railroad purposes, but any right not inconsistent with the easement remains in the abutting owner, and, if the use of the land for railroad purposes should be abandoned, the land would revert to the abutting owner. *Abercrombie v. Simmons*, 71 Kan. 538, 81 Pac. 208, 1 L. R. A. (N. S.) 806, 114 Am. St. Rep. 509, 6 Ann. Cas. 239. If the appellants are entitled to any damages, it can be no more, in any event, than the value of the interest or right of which they have been deprived by the fraud of the appellee in so much of the right of way as is in excess of 12 acres.

No other material error is found in the record, but for the ruling sustaining the demurrer to the evidence of appellants the judgment must be reversed, and the cause remanded for a new trial. All the Justices concurring.



(90 Kan. 375)

**GRIFFIN et al. v. FREDONIA BRICK CO.**

(Supreme Court of Kansas. July 5, 1913.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 1097\*)—REVIEW—SECOND TRIAL—LAW OF CASE.**

The law of this case as declared in a former appeal is followed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368, 4427; Dec. Dig. § 1097.\*]

**2. MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.**

The evidence is reviewed, and it is held that questions of fact relating to the charges of negligence were properly submitted to a jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

**3. EVIDENCE (§ 359\*)—PHOTOGRAPHS—ADMISSIBILITY.**

Photographs purporting to be of the bank in a shale pit where the injury occurred, identified by the photographer, were properly admitted in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1509-1512; Dec. Dig. § 359.\*]

**4. DEATH (§ 104\*)—MEASURE OF DAMAGES.**

Where a youth 17 years of age, physically strong, who had worked in his father's store and for others, earning fair wages, is killed through negligence, an instruction that in awarding damages the jury may, if they find that he had previously contributed anything to his parents, consider what he might reasonably be expected to contribute to them after arriving at the age of 21 years is not erroneous.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 142-148; Dec. Dig. § 104.\*]

Appeal from District Court, Wilson County.

Action by George G. Griffin and Mary L. Griffin against the Fredonia Brick Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

J. T. Cooper, of Fredonia, and H. P. Farrelly, of Chanute, for appellant. P. C. Young and W. H. Edmundson, both of Fredonia, for appellees.

**BENSON, J.** This is the second appeal in this case. The first was by the plaintiffs from a judgment sustaining a demurrer to their evidence. *Griffin v. Brick Co.*, 84 Kan. 347, 114 Pac. 217, 40 L. R. A. (N. S.) 1088. This appeal is by the defendant from a judgment awarding damages to the plaintiffs for the death of their minor son, a laborer at the defendant's brick manufactory.

[1] The facts, stated in the first opinion, need not be restated here. The negligence charged was the failure to make the place where the employé worked reasonably safe, and to properly inspect the shale pit where he was killed. The law applicable to the case was stated in the former opinion. The evidence at the last trial was substantially the same as at the first trial unless it differs in respect to the following matters: At the first trial it appeared that the person whose

duty it was to look after the bank of the shale pit while engaged in that work saw a boulder or lump sticking out from the wall at a place three or four feet below the top, which he could not get down with the tools he was using. At the last trial the person charged with this duty testified: "I didn't see any boulder, but it stuck out there, and I worked hard and got it down until I thought it was safe." Another witness testified: "The place where the boy was injured looked worse than any place close around about there. I saw it before the boy was killed, but don't know just when; don't know how long I had noticed it, but had noticed it after we had passed it. The difference was that the place stuck out worse than other places. Yes, I saw this after Mr. Shea had been up there; it stuck out more after it was pried off right in this particular place than it did right around close to it." And another said: "You have got to be careful because that clay sits on that shale, and between the clay and the shale is smooth; if there is a pitch between the two, then it is liable to slide in there." The evidence showed that the condition of the bank could be better observed from the top than from the bottom, and cracks usually appeared at the surface above before a fall, and such cracks served as indications of danger. Following such indications there would be what were termed "cave-ins" or "tumbles over," these terms indicating a slide of material from the face of the bank or fall from the surface. The cracks referred to were of frequent occurrence, and considerable evidence was given of their appearance. The difference in the evidence at the two trials respecting the appearance of the wall appears to be in its positiveness only. The testimony at both trials tended to prove the same fact.

[2] It was a question of fact whether, from the appearance of the bank at that place where, as testified to, it "stuck out worse than other places," and from the cracks above and the entire appearance, the company exercised reasonable care in making inspections and in making the place reasonably safe for its employés. In passing upon the demurrer to the evidence the court could not say, as matter of law, that reasonable diligence had been shown. It was a question of fact for the jury. A projection of the material was observed after the bank had been barred down at the point from which it afterwards fell. It is true that the person whose duty it was to do this work testified that he thought the bank was safe. Still, he left the protuberance there, and it held the fatal rock. By its fall the young man working immediately at the foot of the bank lost his life without any fault on his part. While, as said in the former opinion, there was much to indicate that the inspector was not at fault, the protuberance was apparent:

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



and whether it was a menace, which, in connection with other circumstances shown, required further attention and action by the defendant for the reasonable safety of its laborers, was a question of fact for the jury.

[3] Complaint is made of the admission in evidence of photographs taken after the casualty occurred. Testimony of the photographer was taken, but is not abstracted. Neither are the photographs presented. The objection was that a sufficient foundation was not laid, and that the conditions were not the same when they were taken as existed at the time of the accident. It must be presumed that the preliminary proof was sufficient in the absence of anything appearing to the contrary. The fact that the photographs were taken after the occurrence would not destroy their utility as an aid to the jury in understanding the evidence relating to the situation and surroundings. The fact that witnesses for the defendant testified that the picture did not show the bank in question, or the bank at the place of the accident, affected the weight of the evidence afforded by the photographs, but not its admissibility.

[4] That part of an instruction relating to the measure of damages was objected to which informed the jury that, if it should be found from the evidence that the deceased in his lifetime contributed to the support of his parents, then they might allow such sum as the evidence discloses he might reasonably have been expected to contribute after arriving at the age of 21 years. The young man was 17 years of age in June preceding his death, strong and in good health, a graduate of the common schools, and preparing for a business college in which he had paid for a scholarship. He had worked in his father's store, and in a smelter and gas plant, and was earning \$1.50 per day in the brick plant. In the light of these facts no just ground for complaint is found in the instruction concerning damages, a part of which has been referred to. *Railway Co. v. Fajardo*, 74 Kan. 314, 86 Pac. 301, 6 L. R. A. (N. S.) 681.

The finding of negligence being supported by competent evidence, and no erroneous rulings being found, the judgment is affirmed. All the Justices concurring.

(90 Kan. 281)

#### ROBBINS v. MADDY et al.

(Supreme Court of Kansas. July 5, 1913.)

Appeal from District Court, Sumner County. Action by F. K. Robbins against W. H. Maddy and others. Judgment for plaintiff, and defendants appeal. Affirmed.

W. W. Schwinn, of Wellington, for appellants. Harold W. Herrick, of Wellington, for appellee.

PER CURIAM. The only question presented upon this appeal is whether the purchaser of land subject to a mortgage may successfully

interpose the defense of usury in the notes secured by the mortgage. This question was answered in the negative in *Tidball v. Schmeltz*, 77 Kan. 440, 94 Pac. 794, 127 Am. St. Rep. 424, following the early case of *Pritchett v. Mitchell*, 17 Kan. 355, 22 Am. Rep. 287.

The appellant requests a re-examination of this question, in the light of an amendment of the statute in the year 1889, after the *Pritchett* Case was decided. The *Tidball* Case was decided long after the amendment. It was not perceived then, nor is it perceived now, how the amendment affected the rule, which appears to be supported by the weight of authority in other jurisdictions. The court is satisfied with its former adjudications.

The judgment sustaining a demurrer to the answer of the purchaser of the mortgaged premises is affirmed.

(90 Kan. 363)

#### WESTERN GROCER CO. v. ALLEMAN et al.

(Supreme Court of Kansas. July 5, 1913.)

Appeal from District Court, Miami County. Action by the Western Grocer Company against P. B. Alleman. May Alleman interpleads. From the judgment in favor of interpleader, plaintiff appeals. Affirmed.

George W. Littick, of Kansas City, for appellant. David F. Carson, of Kansas City, and Coughlin & Coughlin, of Paola, for appellee.

PER CURIAM. This is the second appeal which the plaintiff has taken from a judgment in favor of the interpleader, V. May Alleman. The case was tried originally before the court upon a motion to dissolve the plaintiff's attachment and the interplea, and the evidence consisted almost wholly of affidavits. The judgment was reversed and the cause remanded for a full trial in the regular way upon formal pleadings. *Grocer Co. v. Alleman*, 81 Kan. 543, 106 Pac. 460, 27 L. R. A. (N. S.) 620, 135 Am. St. Rep. 398. Such a trial has been had before a jury, with the same result as before.

There are 15 assignments of error, and 10 of them go to the sufficiency of the evidence to support the verdict. These assignments of error are argued as they would be to a jury. The court is asked to regard witnesses as unworthy of credence, to disbelieve oral testimony, to hold that certain evidence overcomes other evidence, and in a word to retry the case and reach conclusions contrary to those drawn by the jury and approved by the trial judge. There is ample evidence to sustain the general verdict and the special findings of fact, if the testimony favorable to the interpleader be believed. The jury believed it, and that ends the controversy over the facts.

With the facts found against the plaintiff there is no substantial question of law to be discussed. The essential facts are that Mrs. Alleman loaned her husband \$1,500 on his promissory note. The money was hers. Even if he gave it to her, he was not at the time indebted to anybody, and consequently nobody can complain. With this money Alleman started a grocery store, and the plaintiff extended him credit. Later a mercantile agency secured a financial statement of the business from Mrs. Alleman, in which she did not mention her husband's debt to her, but the credit which the plaintiff makes the basis of its suit was not extended on the faith of this statement. (Special finding 19.) Consequently the question of estoppel goes out of the case. Alleman became embarrassed financially and preferred his wife by trading the store for a farm which was to be deeded to her. In concluding the trade a deed was made to him, which he refused to accept, and then the deed to her, as he had originally directed, was executed, delivered, and accepted.



Consequently title to the farm never vested in Alleman. Mrs. Alleman was not cognizant at the time of her husband's financial condition, and the trade was made to pay her, and not to defraud Alleman's other creditors. The value of the farm, above the mortgages upon it, did not exceed the amount of her claim. The statement referred to in finding 22 was true, because when it was made Alleman had paid his wife.

It is useless for the plaintiff to deride the testimony by which these facts were established as absurd, ridiculous, and beyond the pale of reason. The jury and the trial judge saw the witnesses and heard the evidence. The court stated plainly in its instructions to the jury the circumstances under which the plaintiff could recover, and those under which the interpleader could recover, and then approved the verdict and special findings. There is no error in the instructions, which adequately covered the case. The special findings are not inconsistent with each other or with the general verdict. The plaintiff was simply beaten on the facts in a contest conducted according to law before the trier of the facts and this court cannot interfere.

The judgment of the district court is affirmed.

(90 Kan. 428)

**ATCHISON, T. & S. F. RY. CO. v. CITY OF CHANUTE et al.**

(Supreme Court of Kansas. July 5, 1913.)

(*Syllabus by the Court.*)

**MUNICIPAL CORPORATIONS (§ 425\*)—ASSESSMENTS—PAVING STREET.**

Where a railroad company, at its own expense and by virtue of a city ordinance, paves one half of a street adjoining its station grounds, it is not liable to an assessment for the paving by the city of the other half.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1031-1034; Dec. Dig. § 425.\*]

Appeal from District Court, Neosho County.

Action by the Atchison, Topeka & Santa Fé Railway Company against the City of Chanute and others. Judgment for plaintiff, and defendants appeal. Affirmed.

S. C. Brown, City Atty., of Chanute (H. P. Farrelly and T. R. Evans, both of Chanute, of counsel), for appellants. William R. Smith, Owen J. Wood, and Alfred A. Scott, all of Topeka, and John J. Jones, of Chanute, for appellee.

PORTER, J. The city appeals from a judgment permanently enjoining the collection of special assessments for street paving.

In November, 1909, the city passed an ordinance authorizing the railway company, at its own expense, to grade, gutter, and pave the east 46 feet of South Grant avenue, in the city of Chanute, for a distance of one block adjoining plaintiff's right of way and station grounds. Soon after the railway company had completed and paid for the work, the city proceeded to grade and pave 38 feet of the west side of the street adjoining the part already paved by the railway company, and by ordinances duly passed caused one-half of the additional cost to be assessed against the plaintiff's right of way. The trial court found generally for the plaintiff.

The two assignments of error are: First, that there was no evidence to warrant a finding that the city adopted the improvement made by the company as part of a scheme or plan for the improvement of the entire street; second, that under the facts and the law the equities of the case entitle the city to a judgment in its favor. We do not concur in either contention. There was evidence sufficient to sustain the judgment, and obviously the trial court held it to be most inequitable and unjust for the city to attempt to charge the railway company with half the cost of the city's share of the improvement, after the railway company, under the authority of the city, had paid for improving more than half of the street. The adoption by the city of the work paid for by the company was not in any sense an attempt to exempt the railway company from paying its full share of the cost of paving the street. As a matter of fact, the plaintiff paid for improving 46 feet of the street, while the city, or owners of property abutting on the west side of the street, will be assessed for the cost of only 38 feet of paving.

While it is doubtless true that the railway company was greatly benefited by the improvement it paid for, in being able to furnish its patrons with better conveniences for reaching its station and freight platforms, it appears that the portion paved by the company is open to the public as a street, and it must not be forgotten that the patrons of the railway are the public.

The judgment is affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



(74 Wash. 401)

**STEWART & HOLMES DRUG CO. v. ROSS**  
et al.

(Supreme Court of Washington. July 22, 1913.)

**1. SALES (§ 480\*)—CONDITIONAL SALES—RE-TAKING PROPERTY—EVIDENCE—FINDINGS.**

Evidence held to justify a finding that plaintiff, a conditional seller of a soda fountain, after the buyer had failed to make payment therefor as agreed, and had sold his business to another, elected to retake possession of the fountain under the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1439-1448; Dec. Dig. § 480.\*]

**2. SALES (§ 479\*)—CONDITIONAL SALE—NATURE OF RESERVED TITLE—REMEDIES.**

The title retained by the seller on a conditional sale of personalty is absolute, and on breach of the contract by the buyer, the seller may either disaffirm the contract and retake the chattels, or he may treat the transaction as an absolute sale, and sue on the contract for the price; but, the remedies being inconsistent, the assertion of one is an abandonment of the other.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418-1432, 1434-1438; Dec. Dig. § 479.\*]

**3. SALES (§ 480\*)—CONDITIONAL SALES—BUYER'S BREACH—ELECTION OF REMEDIES—DEFENSE BY THIRD PERSON.**

That a conditional seller of personal property had elected to retake the property on the buyer's breach, instead of suing for the price, could be invoked by a third person as a defense to the attempted assertion of the alternative remedy as against him.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1439-1448; Dec. Dig. § 480.\*]

**4. SALES (§ 479\*)—CONDITIONAL SALES—BUYER'S BREACH—RE-TAKING PROPERTY—EFFECT.**

Where, on the buyer's breach of a contract of conditional sale, the seller retakes the chattel, he thereby cancels the debt.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418-1432, 1434-1438; Dec. Dig. § 479.\*]

**5. SALES (§ 480\*)—CONDITIONAL SALE—BREACH—REMEDIES OF SELLER—ESTOPPEL IN PAIS.**

Plaintiff sold a soda fountain to R. under a conditional sale contract on which a large part of the price remained unpaid. R. sold his business exclusive of the fountain to the garnishee, without complying with the sales in bulk law (Rem. & Bal. Code, §§ 5296-5300). In answer to the garnishee's letter with reference to the fountain, plaintiff stated that it would have to be paid for by R., if he was good for it, but that plaintiff's agent would call on the garnishee shortly and go into the matter. Such agent called and attempted to sell the fountain to the garnishee before his payment of the last installment of the price to R., and while he could have protected himself; but, not being able to sell the fountain to the garnishee, plaintiff retook possession and instituted suit against R. and the garnishee for the balance due on the contract, claiming that the garnishee was liable because of the violation of the sales in bulk law. Held, that plaintiff, having retaken the fountain and elected such remedy with notice to the garnishee that it claimed the right to recover the price at a time when the garnishee could have protected itself, was estop-

ped thereafter to claim the right to proceed on the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1439-1448; Dec. Dig. § 480.\*]

**6. SALES (§ 479\*)—SALES IN BULK LAW—RIGHTS OF CREDITOR—NOTICE OF ENFORCEMENT.**

In the absence of an election of another remedy by a creditor of a seller of a stock of goods in violation of sales in bulk law (Rem. & Bal. Code, §§ 5296-5300), the creditor is not required to notify the purchaser of the stock of its intention to rely on the statute.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418-1432, 1434-1438; Dec. Dig. § 479.\*]

**7. SALES (§ 479\*)—SALES IN BULK LAW—CREDITORS—CONDITIONAL SALE—ELECTION.**

A conditional seller of a chattel is not required to elect to recover the purchase price before the buyer's sale of his stock of goods, in violation of the sales in bulk law (Rem. & Bal. Code, §§ 5296-5300), in order to entitle the conditional seller of such chattel to a remedy under the act.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418-1432, 1434-1438; Dec. Dig. § 479.\*]

**8. SALES (§ 480\*)—SALES IN BULK LAW—VIOLATION.**

Where plaintiff made a conditional sale of a soda fountain to R., and also sold him certain supplies, and R., before paying for the fountain or supplies, sold his business and stock to the garnishee without complying with the sales in bulk law (Rem. & Bal. Code, §§ 5296-5300), the fact that plaintiff subsequently elected to retake the fountain did not satisfy the debt for the supplies for which plaintiff was entitled to recover against the garnishee.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1439-1448; Dec. Dig. § 480.\*]

Department 2. Appeal from Superior Court, San Juan County; George A. Joiner, Judge.

Action by the Stewart & Holmes Drug Company against J. G. Ross and J. W. Reed, garnishee. Judgment for defendant, dismissing the garnishment, and plaintiff appeals. Reversed, with directions.

Leopold M. Stern and J. W. Russell, both of Seattle, for appellant. Louis T. Silvain and H. B. Butler, both of Seattle, for respondents.

ELLIS, J. In this action the plaintiff by garnishment sought to enforce against the garnishee defendant Reed an alleged liability under the sales in bulk law. About June 17, 1911, the defendant Ross, who was conducting a small mercantile business at Friday Harbor, San Juan county, purchased from the plaintiff upon a conditional sale contract a soda fountain at an agreed price of \$250. Twenty-five dollars was paid on the purchase price at the time, and \$25 was remitted from the purchase price by reason of a subsequent failure of the fountain to give satisfactory service, thus leaving a balance of \$200, which Ross never paid. Apparently at the time of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
133 P.—37



the purchase Ross also purchased from the plaintiff supplies for the fountain of the value of \$28.50. This also was unpaid. On the 18th day of July, 1911, the defendant Ross sold his entire stock and a part of his fixtures to the garnishee defendant Reed for \$510.79, \$50 of which was paid on July 20, 1911, \$160.79 on July 28, 1911, and \$300 on August 28, 1911. The soda fountain was not included in this sale. It is admitted that Reed did not obtain from Ross a verified statement of his indebtedness and the names of his creditors, as required by the sales in bulk law (Rem. & Bal. Code, § 5296 et seq.). On the 5th day of October, 1911, the plaintiff began an action against the defendant Ross to recover the amount of the unpaid balance of the purchase price of the soda fountain and the account of \$28.50 for supplies therefor. A writ of attachment was sued out, and the return of the sheriff on the summons, complaint, and writ of attachment shows that Ross could not be found. The plaintiff filed an affidavit for garnishment, alleging that the garnishee defendant was indebted to Ross, and had in his possession and under his control personal property belonging to Ross. A writ of garnishment was issued against Reed, who answered, denying any indebtedness to Ross, and alleging that he had no property in his possession belonging to Ross. The plaintiff by affidavit controverted this answer. The defendant Ross was served with summons by publication. He failed to answer and an order of default was taken against him. Thereafter, on January 8, 1913, the issues presented in the garnishment proceeding were tried, and the court adjudged that the garnishee defendant, at the time of the service of the writ of garnishment, was not indebted to the defendant Ross in any sum, and then had in his possession no property belonging to Ross, and discharged the garnishee defendant, awarding him his costs and disbursements, together with an attorney's fee of \$25. The plaintiff has appealed.

[1] Both sides concur in the assertion: "The only question involved is whether or not the court erred in finding that appellant elected to and did rescind the conditional sale contract and retake the property prior to the commencement of the action against the defendant Ross." On this issue the respondent holds the affirmative, the appellant, the negative. The evidence in support of the affirmative view may be briefly condensed as follows: Shortly after making the purchase of the stock the respondent wrote two letters to the appellant; the last apparently written on August 9, 1911. These letters are not in evidence, but the appellant's answer seems to indicate that they advised the appellant of the sale, and that the respondent had not purchased the soda fountain. The appellant's answer was as follows: "Seattle, Wash. Aug. 10, 1911. J. W. Reed, Friday Harbor, Wash. Dear Sir: We are in receipt of yours

of the 9th inst. and note contents. The fountain was sold to Mr. Ross and will have to be paid for by him. We do not know you in the transaction, and therefore have no desire to continue a lengthy correspondence. If Mr. Ross is good for the fountain, he will have to pay for it. Our Mr. Mayrand will probably be in Friday Harbor within a very short time and we will ask him to go into the matter more fully and take whatever action is necessary. Very truly yours, Stewart & Holmes Drug Co." The respondent testified that thereafter, and in the month of August, the exact date did not appear, the man Mayrand, referred to in this letter, or Marens, as he is called in the testimony, did go to Friday Harbor, and attempted to sell the soda fountain to the respondent. Twice subsequently—the dates do not appear—he visited Friday Harbor, and each time tried to sell the fountain to the respondent. This is not contradicted. Marens was not called as a witness. One Woods, another representative of the appellant, testified that in September, 1911, he went to Friday Harbor, and that at that time the respondent had removed the fountain to a back room; and, although he testified that the respondent was using the fountain, the respondent denied this, and Woods' testimony shows that the only use was of the marble counter, and that there was no use being made of the fountain as such. Though Woods was at that time told that Ross had gone to California, there is no evidence that he then made any claim that the respondent would be held for the purchase price of the fountain. The evidence also shows that at some time the appellant through its representative, Marens, made arrangements with one Little to have the fountain boxed up and returned to the appellant at Seattle. Little testified that he was spoken to several times with reference to this matter, the last time being about three months before the trial. We think this evidence justified the finding that the appellant elected to retake the fountain.

[2] The law is well settled that where, as in this state, the title retained by the seller on a conditional sale is an absolute title, on breach of the conditional sale contract by the buyer the seller has a choice of remedies. He may either disaffirm the contract and retake the chattel, or he may treat the transaction as an absolute sale, and sue on the contract for the purchase price. But since these remedies are inconsistent he cannot do both. The assertion of the one is an abandonment of the other. *Winton Motor Car Co. v. Broadway Auto Co.*, 65 Wash. 650, 118 Pac. 817, 37 L. R. A. (N. S.) 71; *Ramey v. Smith*, 56 Wash. 604, 106 Pac. 160; *Keystone Mfg. Co. v. Cassellius*, 74 Minn. 115, 76 N. W. 1028; *Cooper v. Payne*, 111 App. Div. 785, 97 N. Y. Supp. 863; *White v. A. W. Gray's Sons*, 96 App. Div. 154, 89 N. Y. Supp. 481. Such an election once made is final and irrevocable.



"Upon the breach of a conditional bill of sale, the vendor may either disaffirm the sale and retake the chattel, or ratify the sale and sue upon the contract. These remedies are inconsistent; and, where an election is made it is final, and cannot be reconsidered." *Pels & Co. v. Oltarski Iron Works* (Sup.) 129 N. Y. Supp. 371, 372; *Laclede Power Co. v. Est. Ennis Stationery Co.*, 79 Mo. App. 302.

[3] Such an election may be invoked by a third person as a defense to the attempted assertion of the alternative remedy against him. *Frisch v. Wells*, 200 Mass. 429, 86 N. E. 775, 23 L. R. A. (N. S.) 144. The appellant seemingly concedes that this is the law, but relies upon the rule as to election of remedy generally as stated in 15 Cyc. 260: "Although acts prior to the actual commencement of legal proceedings indicate an intention to rely upon one remedial right, yet they do not constitute an election which will preclude the subsequent prosecution of an action or suit based upon an inconsistent remedial right, unless the acts contain the elements of an estoppel in pais."

[4, 5] It may well be doubted that any element of estoppel is necessary where, as here, the retaking of the chattel sold on conditional sale actually cancels the debt. But assuming, without deciding, that this states the correct doctrine as to election in such a case, we think that the foregoing evidence not only shows an election on the appellant's part to retake the soda fountain with knowledge of the fact that the respondent had purchased the stock of goods, but also that the election was accompanied with the necessary element of estoppel in pais. The appellant's letter of August 10th was evidently written with knowledge of the fact that the respondent had purchased the stock of goods. At that time it is certain the respondent had not paid the last \$300 of the purchase price of the stock of goods to Ross, and was then in position to protect himself. It is fairly deducible, also, from the evidence that the first visit of the appellant's representative, Marens, to Friday Harbor, and his first attempt to sell the soda fountain to the respondent was also before the respondent had paid the last \$300 on the purchase price of the stock of goods. The letter of August 10th indicated that the appellant's representative would visit the respondent in a very short time, and the respondent testified that the first visit took place in August. We think, in view of the fact that the appellant had more than a month after the respondent's purchase of the stock of goods before the respondent had paid the last installment of the purchase price thereon in which to have notified the respondent in case it intended to attempt to hold him for the purchase price of the fountain, and that both by letter and by the attempt to sell him the fountain the contrary intention was made to appear, the appellant should now be es-

topped to claim as against the respondent that it did not elect to retake the fountain. While the letter above quoted indicates an intention to hold Ross for the purchase price, it also fails to indicate any intention to hold the respondent. The subsequent offer to sell him the fountain could only be interpreted by him as an election on the appellant's part to assert its title to the fountain under the conditional sale contract.

[6] We do not want to be understood as holding that, in the absence of an election, the appellant would have been under any obligation to notify the respondent of its intention to assert its rights under the sales in bulk law in order to avoid an estoppel. Such a holding would shift the duty, imposed by the statute upon the purchaser, to the creditor. In the absence of an election it was not incumbent upon the appellant to notify the respondent of its intention to rely upon the protection accorded by the statute, but, having written to the respondent, indicating that it relied solely upon the defendant Ross for payment, and afterwards having attempted to sell the fountain to the respondent, the facts showing estoppel become important, not primarily as an estoppel to rely upon the statute, but as an estoppel to deny the election.

[7] It has been suggested that in a case such as this the election by the vendor under the conditional sale to treat the sale as absolute so as to create an existing debt should be made before the sale of the goods in bulk, in order to hold the vendee of the goods under the sales in bulk law. This is on the theory that until such election the vendor under the conditional sale contract is not a creditor in the full sense of the term, and that the purchaser of the goods in bulk without taking the affidavit takes subject only to then existing debts. The statute, however, in its effect as declaring transfers fraudulent in law when the affidavit is not taken, is analogous in principle to the statute (Rem. & Bal. Code, § 8766) relative to voluntary conveyances between husband and wife. We have held the latter statute applicable to protect a creditor whose claim was immature and contingent. *Sallaske v. Fletcher*, 132 Pac. 648. In the absence of any prior election the same rule should apply to creditors claiming protection under the sales in bulk law. It is obvious, however, that if an election to retake the chattel is made, whether before or after the sale of the goods in bulk, it cancels the debt, and is a complete defense to the proceeding under the sales in bulk law to collect the price of the chattel.

[8] The foregoing has no application to the item of \$28.50. That debt was never canceled. The failure to give judgment for that claim was error.

The judgment is reversed, with direction to enter judgment in favor of the appellant and against the respondent for \$28.50;



with interest at the legal rate from June 17, 1911. Neither party will recover costs.

MAIN and MORRIS, JJ., concur. FULLERTON, J., concurs in the result.

(74 Wash. 347)

ALLEN v. MIGLIAVACCA REALTY CO.  
(Supreme Court of Washington. July 15, 1913.)

1. APPEAL AND ERROR (§ 1011\*)—REVIEW—QUESTIONS OF FACT.

The Supreme Court is not bound by the findings of the trial court as it would be by a verdict of a jury, although supported by evidence; and, while the trial court's findings on conflicting evidence are entitled to great weight, they will be disregarded when not supported by a fair preponderance of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

2. LANDLORD AND TENANT (§ 64\*)—ESTOPPEL OF TENANT—PERSONS ESTOPPED.

An assignee of a tenant suing to recover back rent, paid on the theory that the tenant owned the building for which part of the rent was paid, had the same burden of proving, by a preponderance of the evidence, facts to overcome the tenant's estoppel to deny the landlord's title that would have rested upon the tenant had the action been brought by him.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 171, 177-180; Dec. Dig. § 64.\*]

3. LANDLORD AND TENANT (§ 62\*)—ESTOPPEL OF LESSEE—EFFECT OF FRAUD.

Although a tenant is usually estopped to deny his landlord's title, regardless of the validity of the title, where a tenant in possession is induced to accept another as his landlord through that other's fraud or misrepresentation, the estoppel is not effective, but the fraudulent misrepresentation must be of such a nature, and made under such circumstances, as would avoid a written contract in other relations, and, where there exists no confidential or fiduciary relations, must relate to a matter not equally within the knowledge of or equally open to inquiry by the party asserting the fraud, and must be believed and be relied upon by such party.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 152-158, 168, 170, 189; Dec. Dig. § 62.\*]

4. LANDLORD AND TENANT (§ 62\*)—ESTOPPEL OF LESSEE—EFFECT OF FRAUD.

Where a lessee, who had been paying \$15 a month rent, knowing that he owned the building on the leased premises and was entitled to remove it, and that a purchaser of such premises knew of his rights, upon being informed by the purchaser that he bought everything without reservation, and that the lessee must pay \$50 a month rent or get out, accepted from the purchaser a lease of the lot and building at a monthly rental of \$50 a month, which provided that changes or improvements in the building should be the property of the lessor, and should not be removed by the lessee, and that the lessee would surrender the premises in as good a state and condition as they were then in, without offering or attempting to remove the building, he was estopped to deny the lessor's title to the building, the statement by the lessor being at most a misrepresentation as to the legal effect of his deed, or the expression of an opinion, which did not constitute fraud in the absence of any relation of confi-

dence, and the lessee's actions showing that he deliberately decided to forego his right to remove the building rather than lose the location on the lessor's lot.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 152-158, 168, 170, 189; Dec. Dig. § 62.\*]

5. LANDLORD AND TENANT (§ 62\*)—ESTOPPEL OF AGENT—EFFECT OF FRAUD.

A threat of eviction by the owner of leased premises on which was a building owned by the lessee, by which the lessee was induced to accept a lease for the lot and building, was not such duress or fraud as relieved the lessee from the estoppel to dispute his landlord's title or right to make the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 152-158, 168, 170, 189; Dec. Dig. § 62.\*]

6. JUDGMENT (§ 654\*) — CONCLUSIVENESS — MATTERS CONCLUDED.

A dismissal of actions for conversion for insufficiency of proof was not conclusive of anything except that defendant had not converted the property involved.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1165; Dec. Dig. § 654.\*]

7. LANDLORD AND TENANT (§ 62\*)—ESTOPPEL OF TENANT—EFFECT OF MISTAKE.

The belief of the owner of a building on the premises of another that he could, with full knowledge of his ownership and possession, acquiesce in such other's assumed ownership, lease it from him by a lease acknowledging his title, pay the rent for the full term, and then recover the rental paid, was not such a mistake of law as relieved him against the estoppel to deny his lessor's title, since his remedy by removal of the building was obvious; and, while equity will sometimes relieve against a mistake of law, it will do so only where the principle of law is doubtful and the party seeking the relief is wholly innocent of blame.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 152-158, 168, 170, 189; Dec. Dig. § 62.\*]

8. LANDLORD AND TENANT (§ 231\*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action to recover back a portion of rent paid under a lease, on the ground that a building on the leased premises was the property of the tenant, evidence held insufficient to show that the amount sought to be recovered was paid for the rent of the building alone, even conceding that there was such fraud on the lessor's part as relieved the lessee of his estoppel to deny the lessor's title.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 926-934; Dec. Dig. § 231.\*]

Department 2. Appeal from Superior Court, Kitsap County; W. P. Bell, Judge.

Action by J. H. Allen against the Migliavacca Realty Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions to dismiss.

Bryan & Ingle, of Bremerton, and Chas. D. Fullen, of Seattle, for appellant. Jay C. Allen, of Seattle, for respondent.

ELLIS, J. Plaintiff, as the assignee of one Louis Morin, seeks recovery of money alleged to have been paid as rent for a building situated on defendant's lot in Bremerton. It is alleged that Morin paid that portion of the rent sued for under the mistaken belief



that he did not own the building. Plaintiff, in an attempt to trace Morin's title to the building, introduced a written lease of the lot, dated December 1, 1902, from William Bremer and wife to Elsie Gartner, for the term of three years and nine months, in which the lessee was given the right to "remove any building therefrom after expiration of this lease." November 17, 1904, the lease was assigned by Elsie Gartner to her husband, Charles Gartner, who on the same day assigned it for the benefit of his creditors to John B. Yakey. On March 8, 1905, Yakey assigned the lease to Carrie Smith, and "also the building situated on said premises with right to remove the same under terms of said lease." No transfer from Carrie Smith was shown, Morin testifying that he bought the building from one Benson, stating "three bills of sale were made from the court to Benson and from Benson to me," but he did not know where these written instruments were. Morin further testified that he did not know when he had acquired an interest in the building, but that for some time prior to August 18, 1908, he was the owner and in possession of it, and held the lot on which it was situated under an agreement to pay Bremer \$15 a month ground rent. On August 18, 1908, Bremer sold the lot "with the appurtenances" to G. Migliavacca Investment Company. Prior to the sale S. Migliavacca, agent of that company and of the defendant in all the transactions involving these premises, was told by Morin that the building belonged to him. After the purchase of the property Migliavacca exhibited the deed and stated to Morin, "When I bought this property I bought everything, and nothing was reserved," and that Morin would have to pay \$50 a month rent or "get out." Thereupon Morin accepted a lease from the G. Migliavacca Investment Company. It was signed October 1, 1908, and recited the lease of "The building known as No. 312 Washington street in said town of Breerton, and the real estate and the premises on which the same is located together with the appurtenances thereunto pertaining, for the term of two years from and after the first day of October, A. D. 1908, at the monthly rent of \$50.00 per month, payable monthly in advance on the first day of each and every month during the period of this lease." It is provided that the lessee may make any improvement or changes in the building, but that same is to be done at his expense and he is to permit no liens to be filed against the building, and that "all improvements, changes or alterations made by the lessee in said building or in said premises shall, at the expiration of this lease \* \* \* become and remain the property of said lessor and shall not be removed from said premises by the said lessee." It is further stipulated that "At the expiration of the terms of said lease \* \* \* the said lessee will quit and

surrender the said premises in as good state and condition as they now are or may be at any time placed in by the lessor or lessee, ordinary wear and tear by the element or fire excepted." Morin stated that he made no objection to signing the lease, "because," as he stated, "somebody else wanted the place, and so I had to get out or pay the \$50." On January 18, 1909, the G. Migliavacca Investment Company sold the lot, "with the appurtenances," to Migliavacca Realty Company, the defendant in this action. Thereafter Morin continued to pay rent under the lease at the rate of \$50 a month to the defendant until December 1, 1910, and it is to recover the amount paid in excess of \$15 a month during that period that this action is brought; the action being based upon the theory of an express agreement that \$15 monthly was paid for "ground rent" and \$35 monthly for the rent of the building.

Prior to the bringing of this action Morin brought suit against Bremer for the value of the building, alleging that Bremer had sold it to the Migliavacca Investment Company. Verdict was rendered in Morin's favor, but a judgment, notwithstanding the verdict, was sustained by this court upon the theory that, if the building belonged to Morin, Bremer could not and did not sell it, and that Morin had the right to remove the same during his occupancy of the premises. *Morin v. Bremer*, 61 Wash. 62, 111 Pac. 1058, 116 Pac. 1135. Thereafter, and prior to the bringing of this action, Morin brought two actions, one against the Migliavacca Investment Company, and the other against the Migliavacca Realty Company, for the value of the building, alleging a conversion thereof. The answer in each action was a denial generally of the allegations of the complaint, and the judgment recited the sustaining of a demurrer to the sufficiency of plaintiffs' evidence made at the close thereof. This is all that appears in the record to indicate the issues upon which those causes proceeded and were determined.

The findings of the court may, for convenience in discussion, be condensed and grouped as follows: (1) That Morin was the owner of the building; that the Migliavacca Investment Company was apprised of this fact before the purchase; that Bremer had refused to sell it to that company; that after obtaining a deed to the lot "with the appurtenances," the Investment Company exhibited the deed to Morin, claimed to have purchased the building, and told him that if he did not pay \$50 a month rent he would be ousted; and that the defendant, Migliavacca Realty Company, had notice and knowledge of Morin's claim, and was not a bona fide purchaser of the building. (2) The court also found that Morin, believing these representations, entered into and signed the lease; that the representations were false, and that but for the representations Morin would not have agreed to pay rent for the building;



that of the rent so paid the sum of \$785 was collected by the defendant for the use and occupation of the building, and was paid by Morin "in ignorance of his true rights and in reliance on the representations so made to him." Judgment was entered accordingly, and the defendant has appealed.

[1] The case is here for a trial *de novo*, and it is incumbent upon us to determine whether the evidence supports these findings. We are not bound by them as we would be by a verdict of a jury if supported by any evidence. The findings of the trial court upon conflicting evidence are entitled to great weight, but when we are convinced that they are not supported by a fair preponderance of the evidence it is our duty to disregard them. *Dougherty v. Soll*, 70 Wash. 407, 126 Pac. 924.

[2, 3] In pursuance of this rule we have made a painstaking examination of the evidence, and we are satisfied that the first group of facts found as above condensed is fairly sustained. As to the second group we are forced to a contrary conclusion. To sustain this action the respondent assumed the same burden of proof that would have rested upon Morin had the action been prosecuted by him. That a tenant is usually estopped to deny his landlord's title, regardless of the validity of that title, is law so familiar as to require no citation of authority. But this rule is subject to the well-recognized exception that where the tenant in possession is induced to accept another as his landlord, through the fraud or misrepresentation of such other, the estoppel to deny the landlord's title will not be effective. 18 Am. & Eng. Enc. of Law (2d Ed.) 416. It is upon this exception that the respondent is forced to rely. But the fraudulent misrepresentation to be available in this relation must be so established, and must be of such nature and made under such circumstances, as would make it available in avoiding a written contract in other relations. Where, as here, there exist no confidential or fiduciary relation, the misrepresentation must relate to a matter not equally within the knowledge of, or not equally open to inquiry by the party asserting the fraud. The representation must constitute the inducement to the lease. It must have been believed and relied upon by the party to whom it is made, and must have actually deceived him to his injury. These things must be established by a preponderance of the evidence in order to overcome Morin's estoppel to deny the investment company's title and right to make the lease growing out of his acceptance of the lease of October 1, 1908. *Smith, Law of Fraud*, § 260.

[4] The evidence signally fails to meet these requirements. There was no confidential relations existing between the parties. Morin knew that he owned the building, and knew that Migliavacca knew it. Morin testified that he had told Migliavacca so prior

to the purchase, and that Migliavacca said he so understood. Morin knew that the lease under which he was in possession when the Migliavacca Investment Company bought the land gave him the right to remove the building. He testified that such was also Bremer's agreement with him. He not only knew the fact, but knew his rights by reason of the fact. He knew that he owned the building, and that he had the right to remove it. Yet throughout the whole negotiations with Migliavacca he never once offered to remove the building or expressed any desire to remove it. On the contrary, he testified that he never at any time made any offer or took any step in that direction, and admitted that he had no place to which to remove it. There is no evidence that Migliavacca ever at any time, either before or at the time the lease of October 1, 1908, was signed, prohibited the removal of the building. The nearest approach to such an inference is found in Morin's statement, elicited by repeated objections of his counsel suggesting the answer, which was at most a mere conclusion that he (Morin) could not move the building, as Migliavacca told him he (Migliavacca) was the owner. In this same connection Morin testified that at the time he signed the lease he did not make any claim to ownership of the building. He also stated that at that time he made no objection to the terms of the lease, but had made objections before. What those objections were he did not say. When asked if it was not his motive when he signed the lease to raise no question as to his ownership of the building, but to bring suit against Bremer and get something for the building without removing it, he evasively answered: "At the time I signed the lease there was not a word said about anything else." Though he claimed to have signed the lease in reliance upon Migliavacca's representation that the company had bought the building, he also said that he signed it upon advice of his then attorney, Crawford. Though Crawford testified that Morin was mistaken in this, it certainly negatives the idea of such reliance. Moreover, he had no right to so rely in the face of his own knowledge that he owned the building and was in possession of it. Giving full credence to all of Morin's testimony on the subject, Migliavacca's representations when he exhibited the deed to Morin and claimed the building because the deed contained no reservations, amounted only to a misrepresentation as to the legal effect of the deed. It was a mere expression of a legal conclusion on facts known to both parties. In short it was a mere expression of opinion. This does not constitute fraud in the absence of any relation of confidence between the parties. *Smith, Law of Fraud*, § 14.

So far as the record shows, Morin made no inquiry of Bremer, the other party to the sale. It seems to us that Morin's own testi-



mony is hardly capable of any other construction than that he knew he had the right to remove the building so long as he remained in possession under the lease from Bremer, and on the expiration of that lease and the termination of the continued tenancy from month to month, yet rather than remove the building, and thus lose the location, he deliberately determined to forego that right and pay a rental of \$50 a month. It is most difficult to see by what show of right he could leave his building upon the appellant's land and claim its rental value. It was certainly not incumbent on the appellant to remove the building in order to avoid such result.

[5] Nor does the fact, if it be a fact, that Morin was induced to accept the lease under a threat of eviction constitute either duress or fraud so as to relieve him from the estoppel to dispute the landlord's title or right to make the lease. *School District v. Long* (Pa.) 10 Atl. 769; *Hockenbury v. Snyder*, 2 Watts & S. (Pa.) 240; *Andrew v. Carille*, 4 Colo. App. 336, 36 Pac. 66; *Williams v. Wait*, 2 S. D. 210, 49 N. W. 209, 39 Am. St. Rep. 768.

[6] Much argument is devoted to the effect of the decision in *Morin v. Bremer*, supra, as *res judicata* on the one hand, and to the dismissal of the actions for conversion brought by Morin against the two *Migliavacca* companies as having the same effect on the other hand. In *Morin v. Bremer* it was merely decided that Morin as the owner of the building had the right to remove it, and that it could not be sold by Bremer so long as Morin was in possession under the lease from Bremer, or its extension from month to month. It is *res judicata* as to nothing more. The two actions for conversion were dismissed for insufficiency of proof. What the proof was does not appear. Their dismissal can hardly be held conclusive of anything except that the appellant had not converted the building. These decisions have no bearing on the present action other than as tending to show that Morin persistently mistook his remedy in failing to remove the building.

[7] We find no merit in the suggestion that the lease was made under such a mistake of law as to relieve against the estoppel to deny the right of the *Migliavacca Investment Company* to make it. The remedy by removal of the building was obvious, being pointed out by the very lease under which Morin claimed and by the agreement with Bremer under which Morin remained in possession up to the time of the sale. His mistake in supposing that he could, with full knowledge of his ownership and possession, silently acquiesce in another's assumed ownership of the building, lease it from the other by a lease acknowledging the other's title, pay the rent for the full term, and then recover the rental paid, after having remained silent

all the while, was an inexcusable mistake. Though it has been sometimes held that equity will relieve against a mistake of law, it is only where the principle of law is confessedly doubtful, and when the party seeking relief is wholly innocent of blame. *MacKay v. Smith*, 27 Wash. 442, 67 Pac. 982. We have been cited to no authority, and a diligent search convinces us there is none, which holds that when one, knowing the facts and knowing his rights, waives his obvious remedy by a solemnly executed lease, under the mistaken supposition that he can invoke another remedy, will be relieved from the obligations and estoppels of his lease by reason of such mistake.

[8] The judgment is erroneous in any event. The action was for the return of an alleged agreed rental of \$35 a month paid for the building. There was no sufficient evidence of such an agreement. The unambiguous written lease made no such provision. While Morin testified that of the \$50 monthly rent reserved for the premises \$15 was ground rent and \$35 for the rent of the building, *Migliavacca* denied this, and Morin himself contradicted it when he said that when the lease was made nothing was said about the building. Moreover, the evidence showed that when the lease was made the lot was worth \$3,500, and the building was worth only \$900. That is the amount Morin claimed as the value of the building in each of the actions for conversion, and also in his action against Bremer. It is unbelievable that either Morin or *Migliavacca*, had they intended a segregation, would have thought of so inequitable a division. There was no evidence of the actual rental value of the building aside from the lot. Even if the fraud were conceded, the evidence would not sustain the judgment.

It is impossible to sustain this judgment upon any sound theory.

The judgment is reversed, and the cause is remanded, with direction to dismiss.

FULLERTON, MAIN, and MORRIS, JJ., concur.

(74 Wash. 408)

LEE v. HILLMAN et al.

(Supreme Court of Washington. July 22, 1913.)

USURY (§ 102\*)—REMEDIES OF BORROWER—RECOVERY OF USURY PAID.

The remedy given the borrower under a contract for the payment of usurious interest by Rem. & Bal. Code, § 6255, which provides that in an action upon a contract which reserves usurious interest the plaintiff may recover only the principal, less the interest accruing thereon at the rate contracted for, and, if interest has been paid, only the amount of the principal, less twice the amount of the interest paid, and the amount of all accrued and unpaid interest, is not exclusive, even though it would be lawful to contract for any rate of interest in the absence of a usury stat-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ute, and the borrower who has paid interest in excess of the rate fixed by Rem. & Bal. Code, § 6251, may maintain an action in the nature of an assumpsit for money had and received, to recover at least the excess of interest paid above the lawful rate.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 197, 241, 242, 244-258; Dec. Dig. § 102.\*]

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by D. H. Lee against Clarence D. Hillman and others. Judgment for the defendants, and plaintiff appeals. Reversed, with directions.

J. E. McGrew and C. A. Norton, both of Seattle, for appellant, L. E. Kirkpatrick and Raymond G. Wright, both of Seattle, for respondents.

**PARKER, J.** The plaintiff seeks recovery from the defendants of the value of certain property which he claims to have surrendered to them in payment of usurious interest upon loans made by them to him. The defendants demurred to the plaintiff's complaint upon the sole ground that it failed to state a cause of action. The demurrer was sustained by the superior court, and, the plaintiff electing not to plead further, judgment of dismissal was entered accordingly, from which he has appealed.

The argument of counsel upon both sides of the cause proceeds upon the assumption that the only question here involved is: Does the law recognize the right of one who has paid usurious interest to maintain a civil action, as plaintiff, to recover any portion of the amount so paid, or does it withhold from him all remedy except that which our statute gives by way of defense in an action brought to recover the principal upon which he has paid such usurious interest? The learned trial court sustained the demurrer to appellant's complaint evidently upon the theory that, our usury statute having provided a remedy to be interposed by way of defense on the part of the debtor, such remedy is exclusive. The sections of Rem. & Bal. Code relied upon by counsel for respondents as sustaining this view provide as follows:

"Sec. 6251. Any rate of interest not exceeding twelve (12) per centum per annum agreed to in writing by the parties to the contract, shall be legal, and no person shall directly or indirectly take or receive in money, goods or thing in action, or in any other way, any greater interest, sum or value for the loan or forbearance of any money, goods or thing in action than twelve (12) per centum per annum."

"Sec. 6255. If a greater rate of interest than is hereinbefore allowed shall be contracted for or received or reserved, the contract shall not, therefore, be void; but if in any action on such contract proof be made that greater rate of interest has been direct-

ly or indirectly contracted for or taken or reserved, the plaintiff shall only recover the principal, less the amount of interest accruing thereon at the rate contracted for, and the defendant shall recover costs; and if interest shall have been paid, judgment shall be for the principal less twice the amount of the interest paid, and less the amount of all accrued and unpaid interest."

The decisions of the courts are, at least seemingly, in serious conflict as to the right of one who has paid usurious interest to recover the same by civil action as plaintiff, especially under usury statutes which prescribe a remedy by way of defense to an action prosecuted against the debtor to enforce collection of the principal. This seeming conflict, we think, however, will to a considerable extent be found to result from the varying language of the statutes of the several states, when the decisions are critically read. Our statute contains no express provision relating to the right of the payer of usurious interest to maintain such an action, and it is worthy of note that section 6255 gives to such payer the right, by way of defense in the nature of set-off against the principal, not only to have deduction made from the principal of the amount of interest so paid, but also an additional amount equal to the interest so paid, as a penalty. Thus the statute gives a right and a remedy which is farther reaching in effect than the payer would have under any circumstances in the absence of such provision, for whatever right or remedy under the common law or in equity he has would, of course, not go to the extent of enabling him to recover more than the amount of usurious interest so paid by him; that is, the right to the penalty awarded to him by this section must, of necessity, find its support in the statute alone. There is but little difficulty in seeing that the prescribed remedy by which the payer is to obtain the benefit of this penalty should be held exclusive, for that is something which is not given to him as a matter of common right, but because the legislative power conceives it to be a wise public policy, looking to the discouragement of usurious interest exactions, while it is manifest that his right to recover the actual amount of usurious interest paid by him, which by the express terms of section 6251 above quoted would be unlawfully taken from him, may be rested upon that common right possessed by the citizen under the common law and in equity to have restored to him that which has been wrongfully taken from him. In the text of 22 Encyc. of Pl. & Pr. at page 482, it is said: "By the weight of authority the common-law remedy of assumpsit to recover back payments of usury is not abrogated by statutes providing other remedies for the recovery of such payments or for the recovery of penalties and forfeitures; but in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



some of the states there are decisions to the contrary."

In the case of *Baum v. Thoms*, 150 Ind. 378, at pages 381, 382, 387, 388, 50 N. E. 357, at pages 358-360 (65 Am. St. Rep. 368), in an exhaustive review of this question under a statute not unlike ours, the court said: "It is next insisted that while usurious interest voluntarily paid may, under section 7046, Burns' R. S. 1894 (5201, Horner's R. S. 1897), be recouped by the debtor in an action on the contract affected by such usury, the same cannot be recovered back in a direct action, and that therefore the finding and judgment against appellants for usurious interest paid by appellee was contrary to law. Whatever the rule may be in other states it has been uniformly held in this jurisdiction that usurious interest could at common law be recovered back in an action brought for that purpose. *Lacy v. Brown*, 67 Ind. 478, and cases cited; *Musselman v. McElhenny*, 23 Ind. 4, 6, 85 Am. Dec. 445; *Wood v. Kennedy*, 19 Ind. 68; *Smead v. Green*, 5 Ind. 308, 309; *Berry v. Makepeace*, 3 Ind. 154; *State Bank v. Ensminger*, 7 Blackf. 105, 107, and cases cited. See note to *Crawford v. Harvey*, 1 Blackf. (2d Ed.) 382. See, also, *Palmer v. Lord*, 6 Johns. Ch. [N. Y.] 95, 100-106; *Wheaton v. Hibbard*, 20 Johns. [N. Y.] 290, 292, 293, 11 Am. Dec. 284; *Nichols v. Bellows*, 22 Vt. 581, 54 Am. Dec. 85, and note; *Bexgr, etc., Association v. Robinson*, 78 Tex. 163 [14 S. W. 227, 9 L. R. A. 292] 22 Am. St. Rep. 36, and note, page 41; *Zeigler v. Scott*, 10 Ga. 389, 54 Am. Dec. 395, and note, pages 400-402; 27 Am. and Eng. Ency. of Law, 959, and cases cited in notes 3 and 4. The rule is that the borrower who has paid more than the legal rate of interest is not confined to the remedy given by statute, but may maintain assumpsit at common law to recover back the excess of interest paid, on paying or offering to pay the money lent with lawful interest. \* \* \* It is true that section 4 of the act of 1879, being section 7046, Burns' R. S. 1894 (5201, Horner's R. S. 1897), provides that 'When a greater rate of interest than is hereby allowed (eight per cent.) shall be contracted for, the contract shall be void as to the usurious interest contracted for; and in an action on such contract, if it appear that interest at a higher rate than eight per cent. has been directly or indirectly contracted for, the excess of interest over six per cent. shall be deemed usurious and illegal, and in an action on a contract affected by such usury, the excess over the legal interest may be recouped by the debtor, whenever it has been reserved or paid before the bringing of the suit.' But, as we have shown, the borrower is not confined to the remedy given by statute, but may resort to the remedy given by the common law. *State Bank v. Ensminger*, supra; *Smead v. Green*, supra; *Lacy v. Brown*, supra; *Palmer v. Lord*, supra;

*Wheaton v. Hibbard*, supra. The payment of usurious interest is not a voluntary payment in such sense as to entitle the receiver to retain the amount paid above legal interest, but such payment is regarded as under the constraint of a formal, though illegal, contract, obtained by taking advantage of the necessities of the borrower, and therefore excepted from the ordinary rule that one voluntarily paying money on an illegal claim cannot maintain an action to recover such payment. *Wheaton v. Hibbard*, supra; *Schroeppel v. Corning*, 5 Denio [N. Y.] 286; *Peterborough Savings Bank v. Hodgdon*, 62 N. H. 300; *Willie v. Green*, 2 N. H. 333; *Caughman v. Drafts*, 1 Rich. Eq. [S. C.] 414; *Fay v. Lovejoy*, 20 Wis. 403; *Wood v. Lake*, 13 Wis. 84; *First National Bank of Milwaukee v. Plankinton*, 27 Wis. 177, 9 Am. Rep. 453; *Grow v. Albee*, 19 Vt. 540; *Williams v. Wilder*, 37 Vt. 613; *Scott v. Leary*, 34 Md. 389; *Philanthropic Building Ass'n v. McKnight*, 35 Pa. 470; *Thomas v. Shoemaker*, 6 Watts & S. (Pa.) 179-183; note to *Zeigler v. Scott*, 54 Am. Dec. 400-402; note to *Bexar, etc., Association v. Robinson*, 22 Am. St. Rep. 41; note to *Davis v. Garr*, 55 Am. Dec. 398-400; 2 Ency. Plead. and Prac. pp. 1019, 1020, and note on usury. It follows, therefore, that in the absence of a statute expressly prohibiting it, usurious interest, which has been paid by a debtor may be recovered in a direct action, or in any action brought by the person receiving such usurious interest, on a contract express or implied against such debtor. Since the repeal of the amending act of 1865, supra, by the act of 1879, supra, there has been no statute in this state prohibiting the recovery of usurious interest paid by a debtor." The statutory remedy there available was similar to ours, though it did not provide for the deduction from the principal of any sum in addition to the usurious interest paid, as a penalty.

In the early case of *Wood v. Lake*, 13 Wis. 84, 95, decided by the Supreme Court of that state in 1860, that learned court made pertinent observations along similar lines, as follows: "There is another question raised upon this portion of the answer, which was argued at the bar, and which we are called upon to determine. By the law as it stood when the note and mortgage upon which this suit is brought were executed, the taking or agreeing to take illegal interest did not render the contract void. It was good to secure the repayment of the principal sum loaned, but no interest whatever could be recovered upon it. Chapter 55, Laws of 1856. The answer alleges the payment by the defendant to the plaintiff, of the sum of \$60, as interest upon the sum of money mentioned in and secured by the note and mortgage, over and above the highest rate fixed by law; and, in addition to setting up such usurious agreement and the payment of the extra interest in pursuance thereof, as a general defense to



the action, or for the purpose of preventing a recovery of anything more than the sum of money actually loaned, the defendant insists that the \$60 shall be allowed to him and deducted from the amount of the principal sum loaned, by way of set-off or counterclaim, and that the plaintiff is only entitled to a judgment for the balance which shall remain after such deduction. After a full examination of the authorities on the subject, we are of the opinion that the position of the defendant's counsel is correct, and that if final judgment should be rendered upon the demurrer, or if upon a trial of the merits it should be found that the allegations of the answer are true in this respect, the deduction should be made, and that the plaintiff's measure of damages would be the residue of the principal sum loaned, after the money thus paid has been taken out. A remarkable unanimity of opinion upon this question seems to have prevailed among the courts of Great Britain and those of the several states of the Union where laws against usury, properly so called, have existed. It has been universally held, where statutes forbid the taking of excessive interest, and punish a violation of their provisions by the infliction of fines, penalties, or forfeitures upon the person who takes it, that the person who pays the same may, independently of the remedies afforded by the statutes, maintain an action for money had and received, as at common law, to recover back the money so paid. In such cases, both parties are not understood to be in *pari delicto*, so as to preclude a recovery by either. Upon this subject, Mr. Comyn, in his *Law of Usury*, page 211, says: 'And with regard to parties becoming participes criminis, the following distinction is laid down, viz.: Between the prohibition of statutes made to protect the weak or necessitous from being overreached or oppressed, and the prohibitions of statutes enacted upon general reasons of policy and public expediency; in the latter case, all parties are equally criminal; in the former, the oppressor is alone with the pale of the law.' The penalties of the law are all aimed at the lender and none at the borrower, and it appears to be clearly within the intent and meaning of the Legislature, if not their words, that he shall not be permitted to retain or profit by money or property thus unlawfully acquired. The provisions of the law of this state (section 3, c. 172, Laws of 1851), by which every person paying a greater sum for the loan or forbearance of money than that allowed by law might, if his action was brought within one year after such payment, recover back treble the sum so paid, confirm this view. It shows that the Legislature did not intend that the receiver should retain the money thus obtained, and that they did not consider both parties equally at fault. Otherwise they would not have permitted the borrower to recover back three times the amount, and thus speculate out of

the attempted extortions of the lender. But if the borrower chooses, by not bringing his action within one year, to waive his right to a treble recovery, he may do so, and still retain the right to maintain an action for money had and received, to recover back the excess actually paid, at any time within the period prescribed by the statutes of limitations. For the remedy given by the statute is cumulative and not exclusive, as has frequently been decided in other states where similar statutory remedies have been given." In that case it is true the interest was sought to be recovered by way of set-off or counterclaim. It, notwithstanding, involved in part the recovery of interest actually paid, and the court apparently viewed it in that light. The following authorities also lend support to these views, having reference to remedies in addition to the prescribed statutory remedy as well as the right to recover in the absence of any prescribed statutory remedy. *Porter v. Mount*, 41 Barb. (N. Y.) 501; *Thredgill v. Timberlake*, 2 Head (39 Tenn.) 395; *Vandergrif v. Swinney*, 158 Mo. 527, 59 S. W. 71, 81 Am. St. Rep. 325.

This view of the right to recover is opposed by other decisions, of which probably that of *Blain v. Willson*, 32 Neb. 302, 49 N. W. 224, may be regarded as the leading case. We are of the opinion, however, that the better rule is that adhered to by the authorities we have noticed. In 39 Cyc. 1030, numerous authorities are collected bearing upon the question.

Counsel for respondent remind us that usury is condemned by statute law only, and that, in the absence of statute making unlawful the charging and receiving of interest above a given rate, it would be lawful to contract for any rate. It may be conceded that this is a correct view of the law as at present existing in this country. 39 Cyc. 890. Counsel for respondent argue that it must necessarily follow that there can be no such thing as a common-law right to recover usurious interest paid by the debtor. It may be conceded that there is a sense in which there is no such right in the absence of statute, since whatever right the debtor has must necessarily rest primarily upon the statute which makes the exaction of such payment from him unlawful. We think, however, that it does not follow that the debtor who has been thus unlawfully deprived of money or property may not recover such money or property by a common-law remedy, and that of course under our system means by the ordinary civil action which we have substituted for the common-law remedy. While the right here involved rests primarily upon our usury statute, and would not exist in the absence of such statute, we think an ordinary civil action, that being our substitute for the common-law remedy, furnishes a remedy available to the debtor to recover the money or property unlawfully taken from him in payment of usurious interest. We



are unable to see that a debtor having money or property thus unlawfully taken from him is in any different situation, so far as his right to have the same restored is concerned, than as if it were taken from him in some other unlawful manner. Nor can we see that his right to restoration is any different because the taking is made unlawful by statute instead of by the common law. In the text of 2 Ency. Pl. & Pr. 1018, under the head of assumpsit, it is said: "The count for money had and received is sustainable where money has been paid by mistake, or upon a consideration which happens to fail, or for money obtained through imposition, extortion, or oppression, or an undue advantage taken of the plaintiff's situation, contrary to the laws made for the protection of persons under those circumstances." We are of the opinion that, at least in so far as money or property is exacted in payment of interest above the highest rate permitted by our usury statute, the same may be recovered by the payer thereof in a civil action prosecuted by him as plaintiff. It follows that appellant's complaint states a good cause of action as against the general demurrer. The question of appellant's right to recover in this action more than the excess so paid by him above the highest rate allowed by our usury statute is not presented in the briefs of counsel, so we leave that question for future examination.

The judgment is reversed, with directions to overrule respondent's demurrer to the complaint, and for further proceedings not inconsistent with the views herein expressed.

MORRIS, CHADWICK, GOSE, and MOUNT, JJ., concur.

(74 Wash. 351)

RUUTH et ux. v. MORSE HARDWARE CO.  
(Supreme Court of Washington. July 16, 1913.)

1. HUSBAND AND WIFE (§ 268\*)—COMMUNITY DEBT.

Where a husband as one of a copartnership incurred a debt, such debt was a community debt.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 953-967; Dec. Dig. § 268.\*]

2. FRAUDULENT CONVEYANCES (§ 95\*)—CONVEYANCE BY HUSBAND TO WIFE.

Where the purchaser of land under a time contract, after his firm had incurred a debt, and only two days before entry of judgment against him thereon, and in consideration of \$1, quitclaimed the land to his wife, the deed was fraudulent as against creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 243-288; Dec. Dig. § 95.\*]

3. FRAUDULENT CONVEYANCES (§ 192\*)—RIGHTS OF PURCHASER—BONA FIDE PURCHASER.

Where plaintiff, with others, contracted to buy certain lots, paying a part of the purchase price, and agreeing to pay the remainder in in-

stallments by a contract providing that it should not be sold or transferred by the vendees, and one of the vendees thereafter contracted a community debt and quitclaimed to his wife without valuable consideration, in constructive fraud of the creditor, and after judgment in favor of the creditor, such purchaser and his wife conveyed the lots to plaintiff by warranty deed, which was duly recorded, plaintiff was not an innocent purchaser, but took the property with notice of the judgment lien.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 589, 602-604; Dec. Dig. § 192.\*]

4. SUBROGATION (§ 23\*)—RIGHT TO REMEDY IN GENERAL.

The right of subrogation applies where a party who has an interest in the property, and who does not stand as a mere volunteer, pays a debt owing in whole or in part by another, to protect his own rights, or to save his own property; and the remedy is not limited to sureties and quasi sureties, but is freely applied by courts of equity in all cases where good conscience and equity dictate that a debt, paid by one under any sort of legal coercion, ought to be paid by another.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 60-66; Dec. Dig. § 23.\*]

5. SUBROGATION (§ 23\*)—PAYMENT TO PROTECT INTEREST IN PROPERTY.

One of the purchasers of land, under a joint contract with others, who was obliged to pay to the vendor a part of the purchase price for the benefit of another purchaser in order to protect his own interest in the property and as a prerequisite to the acquisition of title, was in equity entitled to subrogation to the rights of the vendor holding the legal title as security for the payment of the purchase price, to the extent of his payment to such vendor, since he was in no sense a volunteer.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 60-66; Dec. Dig. § 23.\*]

6. APPEAL AND ERROR (§ 896\*)—TRIAL DE NOVO—APPEAL.

Where the plaintiff, in an action to quiet title to land claimed by defendant as a purchaser at an execution sale, by his evidence at the trial showed that he was entitled to subrogation to the vendor's rights against a joint purchaser, but the court did not treat the bill as amended to meet the issues made at the trial, or direct an amendment to conform to the case as it then stood, the Supreme Court on trial de novo, with all the facts before it, would treat the amendment as made, and determine plaintiff's right to subrogation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3655-3658; Dec. Dig. § 896.\*]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Bill to quiet title by John Ruuth and wife against the Morse Hardware Company. Judgment for defendant, and plaintiffs appeal. Modified and affirmed.

Tucker & Hyland, of Seattle, for appellants. Wm. Parmerlee and Pope Higgins, both of Seattle, for respondent.

GOSE, J. This is a bill in equity to quiet the title to real estate situated in the city of Seattle. The defendants pleaded title acquired at a sale, upon an execution issued



upon an ordinary money judgment. A decree was entered in favor of the defendant, from which the plaintiffs appeal. The stipulated facts are as follows:

[1, 2] On the 1st day of October, 1906, the Grand Boulevard Improvement Company, a corporation, being the owner of lots 19 to 25, inclusive, in block 3 Buena Vista addition to the city of Seattle, entered into a written contract, whereby it agreed to sell these lots to the appellant John Ruuth and F. W. Ladd and George H. Gerrish, in consideration of the payment by them of \$4,000. Ruuth, Ladd and Gerrish paid \$800 at the time the contract was made, and agreed to pay the remainder in installments of \$800 each upon fixed dates. Time was expressly made of the essence of the contract. The contract provided that it should not be sold, assigned, or transferred by the vendees. Final payment was made on the 2d day of May, 1910, and the vendor then conveyed the lots to the vendees, each of whom took an undivided one-third interest in the property. On the 2d day of December, 1908, F. W. Ladd, in consideration of \$1, gave a quitclaim deed to the lots to his wife, Idella Ladd, which deed was filed for record on the following day. On the 3d day of May, 1910, F. W. Ladd and his wife, Idella, conveyed by warranty deed lots 19 and 20 of the lots first described to the appellant, John Ruuth, which deed was recorded on the 27th day of May. On the 30th day of July, 1908, F. W. Ladd and one Hall, as copartners, contracted a debt with the respondent. On the 7th day of November following the respondent brought suit against F. W. Ladd upon that account. A judgment was entered therein on the 4th day of December, 1908, in favor of the respondent and against F. W. Ladd. On the 10th day of May, 1911, an execution was issued upon the judgment, and the lots in controversy were levied upon, and on the 24th day of June following the lots were sold to the respondent at the execution sale. On the 11th day of July, 1912, the sheriff regularly executed a deed to the purchaser. During all of these times F. W. Ladd and Idella Ladd were husband and wife.

It will be remembered that the contract of purchase was made in October, 1906; that Ladd, in consideration of \$1, quitclaimed to his wife on the 2d day of December, 1908; that the deed was filed for record the next day; that the judgment was entered two days later; that final payment was made on the contract, and the property was conveyed to the vendees on the 2d day of May, 1910; and that on the following day Ladd and wife attempted to convey the lots in controversy to the appellant John Ruuth by a deed of warranty.

The appellant John Ruuth testified that he purchased from the Ladds without an abstract of title; that he did not have the title examined; that he had no actual notice of

the judgment; that he had made all the payments on the contract; that F. W. Ladd had repaid him in each instance except as to the final payment; that he made the final payment for Ladd upon the lots; that in consideration of \$433.33 of the amount then advanced by him, the Ladds conveyed to him their undivided one-third of the two lots in controversy; and that they gave to him their joint note for the excess. Upon these facts it is obvious that the debt of Hall and Ladd was a community debt of the Ladds, and that the conveyance of Mr. Ladd to his wife was made without a valuable consideration after the debt had been contracted. The conveyance was constructively fraudulent as against the respondent.

[3] The appellants contend, however, that they acquired the property without either actual or constructive notice of the judgment lien, and that they are innocent purchasers. In support of this view they cite *Clerf v. Montgomery*, 15 Wash. 483, 46 Pac. 1028, 48 Pac. 733, *Anders v. Bouska*, 61 Wash. 395, 112 Pac. 523, and *Sawtelle v. Weymount*, 14 Wash. 21, 43 Pac. 1101. In the *Clerf* Case the husband conveyed the legal title to the premises to his wife. Thereafter *Clerf*, whose claim antedated the deed to the wife, attached the property. Subsequent to the filing of the writ of attachment in the office of the county auditor the wife sold and conveyed the property for a valuable consideration. Five days later *Clerf* obtained a judgment in the attachment suit against the husband. The trial court found that the conveyance to the wife was made with intent to defraud the creditors of the husband. The purpose of the suit was to set aside the deed to the wife as fraudulent. It was held that "the record title" was in the wife, and that the writ of attachment sued out against the husband only did not give constructive notice to the purchaser, that he had no actual notice, and that he was a bona fide purchaser. In the *Sawtelle* Case the same rule was applied. There the husband had conveyed the legal title to the wife before the judgment had been entered against him, and she had conveyed it to the purchasers for value after the entry of the judgment. The *Anders* Case announces a like principle. It will be observed that in each of these cases the wife held the record legal title before there was any attempt upon the part of the creditor to obtain an involuntary lien against the property, and that in each instance the suit was against the husband only.

The principle announced in these cases is not controlling for two reasons: (a) The appellant husband dealt exclusively with F. W. Ladd, knew his relation to the original contract for the purchase of the property, and advanced the consideration for the final payment at his instance; and (b) when Ladd attempted to convey to his wife, he had no title. When the title was later ac-



quired it met the judgment lien, and was subject to it.

[4, 5] The appellants next contend, having paid to the common grantor \$433.33 of the purchase price for the benefit of the Ladds upon a joint contract, where there was no severalty of interest, the payment being necessary for the protection of their own interest in the property, and a prerequisite to the acquisition of title, that in equity and good conscience they should be subrogated to the rights of the vendor, to the extent of such payment, and legal interest from the date of the payment, and that it should be decreed a lien upon the respondent's undivided one-third interest in the property. As sustaining authority they rely upon *Murray v. O'Brien*, 56 Wash. 361, 105 Pac. 840, 28 L. R. A. (N. S.) 998, *Cole v. Malcolm*, 66 N. Y. 363, and *Arnold v. Green*, 116 N. Y. 566, 23 N. E. 1. In the *Murray* Case, in discussing the doctrine of subrogation, we said: "The right of subrogation under the better rule applies in cases where a party who has an interest in the property, and who does not stand as a mere volunteer, pays a debt owing in whole or in part by another, to protect his own rights, or to save his own property. The remedy is no longer limited to sureties and quasi sureties, but is freely applied by courts of equity in all cases where good conscience and equity dictate that a debt paid by one under any sort of legal coercion ought to be paid by another."

In *Cole v. Malcolm* the principle of subrogation is thus stated: "It is generally and most frequently applied in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is only secondarily liable for the debt; but it is also applicable to cases where a party is compelled to pay the debt of a third person to protect his own rights, or to save his own property." *Arnold v. Green* announces the broad principle that one who pays the debt of another to avoid losing his property is not a stranger or volunteer, but that he may be protected by the equitable doctrine of subrogation. In the case at bar the parties were joint purchasers. Each was liable for the payment of the full purchase price. Payments had been made upon the property before the final payment, and time was made the essence of the contract. Ladd could not meet his last payment, and the appellant husband, at his request, advanced the money for him direct to the vendor. The principles of equity will not permit the respondent to reap the benefit of this payment. The vendor held the legal title as security for the payment of the purchase price, and the appellant ought to be subrogated to that right. They were in no sense volunteers, but on the contrary, they were compelled to advance the money to protect their interest in the property.

The respondent, among other cases, has

cited *Asher v. Sekofsky*, 10 Wash. 380, 38 Pac. 1133, *Morris v. White*, 36 N. J. Eq. 324, *Downer v. Wilson*, 33 Vt. 1, and *Banta v. Garmo*, 1 Sandf. Ch. (N. Y.) 383. It was held in the *Asher* Case that "one who merely lends money to pay purchase money is not subrogated to the vendor's lien." The distinction between the payment of a debt by a volunteer and by one who makes a payment for another to protect his own property interest is recognized in *Morris v. White*, where the court said: "The doctrine of subrogation is not applied to the mere stranger or volunteer who has paid the debt of another, without any assignment or agreement for subrogation, without any legal obligation to make the payment, and without being compelled to do so for the preservation of any rights or property of his own." *Downer v. Wilson* and *Banta v. Garmo* recognize this distinction. The respondent has cited no authority where, at the time the money was advanced to pay an incumbrance, the party advancing it had an interest in the incumbered property to protect.

[6] The appellants filed an amended reply, setting forth the advancement of Ladd's portion of the last payment to the common grantor to complete the purchase. The prayer was either for judgment as prayed for in the complaint, or for subrogation to the extent of \$433.33. The testimony was all admitted without objection, after the following statement of counsel for the respondent: "Mr. Parmerlee: It has been agreed by counsel that the answer might be amended in a couple of respects, and that it be denied by the plaintiffs; and the plaintiffs also desire to amend their reply by adding a part to it. There will be no objections to that as to time, but there will be an argument as to the sufficiency of it at the close of the case." The respondent contends that the matter set forth in the amended reply is a departure from the cause of action pleaded in the complaint, and that the scope of the complaint may not be enlarged by the reply. This may be conceded, but the argument does not meet the situation. The appellants were privileged to plead all the facts in their bill, and to pray for general equitable relief. This would have entitled them to subrogation. When the evidence had been submitted without objection, the court should have treated the bill as amended to meet the issues as actually made in the trial, or should have directed an amendment of the bill to conform to the case as it then stood. Instead of doing this, the court entered a decree quieting title in the respondent in harmony with the prayer in its answer, and provided in the decree that the question of the right of the appellants to subrogation was not adjudicated "for the reason that said question of subrogation could not be considered by the court in the trial of the case, on account of its not having been properly pleaded." There is no



need of further litigation to determine the appellants' right to subrogation. The facts are before us for a trial de novo, and they are either admitted or undisputed.

The case will be remanded, with directions to modify the decree so as to give the appellants a lien upon the property described in the complaint for \$433.33, with legal interest from May 2, 1910, the date it was paid. The appellants will recover their costs.

CHADWICK, MOUNT, and PARKER, JJ., concur.

(74 Wash. 359)

WOODS v. McIVOR et ux.

(Supreme Court of Washington. July 16, 1913.)

SALES (§ 473\*)—RECORDING CONDITIONAL SALE.

Where a conditional bill of sale, under which the seller held an automobile when he sold it to plaintiff, was never recorded, plaintiff acquired good title under the statute, as against the person from whom his vendor purchased.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1377-1390; Dec. Dig. § 473.\*]

Department 1. Appeal from Superior Court, Spokane County; John B. Yakey, Judge.

Action by Alice Woods against Norman D. McIvor and wife. From a judgment for defendants, plaintiff appeals. Affirmed.

Denton M. Crow, of Spokane, for appellant. Barnes & Dillard, of Spokane, for respondents.

CHADWICK, J. On or about the 27th day of May, 1912, plaintiff purchased of the defendant a certain automobile. The court below found upon the conflicting evidence that the price agreed to be paid was \$1,250 of which \$750 was paid down. The car was used by plaintiff's son; it having been bought, as plaintiff says, for his use. About the 10th of August following the son determined to leave the city of Spokane and negotiations tending to a return of the car were opened up between plaintiff and the defendant. Defendant was uncertain as to whether he would repurchase the car until after he had made some examination of its gears and inner workings. On the 2d day of September, 1912, the car was stolen, and has not since been recovered. Plaintiff brought this action to recover the amount paid, and \$109, paid out for repairs and upkeep. She sets up a breach of warranty in that the car did not meet the representations made by the defendant as to its quality, and also claims a right to rescind the contract on the ground that, at the time the car was purchased, it was held by the defendant under a conditional bill of sale; the title being in a third party.

There is some discussion of the pleadings

and remedies sought by plaintiff, but we deem it unnecessary to enter upon a technical discussion of these questions, for the reason that plaintiff's proof is entirely insufficient to warrant a judgment in her favor on account of a breach of warranty. She testified that the car was in proper condition at the time she purchased, as did also her son, and she further testified that, so far as she knew, the car was not materially out of repair at the time it was returned to the defendant.

Neither can the plaintiff rescind the contract. The testimony shows that the conditional bill of sale had never been recorded, and her purchase from the defendant would have been protected under the statute. *Worley v. Metropolitan Motor Car Co.*, 130 Pac. 107; *American Multigraph Sales Co. v. Jones*, 58 Wash. 619, 109 Pac. 108.

Finding no error, and being satisfied that the evidence sustains the findings of the court, the judgment is affirmed.

GOSE, MOUNT, and PARKER, JJ., concur.

(74 Wash. 342)

STATE v. CRAWFORD et al.

(Supreme Court of Washington. July 8, 1913.)

CARRIERS (§ 2\*)—CONSTITUTIONAL LAW (§ 247\*)—EQUAL PROTECTION OF LAWS—CRIMINAL PROSECUTION.

Public Service Commission Law (Laws 1911, c. 117) § 25, prohibits a street car company from charging more than five cents for one continuous ride within the corporate limits of any city or town, and section 95 of the act provides that any officer, agent, or employee who violates the act shall be guilty of a gross misdemeanor. Rem. & Bal. Code, § 2267, provides that one guilty of a gross misdemeanor shall be imprisoned in the county jail not to exceed one year, or fined not to exceed \$1,000, or both. Held, that the penalty imposed was so excessive as to practically prohibit making a test of the law, even though there is no minimum penalty fixed, and the statute therefore denies the equal protection of the laws to the street car company.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 4, 5; Dec. Dig. § 2.\* Constitutional Law, Cent. Dig. § 703; Dec. Dig. § 247.\*]

Department 1. Appeal from Superior Court, King County; J. T. Ronald and John F. Main, Judges.

W. R. Crawford and another were convicted of a violation of the public service commission law in the county court, and upon an appeal to the superior court, a demurrer to the complaint was sustained. From the judgment of the superior court, the State appeals. Affirmed.

W. V. Tanner and Stephen V. Carey, both of Olympia, and John F. Murphy and S. H. Steele, both of Seattle, for the State. Scott Calhoun, of Seattle, for respondents.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes



GOSE, J. Section 25 of the public service commission law (Laws 1911, p. 558) provides: "No street railroad company shall charge, demand, or collect more than five cents for one continuous ride within the corporate limits of any city or town. \* \* \*". Section 95 of the act is as follows: "Every officer, agent or employé of any public service company, who shall violate or fail to comply with, or who procures, aids or abets any violation by any public service company of any provision of this act, or who shall fail to obey, observe or comply with any order of the commission, or any provision of any order of the commission, or who procures, aids, or abets any such public service company in its failure to obey, observe and comply with any such order or provision, shall be guilty of a gross misdemeanor." The Code (Rem. & Bal. § 2267) provides: "Every person convicted of a gross misdemeanor for which no punishment is prescribed in any statute in force at the time of conviction and sentence, shall be punished by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both." The defendants were prosecuted, convicted and sentenced in the justice court of Seattle precinct, King county, for an alleged violation of the provisions of section 25 of the public service commission law. The charge is that the defendants, being the officers, employes, agents, and servants of the Seattle, Renton & Southern Railway Company, a railway corporation operating a street railway within the corporate limits of the city of Seattle, unlawfully charged and collected from the complaining witness a 10-cent fare for one continuous ride within the corporate limits of the city. Upon appeal to the superior court a demurrer to the complaint was sustained. The state prosecutes an appeal.

The point urged by the respondents in support of the judgment is that the railway company is, by the terms of the statute, denied the equal protection of the law, and that its property is liable to be taken without due process of law, because it may only have a hearing upon a claim of the unconstitutionality of the statute, at the risk, if mistaken, of being subjected to such heavy and successive penalties as to practically foreclose it of the right to litigate that question. This view has received the sanction of the Supreme Court of the United States. *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764. A like principle was announced in *Ex parte Wood* (C. C.) 155 Fed. 190.

In the *Young Case* certain stockholders of the Northern Pacific Railway Company brought suit in the federal court against the company, the members of the State Railroad and Warehouse Commission, and the Attorney General of the state of Minnesota. The object of the suit was to prevent compliance with the provisions of certain acts of the

Legislature of the state of Minnesota and certain orders of the State Railroad and Warehouse Commission, prescribing the rates which should be charged for transportation of passengers and commodities upon railroads within the state. The bill, among other things, prayed that the Attorney General and the members of the commission be enjoined from enforcing the provisions of the several acts. The court gave a temporary restraining order as prayed for. On the next day the state, on the relation of its Attorney General, commenced an action in the state court against the railway company, the object of which was to compel the company to put into effect the rates and charges fixed by the laws of the state. Thereupon, and in response to a rule to show cause why he should not be punished as for contempt, the Attorney General, after a hearing, was held to be in contempt of the federal court, out of which the temporary restraining order had issued. He thereupon sued out a writ of habeas corpus in the federal Supreme Court. In discussing the effect of extreme and cumulative penalties in the several legislative acts, the court said: "It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights. It is urged that there is no principle upon which to base the claim that a person is entitled to disobey a statute at least once, for the purpose of testing its validity, without subjecting himself to the penalties for disobedience provided by the statute in case it is valid. This is not an accurate statement of the case. Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the Legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines, as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act



depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character and the ordinary case of a statute upon a subject requiring no such investigation, and over which the jurisdiction of the Legislature is complete in any event. We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates."

The fine to be imposed under the Minnesota statute was heavier than that provided by our statute, but the principle is the same. Here the penalty is "punishment by imprisonment in the county jail for not more than one year or by a fine of not more than \$1,000, or by both." It is apparent that in the operation of a street railway in the city of Seattle the officers and agents of the operating company might violate the statute 1,000 times, or perhaps many thousand times each day, and in each instance would subject themselves to the penalty of the law.

The Attorney General argues that the statute gives the courts a wide discretion in the matter of punishment, and that they are permitted to impose a fine as low as one cent and to impose a jail sentence as short as one hour. This is true, but it is also true that their discretion would permit the maximum sentence. As an illustration of the practical working of the act, it seems proper to observe that the justice court imposed a sentence of 30 days' imprisonment in the King county jail.

The Attorney General cites *State ex rel. Railroad Commission v. O. R. & N. Co.*, 68 Wash. 160, 123 Pac. 3, and insists that it announces a view that sustains the constitutionality of the law. In that case, after a full hearing upon the merits, the railway company appearing by counsel, the commission entered an order requiring the railway company to erect a suitable station at Hay in Whitman county, for the accommodation of passengers and freight, the same to be completed within 45 days after the service of the order. The time for complying with the order expired on September 24, 1909, but the station was not completed until the 11th day of January following. The railroad company did not seek a review of the order within the time prescribed by law, or at all; hence, under the statute (Rem. & Bal. § 8629) the order became "final and conclusive." The suit was for a recovery of a penalty for noncompliance with the order, and a judgment was entered for \$1,000. In the discussion of the case the court said that the railroad company appeared at the hearing, submitted its testimony, and raised no ques-

tion as to the sufficiency of the complaint or the jurisdiction of the commission under the complaint to make an investigation of its station facilities at Hay. It was held that the proceeding was regular, that the commission had jurisdiction, and that, the railroad company having failed to review the order as it was permitted to do under the statute, the order became, in the language of the statute, "final and conclusive." The distinction is obvious. The necessity for the station had been legally adjudged, and the penalty was imposed under the statute because of the failure of the railroad company to obey the order. This distinction was recognized by Mr. Justice Brewer in *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92, where he said: "It is doubtless true that the state may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme or cumulative penalties have been imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented."

The view we have taken of the case makes it unnecessary to consider the other questions discussed by counsel.

The judgment is affirmed.

PARKER, MOUNT, and CHADWICK, JJ.,  
concur.

(74 Wash. 373)

LAVNER v. INDEPENDENT LIGHT &  
WATER CO.

(Supreme Court of Washington. July 18,  
1913.)

1. NUISANCE (§ 72\*)—EXISTENCE.

There is no exact test as to when one damaged by smoke and fumes from a manufacturing plant is entitled to relief; the question of whether a nuisance exists being one of fact depending upon the particular circumstances.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. §§ 164-169; Dec. Dig. § 72.\*]

2. NUISANCE (§ 76\*)—ACTION FOR NUISANCE—ACTION FOR DAMAGES—SUFFICIENCY OF EVIDENCE.

In an action for damage to plaintiff's property from soot and noxious fumes from defendant's manufacturing plant, evidence held to sustain a finding that the smoke, etc., from the plant directly caused substantial discomfort and inconvenience to plaintiff's tenants, so as to materially reduce the value of the property, entitling plaintiff to an injunction and damages.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. §§ 185-188; Dec. Dig. § 76.\*]

3. NUISANCE (§ 72\*)—SMOKE.

Where the smoke and fumes from a manufacturing plant thrown upon plaintiff's property directly caused substantial discomfort and inconvenience to his tenants, so as to materially diminish the rental value of the property, plaintiff was entitled to have the nuisance enjoined and to damages.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. §§ 164-169; Dec. Dig. § 72.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Department 1. Appeal from Superior Court, Clarke County; John R. Mitchell, Judge.

Action by Robert Lavner against the Independent Light & Water Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Charles A. Johns, of Portland, Or., and Miller, Crass & Wilkinson, of Vancouver, for appellant. Donald McMaster, of Vancouver, for respondent.

**PARKER, J.** The plaintiff commenced this action seeking recovery of damages from the defendant, which he claims resulted to him from the casting of large quantities of soot, lampblack, and noxious fumes from the defendant's gas manufacturing plant upon residence property owned by him and situated near the defendant's plant, and also seeking an injunction restraining the continuation thereof, claiming such casting of soot, lampblack, and noxious fumes upon his property to be a nuisance. A trial before the court resulted in findings and judgment in favor of the plaintiff, awarding him \$300 damages for past injuries, and also an injunction as prayed for. From this disposition of the cause the defendant has appealed.

Some two years prior to the commencement of this action appellant constructed an oil gas manufacturing plant in the city of Vancouver, which it has operated since then. Since several years prior to the construction of appellant's plant respondent has owned three dwelling houses situated near its present location. The evidence tends strongly to show, and we think is amply sufficient to warrant the trial court in believing, the following: In the operation of appellant's plant oil is used as fuel, and there is emitted therefrom smoke, soot, lampblack, and noxious fumes. The prevailing winds are directly from appellant's plant towards respondent's dwelling houses, and prior to the trial of this action there was cast upon respondent's property from appellant's plant large quantities of smoke, soot, lampblack, and noxious fumes, which also penetrated into his houses, thereby rendering them much less desirable for occupancy as dwellings than they would be in the absence of the smoke, soot, and noxious fumes he complains of. This compelled the respondent to rent his dwellings at much less per month than he would otherwise have been able to obtain for them, and it also resulted in him having some difficulty in keeping his tenants; some of whom vacated his houses for that reason. Respondent was thus damaged, up to the time of the commencement of this action, by reason of loss of rents at least to the extent of \$300, which sum the court found in his favor. At the time of the trial of this action continued operation of appellant's plant in the same manner was threatened.

[1] This, like all cases of nuisance of this character, must depend upon its own peculiar circumstances, in view of the fact that appellant was carrying on a lawful business and respondent's injury resulted from the operation of that business. The law has been unable to lay down any very exact test as to when a person damaged by smoke and fumes from such a plant is entitled to relief by way of injunction or damages. As said in 1 Wood on Nuisances (3d Ed.) § 497: "No precise test can be given as applicable to all cases, but the question of nuisance is one of fact, and must be determined by the jury from the circumstances of each case."

[2, 3] We think, however, in view of all the circumstances surrounding this controversy, the learned trial court was warranted in concluding that the smoke, soot, and fumes cast upon respondent's property was of such character as to become the direct cause of substantial discomfort and inconvenience to respondent's tenants, and that it materially diminished the earning value of his property, and that respondent was entitled to the relief granted. Joyce, Nuisances, § 135; McGill v. Pintsch Compressing Co., 140 Iowa, 429, 118 N. W. 786, 20 L. R. A. (N. S.) 466.

We have not lost sight of our holding in De Kay v. North Yakima & Valley Ry., 129 Pac. 574, but we do not regard our holding in that case as in conflict with our conclusions in this case.

We are of the opinion that the learned trial court correctly disposed of the cause, and therefore affirm the judgment.

**MOUNT, GOSE, and CHADWICK, JJ.,** concur.

(74 Wash. 380)

**CARR v. REMELE et al.**

(Supreme Court of Washington. July 21, 1913.)

**1. VENUE (§ 28\*)—RESIDENCE OF THE PARTIES —DOMICILE FOR PURPOSE OF ACTION.**

In an action against two defendants, where it appeared that one of them was foreman of a ranch in the county in which the action was brought, and had recently come from another state and intended later to remove to another county, his residence in the county where the suit was brought was sufficiently established to give the court jurisdiction over the action as to both defendants under Rem. & Bal. Code, § 207, providing that the action may be brought in the county where the defendants or some of them reside.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 42; Dec. Dig. § 28.\*]

**2. VENUE (§ 3\*) — RESIDENCE OF PARTIES — STATUTORY PROVISIONS.**

In doubtful cases, the statute as to venue should be liberally construed in favor of the jurisdiction, where the suit is instituted.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 2; Dec. Dig. § 8.\*]

Department 1. Appeal from Superior Court, Adams County; O. R. Holcomb, Judge.



Action by W. Martin Carr against A. C. Remele and another. Motion by the defendants from change of venue denied, and they appeal. Affirmed.

Curtiss & Remele, of Spokane, for appellants. John M. Cannon, of Spokane, for respondent.

CHADWICK, J. This motion was begun in Adams county. Defendant Remele is confessedly a resident of Spokane county, and Robertson was employed by him as foreman on his ranch in Adams county. Defendants appeared and filed a motion for a change of venue. This motion was supported by their own affidavits, each claiming that he was and is a resident of Spokane county. This showing was met by counter affidavits. After a hearing and argument of counsel, the court denied the motion, holding that the defendant Robertson was a resident of Adams county.

[1] We have read the affidavits, and are satisfied that the court did not err in his judgment. It may be that Robertson was not a bona fide resident of Adams county with animus manendi. Neither is it shown to our satisfaction that he was a resident of Spokane county. There is no showing that he ever declared a residence in that county, or that he was ever engaged in any business there, or that he voted or participated in any way in the civic affairs of the county. His showing, taken at its best, indicates rather that he now intends to reside in Spokane. He came recently from Minnesota and Montana. At the time the cause of action arose and at the time the suit was begun he was domiciled in Adams county and was there engaged in business; and, if he is to be credited with a residence in this state at all, we think that he is a resident of Adams county within the meaning of the statute. If a defendant's affairs are in such a state that it cannot be certainly known in which county his residence is established where his acts are to be measured against his mental reservations, the fact that his domicile and place of business activity is in the county where he is sued is an important if not a controlling circumstance.

[2] In doubtful cases we think the statutes should be liberally construed in favor of the jurisdiction where the suit is instituted. One claiming the benefit of this statute "should be able to point to his residence by facts so certain and notorious as to enable the plaintiff, by the use of ordinary diligence, certainly to know where to bring his suit. The fact of residence in a particular county ought not to be so uncertain and equivocal, nor ought the statute to be so strictly construed, as that the plaintiff shall be compelled, in a case rendered doubtful and uncertain by the conduct of the defendant, to decide rightly at his peril. Too great strictness of construction applied to a case like the present might have the effect to defeat the suit in both counties,

and place the plaintiff in the condition of the unfortunate suitor, who was refused admittance into both the court of law and chancery, because each thought the other the only proper forum to afford redress, or the plaintiff who was denied redress for an acknowledged injury, because, when he sued in case, the court thought he ought to have brought trespass; and, when he brought trespass, the court thought his only remedy was case. Cases of this kind have often been instanced to illustrate the absurdity of maintaining the exclusive jurisdiction of courts of law and equity, and the distinction of forms of action, which our law rejects. But, if the statute in question is to be so strictly construed as to endanger the defeat of the plaintiff's action in a case like the present, it might be justly chargeable with a similar abuse. It ought not to receive a construction which will prevent its object. \* \* \* At all events, where, as in this case, he has had his residence in one county for a considerable time anterior to the bringing of the suit that, for the purposes of the suit, ought to be held to be the place of his residence, until he has effected an actual and complete change of residence from that to another county. \* \* \* Brown v. Boulden, 18 Tex. 431. See, also, Pearson v. West, 97 Tex. 238, 77 S. W. 944.

It is our judgment that defendant Robertson was properly sued in the superior court of Adams county, and is without right to change the venue. His status fixed the venue of the case. Rem. & Bal. Code, § 207.

Affirmed.

GOSE, PARKER, and MOUNT, JJ., concur.

(72 Wash. 482)

FARRAR v. ANDREW PETERSON & CO.  
(Supreme Court of Washington. July 16, 1913.)

On rehearing. Former opinion (130 Pac. 753) adhered to.

Herschmer Johnston, of Seattle, for appellant. Earle & Steinhert, of Seattle, for respondent.

PARKER, J. This case was by mistake placed upon our calendar for the January term of this year, and called for argument in due course on January 30th. No counsel appearing at that time, we assumed that none desired to be heard orally. We thereupon treated the cause as submitted upon the briefs then on file. Thereafter the case was decided and an opinion filed March 18th. 130 Pac. 753. Thereafter a petition for rehearing was filed, upon the ground that counsel were deprived of oral argument by the cause being erroneously placed on the January calendar. Rehearing was accordingly granted, and the case orally argued during the present term.

We regret that counsel were thus deprived



of oral argument before we announced our decision. However, we have again carefully reviewed the questions presented, in the light of the oral argument and additional briefs, and conclude that the judgment of the trial court must be reversed, and the case dismissed, for the reasons stated in our opinion filed on March 18th.

It is so ordered.

GOSE, MOUNT, and CHADWICK, JJ.,  
concur.

(74 Wash. 332)

WAY v. PACIFIC LUMBER & TIMBER CO.  
(Supreme Court of Washington. July 15,  
1913.)

**INSURANCE (§ 188\*)—PREMIUMS—REBATE FROM  
PREMIUMS.**

Under Sess. Laws 1911, c. 49, § 33, prohibiting the sale of insurance at less than the scheduled rate, and penalizing the company or agent violating it by revoking its or his license, and the property owner by reducing the insurance proportionately and by making him liable to pay a fine, where one member of a firm of insurance agents wrote policies at a rate less than the scheduled rate, his partner, who had no knowledge of the transaction, could not, after the dissolution of the partnership, recover the difference between the scheduled rate and the rate paid, since the statute does not render a contract to pay a rate less than the scheduled rate void, but provides an entirely different penalty, and there was therefore no implied contract to pay the scheduled rate.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 245, 402-407; Dec. Dig. § 188.\*]

Department 1. Appeal from Superior Court, King County; H. A. P. Myers, Judge.

Action by E. W. Way against the Pacific Lumber & Timber Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Marion A. Butler and R. H. Lindsay, both of Seattle, for appellant. Douglas, Lane & Douglas, of Seattle, for respondent.

CHADWICK, J. Plaintiff and H. M. Gould were copartners doing an insurance business in the city of Seattle. Certain policies of insurance were written by the firm in favor of the defendant Pacific Lumber & Timber Company, a corporation, at a rate less than what may be called the "board" or "compact" rate. The policies were paid for at the reduced rate. Some time subsequent to the time of the issuance of the policies the copartnership was dissolved, Gould retiring, and plaintiff has brought this action to recover the difference between the board rate, or what he insists the rate should have been, and the amount paid. The court found that Way had no knowledge of the transactions leading up to the issuance of the policies, but that the partnership was nevertheless bound by the act of Gould, and that he could not recover. It is the theory of the plaintiff, that the contract made by Gould for the firm was illegal and void under Insurance Code,

c. 49 (Session Laws 1911), section 33 of which makes the selling of insurance at less than the scheduled rate unlawful; that the unlawful agreement of one partner without the knowledge or consent of the other is not binding upon the firm, and that he, as the successor of the firm and as assignee of Gould's interest therein, is entitled to recover.

We are invited by defendant to discuss the constitutionality of the act of 1911 in so far as it gives to insurance companies and other outside agencies the right to fix rates that are binding upon the state and its citizens, but we think it unnecessary to go into this phase of the case; for, as we view it, plaintiff cannot recover upon general grounds. The contract was made and executed. Plaintiff can only recover upon a contract express or implied. That he cannot recover upon an express contract goes without saying, for the amount agreed to be paid for the policies has been paid. There is no implied contract unless it is in virtue of section 33 of the Insurance Code. This section is designed to prevent rebating. It penalizes a company, agent, solicitor, or broker by revoking its or his license, and the property owner by reducing the insurance in such proportion as the amount of the rebate bears to the total premium, and by making him liable to pay a fine "of not more than two hundred dollars."

Plaintiff's error lies in the assumption that the contract between the copartnership and the defendant was void, whereas the rule is that a contract which violates a statutory regulation of business is not void unless made so by the terms of the act. "It is a general proposition, sustained by the weight of authority, that where a statute imposes a penalty for failure to comply with statutory requirements, the penalty so provided is exclusive of any other." *La France Fire Engine Co. v. Mt. Vernon*, 9 Wash. 142, 37 Pac. 287, 38 Pac. 80, 43 Am. St. Rep. 827; *Horrell v. California, etc., Ass'n*, 40 Wash. 531, 82 Pac. 889. The statute strikes no blow at the business of insurance, neither does it assume to void contracts. Its purpose is to regulate, not to prohibit. "When a statute is \* \* \* a regulation of a traffic or business, and not to prohibit it altogether, whether a contract which violates the statute shall be treated as wholly void will depend on the intention expressed in the particular statute. Unless the contrary intention is manifest, the contract will be valid." *Sutherland, Stat. Constr. § 366*. The distinction between a valid contract, but one subjecting the contracting parties to penalties, and one made in contravention of a positive statute, or one declaring a public policy, will be illustrated by comparing the cases we have just cited with the case of *Carstens Packing Co. v. So. Pac. Ry. Co.*, 58 Wash. 239, 108 Pac. 613, 27 L. R. A. (N. S.) 975.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



It follows, there being no contract or promise made by the defendant to pay a greater sum than has been paid, and none implied by statute, that the judgment should be affirmed.

GOSE, PARKER, and MOUNT, JJ., concur.

(74 Wash. 331)

**HOWARD v. BUSSELL LAND CO.**

(Supreme Court of Washington. July 15, 1913.)

**1. APPEAL AND ERROR (§ 564\*)—STATEMENT OF FACTS—TIME FOR FILING.**

Under Rem. & Bal. Code, § 393, providing that a proposed statement of facts must be filed and served within 30 days after the time within which an appeal can be taken begins to run, a statement filed 31 days after the judgment was entered was filed too late, and should be stricken, since the Supreme Court has no authority to extend the statutory time even one day.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.\*]

**2. APPEAL AND ERROR (§ 555\*)—STATEMENT OF FACTS—EFFECT OF STRIKING—DISMISSAL OF APPEAL.**

Where no question is raised on appeal outside of the statement of facts, which was stricken because it was filed too late, the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2955; Dec. Dig. § 555.\*]

Department 2. Appeal from Superior Court, Yakima County; Thos. E. Grady, Judge.

Action by Fred Howard against the Bussell Land Company. Judgment for plaintiff, and defendant appeals. Appeal dismissed, and judgment affirmed.

H. J. Snively, of North Yakima, for appellant. McAulay & Meigs, of North Yakima, for respondent.

MORRIS, J. [1] Upon the hearing of this appeal a motion was made to strike the statement of facts upon the ground that the same was not filed nor served within 30 days from the entry of the judgment, and no extension of time had been granted. Judgment was entered October 21, 1912, and the proposed statement of facts was filed and served November 21, 1912. No extension having been granted, this was too late. Section 393, Rem. & Bal. Code, provides that a proposed statement of facts must be filed and served before or within 30 days after the time begins to run within which an appeal can be taken, unless such time be enlarged by an order of the court. It will be noted that this proposed statement was served and filed on the 31st day. If we extend the time fixed by the statute one day we could extend it a hundred days and thus work a repeal of the statute.

[2] No question is raised in this case out-

side of the statement of facts; to strike it, therefore, works a dismissal of the appeal.

The appeal is dismissed, and the judgment of the lower court affirmed.

MAIN, ELLIS, and FULLERTON, JJ., concur.

(74 Wash. 375)

**In re WESTLAKE AVE. NORTH IN THE CITY OF SEATTLE.**

In re CARTON et ux.

(Supreme Court of Washington. July 19, 1913.)

**1. EMINENT DOMAIN (§ 245\*)—COMPENSATION—PAYMENT.**

Where a city brought property to be condemned within the court's jurisdiction, made all interested persons parties, and paid the damages awarded into court, and all parties interested therein consented that the money be awarded to a certain person, and a judgment which was not appealed from was entered without objection, and the city paid the warrant issued to the person in whose favor the judgment was rendered, it was not liable again for any part of the award, merely because some of the parties to the proceeding did not keep faith with the others by distributing the award between themselves as agreed.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 637; Dec. Dig. § 245.\*]

**2. EMINENT DOMAIN (§ 245\*)—PAYMENT OF COMPENSATION.**

If the court inadvertently, or because of fraud practiced upon it in condemnation proceedings, omitted the name of a party from the verdict, or made payment to the wrong party, the condemning city would not, upon that account, be liable beyond its statutory liability, nor would the claimants to the fund be thereby deprived of any rights as between themselves.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 637; Dec. Dig. § 245.\*]

Department 1. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

In the matter of Westlake Avenue North in the City of Seattle, in which M. O. Carton and wife petition for the apportionment of the award in condemnation proceedings. From a judgment granting the award, the City of Seattle appeals. Reversed, and action dismissed.

Jas. E. Bradford and Wm. B. Allison, both of Seattle, for appellant. Wm. L. Waters, of Seattle, for respondents.

MOUNT, J. This is a proceeding in a condemnation case, wherein M. O. Carton and wife claim an interest in an award in condemnation, and seek to recover such interest from the city of Seattle which condemned the property, and from certain other interested parties who have collected the award in condemnation. Upon a trial of the issues made in this proceeding, the trial court awarded the petitioners a judgment against the city of Seattle in the sum of \$1,665, and against certain other parties in the sum of \$232. The city only has appealed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



This is the second appeal upon substantially the same facts. When the case was here before, we said, in 66 Wash. 447, 120 Pac. 111: "This action is waged upon the theory that the city is liable to the plaintiffs for the misapplication of the fund, and the judgment of the trial judge was based principally if not entirely, upon the theory that the mortgages had become merged in the legal title, and that no recovery could be had by the assignee thereof. We cannot agree with this theory, nor will we discuss it, for we find ample warrant in other principles of the law to sustain the judgment of the trial court. It is a maxim of the law that for every wrong there is a remedy; or stating the principle the other way, there can be no remedy unless there be a wrong. A wrong consists in a trespass upon the right of another, or in the omission of a duty imposed by law. Applying this test, we cannot conceive how a right of action can be maintained against the city. There is no suggestion that it did not proceed in strict accord with the statute. It brought the property within the jurisdiction of the court; it made all interested therein parties, and upon the return of a verdict assessing damages paid the fund into court, or, what is the same thing, made it available to those who had a lawful claim thereto. Beyond this, it was not required to go. The law puts no duty of segregation, or application of the funds once paid into the registry of the court, upon it, and if the court inadvertently or as the result of fraud practiced upon it, omits the names of some of the proper parties from the verdict, or makes payment to the wrong party, it does not make the city liable beyond the terms of the statute, or deprive the parties claimant of any rights or obligations *inter sese*." After further discussion of the case we concluded by saying: "The judgment of the lower court is therefore affirmed, without prejudice, however, to the plaintiff to invoke the general equity powers of the court in the original action as was done in the Hess Case, or to take an assignment of the right which is in Rutherford and wife to bring a personal action for damages against those responsible for the present state of affairs."

Thereafter these petitioners commenced this action in the lower court alleging, in substance, that certain property had been condemned; that city warrants had been issued in payment therefor in the sum of \$6,130.40, and in the sum of \$230.16; that the city had appropriated the real estate for public uses; that it had levied an assessment and collected funds which the city was holding in lieu of the property; that the city was holding in trust the sum of \$6,360.56; and that unless restrained by the court it would pay this sum of money to persons not entitled to receive the same; that the petitioners had an interest in the fund to the

extent of one lot and a fraction. The petitioners further alleged that if the city was not restrained, the fund in the possession of the city treasurer which was held in lieu of the land would be dissipated and lost; that the petitioners' mortgage and liens on the property in question would be lost and destroyed and be of no value; that petitioners had no plain, speedy, or adequate remedy at law. There was a prayer for a restraining order against the city. A hearing was had on the show cause order, and the trial court denied the restraining order. Thereafter the city paid the warrants, which were held by W. D. Perkins & Co.

Afterwards the action came on for trial before the court without a jury. It appeared in this case that the city of Seattle in July, 1908, commenced an action to condemn certain lots in the city of Seattle for street purposes. All the record owners and incumbents were made parties to that proceeding, which resulted finally in a judgment in favor of Mrs. P. A. Campbell in the sum of \$6,320.76. No appeal was taken from that judgment, and it became final. After the judgment had been entered, it was satisfied by Mrs. Campbell, and she procured from the county clerk a transcript of the execution docket and presented the same to the city comptroller and demanded and received therefor a condemnation warrant for the amount of the judgment and costs. After the issuance of this warrant, it was sold and assigned to W. D. Perkins & Co. After sufficient money had been collected by the city and was in the hands of the city treasurer to pay this warrant, and after the restraining order in this proceeding had been denied, the city treasurer paid the warrant to W. D. Perkins & Co., the holders of the warrant. Upon the trial of this case the trial judge evidently concluded that the city had wrongfully paid this money to W. D. Perkins & Co., after notice that these petitioners had a claim against the same, and therefore entered a judgment against the city for the sum of \$1,665; being the interest which these petitioners had in the property condemned by the city.

[1] Whatever may be the rights of the parties interested in the property condemned as between themselves need not be here decided. We endeavored to make it plain in *Carton v. Seattle*, supra, that the city was not liable for the misapplication of the funds which had been brought within the jurisdiction of the court upon the condemnation proceeding. In that case we said: "There is no suggestion that it did not proceed in strict accord with the statute. It brought the property within the jurisdiction of the court; it made all interested therein parties, and upon the return of a verdict assessing damages paid the fund into court, or, what is the same thing, made it available to those who had a lawful claim thereto. Be-



yond this, it was not required to go." The same is true in this case. The city did all that it was required to do. It brought the property within the jurisdiction of the court; it made all interested therein parties to the action, and upon the return of a verdict assessing the damages for the property taken it paid the fund into court, or, what is the same thing, made it available to all the parties interested in it. All the parties interested in it finally consented that a judgment should go in the name of Mrs. P. A. Campbell. A judgment was so entered. No appeal was taken therefrom or objection made thereto. Mrs. Campbell through her authorized attorneys satisfied the judgment and received the city's warrant therefor. She negotiated the warrant, and the city, after the money had been paid into the treasury for the purpose, paid the warrant. So far as the city is concerned it followed the provisions of the law strictly, and lawfully paid the money to the holder of the warrant. The city did nothing unlawful in the matter. When it paid the award fixed by the court in condemnation to the parties adjudged entitled thereto, its liability ceased. The fact, if it be a fact, that some of the parties to the action did not keep faith with other parties did not involve the city in any further liability.

[2] As we said in the other case: "If the court inadvertently, or as the result of fraud practiced upon it, omits the names of some of the proper parties from the verdict, or makes payment to the wrong party, it does not make the city liable beyond the terms of the statute, or deprive the parties claimant of any rights or obligations inter sese." It is plain, we think, that the trial court erred in granting a further judgment against the city.

The judgment is therefore reversed, and the action dismissed as against the city.

CHADWICK, GOSE, and PARKER, JJ., concur.

(74 Wash. 388)

SCWABACHER BROS. & CO., Inc., v.  
MURPHINE et al.

(Supreme Court of Washington. July 21, 1913.)

CORPORATIONS (§ 428\*)—NOTICE TO AGENT.

An agent is presumed to have only such authority as inheres in the duties he is assigned to perform, and consequently, where defendant withdrew from a partnership prior to the incurring of indebtedness to plaintiff corporation, notice to the collector of plaintiff, who was without authority to arrange either the terms or the times of payment, is not attributable to plaintiff; the matter of credits not being within the apparent scope of the collector's authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1748-1761; Dec. Dig. § 428.\*]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by Schwabacher Bros. & Co., Incorporated, a corporation, against Samuel S. Murphine and Thomas F. Murphine, as copartners doing business under the firm name of Murphine & Son. From a judgment in favor of the defendant Thomas F. Murphine, plaintiff appeals. Reversed and remanded.

J. W. Russell, of Seattle, for appellant. Alderson & Murphine, of Seattle, for respondents.

GOSE, J. This is a suit upon an account for goods, wares, and merchandise alleged to have been sold to Samuel S. Murphine and Thomas F. Murphine, doing business as partners under the firm name and style of Murphine & Son. There was a judgment against the father for the amount claimed, and a judgment in favor of the son for costs. The plaintiff has appealed from the judgment in favor of the latter.

The court found that the copartnership was formed some time in 1904; that it was continued until about the 25th day of April, 1910, when it was dissolved by the son retiring; that the father continued business under the name of Murphine & Son, and "that shortly after the dissolution of the partnership and the sale of Thomas F. Murphine's interest to his father, S. S. Murphine, S. S. Murphine notified Mr. Hood, who was at that time a collector of Schwabacher Bros. & Co., the plaintiff in this case, of the dissolution of the firm, and of the retirement therefrom of Thomas F. Murphine, and that Mr. Wood, the credit man of Schwabacher Bros. Co., never had any notice of the dissolution of the firm until February 29, 1912; that the only person connected with Schwabacher Bros. Co. who had notice of the dissolution was Mr. Hood, the collector, the duly authorized collector." The indebtedness was incurred after the retirement of Thomas F. Murphine, and between the 4th day of December, 1911, and the 1st day of March, 1912, including the latter date. The appellant had dealings with the firm of Murphine & Son from about the time it commenced to do business. The purchases were all made by means of the telephone. It is conceded that actual notice to the appellant of the retirement of Thomas F. Murphine was necessary to exempt him from liability.

The single question presented by the appeal is whether notice to Mr. Hood, the collector for the appellant, that Thomas F. Murphine had retired from the firm was notice to the appellant. The evidence shows that Hood was a collector without authority to arrange either the terms or the time of payment. He was invested with no discretion. His authority was limited and special. It follows that notice to him of the retirement of a member of the firm was not notice to his principal. The matter of extending credit was wholly outside of the scope of his duties. An agent

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



is presumed to have such authority as inheres in the duties he is assigned to perform, and notice to him within the scope of his agency will be imputed to his principal, subject to exceptions not here present. *Moon Bros., etc., v. Devenish*, 42 Wash. 415, 85 Pac. 17, 7 Ann. Cas. 649; *Corbet v. Waller*, 27 Wash. 242, 67 Pac. 567; *Cowan v. Roberts*, 133 N. C. 629, 45 S. E. 954.

In the *Devenish* Case this court quoted with approval from *Trentor v. Pothen*, 46 Minn. 298, 49 N. W. 129, 24 Am. St. Rep. 225, as follows: "The rule which imputes to the principal the knowledge possessed by the agent applies only to cases where the knowledge is possessed by an agent within the scope of whose authority the subject-matter lies; in other words, the knowledge or notice must come to an agent who has authority to deal in reference to those matters which the knowledge or notice affects. The facts of which the agent had notice must be within the scope of the agency, so that it becomes his duty to act upon them or communicate them to his principal."

In *Cowan v. Roberts* a retiring partner gave notice of his withdrawal from the firm at the plaintiffs' office to a man whom he found working on the books. The notice was held to be insufficient; the court saying that it should have been given to the plaintiffs, "or to some one of their employees who had charge of their credit department." Tested by these well-established principles the notice was clearly insufficient. The notice was designed to relieve Thomas F. Murphine from liability for the subsequent purchases of Murphine & Son. Hood, the collector, had no connection with either the sales or credit branch of the business. It appears that a small portion of the account was purchased on the 1st day of March, 1912, and that the appellant's assistant credit man had received notice the day previous of the retirement of Thomas F. Murphine. The latter is not liable for the amount of that sale.

The case will be remanded, with directions to enter judgment against Thomas F. Murphine for the amount of appellant's account, less the sale on March 1, 1912. The appellant will recover costs.

PARKER, MOUNT, and CHADWICK, JJ., concur.

(74 Wash. 340)

H. E. ORR CO. v. INTERLAKEN LAND CO.

(Supreme Court of Washington. July 15, 1913.)

# 1. SALES (§ 7\*)—CONSTRUCTION OF CONTRACT—AGENCY.

Defendant, who owned an addition of residence property, executed a contract appointing plaintiff sole agent for selling lots therein, and providing that the lots should be sold for one-third cash and the balance in stated

payments, with a reduction of 2½ per cent. allowed for cash sales in case a purchaser decided to build immediately. It also provided that plaintiff should receive 20 per cent. commission on the actual purchase price of property sold, to be paid on the delivery of the deed when the sale was for cash, and when otherwise one half to be paid on delivery of the contract for sale and the other half upon collection of the first deferred payment. Thereafter plaintiff induced defendant to make a contract with a building company, requiring the company to make plans for dwelling houses to be erected on the lots enumerated at the times specified, provided that, after commencement of work on the third house, the company should not be required to commence work on any other house until one of the lots was sold, and should commence work on another house after each successive lot was sold, and further provided that, when any house was fully roofed and plastered, defendant should sell the lot to the company and execute a warranty deed to enable it to obtain a building loan, and to make a contract of sale of the premises on the terms stated, and that if the company was not in default as to its agreement defendant would cancel the note and mortgage made by it on any lot upon notice of its sale by the company, and presentation of a new note and mortgage by the purchaser in defendant's favor payable as stated, and further provided that defendant could terminate the agreement at its election, and might repurchase any lot before the building company had sold it, upon paying the cost of the improvements and the amount paid to defendant. Held, that the second contract executed was not a sale, but merely made the building company defendant's agent coupled with an interest for the sale of the lots.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 16, 17; Dec. Dig. § 7.\*]

## 2. CONTRACTS (§ 245\*)—RESCISSION.

The second contract executed at plaintiff's instance between defendant and the building company operated to ipso facto withdraw the lots specified therein from the operation of the first contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1129, 1130; Dec. Dig. § 245.\*]

## 3. BROKERS (§ 71\*)—COMMISSION.

The second contract not providing for the payment of commission upon the sale of lots by the building company, no commission upon such sales could be recovered.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 56; Dec. Dig. § 71.\*]

## 4. EVIDENCE (§ 441\*)—PAROL EVIDENCE—VIOLATING CONTRACT.

Where a contract appointing an agent for the sale of lots provided that he should have a certain commission, evidence was not admissible that it was agreed between the parties that no commission should be allowed unless the broker procured a sale of particular property to third persons.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1719, 1723-1763, 1765-1845, 2030-2047; Dec. Dig. § 441.\*]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by the H. E. Orr Company against the Interlaken Land Company. From a judgment for plaintiff, defendant appeals. Reversed, with direction to dismiss.

Kellogg & Huntoon, of Seattle, for appellant. Chas. P. Harris, of Seattle, for respondent.



GOSE, J. This is a suit to recover a broker's commission upon an alleged sale of real estate. The case was tried to the court. There was a judgment for the plaintiff. The defendant has appealed.

Respondent's claim has its basis in two written contracts. The first contract was made on the 16th day of November, 1909, between the appellant, as the party of the first part, and the respondent, as the party of the second part. The appellant then owned an addition of high class residence property, which it desired to convert into cash to the extent of about \$430,000 as soon as possible. This contract provides that the appellant constitutes and appoints the respondent "its sole agents for the sale" of all unsold lots in Interlaken, an addition to the city of Seattle; that the agency shall continue in force for one year from the date of the contract; that the terms on which all lots shall be sold are "one-third cash, the balance in four equal semiannual payments," with interest on all deferred payments as specified; "provided, however, that a reduction of 2½ per cent. shall be allowed for all sales for cash, and provided, further, that any purchaser desiring to build immediately on the lot or lots purchased" may purchase on the basis of one-fourth cash, the balance in four equal semiannual installments, with interest on deferred payments as stipulated; and that when the sale is for cash, and the purchaser desires to build immediately on the lot purchased, there shall be a discount of 4 per cent. of the purchase price, in addition to the 2½ per cent. discount above specified; that the respondent "shall be entitled to receive 20 per cent. commission on the actual purchase price of any property sold, \* \* \* to be paid it on the execution and delivery of the purchase deed when the sale is for cash, otherwise one half of said compensation or commission to be paid to the party of the second part upon the execution and delivery of the contract for sale, and that the other half of said compensation to be paid to the party of the second part upon the collection of the first deferred payment." The contract further provides that, if the total sales made by the respondent should not reach \$75,000 by May 16, 1910, or \$150,000 by August 16, 1910, the appellant might at its option terminate the contract by giving the stipulated notice.

On the 6th day of December following, the respondent induced the appellant to enter into a contract with the W. M. Lucas Building Company, a corporation, which provides that the latter company should prepare plans, elevations, and specifications for a dwelling house for each of 10 enumerated lots in Interlaken, subject to approval by a representative of the appellant; that the dwelling houses should cost the sums respectively enumerated in the contract, ranging from \$3,500 to \$5,000; that the specification for the first house

to be constructed should be submitted for approval within 15 days after date of the contract; plans for the second house within 30 days; plans for the third house to be submitted within 45 days; and that thereafter it should submit plans for a house every 20 days until the plans, elevations, and specifications should have been submitted for the 10 houses to be constructed under the contract. The contract further provides that, within 10 days after any approval of the plans, elevations, and specifications for a house on any lot, the building company is to commence the work of excavating for such house, and have the same under roof and plastered within 90 days after such approval, and completed and ready for occupancy within 180 days after such approval; "provided, that after the commencement of work on the third house the party of the second part (the building company) shall not be required to commence work on any further house until a sale of one of said lots shall have been made and, after each such sale, the party of the second part shall, within five days, commence work on another house and lot; it being hereby understood and agreed that no house shall be commenced after 10 months from the date of this contract." It was further stipulated "that whenever any house erected on any of said lots has been fully roofed and plastered the party of the first part (the appellant), upon payment to it by the party of the second part of the sum of \$100, will sell and convey such lot to the party of the second part by a good and sufficient deed of general warranty, free and clear of all incumbrances of whatsoever nature except the lien of paving assessments and any assessments which may become a lien after the date of this contract, for the purpose of enabling the said party of the second part to obtain a building loan on said property due in not less than three nor more than five years, said loan not to exceed 50 per cent. of the value of the property, and to bear interest at the rate of 7 per cent. per annum, and for the further purpose of enabling party of the second part to make a contract of sale of said premises to some third party"; that "the prices and terms on which such sales by the party of the first part shall be are" as therein specifically enumerated. It was further agreed that each deferred payment should be evidenced and secured by a promissory note and second mortgage upon the lot, and residence erected thereon; that if the building company was not in default as to any of its covenants the appellant would cancel the note and mortgage made by the building company to it on any lot "upon notice of sale and conveyance of said lot by the party of the second part to some third party, and upon presentation to the said party of the first part of a new note and mortgage made by said third party in favor of the party of the first part for the balance of the principal and interest



due on said lot, payable according to the terms of such new note and mortgage, in four equal semiannual payments" with interest as stipulated, such mortgage to be a lien on the lot paramount to all other liens and incumbrances, except the building loan mortgage; and that, if the total amount of the deferred payments should be less than the unpaid purchase price of the lot, the difference should be paid in cash by the building company to the appellant. The contract further provides that the mortgage and notes executed by third parties should be in favor of the appellant, to the extent of the principal and interest due it under the second mortgage executed to it by the building company. It was further agreed that the appellant should have the right to terminate the agreement at its election, giving written notice in the manner stipulated in the contract; that "as to each of said lots," if the building company had not made a sale thereof within nine months after the date of the sale of the lot to it by the appellant, then the appellant might at its option at any time thereafter, before a sale to a third party, repurchase the lot from the building company upon payment to it of the cost of the improvements thereon, plus the \$100 theretofore paid on the lot, and less the amount of any incumbrance placed or suffered to be placed thereon by the building company. It was further provided that if the building company had not made any such sale within 15 months from the date of the conveyance of the lot to it, then that either party to the agreement might apply to the superior court of King county for an order directing the sale of the premises in the manner provided by law for the sale of real estate on execution; the net proceeds thereof to be divided between the parties pro rata, according to their respective interests. It is alleged in the complaint that this contract was entered into through the "exclusive efforts" of the respondent.

[1] The first question presented is, Was the second contract a sale? The respondent asserts that it was; whilst the appellant contends that it created an agency or a trusteeship. We cannot construe the contract as a sale. A reading of the contract as a whole forces the conviction that it constitutes the building company an agent, coupled with an interest. It creates a mere co-operative plan, whereby the appellant furnished the land, and the building company was to furnish satisfactory plans and specifications, and erect residences upon the lots with the view of selling the properties to third parties to the mutual advantage of the contracting parties. The contract, when read as an entirety, has none of the elements of a sale. It passes no present title, but merely agrees to pass the title to the building company in order that it might (a) secure a loan upon the property for 50 per cent. of the cost of the building; (b) give a second mortgage to the

appellant for the purchase price of the respective lots in excess of \$100; and (c) make sale of the respective lots to third parties, substituting the security given by the purchaser for the security given by the building company.

[2] The execution of this contract at the instance of the respondent ipso facto withdrew the property therein specified from the operation of the first contract.

[3] There was no provision for a commission in the second contract, and therefore there can be no recovery. The contracts are too lengthy to be set forth in extenso. The first contract covers 10 pages of the printed brief; the second contract covers 16 pages of the brief. We have, however, set forth sufficient of both contracts to render a discussion intelligible. The statute of frauds presents a second barrier to the recovery of a commission. There is a vital difference in the essential portions of the two contracts. It is apparent from the first contract that it was the desire of the appellant to convert the property into a cash equivalent, with all possible dispatch. It is also apparent that the second contract was made in the hope that it would quicken the sale of the remaining property, and thus redound to the mutual advantage of the first contracting parties. In the furtherance of this end, the appellant induced the respondent to enter into a second contract, which, standing alone, gave no promise of cash sales. The second contract is complete in itself except upon the question of a commission, and while not signed by the appellant it is conceded that it caused it to be made. It makes no provision for a commission; hence there can be no recovery.

The case, in this respect, is controlled by *Forland v. Boyum*, 53 Wash. 421, 102 Pac. 34. In that case the owner entered into a contract with a broker whereby she gave him the exclusive right for a period of 30 days to sell the property described in the contract at a fixed price upon an agreed commission. Later upon the same day, the broker entered into a written contract with a purchaser for the sale of the property, and received \$500 as earnest money. The owner indorsed her approval upon the contract. The contract provided that if the purchaser defaulted, the earnest money should be forfeited to the broker "to the extent of their agreed upon commission." We held that the "suit, if sustained at all, must be sustained under the second contract"; that it was not a modification of the first contract, but that it was a "complete independent contract, certain in all its terms except the amount of commission to be paid"; that to ascertain the commission, parol testimony must be resorted to, and that the statute of frauds (Laws 1905, p. 110, § 1) stood as a barrier to a recovery.

[4] In the case at bar the respondent contends that it is entitled to a 20 per cent. commission stipulated in the first contract of



sale. Testimony was offered on the part of the appellant to the effect that it was expressly agreed that there should be no commission flowing from the latter contract, unless the respondent procured a sale of that property to a third party, which it made no pretense of doing. This testimony was not competent, and we only refer to it to show the wisdom of the law, and the necessity of adhering to it in all cases where a recovery is sought in the face of the statute.

Reversed, with instructions to dismiss.

CHADWICK, MOUNT, and PARKER, JJ.,  
concur.

(74 Wash. 382)

HOOVER et al. v. BOUFFLEUR et al.

(Supreme Court of Washington. July 21, 1913.)

1. MORTGAGES (§ 38\*)—DEED OR MORTGAGE.

Clear and convincing evidence is necessary to show that a deed, absolute on its face, is a mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 108-111; Dec. Dig. § 38.\*]

2. MORTGAGES (§ 33\*)—DEED OR MORTGAGE—OPTION TO PURCHASE.

The fact that a deed, absolute on its face, contains an option to purchase does not convert it into a mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 67-82; Dec. Dig. § 33.\*]

3. MORTGAGES (§ 32\*)—DEED OR MORTGAGE.

In determining whether a deed, absolute on its face, is a mortgage, a court of equity will look to the intent of the parties rather than to the form of the instrument, and will effectuate such intent as gathered from the whole transaction.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 60-66, 84-94; Dec. Dig. § 32.\*]

4. MORTGAGES (§ 38\*)—DEED OR MORTGAGE—EVIDENCE.

Evidence held to show that a transaction constituted a mortgage of realty, and not an absolute conveyance thereof.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 108-111; Dec. Dig. § 38.\*]

5. MORTGAGES (§ 32\*)—DEED OR MORTGAGE—ASCERTAINMENT OF INTENTION—COLLATERAL FAVOR.

The intent of the parties as to whether an instrument constitutes a deed or mortgage need not necessarily appear upon the face of a collateral paper executed by the parties at the time.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 60-66, 84-94; Dec. Dig. § 32.\*]

Department 1. Appeal from Superior Court, Spokane County; Chester F. Miller, Judge.

Action by Frank T. Hoover and others against H. P. Bouffleur and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

John C. Kleber, of Spokane, for appellants. Wm. S. Lewis, of Spokane, for respondents.

CHADWICK, J. On the 9th day of February, 1912, plaintiffs were the owners of lot 10 in block 3, Richland Park addition to Spokane Falls. They had purchased the property some time prior thereto for \$3,800, and had made improvements thereon of considerable value. The trial court found the property to be worth more than \$4,000 at that time. There was a mortgage for \$3,000 on the property. This mortgage was payable in installments of \$50 a month with interest. There was at the time mentioned three installments overdue on the mortgage, together with the interest, in all aggregating the sum of \$228.75. Plaintiffs did not have the money to meet these payments, and they negotiated with one Heaton, who brought them in contact with defendant. The amount desired by plaintiffs was \$250. This defendant agreed to advance after looking at the property. Defendant testified, and he is supported by Heaton in this: That he refused to make a loan upon the property; that he told plaintiffs that he would buy the property, advance the \$250, and give them an option to repurchase within three months, upon payment of \$325. A deed was drawn and executed by the plaintiffs, conveying the property to defendant subject to the unpaid balance of the mortgage, \$1,000, including the \$150 to be paid out of the loan or purchase price, as the case may be, having been paid upon the mortgage hereinbefore referred to, leaving \$2,000 still due. An option to purchase was then executed by plaintiffs in the form following: "Option to Purchase. Spokane, Wash. Feb. 9, 1912. The undersigned hereby agrees to sell to Frank T. Hoover or wife of Spokane, Wash. within 30 days from date hereof, the following described property, to wit: Lot ten (10) in block three (3) of Richland Park addition to Spokane Falls, now Spokane, Washington. For the sum of three hundred and twenty-five (\$325.00) dollars to be paid to the undersigned by the said Frank T. Hoover or wife on or before 90 days from date hereof, and if not so paid then this option to be null and void. H. P. Bouffleur." The \$250 was dispensed as follows: \$10 was paid to Heaton, defendant testified, and so does Heaton, that it was paid at the request of plaintiffs, \$232.75 was paid in the form of a check drawn in favor of the mortgagee, the parties assuming that amount to be the true amount of principal and interest due, and \$7.75 was paid to plaintiff Frank T. Hoover. Defendant testifies that these payments were all directed by the plaintiff. The plaintiffs, on the other hand, insist that they applied for a loan to Heaton; that Heaton was at all times the agent of the defendant, and that he arranged with defendant to make a loan of \$250; that defendant went to the home of plaintiffs and satisfied himself that the security was ample, and that they thereafter

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



went to his office and executed the deed and accepted the option; they say that nothing was said about rent for the place. Defendant explains this omission by saying that he thought it would be no more than fair to give them the rent for the three months, or until the expiration of the option. The time having expired, and the plaintiffs having failed to repurchase the property, a notice to vacate was served upon them. Thereupon plaintiffs tendered to defendant the sum of \$90.00 that being the amount he would be entitled to recover under the usury statutes (section 6251 et seq., Rem. & Bal. Code), and demanded a deed. This was refused, and in consequence this case was brought, and from a judgment in favor of the plaintiffs, defendant has appealed.

[1] Appellant relies upon certain well-settled principles of the law. That is, that there is a certain integrity about a written instrument, and especially a deed, and that to overcome its terms and import testimony must be clear, cogent, and convincing. He cites *Dempsey v. Dempsey*, 61 Wash. 634, 112 Pac. 755; *Dabney v. Smith*, 38 Wash. 40, 80 Pac. 199; *Reynolds v. Reynolds*, 42 Wash. 107, 84 Pac. 579; *Johnson v. Bank*, 65 Wash. 261, 118 Pac. 21; *Deposit Co. v. Lietzow*, 59 Wash. 284, 109 Pac. 1021; *Swarm v. Boggs*, 12 Wash. 246, 40 Pac. 941; *Dignan v. Moore*, 8 Wash. 312, 36 Pac. 146; *Boyer v. Paine*, 60 Wash. 56, 110 Pac. 682; *Reed v. Parker*, 33 Wash. 107, 74 Pac. 61; *Conner v. Clapp*, 37 Wash. 299, 79 Pac. 929.

[2] He also relies upon the rule that the mere option to purchase will not in itself make a deed a mortgage. *Johnson v. National Bank of Commerce*, 65 Wash. 261, 118 Pac. 21. These cases do not deny the right of the plaintiffs to recover in this action.

[3] A court of equity looks to the intent of a contract rather than to its form; and, although the spoken words of the witness may be at variance with the actual conduct of the parties, they will not be accepted or permitted to overcome the true intent as it is gathered from the whole transaction. *Johnson v. National Bank of Commerce*, supra.

[4] Although appellant was careful to refrain from the use of the words "loan" and "mortgage," and to impress upon the plaintiffs that he was buying the property, it is our duty to go beyond his spoken words, and review and consider every material circumstance. The fact that the property was worth at least \$4,000, and the amount paid by the defendant, or substantially all of it, was paid upon the mortgage, thus reducing that incumbrance for the benefit of the defendant if a sale was indeed contemplated, when coupled with the option agreement or defeasance, are circumstances which in our judgment make it the imperative duty of a court of equity to declare the deed executed by respondents to be a mortgage. Otherwise

we would be put to the stress of holding that respondents had sold a valuable piece of property for a cash payment of \$7.50 and three months' rent. We think the case falls squarely within the rule declared in *Mears v. Strobach*, 12 Wash. 64, 40 Pac. 622, where "it is true that there was testimony to the effect that the plaintiffs refused to make a loan, and would only consent to advance the money upon an absolute conveyance to them of the property. But this testimony, interpreted in the light of the instruments actually executed, and of the other facts, sufficiently proven by the evidence, fails to satisfy us that the transaction was not, after all, substantially one of lending and borrowing. In our opinion, there was no intention on the part of either of the parties to do more than on the one part to secure the loan of the money, and on the other to loan it and get proper security for repayment with interest. This being so, the bare fact that they refused to loan the money and take a mortgage only tends to show that they thought they could evade the law, requiring the mortgage to be foreclosed before they could get possession of the property, by taking a deed, as they did, and giving a lease and an option to purchase to the grantors named in the deed."

[5] Appellant has emphasized that part of the opinion in the case of *Johnson v. National Bank of Commerce*, 65 Wash. 261, 118 Pac. 21, wherein we said: "We think the better rule is that where there is a deed absolute in form, either with or without a contemporaneous agreement for a resale of the property, there being nothing upon the face of the collateral papers to show a contrary intent, the presumption of law, independent of evidence, is that the transaction is what it appears to be, and that he who asserts that the writing should be given a different construction, must show, by clear and convincing evidence, that a mortgage and not a sale with the right to repurchase was intended." We may adopt this expression as a fair statement of the general rule, but it was not our intention to hold that the intent of the parties must necessarily appear upon the face of the collateral paper. To do so would kill that true spirit of equity with which a court should approach cases of this kind.

Viewing the case at bar from all its angles, and taking it by its four corners, we have no doubt that the transaction was conceived and carried out with purpose to evade the law designed to prevent the taking of usury. The record shows what seems to be a studied effort on the part of the defendant to bring himself within certain expressions of this court, as he has gathered them from our written opinions: "That a deed regular in form is presumptive evidence of the highest character; that it voices the intention of the parties;" that "evidence re-



lied on to prove that a deed is in fact a mortgage must be clear, cogent, and convincing:" that "the evidence must show that it was intended by both of the parties;" that "a deed will not be held to be a mortgage when it appears that the grantee had declined to make a loan upon the property;" and that "a deed will be held to be absolute where there is nothing upon the face of the collateral papers to show a contrary intent." All of these expressions will be found in the cases hereinbefore cited. The statements were pertinent at the time they were employed, but an examination of the cases will show that they were applied as governing rules where there was no such lack of consideration as would shock the conscience, or the case was so wanting in equity, or the equities were so balanced as to compel us to look to the instruments alone for guidance. It is certain that we never intended to mark a path around the statutes designed to protect the necessitous borrower from the exactions of those who are disposed to take an unlawful return for a loan or forbearance of money.

Affirmed.

GOSE, PARKER, and MOUNT, JJ., concur.

(74 Wash. 417)

**JOHNSON v. COLUMBIA & P. S. RY. CO.**

(Supreme Court of Washington. July 23, 1913.)

**1. MASTER AND SERVANT (§§ 276, 278\*)—INJURIES TO SERVANT—ACTION—EVIDENCE—SUFFICIENCY.**

In a personal injury action by a servant, evidence held insufficient to show the master's negligence or that it was the proximate cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 956-958, 959, 960-969, 970, 971, 972, 976, 977; Dec. Dig. §§ 276, 278.\*]

**2. MASTER AND SERVANT (§ 265\*)—INJURIES TO SERVANT—PRESUMPTIONS—"RES IPSA LOQUITUR."**

In a personal injury action by a servant, mere proof of the injury which was caused by the slipping of iron from under a hydraulic hammer will not support a recovery upon the theory of "res ipsa loquitur," for that doctrine is never applied except where the party injured is not in a position to explain the accident which, because of the care due him, presumptively occurred through some negligence of the defendant either in the control of or in its instrumentalities.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6136-6139; vol. 8, p. 7787.]

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Otto Johnson against the Columbia & Puget Sound Railway Company. From

a judgment for defendant, plaintiff appeals. Affirmed.

E. F. Klenstra, of Seattle, for appellant. Farrell, Kane & Stratton and Stanley J. Padden, all of Seattle, for respondent.

MOUNT, J. This action was brought by the plaintiff to recover damages for personal injuries. After the issues were made up the case was tried to the court and a jury. At the close of the plaintiff's evidence, the trial court, upon motion of the defendant, granted a nonsuit and dismissed the action for the reason that no negligence on the part of the defendant was shown. The plaintiff has appealed.

[1] The facts as shown by the appellant's evidence are substantially as follows: The appellant was employed by the respondent as a helper to a blacksmith. He had been engaged in this work for about 10 days. On the 20th day of October, 1910, he was engaged with the blacksmith in welding a tooth for a steam shovel. This tooth consisted of a piece of iron about 20 inches long and 6 by 6 inches square. This iron was being welded under a steam trip hammer. It was the duty of the appellant to manipulate certain chains which extended from a crane to the tongs and iron, thereby placing the iron between the die and the trip hammer. The iron being welded was held by a pair of tongs which are designated as "straight-lipped" tongs. The blacksmith was assisted by another helper whose duty it was to manipulate the trip hammer. The blacksmith himself manipulated the iron under the hammer. While engaged in this work, the iron in some manner not explained in the evidence fell from the die or slipped out from between the die and the hammer and fell to the floor. The end of the tongs swung towards the appellant and struck him on the side and injured him. The negligence alleged in the complaint was that the blacksmith used "a defective, unsafe and improper tongs, not suitable for such purpose, to wit, said tongs being what is known as the 'straight lipped,' and not considered safe or suitable for such heavy work because of its straight lip. \* \* \* and not constructed or intended to safely hold such large pieces of iron steady or to prevent the same from shifting or jumping while being welded, and said tongs were negligently used by the respondent instead of the 'pick' style designed and constructed for such use or work." The second ground of negligence alleged was that the foreman of the respondent, being in control of the operation of the steam hammer and the employes, negligently ordered the helping operator to hammer or strike and hammer the iron with more force and to use the full striking capacity of said hammer, which caused the iron to jump or kick from under the hammer and the said defective tongs to strike appel-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



lant, inflicting the injuries set out in the complaint. There was some evidence which tended to show that the straight-lipped tongs which were used on this occasion were not safe or proper tongs to be used upon work of this character by reason of the fact that the straight-lipped tongs would not hold the iron solidly. That another pair of tongs which were commonly called the "pick" style would, by reason of their construction, hold large pieces of iron solidly and not permit such iron to slip within the tongs. But it was conceded upon the trial of the case that the straight-lipped tongs which were used upon this occasion did not slip upon the iron and did not permit the iron to slip within the jaws of the tongs, for after the iron fell to the floor the tongs still held the iron firmly and solidly in position. The fact that improper tongs were used, therefore, was not the proximate cause of the injury, because these tongs held the iron as firmly as any other character of tongs could have done. There was therefore no negligence in using these tongs; or, if there was negligence in the use of the tongs, such negligence did not cause the injury.

The other ground of negligence alleged was that the foreman ordered the helper operating the hammer to strike the iron with more force. As one of the witnesses said, "Hit her harder." We find nothing in the case to show that this caused the iron to fall out from between the die and the hammer. In fact, there is no evidence which tended to show that hitting the iron harder caused it to slip out from between the die and the hammer. Nor is there any evidence to show that it was unusual for the hammer at that time to use more force, or that it was unnecessary for the hammer to strike with more force at that time. We find nothing in the evidence which shows, or even tended to show, that the respondent was negligent, or that its negligence was the cause of the injury. The appliances, except perhaps the tongs, were the kind commonly used and were in good repair. The tongs, even though we may conclude that they were not the kind which should have been used, held the iron perfectly and did not permit it to slip. Such negligence, therefore, did not cause the injury.

[2] Before the appellant can recover in a case of this character, it must be shown that there was some negligence on the part of the respondent which caused the injury. *Hansen v. Seattle Lumber Co.*, 31 Wash. 604, 72 Pac. 457. It is contended by the appellant that the mere fact that the accident happened was sufficient to take the case to the jury. In other words, that the rule *res ipsa loquitur* applies in this case.

In *Lynch v. Ninemire Packing Co.*, 63 Wash. 423, 115 Pac. 838, we said: "The maxim of *res ipsa loquitur* is applied in neg-

ligence cases on the theory that the accident in the light of surrounding circumstances is of such a character as to raise a presumption of negligence from the occurrence itself, and on the further theory that the injured party is not in a position to explain its cause, while the party charged, having more favorable opportunities, is in a position to thus explain and show himself free from negligence, if such be the case."

In *Lewinn v. Murphy*, 63 Wash. 356, 115 Pac. 740, Ann. Cas. 1912D, 433, we said: The doctrine of *res ipsa loquitur* "has never been applied by the courts except where the facts and demands of justice make its application essential, depending upon the peculiar facts and circumstances in each particular case, and where the duty which the defendant owes the injured person is of such a nature that proof that the accident happened under the given conditions is of such value in law as to afford evidence of negligence in itself, and thus make out a *prima facie* case, and only then when the producing cause of the injury is under the control of the defendant, and the accident is of such a nature that it would not ordinarily occur except from the lack of due care."

We find nothing in the record in this case which brings it within the rule stated. The cause of the iron slipping from between the hammer and the die is not explained in the evidence. It was necessary for the appellant to show that this was caused by defective machinery or by some extraordinary or negligent act over which the respondent had control. This was not shown. We conclude, therefore, that the trial court properly granted a nonsuit.

The judgment is therefore affirmed.

PARKER, CHADWICK, and GOSE, JJ., concur.

(74 Wash. 458)

#### BEERS v. BEERS.

(Supreme Court of Washington. July 26, 1913.)

#### 1. DIVORCE (§ 303\*)—CUSTODY OF CHILDREN—MODIFICATION OF DECREE.

The court has power to modify a decree of divorce with reference to the custody of the minor children, where there is a material change in the conditions or fitness of the parties, or where the welfare of the children would be promoted thereby.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 793-795; Dec. Dig. § 303.\*]

#### 2. DIVORCE (§ 303\*)—CUSTODY OF CHILDREN—MODIFICATION OF DECREE.

Where a decree of divorce awarded the custody of minor children to the wife, a petition by the husband for a modification of the decree, alleging that the wife had practically abandoned such children; that one of them was being carried about the country by her sister and her sister's husband, who were traveling vaudeville actors; that the other was being kept at the home of her father, who was living with a woman not his wife; that she was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



being falsely taught as to her correct name; that in the divorce proceeding the wife falsely represented that she had rich friends and relatives, who would assist her in the education, maintenance, and support of the minor children; that she was not a fit and suitable person longer to have their care, custody, and control; that the husband was employed and living with his father and mother in the county where the divorce was granted; that his mother was in the best of health; that their home was comfortable, and the children could be given the education and every comfort and advantage that children of their age and circumstances should have—stated sufficient facts, when their truth was admitted by demurrer, to justify the court in granting the custody of the children to the husband.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 793-795; Dec. Dig. § 303.\*]

### 3. DIVORCE (§ 245\*) — ALIMONY — MODIFICATION OF DECREE.

The court has power to modify a divorce decree, as to alimony subsequently accruing, as the conditions and circumstances of the parties may change from time to time.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 691-695; Dec. Dig. § 245.\*]

### 4. DIVORCE (§ 245\*) — ALIMONY — MODIFICATION OF DECREE.

The court has no power to modify a divorce decree as to installments of alimony due thereunder and unpaid, since the rights and liabilities of the parties with reference to such installments become absolute and fixed at the time provided in the decree for their payment.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 691-695; Dec. Dig. § 245.\*]

Department 2. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action for divorce by Irene Beers against Fred E. Beers. From a judgment modifying the decree of divorce, plaintiff appeals. Remanded, with directions.

Geo. W. Saulsberry, of Seattle, for appellant. Gay & Olson and Milo A. Root, all of Seattle, for respondent.

MAIN, J. The purpose of this proceeding is to modify a decree of divorce. On April 10, 1909, the superior court for King county entered a decree granting to the plaintiff an absolute divorce from the defendant, and awarding to the plaintiff the care and custody of their two minor children, Gladys Irene and Evelyn. The decree also provided that the defendant pay to the plaintiff for the use and benefit of the children, the sum of \$15 each and every month until the further order of the court, \$100 as an attorney's fee for plaintiff's attorney, to be paid in installments of \$20 per month, and costs of the action. The right to modify or change the decree with reference to the allowance or custody of the children was reserved by the court in the decree. Thereafter, during the month of October, 1912, the defendant filed a petition seeking to have the decree modified with respect to the payment of alimony and the custody of the children. From this petition it appears that the decree, so far as the payment of alimony, attorney's fee, and costs are concerned, has never been com-

plied with by the defendant. The portions of the petition material to this inquiry are in substance as follows: That the plaintiff has practically abandoned her two minor children; that Gladys Irene is being carried about the country by plaintiff's sister and her husband, traveling vaudeville actors of Chicago, Ill.; that Evelyn is kept in the home of plaintiff's father, at Bryn Mawr, in King county, who is living with a woman not his wife; that the child is falsely taught as to her correct name; that at the trial of the divorce proceeding, plaintiff upon oath falsely represented that she had rich friends and relatives who would assist her in the education, maintenance, and support of the minor children; that the plaintiff is not now a fit and suitable person longer to have their care, custody, and control; that defendant now has employment in King county, lives with his father and mother at Bryn Mawr, and that his mother is in the best of health; that their home is comfortable, and the minor children can be given the education and every comfort and advantage that children of their age and circumstances should have. To this petition a general demurrer was interposed which, on December 24, 1912, was by the court overruled. The plaintiff elected to stand on the demurrer and refused to plead further. Thereupon judgment was entered modifying the decree and adjudging that the defendant be relieved and discharged from the payment of alimony, including that already accrued and unpaid, and that which would accrue in the future. It was further decreed that the custody of the children be taken from the plaintiff and given to the defendant. From this judgment the plaintiff has appealed.

Upon this appeal the questions presented are the right or power of the court to modify the decree: (1) As to the custody of the children; (2) as to alimony yet to accrue; and (3) as to alimony past due.

[1] I. The law in this state is well settled that where there is a material change in the conditions or fitness of the parties, or the welfare of the children would be promoted thereby, the court has the power to modify the decree with reference to the custody of the minor children. *Koontz v. Koontz*, 25 Wash. 336, 65 Pac. 546; *Irving v. Irving*, 26 Wash. 122, 66 Pac. 123; *Kane v. Miller*, 40 Wash. 130, 82 Pac. 177.

[2] The appellant's demurrer admits all the facts as alleged in the petition which are well pleaded. Assuming, then, that the facts are as stated in the petition, the welfare of the children would be better served at the present time by awarding their custody to the father. The facts stated in the petition were sufficient, upon demurrer, to entitle the respondent to the relief sought.

[3] II. As to the alimony yet to accrue, the law reposes in the court the power to modify the decree as the conditions and cir-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes



cumstances of the parties may change from time to time. *Poland v. Poland*, 63 Wash. 597, 116 Pac. 2; *Dyer v. Dyer*, 65 Wash. 535, 118 Pac. 634; *Harris v. Harris*, 128 Pac. 673. The appellant in her brief does not appear to seriously contend that the law is otherwise than as above stated as affecting the custody of the children and alimony yet to accrue.

[4] III. On the question of the power of the court to modify the decree as to those installments of alimony past due and unpaid; the law appears to be that such power does not exist. The rights and liabilities of the parties with reference to such installments become absolute and fixed at the time provided in the decree for their payment, and as to such the decree is not subject to modification. In *Craig v. Craig*, 163 Ill. 176, 45 N. E. 153, it is said: "In the case at bar it was error to set aside and cancel alimony which had already accrued and was due to plaintiff in error under the decree. The amount of such alimony was a debt due from the defendant James R. Craig to the beneficiary in the decree, and the latter had a vested property right therein, which the court was not authorized to take away from her." In *Harris v. Harris*, *supra*, speaking upon the same question, it was said: "The only final feature of judgments of this character is as to each installment of alimony as it becomes due. As to these installments, the rights and liabilities of the parties become absolute and fixed at the time provided in the decree for their payment, and to this extent the judgment is a final one." It was error, therefore, for the court to modify the decree as to the installments of alimony which had accrued at the time of the hearing, and to this extent the judgment must be modified by excepting from its operation the alimony already accrued.

The cause will be remanded to the superior court, with direction to modify the judgment as herein indicated.

ELLIS, FULLERTON, and MORRIS, JJ., concur.

(74 Wash. 391)

KINNEAR et al. v. ROSS, Com'r of Public Lands, et al.

(Supreme Court of Washington. July 22, 1913.)

1. PUBLIC LANDS (§ 185\*)—TIDELANDS—AWARD—PREFERENCE.

Under Laws 1895, c. 178, giving the owner of uplands a preference right to purchase tidelands, and providing that, if at the end of 60 days there are no conflicting applications, the applicant shall be deemed to have the right to purchase, but, if there are conflicting applications, the board of state land commissioners shall order a hearing and require each applicant to submit a statement of fact whereby he claims a preference, that in case any applicant should fail to file such statement he shall be deemed to have waived his right of purchase,

and that upon the hearing the board shall certify the award to the commissioners of public land, the board of commissioners has authority to set aside an award of the preference right not certified to the commissioner of public lands, where there were conflicting applications, and none of the parties filed the statements required.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. § 598; Dec. Dig. § 185.\*]

2. PUBLIC LANDS (§ 185\*)—TIDELANDS—WAIVER OF PREFERENCE RIGHT.

Where the board of land commissioners upon a conflicting claim certified to the commissioner of public lands that none of the applicants were entitled to a preference right to purchase tideland, the rights of the applicants to complete their purchase arose at the time of the certification, and their failure to appeal within the time and manner given them by statute is a waiver of their rights.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. § 598; Dec. Dig. § 185.\*]

3. PUBLIC LANDS (§ 185\*)—PREFERENCE RIGHT TO PURCHASE TIDELANDS—LACHES.

Where the board of land commissioners upon conflicting claims made an order giving plaintiffs the preference right to purchase tideland, and though such order was afterwards set aside, plaintiffs made no efforts to complete their purchase, waiting over 10 years before renewing their claim, and making no formal tender of the purchase price, their rights, if any, under the order are lost by laches.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. § 598; Dec. Dig. § 185.\*]

Department 2. Appeal from Superior Court, Thurston County; John R. Mitchell, Judge.

Action by Angie C. Kinnear and others, executrix and executors of the last will and testament of George Kinnear, deceased, and others, against E. W. Ross, Commissioner of Public Lands, and others. From a judgment dismissing the complaint, plaintiffs appeal. Affirmed.

Geo. B. Cole, of Seattle, for appellants. W. V. Tanner, of Olympia, and S. H. Kelleran, of Seattle, for respondents.

FULLERTON, J. This action was instituted by the appellant to enjoin the commissioner of public lands from selling as property of the state certain tidelands, known on the official plats of the state as block 411, Seattle tidelands. The commissioner of public lands took issue on the allegations of the complaint, and a trial was had thereon which resulted in a dismissal of the action with prejudice.

The facts material to the inquiry in this court are not in dispute. On March 15, 1895, the board of state land commissioners of the state of Washington platted with other lands the tidelands here in question, and on that day filed such plat in the office of the commissioner of public lands, and in the office of the auditor of King county, the county in which the lands are situated; the appraised value of the block as shown on the plat being \$231. The predecessors in interest of the appellants claimed to own uplands abutting upon the tidelands, and to have a preference right to purchase the block in



virtue of statute, and on April 25, 1895, filed with the commissioner of public lands an application to purchase the same. No proof of ownership of abutting uplands conferring on them the right to purchase was submitted by the applicants, nor was the upland which the applicants claimed to own and upon which they based their claim of right to purchase described in the application. In the meantime three other applicants, claiming a preference right to purchase the land in virtue of upland holdings, filed with the commissioner of public lands applications to purchase the same. These several applications were referred by the commissioner of public lands to the board of state land commissioners, and that body, after due notice to the applicants, heard their several contentions, and on June 30, 1896, entered in their minutes an order rejecting all applications except that of the predecessors in interest of the appellants and awarding to such predecessors the preference right to purchase the property. This order, however, was not certified to the commissioner of public lands. On December 17, 1896, the board reconsidered and reviewed this order, and made a second order in which it found that the appellants' predecessors were entitled to purchase only a portion of the block 11, and entered another order on their minutes in which it awarded to them only a part of such block, awarding the remainder to one A. C. Shaw, whose application had been rejected at the first hearing. This order likewise was not certified to the commissioner of public lands.

On December 22, 1897, the board again reviewed its former orders at a hearing at which all of the applicants were again represented, those whose applications had formerly been rejected as well as the successful applicants. This order contains the following recital: "In the hearing of the case it developed that each applicant based his right to purchase the tidelands in controversy upon the fact of his being the upland owner. The board thereupon ordered that the several applicants be ordered to furnish proof to the board of the ownership of the upland abutting the tidelands applied for by each at the time said applications were filed. And it was further ordered that if such proof does not establish the fact of such ownership that the entire application shall stand rejected." Notice of this order was given the applicants, together with a notice to the effect that a further hearing would be had on January 26, 1898. At the last-mentioned date none of the applicants appeared or attempted to furnish the proofs required, except A. C. Shaw, who filed a certified copy of a deed to certain uplands as such proof. On February 7, 1898, the board again reconsidered and reviewed all of its prior orders relative to the purchase of the block in question, and on that day entered an order reciting that the applicants had failed to furnish the board with proofs of their upland ownership

necessary to entitle them to a preference right of purchase under the statute, and ordered that each and all of the applications stand rejected for that reason, and that the land be "thrown open to sale by public auction as provided in section 47 of the act relating to public lands of the state." Notice in writing of this last order was served upon all of the applicants on February 11, 1898, the appellants' predecessors in interest as well as the others, together with a notice informing each of them that they had 30 days from the date thereof in which to appeal from the order. There was no appeal from the order, nor did the predecessors in interest of appellants tender the purchase price of the lands to the commissioner of public lands, or make any formal demand for a deed within 60 days after notice was given them of the order rejecting their application. Indeed, no formal demand or tender was made until just prior to the institution of the present action, a period of more than 10 years after the rejection of the application. In September the land was reappraised (the appraisers finding the value thereof to be \$1,000) and offered for sale, whereupon the present action was instituted with the result above stated.

The appellants contend that their predecessors in interest acquired a vested right to the land by virtue of the original order of the board of state land commissioners, purporting to award to them a preference right to purchase the lands; that all of the subsequent orders of such board are in consequence nullities, and that they have now, as the successors in interest of the persons in whose favor the order was made, a right to a deed from the state for such property on the payment of its then appraised value.

[1] The statute in force when the application under which the appellants claim was filed, Laws 1895, p. 527, gave the owner of uplands abutting upon tidelands a preference right to apply for the purchase of such lands for 60 days following the filing of the final appraisal of the same with the commissioner of public lands, and provided that, if at the end of such 60 days there were no conflicting applications filed, the applicant should "be deemed to have the right of purchase." It further provided that, if at the end of such 60 days there were conflicting applications filed for the land, the board of state land commissioners should order a hearing, and should within a time stated order each applicant to submit under oath a full statement of the facts whereby he claims a preference right of purchase, which statement, it was further provided, should be the only pleading required, and should be deemed denied by the other applicants; that in case any applicant should fail within the time limited to file such statement, he should, unless good excuse be shown therefor, be deemed to have waived his right of purchase of the tract under his application, and that at the hearing the board should determine who has the



first right of purchase, and should award the land to such applicant, and certify such award to the commissioner of public lands, who should thereafter proceed to sell and dispose of such lands in accordance therewith. It also further provided that, when the land should be finally awarded to an applicant, he must make his initial payment for the land within 30 days thereafter.

Tested by these statutes it is plain that there was no final award of the lands here in question to the applicants. The order of the board of state land commissioners under which the appellants claim was not a final award. To make it final it was necessary that it be certified to the commissioner of public lands. The board did not so certify this order; on the contrary it retained jurisdiction over the subject-matter, and made further and different orders with respect thereto before it made such certification. The record, it is true, offers no direct explanation why the board did not certify to the commissioner of public lands its original order, but the reason is not far to seek. There were conflicting applications, and the board had made the award without the pleadings and proofs required by the statute as a prerequisite to the determination of conflicting applications. It thought its order irregular and void, and retained jurisdiction over the cause that it might make a valid order in the premises. When, therefore, it retained jurisdiction and directed these proofs to be filed, and the applicants failed to comply therewith, it was justified in rejecting the applications and certifying the land to the commissioner of public lands as lands not subject to a preference right of purchase.

[2] Moreover, the right of the applicants to complete their purchase, if they were entitled at all to the right of purchase, arose when the order of the board was certified to the commissioner of public lands. The record is clear that these applicants had notice of this order and certification at the time it was made. Their remedy was to appeal to the courts from the order within the time and in the manner given them by statute, and failing to do so they must be held to have acquiesced in the final disposition made of their application, even if we assume that the original order of the board was the only order the board had power to make.

[3] Again, the appellants are estopped by their own laches from now asserting a preference right of purchase, or claiming under the original order. They did not within a reasonable time make a valid demand upon the board of land commissioners or the commissioner of public lands for a compliance with the order. A demand to be valid under such circumstances must be made within a reasonable time after the right accrued, it

must be formal and be accompanied with a tender of the purchase price of the property. Here no such demand was made, and the record clearly shows that no tender of the purchase price to the state was made until more than 10 years after the claimed right of purchase accrued.

The appellants cite and rely upon the case of *State ex rel. Billings v. Bridges*, 22 Wash. 64, 60 Pac. 60, 79 Am. St. Rep. 914, and *State ex rel. Wilson v. Grays Harbor & P. S. R. Co.*, 60 Wash. 32, 110 Pac. 676. But the rule of those cases do not aid the appellants. The applicants therein had complied with all of the requirements of the law necessary to acquiring a right in the property, and appealed seasonably to the courts when their rights were not recognized. Here there was no such compliance in the first instance, and there was a delay of more than 10 years between the time the right is claimed to have accrued and the attempt to enforce such rights. These facts differentiate the cases.

The judgment appealed from is affirmed.

MAIN, MORRIS, and ELLIS, JJ., concur.

(74 Wash. 397)

FOGARTY v. NORTHERN PAC. RY. CO.

(Supreme Court of Washington. July 22, 1913.)

1. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

In an action brought under the federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]) for the death of a servant, the question of the servant's contributory negligence is properly left to the jury; section 3 of the act providing that contributory negligence shall not bar recovery, but merely reduce damages in proportion to the amount of negligence attributable to the servant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.\*]

2. DEATH (§ 18\*)—RIGHT OF ACTION FOR WRONGFUL DEATH.

The right of action given by the federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]) to dependent relatives of a deceased servant is limited to a recovery of damages for whatever pecuniary benefits they have lost by reason of the servant's death, and the mere liability of the deceased to support his wife and minor child will not establish their right of action.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 20; Dec. Dig. § 18.\*]

3. DEATH (§ 105\*)—VERDICT—APPORTIONMENT OF DAMAGES.

Where an action under the federal Employer's Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]) is brought for the benefit of several relatives of the deceased servant, the verdict should apportion the recovery among the relatives according to their respective losses.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 149; Dec. Dig. § 105.\*]



Department 2. Appeal from Superior Court, Yakima County; Thos. E. Grady, Judge.

Action by John B. Fogarty, as administrator of the estate of Frank Edward Myers, deceased, against the Northern Pacific Railway Company, a corporation. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Englehart & Rigg, of North Yakima, for appellant. Wm. M. Thompson and Henry J. Snively, both of North Yakima, for respondent.

MORRIS, J. This action was brought under the federal Employer's Liability Act on behalf of the widow and minor child to recover damages for the death of Frank E. Myers caused by the derailment of an engine upon which the deceased was working as fireman. The negligence charged was in failing to cause a switch to be properly set and closed, and maintaining it in an open and defective condition.

[1] Several defenses were pleaded, none of which need be referred to except two. The first of these is contributory negligence. All that need be said in regard to this charge is that, under section 3 of the act, contributory negligence is not a bar to recovery, but the damages are to be diminished by the jury in proportion to the amount of negligence attributable to the employé. It will thus be seen that in cases under this act it becomes a question of fact for a jury to apportion the negligence of the employer and the employé, and to render a verdict in such an amount as they shall fairly determine to represent the true apportionment. The cases must therefore be rare in which the court would be justified in saying, as a matter of law, that the contributory negligence of the employé so far exceeds the negligence of the employer that the jury would not be justified in returning a verdict in any amount. Whether or not such a rule should be adopted need not here be discussed, as the facts upon which the charge of contributory negligence is here based are so plainly for the determination of the jury that it would be a judicial usurpation of power to interfere with the verdict.

[2] The next defense to be noted is that, long prior to the death of deceased, the deceased and his wife had abandoned each other, and had not lived together as husband and wife. It was also charged in this connection that the deceased had also abandoned the minor child, who is now about seven years of age, and had not contributed to the support of this child for many years, and that neither the widow nor the child were to any extent dependent upon the deceased for support. The jury returned a verdict assessing the damages in a lump sum at \$20,000, which the lower court reduced to \$12,500, and the company appeals.

In submitting this defense to the jury we think the lower court committed error. The

jury were instructed that in cases of this character the law has no fixed standard by which to ascertain and fix the damages, and that the question for them to determine was, What loss did the wife and child suffer by reason of the death of the deceased? The jury were further told that the damages should be assessed in a single sum for the benefit of the surviving widow and child. Whatever may be the rule as to the correctness of these instructions in an ordinary action for wrongful death under the statutes of this state, they were not correct as applied to a cause of action founded upon the federal Employer's Liability Act. Under this act, as interpreted by the Supreme Court of the United States, a new and distinct right of action is given for the benefit of the dependent relatives named in the statute, and the damages recoverable are limited to such loss as results because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employé. The damage is limited strictly to the financial loss sustained. If there is no reasonable expectation of pecuniary benefits, or no financial loss sustained, then there can be no recovery under this act. The court below went beyond this limitation in charging the jury that in cases of this character the law has no fixed standard by which to ascertain the loss, and that the sole question for them to determine was what loss did the wife and child suffer. The law does fix a standard, and that standard or measure is the financial benefit which might reasonably be expected in a pecuniary way, and the question for the jury to determine was not, what general loss, but what pecuniary loss, did the wife and child sustain? In speaking of the damages or loss recoverable under this act, the Supreme Court of the United States, in *Michigan Central Railroad Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. —, says: "The damages are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries. The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived."

Another instruction was: "You are instructed that it was the legal duty of the deceased in his lifetime to care for and support his wife and child, even though he lived separate and apart from them, or they lived separate and apart from him; and this duty could not be avoided by him by any voluntary act on his part, and a wife and child have the right to recover damages for the death of the husband and father caused by the negligence of another, independent of whether he has contributed anything to their support." This



we think was erroneous in that it fixes "legal duty" independent of pecuniary benefits as a measure by which the jury should estimate the damages instead of the pecuniary benefits which the wife and child might have reasonably received during the lifetime of the deceased. This same interpretation of the character of the loss recoverable under this act is also made in *American Railroad v. Dicksen*, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. —, where it is held that the damages recoverable are limited to the loss sustained by the deprivation of a reasonable expectation of pecuniary benefits and the financial loss sustained.

[3] It was also error to direct the jury to assess the damages in a single sum. The jury might have found, as between the widow and child, that they did not sustain an equal financial loss, or they might have found that one sustained such a loss while the other did not, yet under the instructions to assess the damages in a single sum, there was no way to indicate the determination of the jury as to the pecuniary loss suffered by each claimed beneficiary. This question in cases under this act has lately been reviewed by the Supreme Court of the United States in *Gulf, Col. & S. F. Ry. Co. v. McGinnis*, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. Ed. —, where it said: "The statutory action of an administrator is not for the equal benefit of each of the surviving relatives for whose benefit the suit is brought. Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss. That apportionment is for the jury to return. This will, of course, exclude any recovery in behalf of such as show no pecuniary loss."

For these reasons, the judgment is reversed, and the cause remanded for a new trial.

MAIN, FULLERTON, and ELLIS, JJ., concur.

(74 Wash. 356)

FIELD v. SPOKANE, P. & S. RY. CO.  
(two cases).

(Supreme Court of Washington. July 16, 1913.)

**1. NEW TRIAL (§ 102\*)—NEWLY DISCOVERED EVIDENCE—DILIGENCE.**

In a personal injury action, where the complaint made no specific mention of the injuries to plaintiff's spine or shortened leg, but was confined to general allegations, and no evidence of any such injuries was offered on the first trial, defendant cannot, after a second trial, procure a new trial on the ground of newly discovered evidence that plaintiff was suffering from no such injury, where it did not object at the second trial, occurring four years after the injury, to the introduction of testimony tending to show such injuries and did not assert surprise, but accepted the issue, and introduced rebutting testimony thereon.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 207, 210-214; Dec. Dig. § 102.\*]

**2. NEW TRIAL (§ 76\*)—PERSONAL INJURIES—EXCESSIVE AWARD.**

An award of \$4,000 damages for personal injuries cannot be held excessive, so as to require a new trial, where the evidence on the second trial, which was two years after the first and four years after the accident, tended to show that plaintiff was severely injured, because the evidence on the first trial tended to show only temporary injuries.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 153-156; Dec. Dig. § 76.\*]

**3. NEW TRIAL (§ 76\*)—PERSONAL INJURIES—EXCESSIVE AWARD.**

An allowance of \$500 damages for personal injuries suffered by a female injured by a railroad company cannot be held so excessive as to indicate passion and prejudice on the part of the jury and require a new trial, though the injury was slight and of a temporary nature.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 153-156; Dec. Dig. § 76.\*]

Department 2. Appeal from Superior Court, Clarke County; Donald McMaster, Judge.

Actions by Eliza Field and by Ella Field against the Spokane, Portland & Seattle Railway Company. From judgments for plaintiffs, defendant appeals. Affirmed.

Carey & Kerr, of Portland, Or., A. L. Miller, of Vancouver, and Omar O. Spencer, of Portland, Or., for appellant. Frank E. Vaughan, of Vancouver, and Hayden & Langhorne, of Tacoma, for respondents.

MORRIS, J. These consolidated cases come to this court on appeal for the second time. The first judgments were reversed, and new trials granted, because of an erroneous instruction to the jury. *Field v. S., P. & S. R. Co.*, 64 Wash. 445, 117 Pac. 228. Upon the second trial respondents obtained judgments for, respectively, \$4,000 and \$500, and the railway company appeals.

The facts are all stated in the first opinion and will not again be referred to. Two assignments of error are now urged: (1) That the lower court erred in denying a motion for a new trial based upon newly discovered evidence as to the injuries sustained by Eliza Field, and (2) that each of the verdicts is excessive.

[1] The first error is based upon the fact that upon the second trial an osteopath, who had been treating Mrs. Field subsequent to the first trial, testified to injuries to the spine and a shortened leg, causing her to walk with a limp, and that these injuries were of a permanent nature. The amended complaint, upon which the case of Eliza Field was tried, makes no specific mention of injuries to the spine or a shortened leg, but confines itself to a general allegation that she was severely bruised and injured, so that she became lame, sick, and sore, suffering great pain, and her health permanently injured. At the first trial no evidence was given tending to show any permanent injury to the spine, nor mention made of a short-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ened leg. No objection was, however, made to this evidence upon the second trial, which took place nearly four years after the accident; appellant accepting the issue and contenting itself with offering evidence of several of the jurors, who were in attendance at the time of the first trial, to the effect that Mrs. Field was not then lame nor limped when walking, except when her attention was evidently called to it. Upon its motion for a new trial appellant read affidavits to the effect that upon a new trial the persons named in the affidavits would testify that Mrs. Field was not lame, did not walk with a limp, nor complain of injury to her spine. Respondents produced affidavits from these same persons to the effect that they had been misquoted in appellant's affidavits, and would not testify as there indicated, but would in most cases testify in favor of respondent's contention as to the then condition of Mrs. Field.

We can find no error in the denial of the motion for new trial upon this claim of newly discovered evidence. It occurs to us that, if appellant had been surprised at the character of the evidence as to the extent and nature of Mrs. Field's injuries, the proper way would have been to have suggested its surprise and unpreparedness to meet such issue at the time the evidence supporting it was introduced, or ask for an appointment of physicians to examine her. Not having done so, nor in any way raising the question of the relevancy of this testimony at the time of the trial, but having accepted the issue, it would be an improper direction to now say appellant should be afforded the opportunity of meeting this testimony, when it in no way sought to take advantage of any of the opportunities to defend against it, which might have been afforded it at the time of the trial. We are not, therefore, prepared to say that the lower court erred in denying this phase of the motion for new trial.

[2, 3] Nor are we prepared to say the damages in either case are excessive. Medical testimony offered at the first trial, and which was made a part of the evidence at the second trial, would indicate that Mrs. Field's injuries were only of a temporary nature. The evidence offered at the second trial as to her condition subsequent to the first trial, and at the time of the second trial, which occurred nearly two years after the first trial, and four years after the accident, sustains respondent's contention that Mrs. Field suffered a severe injury, and that its effects are serious, painful, and permanent. We must therefore accept the verdict as a finding by the jury that the condition as shown at the time of the second trial is the true one, rather than that shown at the time of the first trial, and with this view we are not prepared to say the damages are excessive. The injury to Ella Field was slight, and of

a temporary nature. We cannot say, however, that the award of \$500 in her case is excessive to such an extent as to indicate passion and prejudice on the part of the jury, or call for any reduction by this court.

Neither verdict will be disturbed, and the judgments are affirmed.

ELLIS, MAIN, and FULLERTON, JJ., concur.

(74 Wash. 421)

HOPE et al. v. BROWN et al.

(Supreme Court of Washington. July 23, 1913.)

1. BOUNDARIES (§ 37\*)—LOCATION—PRIMA FACIE CASE—REPUTATION.

In ejectment to determine the location of a disputed boundary line, evidence of a single witness of some years' residence in the neighborhood that a certain post by general reputation was supposed to be on a section line between certain specified sections, which post had been selected as the beginning point of the descriptions in the conveyances of adjoining property, was insufficient to establish a prima facie case of the true location of the section line.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 184-194; Dec. Dig. § 37.\*]

2. EJECTMENT (§ 86\*)—POSSESSION—BURDEN OF PROOF.

Where in ejectment defendants were in peaceable possession of the land in dispute, and had acquired such possession without ousting plaintiffs from their possession, such peaceable possession was sufficient evidence of title in defendants to place the burden of showing a better title on plaintiffs, without defendants offering any evidence as to the true location of the boundary line.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 238-245; Dec. Dig. § 86.\*]

Department 1. Appeal from Superior Court, Kitsap County; John B. Yakey, Judge.

Action by Jennie L. Hope and others against Beriah Brown and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Moore, Wardall, Wardall & Martin, of Seattle, for appellants. Geo. M. McKay, of Seattle, for respondents.

PARKER, J. The plaintiff seeks to recover from the defendants the possession of a tract of land lying along the common boundary line of two 5-acre tracts. The southerly one of these 5-acre tracts is owned by the plaintiffs, while the northerly one is owned by the defendants. The controversy arises over the true location upon the ground of the common boundary line running east and west between these two tracts. A trial before the court without a jury resulted in findings and judgment in favor of the defendants, from which the plaintiffs have appealed.

On October 14, 1890, William Motherway owned a large tract of land embracing these two 5-acre tracts. On that day he conveyed to Frederick J. Hope the southerly tract,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes



describing it as follows: "Commencing at the meander post of Dye's Inlet, on the section line between sections 20 and 29, township 25 north, range 1 east W. M.; thence west along the same section line 566.5 feet; thence north 297 feet; thence east 900 feet to the meander line; thence in a southwesterly direction along the meander line to the place of beginning—containing five acres, more or less." On the same day he also conveyed to Harriette E. Williams the northerly tract, describing it as follows: "Commencing at a point 566.5 feet west and 297 feet north of the meander post between sections 20 and 29, township 25 north, range 1 east W. M.; running thence north 234 feet; thence east 967 feet to the meander line; thence southerly along the meander line to a point east of the place of beginning; thence west 900 feet to the place of beginning—containing five acres more or less." These two conveyances are the source of the respective titles of the parties to this action; all the mesne conveyances being made by the same descriptions. Thus it is rendered plain that there is no encroachment of one tract upon the other so far as the descriptions in the conveyances are concerned, and that they have a common, boundary line running east and west.

There is but little else than questions of fact involved in this controversy. Appellants rest their claim to the land in dispute upon an alleged agreed boundary line and adverse possession, as well as their claimed true location of the section line on the south of their tract. The trial court found against them upon all of these questions. We have carefully read all of the evidence, much of which is conflicting, contained in the somewhat voluminous record, and feel constrained to agree with the trial court in its conclusions upon these questions. We see no useful purpose in a discussion of the evidence in detail here, though we will say a word touching the section line location.

[1] The record is almost wholly barren of any evidence tending to show the true location of the section line upon the ground. Evidence sufficient to convince the court of such location would, of course, be decisive of the controversy, aside from the questions of agreed boundary and adverse possession. Appellants did not offer any evidence, which can be regarded as at all convincing, showing a survey of that line as claimed by them. Other evidence introduced by them to prove its location consisted only of the testimony of a single witness of some years' residence in the neighborhood, who was asked and answered as follows: "Q. Was that post by general reputation in the neighborhood supposed to be on the section line between sections 20 and 29? A. Yes, sir." This referred to a post claimed to be the "meander post" on the section line, mentioned in the descrip-

tions of the conveyances. We think this was not sufficient to warrant us holding that the trial court was bound to regard this evidence as even *prima facie* establishing the true location of the section line.

[2] It is true respondents offered no evidence as to the true location of that line, but they were in peaceable possession of the land in dispute, and had acquired that possession without ousting appellants of possession, as the trial court evidently believed and we think was warranted in believing from the evidence. This peaceable possession on the part of respondents was sufficient evidence of title in them to place the burden of showing a better title upon appellants. Our decision in *Dicus v. Major*, 130 Pac. 474, and the authorities there reviewed support this view.

We conclude that the judgment must be affirmed. It is so ordered.

GOSE, MOUNT, and CHADWICK, JJ., concur.

(74 Wash. 481)

SEATTLE NAT. BANK v. BECKER et ux.  
(Supreme Court of Washington. July 23, 1913.)

BILLS AND NOTES (§ 475\*)—ACTIONS AGAINST INDORSER—ANSWER—CONDITIONAL DELIVERY.

In an action against the indorser of a note, an affirmative defense which states that the note was indorsed by the defendants and delivered to the payee upon an express understanding that it would not be binding unless indorsed by two others, and that certain property would be first applied to the satisfaction thereof, and alleges that the payee did not secure the indorsement required, sufficiently alleges that the delivery was conditional, and that the note was not complete until the conditions were complied with, and states a defense to the action.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1514-1518, 1556; Dec. Dig. § 475.\*]

Department 2. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by the Seattle National Bank against J. A. Becker and another upon a promissory note. Judgment for the plaintiff, and defendants appeal. Reversed.

Edgar S. Hadley, of Seattle, for appellants. Bausman & Kelleher, of Seattle, for respondent.

MORRIS, J. Appeal from a judgment upon a promissory note after sustaining a demurrer to affirmative defenses.

The appellants pleaded two affirmative defenses. The first need not be referred to, as in our judgment it was demurrable. The second affirmative defense was as follows: "That on or about the 1st day of June, 1911; the Pacific Steel Furniture Company, being indebted to the plaintiff, was required to give a note in renewal thereof, and these defendants were requested by said bank to indorse said note; that it was agreed that as a fur-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ther indorser on said note the plaintiff would secure the indorsement of Hartley D. Smith and Minnie E. Smith, his wife, and would take the property hereinabove described as security for said loan; that the defendants stated to the plaintiff they would not indorse said note unless the plaintiff further secured the indorsement of said Hartley D. Smith and Minnie E. Smith, his wife, and it was so agreed by the plaintiff, and upon that understanding, and not otherwise, these defendants attached their names to the said note and delivered the same to the plaintiff, with the understanding and agreement that before said note would be binding upon them, or they would be liable thereon, the plaintiff would secure the indorsement of the said Hartley D. Smith and wife, and would first satisfy said note from the property deeded to them and from other property of the said Hartley D. Smith and Minnie E. Smith; that contrary to this agreement, and without any knowledge of these defendants, the plaintiff failed and neglected to secure the indorsement of the said Minnie E. Smith, contrary to their agreement and to the agreement of all the parties as to the delivery and liability of these defendants upon said note."

We believe this to be a good defense, and the court below was in error in sustaining a demurrer thereto. The delivery pleaded was a conditional one, and as against appellants the instrument was not complete until the terms of the conditional delivery had been fully complied with. We think this defense plainly pleads that appellants indorsed the note on condition that the payee would secure additional indorsements before the note would be binding upon appellants, and with such a plea it was good as against the demurrer. *Young v. Smith*, 14 Wash. 565, 45 Pac. 45; *Seattle v. Griffith Realty & Banking Co.*, 28 Wash. 605, 68 Pac. 1086; *McCormick Machinery Co. v. Faulkner*, 7 S. D. 363, 64 N. W. 163, 58 Am. St. Rep. 839.

For this error, the judgment is reversed.

MAIN, ELLIS, and FULLERTON, JJ., concur.

(37 Okl. 606)

TIREY et al. v. DARNEAL.  
(Supreme Court of Oklahoma. June 11, 1913.)

(Syllabus by the Court.)

1. INDIANS (§ 13\*)—ALIENATION OF ALLOTMENTS—REMOVAL OF RESTRICTIONS.

Section 6 of the act of Congress of May 27, 1908 (35 Stat. 342, c. 199), providing that the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the control and jurisdiction of the probate (county) courts of the state of Oklahoma, is in the nature of a restriction, by Congress, on the alienation of land belonging to minor allottees, and as such can only be removed by a regular proceeding as provided by statute, through the instrumentality of the county court, and a

deed executed by a minor, even though married, without any attempt to comply with such law, is void.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 30; Dec. Dig. § 13.\*]

2. INDIANS (§ 13\*)—VOID DEED—RIGHT OF ACTION—CONDITION PRECEDENT.

Where such a void deed is executed, the grantor is not required to refund the consideration therefor before asking relief in equity.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 30; Dec. Dig. § 13.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Haskell County; Malcolm E. Rosser, Judge.

Action by Elias Darneal, an infant, etc., against L. C. Tirey and others to cancel a deed. Judgment for plaintiff, and defendants bring error. Affirmed.

Clark & Crittenden, of Stigler, for plaintiffs in error. Frederick & King, of Stigler, for defendant in error.

ROBERTSON, C. Elias Darneal, the defendant in error, is a Choctaw Indian by blood, and received as a part of his allotment as such Choctaw citizen the southeast quarter (S. E.  $\frac{1}{4}$ ) and the southeast quarter (S. E.  $\frac{1}{4}$ ) of the southeast quarter (S. E.  $\frac{1}{4}$ ) of the southwest quarter (S. W.  $\frac{1}{4}$ ) of section 2, township 8 north, range 19 east of Indian base and meridian in Haskell county, Okl., to which a patent had been duly executed and delivered him; on July 28, 1908, he, being then under the age of 21 years, but at the time a married man and the head of a family, joined by his wife, Ida Darneal, executed to L. C. Tirey, one of the plaintiffs in error, his warranty deed to the premises above described. On August 7, 1907, Tirey sold a portion of the land to W. M. Shelton, and the balance to Ike Wheat. On December 2, 1909, the defendant, Elias Darneal, by his guardian, C. T. Mitchell, filed a petition in the district court of Haskell county, praying for the possession of the land above described, and for the cancellation of the deed; after several preliminary motions had been disposed of, Tirey, on the 20th day of August, 1910, filed his separate answer to plaintiff's petition, which besides being a general denial, alleged that at the time Darneal and his wife executed the deed to him they were husband and wife, living together as such; that the contract was made and entered into in good faith by all parties concerned; that they were legally authorized to make and enter into the same; that he paid Darneal \$1,500 for the land; that since receiving the deed as aforesaid he had conveyed the same to W. M. Shelton and Ike Wheat; that improvements to the value of \$1,500 had been placed thereon, and prayed that the plaintiff be required to reimburse them to that extent before he should be entitled to ask relief in equity. Shelton and Wheat, the grantors of Tirey, answered by

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



general denial. The cause was tried to the court, aided by a jury, and on December 6th a judgment was entered canceling the deeds hereinbefore referred to, and finding that the defendants had placed improvements on said land since the purchase thereof, which had enhanced the value of said land exclusive of the value of rents thereof, in the sum of \$1,210, and it was therefore ordered and adjudged, that the defendants have and recover from the plaintiff the sum of \$1,210, and the same was declared a lien on the rents and property.

After a motion for a new trial had been overruled, the defendants took time to make and serve a case-made, and complain here of the judgment: First that the court committed error in refusing to require of plaintiff to refund the purchase price of \$1,450; and, second, that the court erred in refusing to require the plaintiff to return to the defendant Tirey certain property that he received from him as a consideration for the land in controversy. The defendant in error in his brief answers these allegations by insisting that at the time the deed was made to Tirey, he (being under the age of 21 years) had no power or authority to sell the land without proceedings in, and sanction of, the county court, neither of which was had, and that therefore the deed, so made to Tirey, was absolutely void; and, second that even though Darneal should have been required to refund the property received by him for the land, the answers contain no allegation that the defendant had any of the money, or the property received by him for the land, in his possession at the time the answers were filed, and the only proof in the case on this point showed that he did not have any of the money or property received for the land, and that therefore there was no error in the judgment of the lower court.

[1] The deed was void; of that there can be no doubt. Section 6 of the act of Congress approved May 27, 1908 (35 Stat. 313, c. 199), which deals with the subject of the removal of restrictions from lands of allottees of the Five Civilized Tribes, provides that the persons and property of minor allottees of said Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the control and jurisdiction of the probate courts of the state of Oklahoma. This provision of that act is in the nature of a restriction, by Congress, on the alienation of land belonging to minor allottees, and can be removed only by a regular proceeding, provided by statute, through the instrumentality of the county court. It has long been the policy of Congress, upheld universally by the courts, that the alienation of restricted Indian allotments was not only prohibited, but all such attempted conveyances were void. As was said above, this conveyance by Darneal to Tirey, by reason of the provision of the act of Congress, supra, was not voidable, but void. Plaintiffs in

error admit this, and urge this appeal, not on the grounds that they are entitled to an interest in the land by reason of a voidable transfer, but on the theory that an infant is liable for necessities furnished him and his family, and urge that the consideration paid Darneal for the land was used by him for this purpose and that therefore he should have been compelled to return the purchase price before asking the removal of the cloud from his title, cast thereon by the void deed to Tirey. The doctrine that an infant is liable for necessities is one recognized by this court, and well established by reason and precedent (Muskogee Development Co. v. Green, 22 Okl. 237, 97 Pac. 619, and cases therein cited), but it has no application to this case, and it is sufficient to say that this case does not come within the reason or purpose of that rule, for that the consideration was not paid for the purpose of procuring or providing necessities for Darneal's family. Neither is it shown, at the time the answers were filed, or the case was tried, that Darneal had in his possession any of the consideration paid him for the land. This in itself would have been sufficient reason for not requiring him, in this action, to refund the purchase price or property received by him from Tirey.

But it is unnecessary to give further consideration to that theory for the reason that this deed was void, and as was said by Justice Hayes, in *Simmons v. Whittington*, 27 Okl. 356, 112 Pac. 1018: "If the deeds made before the removal of restrictions were only voidable, there might be some support for this contention, but they are absolutely void, because prohibited by law. They bind no one. In legal effect they are nothing; and knowledge of their existence conveyed no notice of the rights of any one, because no one can claim any rights under them." This interpretation of the act of Congress of May 27, 1908, supra, is also found in *Jefferson v. Winkler*, 26 Okl. 653, 110 Pac. 755, where in the syllabus it is said: "A minor within the meaning of said sections includes males under the age of 21 years and females under the age of 18 years, and the marriage of such minor does not confer upon him or her the authority to sell his or her allotted lands independent of the jurisdiction and supervision of the probate courts of the state." In the last-named case *Rebecca Johnson*, a Creek freedman under the age of 18 years, had made a deed to her allotment to Winkler, without the supervision or authority of the probate court. The court, speaking of Winkler's rights under such a deed, said: "It, therefore, follows that, since Rebecca Johnson was not 18 years of age at the time she conveyed the land in controversy to defendant in error, and the sale to him was not made under the supervision and order of any probate court of the state, he acquired no title thereby, and has not sufficient interest in the lands in contro



versy to entitle him to maintain this action." See, also, *Rogers v. Noel et al.*, 34 Okl. 238, 124 Pac. 976; *Howard v. Farrar*, 28 Okl. 490, 114 Pac. 695, and cases therein cited; also, *Gill v. Haggerty*, 32 Okl. 407, 122 Pac. 641.

[2] The principles enunciated in the foregoing cases control in the case at bar, and we therefore hold that the pretended deed from Darneal to Tirey was void, and, this being true, Darneal could not be compelled to refund the purchase price, especially since it is not shown that he had any part thereof in his possession at the time the answers were filed and the case tried, and the court committed no error in so holding. If the deed was void, the rule of law urged by counsel for plaintiffs in error, with reference to voidable contracts, has no application.

For the reasons stated, the judgment of the district court of Haskell county should be affirmed.

PER CURIAM. Adopted in whole.

(165 Cal. 699)

**ATKINSON v. STATE DEPARTMENT OF ENGINEERING et al.** (S. F. 6,606.)

(Supreme Court of California. July 1, 1913.)

**1. STATES (§ 100\*)—CONTRACTS — STATUTORY REQUIREMENTS — EXCESS OF CONTRACT PRICE OVER ESTIMATE.**

The state building act (St. 1909, p. 650) gives the State Engineering Department charge of the construction of state buildings and provides that, before contracting therefor, it must prepare plans and specifications and estimates of cost, to be approved by the advisory board of such department, and thereafter let the work by contract to the lowest bidder, upon public notice asking bids for the entire work, and also where possible bids for each of the eight parts thereof as for masonry, iron work, etc.; that no contract shall be binding until certified by the Attorney General; and that no contract shall be made exceeding in amount the approved estimates of cost. The form of bids for state buildings required first a bid for the entire work and then bids for each of the eight classes of work, and in addition alternates from A to N, as shown in the plans and specifications, which were propositions by bidders as to deductions from the amount bid for the entire work in case certain work was omitted; such alternates, except G and H, not including all of the work in any one of the classes. On this form petitioner bid for the entire work \$612,700, and on opening the bids the department omitted certain alternates and accepted the bids of others for alternates G and H, at \$76,106 and, deducting the amount of petitioner's alternates from his bid, awarded him the contract for the remainder for \$451,166, making the whole of the contracts awarded \$527,272, which was in excess of the estimates for the work covered. *Held*, that estimates of cost, as to all work and materials to be included in the contract, should be made; that the estimated cost of the parts of the work omitted should be deducted from the estimated cost of the entire work; and that the petitioner's contract was invalid as exceeding the estimated cost of the work covered thereby.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 97; Dec. Dig. § 100.\*]

**2. STATES (§ 98\*)—CONTRACTS—ADVERTISING — SUFFICIENCY OF NOTICE.**

Under such statute a public notice to bidders asking for bids for the entire work on a group of ten buildings in accordance with plans and specifications therefor and for work on each of the classes of work designated by the statute, but not showing the scheme of alternate bids appearing in the plans and specifications on the theory that parts of the work shown by the complete specifications might be omitted and deducted from the contract price, was insufficient, since the statute required the notice to show on its face in general terms at least what the scheme of the department was as to bids.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 95; Dec. Dig. § 98.\*]

In Bank. Mandamus by John F. Atkinson against the State Department of Engineering, W. F. McClure, State Engineer, and U. S. Webb, Attorney General. Alternative writ discharged, and proceeding dismissed.

Oscar Lawler, of Washington, D. C., for petitioner. U. S. Webb, Atty. Gen., and John T. Nourse, Deputy Atty. Gen., for respondents.

PER CURIAM. This is an application for a writ of mandate requiring respondents to execute and deliver to petitioner a contract alleged to have been awarded to him as contractor for the construction and erection of a group of buildings for the State Normal School at Los Angeles. An alternative writ was issued. An answer has been presented to the petition, and the matter was submitted for decision upon the pleadings; petitioner claiming that no real controversy appears as to the facts material to a determination of the controversy.

Provision was made by statute under which the trustees of such State Normal School were authorized to sell the present normal school site and devote the proceeds to the erection of a new school and the payment of all necessary expenses thereof. So far as the construction of such improvements is concerned, the act known as the State Building Act (Stats. 1909, p. 656) controls. Substantially and so far as is material here, this act provides as follows: The Department of Engineering has sole charge and control of "the erection, construction, alteration, repair or improvement of any state structure, building, road or other state improvement of any kind," except improvements on property under the jurisdiction of the Board of State Harbor Commissioners, "the total cost of which will exceed the sum of one thousand dollars." Before entering into any contract for any such work, the department must prepare full, complete, and accurate plans and specifications and estimates of cost. These must be approved by the advisory board of such department, and the original draft filed permanently in the office of the department. The department, after such approval and filing, shall endeavor to let the work by con-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



tract to the lowest responsible bidder or bidders upon public notice. Notice of such work and inviting bids must be given by publication in a newspaper, in the county where the work is to be done, for three consecutive weeks and sent by mail to registered bidders. The notice "must state the time and place for the receiving and opening of sealed bids and must also state that bids will be received for the entire work, and also, where possible, for the performance of each of the following parts thereof, viz.: First, for the masonry work, including all brick, stone, terra cotta, and concrete work, and all necessary excavations and filling; second, for the iron work; third, for the carpenter, electric and glazing work; fourth, for the plastering work; fifth, for the plumbing and gas fitting work; sixth, for the heating work; seventh, for the tinning, galvanized iron and slating work; eighth, for the painting and graining work." On the day named in the notice, the department shall publicly open the bids received and shall award "such contract or contracts" to the lowest responsible bidder or bidders, provided that, if in the opinion of the department the acceptance of the lowest responsible bid or bids shall not be for the best interests of the state, it shall be lawful to reject all bids and readvertise. No contract awarded shall be binding until submitted to the Attorney General, found by him to be in accordance with the provisions of the act, and certified by him accordingly. If, after the approval of the plans, specifications, and estimates of cost, the department shall be of the opinion that the acceptance of any bid or bids shall not be for the best interests of the state, or if after the rejection of all bids the department shall be of the opinion that the acceptance of further bids will not be for the best interests of the state, it may direct such work to be done by day's labor, under its direction and control. "No contract or contracts shall be made exceeding in amount the estimates of costs approved by the advisory board of engineering," and no estimate of cost, including expense of advertising and inspection, shall be approved by said board requiring a greater expenditure of money than is appropriated for the specific purpose in the act authorizing the same.

Plans and specifications for all the work and estimates of cost for all for which any contract has been attempted to be awarded were prepared and approved as required by the act. Notice to bidders was given in the manner required by the act; such notice being as follows:

"State Normal School—Los Angeles.

"Notice to Contractors.

"Sealed bids will be received by W. F. McClure, State Engineer, Capitol Building, Sacramento, California, up to and including 12 o'clock noon, Saturday, April 12, 1913,

said bids then and there to be publicly opened and read, for a group of ten buildings for the State Normal School, Los Angeles, California, in accordance with plans and specifications therefor, copies of which may be obtained on application to the State Department of Engineering, Sacramento, California.

"First, for entire work.

"Second, for mason work, including all brick, stone, terra cotta and concrete work, and all necessary excavating and filling.

"Third, for iron work.

"Fourth, for carpentering, electric and glazing work.

"Fifth, for plastering.

"Sixth, for plumbing and gas fitting.

"Seventh, for heating.

"Eighth, for tinning, galvanized iron and slating work.

"Ninth, for painting and graining.

"A bond in the sum of ten per centum (10%) of the amount of the bid must accompany each bid.

"A deposit of twenty-five (\$25.00) dollars will be required on plans and specifications, the deposit to be returned immediately on the return of the plans and specifications to the State Department of Engineering at Sacramento, California, in good condition.

"The State Department of Engineering reserves the right to reject any and all bids and to waive any informality in any bid received.

"All bids must be addressed to W. F. McClure, State Engineer, Sacramento, California, and plainly marked on the envelope: 'Proposals for State Normal School Buildings, Los Angeles, California.'

"[Signed] W. F. McClure,

"State Engineer."

The specifications contained a provision that "bids shall be submitted on forms supplied by the office of the State Department of Engineering, and all blanks for alternates shall be filled out in full as required," and that each bidder must state a specific sum for which he will do the whole work. The form of bid to be used was prescribed by the specifications. It first provided for a bid in precise accord with the published notice to bidders. Then followed the so-called "alternates," being designated from A to N. These were simply 14 propositions on the part of the bidder as to the various amounts to be deducted from the amount bid for the entire work in the event that certain work is omitted. For instance, A was to the effect that, if the front yard wall between fine arts and gymnasium buildings, including railing and steps, is omitted, there shall be deducted a certain sum; J was to the effect that, if the fine arts building is omitted in its entirety, a certain sum shall be so deducted; and F was to the effect that, if all chandeliers and light fixtures are omitted, a certain sum shall be deducted. So far as we can see,



none of these so-called "alternates" included all of the work in any one of the classes specified in the statute for which a separate bid might be called for, with the possible exception of G and H; G being the entire heating and ventilating system and H being the plumbing, gas fitting, and sanitary sewerage. It may be conceded that these do include the matters specified in the fifth and sixth specifications in the statute. But each of the other alternates included either only a part of the work and materials of one of such specified classes, or work or materials not included in any of such classes. We have stated some of these. Others are all cement walks (B), all oil macadam drives on sheet No. 1 (C), programme clock and private telephone system (D), tinting, painting, and decorating of all interior plastered wall and ceiling surfaces (E), tile rainwater drainage system (I), manual arts building in its entirety (K), fountain or basin in front of administration building (L), and all cabinets, cases, tables, etc., as listed, etc. (N).

Petitioner put in a bid on this form; his bid for the entire work being \$612,700. The blanks for "alternates" were filled out by him. The department, upon the opening of the bids, decided to omit altogether and not do at all any of the work specified in alternates B, C, D, E, F, J, and N; the aggregate of the amounts specified in his alternates for these being \$73,034. It further accepted the bids of others for G and H, and omitted them from his contract; the aggregate amount specified in his alternates for these being \$88,500. This made an aggregate to be deducted from his bid of \$161,534. It awarded him the contract for the remainder of the work for \$451,166, the difference between his bid for the entire work and the aggregate of omissions. It awarded contracts to others for the work specified in G and H for the sum of \$76,106, making an aggregate of contracts awarded of \$527,272.

It is undisputed that the estimates of cost of all the proposed work, made and approved by the engineering department exclusive of architects' fees for plans, etc., and inspection, etc., amounted to \$560,286. This did not include any of the matters specified in alternates B, C, D, E, F, and N, all of which were finally omitted and for no part of which has any contract been awarded. It did include J, the fine arts building, for which no contract has been awarded. Taking petitioner's figures as to the amount of the estimate as to this, which is lower than the amount specified in the answer filed herein (\$35,271), we have \$33,592 to be deducted. Deducting this, we have as the estimate on the work included in the contracts awarded \$526,694. The estimates also included E for tinting, painting, and decorating of all interior plastered wall and ceiling surfaces, for none of which has any contract been awarded. The only evidence we have as to the estimate of

the department on this is the amount specified in petitioner's alternate bid thereon, which is \$12,000. In view of the denials and allegations of the answer on the subject of excess of amount of contracts awarded over estimates of cost, it was incumbent on petitioner to show the fact in this regard, and we are warranted in concluding that such estimates amounted at least to \$12,000. Deducting this, we have as the estimates of the engineering department on the work included in the contracts awarded the sum of \$514,694.

[1] We thus have an excess in the aggregate amount for which contracts were awarded over the estimates of the engineering department of the cost of the work included therein of \$12,578.

Taking petitioner's proposed contract alone: It is, as already stated, for \$451,166. Omitting, as it does, the matters specified in E, G, H, and J, for which the estimates of cost aggregated, taking petitioner's figures on J, \$125,592 (E \$12,000, G and H \$80,000, and J \$33,592), the amount of \$125,592 must be deducted from the total estimate, \$560,286, leaving \$434,694 as the estimate of cost by the department for the work included in petitioner's proposed contract, an excess of cost over estimate of \$16,472.

There is some confusion in view of the pleadings as to alternate I, \$2,500. Petitioner claims that this work is included in the plumbing and gas fitting contract which was awarded to another. If this be so, a review of the figures will show that the price named in the proposed contract, \$451,166, exceeds the amount bid by petitioner in the sum of \$2,500. There is also some question as to architects' fees. It is said that they were included in the estimates of cost by the department at \$28,014, bringing such estimates up to \$588,300, and that in fact they will amount only to \$26,363.60. Granting all that is claimed by petitioner in regard to both I and architects' fees, and deducting from such excess on all contracts \$4,150.40 because thereof, we still have an excess of \$3,427.60 of cost over estimates, in so far as all the contracts are concerned. Taking petitioner's contract alone into consideration, and deducting \$2,500 on account of I, for of course the architects' fees are immaterial here, we have an excess of contract awarded over estimate of \$13,972.

It is suggested by petitioner in his closing brief that there was no estimate of cost as to the matters specified in E, and that the same were not embraced in the total estimate of \$560,286. Clearly under the act an estimate of cost was required as to such matters, and, if no estimate had been made in regard thereto, the Department of Engineering was not warranted in proceeding in the matter of letting a contract for the work. The answer of respondents did not, as we read it, allege any failure to make an estimate of cost as to this particular work, and



there was no evidence to show that there was any such failure. Such answer does allege such a failure to make estimates of cost as to some other matters as to which we think estimates were required, such as cement walks and macadam drives. In fact, as we read the act, the estimates of cost as to all work and materials to be included in the contract should be made. It may be proper to observe that it is suggested that the engineering department had nothing to do with the preparation of the plans and specifications and estimates of cost for this work; such preliminary work having been done under the authorization of statute by the board of trustees of the Los Angeles State Normal School.

Under the circumstances just stated, we see no escape from the conclusion that the proposed contract of petitioner is prohibited by the provision of the act declaring that "no contract or contracts shall be made exceeding in amount the estimates of cost approved by the advisory board of engineering." It is obvious that if omissions of some of the work included in the plans and specifications may legally be made by the Department of Engineering from the contracts awarded, as was done in this case, the estimated cost of the matters so omitted must be deducted from the estimated cost of the entire work, and the remainder is the estimate of cost beyond which the department may not go in awarding contracts.

[2] We are of the opinion that the published notice to bidders did not measure up to the requirements of the statute, in view of the scheme of alternate bids shown by the plans and specifications. It did not show that anything in the nature of alternate bids, upon the theory that certain omissions might subsequently be made, was called for. It expressly declared that bids would be received "for a group of ten buildings, \* \* \* in accordance with plans and specifications therefor," and did not give the slightest intimation that any other bid was required (except bids for the parts of the work designated in the statute itself), or that bids would also be received for a group of only nine buildings, or that each bidder was in effect to put in more than one bid for the entire work, on the theory that specified portions of the work shown by the completed and approved plans and specifications might be omitted. In fact, the notice on its face negatived any such idea. Assuming, for the purposes of the decision, that the Department of Engineering may submit different schemes of proposed improvement for bids at the same time and in one proceeding, as was in effect done here, the notice should show that such is the proposition. Such we think is the plain requirement of the statute. It is no answer to the objection made to say that the plans and specifications on file

showed such to be the intention of the department. The statute cannot be reasonably construed otherwise than as requiring the notice to show on its face, in general terms at least, what the scheme of the department is as to bids, and we would not be warranted in holding that a notice which did not do this, but which in fact indicated a different scheme, namely, a single definite plan for the proposed improvement and a single bid for the whole, with bids for the parts of the whole designated by the statute, was sufficient because of the reference which we have heretofore quoted to the plans and specifications on file.

A question is suggested as to the right of the department under the building act to submit to bidders alternative schemes for the doing of the proposed work. We are informed that it is exceedingly important that a decision should be given in this proceeding at the earliest possible moment in order that the work of constructing the new normal school may not be delayed. As the question suggested will probably not be of any further practical importance in so far as this particular work is concerned, and as its determination cannot affect our decision herein in view of what we have already said, we deem it expedient to leave it undetermined herein rather than to delay the decision herein for the purpose of further investigation and consideration of a question that cannot affect the result. We do not intend to intimate by this that such a plan may or may not be followed, provided proper notice be given.

The alternative writ of mandate heretofore issued is discharged and the proceeding dismissed.

(165 Cal. 555)

RICHMOND SCHOOL DIST. OF CONTRA COSTA COUNTY v. BOARD OF SUP'RS OF CONTRA COSTA COUNTY et al. (S. F. 6,575.)

(Supreme Court of California. June 3, 1913.)

SCHOOLS AND SCHOOL DISTRICTS (§ 22\*)—ANNEXATION OF DISTRICT TO CITY—REPEAL OF SCHOOL CENSUS LAW—EFFECT.

The act of 1911, repealing provisions for a school census, did not destroy the effect of Pol. Code, § 1576, for annexation to a city of a school district on petition of a majority of heads of families. "as shown by the last preceding school census," but in annexation proceedings thereafter it was only necessary to show signatures by a majority of heads of families.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 41; Dec. Dig. § 22.\*]

In Bank. Petition by the Richmond School District of Contra Costa County against the Board of County Supervisors and others. Petition for a hearing in the Supreme Court after decision in the District Court of Appeals. Petition denied.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



H. L. Breed, of Oakland, for petitioner.  
A. B. McKenzie, of Martinez, for defendants.

**PER CURIAM.** Petition for a hearing in this court after decision in the District Court of Appeal is denied. Under section 1576 of the Political Code, proceedings may be had to annex to an incorporated city for school purposes a part of a school district lying outside of such city, or outside of an annexation to said city of a part of said school district, whenever a majority of the heads of families residing in such outside portion, "as shown by the last preceding school census," shall petition for such annexation. At the time this section was enacted the law provided for a school census. The Legislature of 1911 repealed the provisions for a school census. Consequently the clause "as shown by the last preceding school census" in section 1576 was thenceforth inoperative. This did not destroy the effect of the section as giving power to annex such portions of a school district. Its effect is that in annexation proceedings taken since the repeal of the school census law it is only necessary to show that the petition is signed by a majority of the heads of families at the time residing in the portion to be annexed.

(22 Cal. App. 149)

**STALEY v. O'DAY. (Civ. 1,261.)**

(District Court of Appeal, First District, California. May 26, 1913. Rehearing Denied by Supreme Court July 25, 1913.)

**1. APPEAL AND ERROR (§ 957\*)—DEFAULTS—VACATION—DISCRETION.**

The discretionary action of the trial court on a motion to set aside a default will not be reviewed, in the absence of an abuse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. § 957.\*]

**2. JUDGMENT (§ 153\*)—DEFAULT—VACATION.**

The delay of the defendant in making an application for the vacation of a default on the ground of excusable neglect is to be considered in determining whether the default shall be set aside, or the terms upon which it may be vacated.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 300-304; Dec. Dig. § 153.\*]

**3. JUDGMENT (§ 143\*)—DEFAULT—VACATION.**

Defendant demanded a bill of particulars, and plaintiff secured an extension of time for filing, which carried the time beyond period during which the trial court could allow defendant to answer, whereupon defendant obtained a stay of proceedings for 10 days after the filing of the bill of particulars. Thereafter plaintiff secured the transfer of the case, and secured a vacation of the stay of proceedings and the order for the bill of particulars, and without notice to defendant, applied for default on account of defendant's failure to answer, which default was granted. *Held*, that even though the motion judgment for default was continued for a long time, and the application to vacate was not prompt, yet as defendant had a good defense, and his attorney believed that the court had the power to make the order relied upon, it was not an abuse of discretion

for the court to set aside the default upon the payment of all costs by defendant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269, 270, 272-291; Dec. Dig. § 143.\*]

**4. APPEAL AND ERROR (§ 957\*)—DISCRETION—VACATION OF DEFAULT.**

A default inadvertently permitted by a party having a substantial defense presents a case in which great latitude extended.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. § 957.\*]

**5. JUDGMENT (§ 143\*)—DEFAULTS—VACATION—"MISTAKE."**

A mistake of law as to the power of the court to extend the time for answering is a "mistake" within Code Civ. Proc. § 473, providing that the court may relieve a party from defaults occasioned by excusable neglect or mistake.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269, 270, 272-291; Dec. Dig. § 143.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4539-4542; vol. 8, p. 7722.]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by John W. Staley against Thomas O'Day. From an order vacating and setting aside a default judgment, plaintiff appeals. Affirmed.

James A. Badgalupi and Harry G. McKannay, both of San Francisco, for appellant. Walter H. Linforth and A. H. Crook, both of San Francisco, for respondent.

**KERRIGAN, J.** This is an appeal by plaintiff from an order vacating and setting aside a judgment by default entered against the defendant.

The action is for \$3,000, a balance claimed to be due from the defendant to one Harry G. McKannay, the assignor of the plaintiff, for services rendered in the capacity of attorney at law. The action was commenced on December 9, 1910; and some time in the latter part of the following February the defendant had obtained from the court by various orders all the time to answer which the court, under the provisions of section 1054 of the Code of Civil Procedure was authorized to grant. Upon filing his demurrer to the complaint defendant served upon the plaintiff a demand for a bill of particulars. In conformity with this demand a bill of particulars was served on the defendant within defendant's time to answer, but upon a proper showing plaintiff was directed to serve the defendant with a more definite bill of particulars. Instead of complying with this order at once or within the five days specified, plaintiff by various orders had his time to serve this bill extended 30 days. In the meanwhile any extension of time which the court could grant the defendant to answer being about to expire, and the counsel who at that time represented him deeming a full bill of particulars essential to enable him to prop-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



erly prepare defendant's answer, and believing that the court had the power to grant it, secured from the court an order staying all proceedings until 10 days after he should be served with such bill. The second bill of particulars was ultimately served, but the defendant objected to it, and upon an application duly made the court again ordered a more complete bill of particulars, and at the same time made another order staying all proceedings in the cause until 10 days after service upon defendant of such third bill. The plaintiff did not comply with the order to serve this bill within the time directed, but by various orders had his time to do so extended 30 days. In the meantime, the case having been transferred from the department of the superior court in which it was pending to extra session No. 1 thereof, the plaintiff, without notice to defendant or his counsel, applied to the judge of the latter department and secured from him an order vacating and setting aside the last order for a bill of particulars and the pending order staying proceedings. Thereafter on the same day plaintiff served on defendant an application to enter the latter's default, and had the time for giving notice of such motion shortened to two days. This motion was subsequently granted; and thereafter the defendant applied to the court to set aside the default and judgment against him, upon the grounds enumerated in section 473 of the Code of Civil Procedure, which motion, after notice and hearing, was granted upon terms.

[1, 3] The question thus presented by the record is, Did the court abuse its discretion in vacating the default and judgment against defendant? We are not prepared to say that its action amounted to an abuse of discretion. "Applications of this nature are addressed to the sound legal discretion of the court below, and the order of that court, either in granting or denying motion, will not be disturbed by this court, unless the appellant shall make it appear to have been so clearly erroneous as to amount to an abuse of discretion." *Williamson v. Cummings Rock Drill Co.*, 95 Cal. 652, 30 Pac. 762. See, also, *Banta v. Siller*, 121 Cal. 414, 53 Pac. 935; *Merchants' Ad-Sign Co. v. Los Angeles Bill Posting Co.*, 128 Cal. 619, 61 Pac. 277; *O'Brien v. Leach*, 139 Cal. 220, 72 Pac. 1004, 96 Am. St. Rep. 105.

[2] It is not disputed that the court exceeded its jurisdiction in extending defendant's time to answer beyond the statutory period of 30 days; but the counsel who represented defendant at that time states in his affidavit filed herein that he believed those orders legal and valid, and that as he deemed a complete bill of particulars necessary to enable him to properly and fully prepare defendant's answer to the complaint, he deferred doing so, relying on those orders, until he should obtain such particulars. The

judge before whom the cause was pending at that time having made these orders, must have believed that he had the power to do so, and that the defendant was entitled to them; and as counsel for plaintiff, for aught that appears, did not himself question the regularity and validity of these orders until May 3d, it would seem that the judge who set aside the default of defendant was warranted in concluding that these circumstances constituted a fair and sufficient excuse for defendant's delay up to May 3d, when the order staying proceedings was vacated.

As to the balance of time that elapsed before defendant answered, it is true that the motion to enter defendant's default was pending for a little more than 50 days; but we cannot assume—nor are we in fact asked to assume—that the various continuances of that matter were owing to the neglect or fault of the defendant, and "the delay in making the application after the judgment had been rendered was a matter," like other matters in the case, "to be considered by that court in determining whether to grant the relief, and the terms which it imposed as a condition of granting the motion must, in the absence of any contrary showing, be held to be ample compensation to the plaintiff." *Nicoll v. Weldon*, 130 Cal. 666, 63 Pac. 63.

It appears from the record that defendant had a substantial defense, and that he intended to contest the action. It also appears that no prejudice has been sustained by plaintiff by reason of the court's action, for when the action was commenced an attachment was levied, and thereafter it was released by the filing of the usual undertaking, approved by the trial judge, so plaintiff is secure in the payment of any judgment he may recover. Finally, to protect the plaintiff, the court in opening the default ordered the defendant to pay plaintiff's costs thus far incurred. In view of all these circumstances we feel that the case should be tried on its merits. The authorities sustain this view. "The granting or denying a motion to set aside the default of a defendant is so largely a matter of discretion with the trial court that, unless it is clearly made to appear that there has been an abuse of this discretion, this court declines to set aside its order. Especially are we indisposed to review its action when it has set aside the default, and it does not appear that the plaintiff has sustained any prejudice thereby." *Nicoll v. Weldon*, 130 Cal. 666, 63 Pac. 63; *Winchester v. Black*, 134 Cal. 125, 66 Pac. 197; *Langford v. Langford*, 136 Cal. 507, 69 Pac. 235.

[4] "A default inadvertently permitted by a party having a substantial defense presents a case in which great latitude should be extended to the discretion of the court by which the default was set aside." *Harbaugh v. Land & Water Co.*, 109 Cal. 70, 41 Pac. 792.



[5] There is no merit in the contention that a mistake of law is not a "mistake" within the meaning of section 473 of the Code of Civil Procedure, from the effect of which a party may be relieved under the section. In other words, the language of that section does not limit the relief to mistakes of fact. *Douglass v. Todd*, 98 Cal. 655, 31 Pac. 623, 31 Am. St. Rep. 247; *Tuttle v. Scott*, 119 Cal. 586, 51 Pac. 849; *Langford v. Langford*, 136 Cal. 507, 69 Pac. 235.

The order is affirmed.

We concur: LENNON, P. J.; HALL, J.

(22 Cal. App. 114)

**ROPER et al. v. GOULD.** (Civ. 1,221.)

(District Court of Appeal, Second District, California. May 16, 1913. Rehearing Denied by Supreme Court July 15, 1913.)

**1. BILLS AND NOTES (§ 190\*)—INDORSEMENT—QUALIFIED INDORSEMENT—LIABILITY OF INDORSEER.**

Under Civ. Code, § 3118, providing that an indorser may qualify his indorsement with the words "without recourse," when he will be responsible only as if the transfer were made without indorsement, and section 3116, providing that the warranties therein specified do not apply to a transfer by a qualified indorsement, no recovery could be had on a negotiable note against an indorser as such if the indorsement was qualified.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 454, 455; Dec. Dig. § 190.\*]

**2. BILLS AND NOTES (§ 397\*)—INDORSEMENT—PRESENTMENT AND DEMAND—EXCUSES—ABSENCE OF STATUTE.**

The maker's adjudication in bankruptcy, whether known to the indorser or not, will not excuse presentment and demand; Civ. Code, § 3159, providing that a waiver of notice does not waive presentment, and section 3155 providing that notice of dishonor is excused when waived, etc.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1029-1044; Dec. Dig. § 397.\*]

**3. BILLS AND NOTES (§ 422\*)—NEGOTIABLE INSTRUMENTS—NOTICE OF DISHONOR—WAIVER.**

A letter by the indorser to the indorsee of a negotiable note, stating that the maker informed him that he was in bankruptcy, but expected to handle the note on partial payments, and that the indorser and maker would probably be able to care for the indorsee in some way, was not a waiver of notice of dishonor.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1196-1208; Dec. Dig. § 422.\*]

**4. BILLS AND NOTES (§ 422\*)—NOTICE OF DISHONOR—WAIVER.**

Information given by the indorser to the indorsee that the maker was in bankruptcy could not operate as a waiver of notice of dishonor, if otherwise sufficient, where it was not given within 10 days before the maturity of the note, as required by Civ. Code, § 3156.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1196-1208; Dec. Dig. § 422.\*]

Appeal from Superior Court, Los Angeles County; J. D. Murphey, Judge.

Action by J. W. Roper and another against Carl P. Gould. From a judgment for plaintiffs, defendant appeals. Reversed.

Gilbert F. Wyvell, of Los Angeles, for appellant. Hanson, Hackler & Heath, of Los Angeles, for respondents.

**SHAW, J.** Action against defendant as indorser of a promissory note. Judgment for plaintiffs, from which defendant appeals.

The note was signed January 1, 1909, due two years after date, negotiable in form, and made by one C. W. McArthur to John P. Benson, who indorsed it as follows: "March 1, 1909. For value received I hereby sell, transfer and assign all my right, title and interest in the within note to Carl P. Gould. John P. Benson;" and delivered it to the defendant, Carl P. Gould, who indorsed thereon the following: "For value received I hereby sell, transfer and assign all my right, title and interest in the within note to J. W. Roper and Ossie Roper. Mch. 6, 1909. Carl P. Gould;" and delivered it to the plaintiffs.

Counsel for the respective parties devote much of their argument to the question as to whether the delivery of the note to plaintiffs by defendant, with the writing indorsed upon the back thereof, should be construed as an unqualified indorsement under and by virtue of which an implied conditional obligation was imposed upon defendant to pay the same (section 3116, Civ. Code), or whether it was a qualified indorsement within the meaning of section 3118, Civil Code, exempting him from such conditional obligation. Under our view of the case, we deem it unnecessary, not only to decide this question, but likewise unnecessary to determine the question as to whether under the Code provisions of this state there can be, as to a negotiable instrument, an indorsement thereon other than that defined in section 3118, Civil Code, exempting the indorser from the implied warranties specified in section 3116.

[1] The court made an express finding "that the writing on the back of said promissory note signed by the defendant constituted a qualified indorsement of said note." Section 3118, supra, provides that, "An indorser may qualify his indorsement with the words, 'without recourse,' or equivalent words," in which case he is only responsible to the extent that he would be if the transfer was made without indorsement; and section 3116, supra, provides that the warranties and conditional obligation therein specified do not apply to a transfer of the instrument where the indorsement is qualified. Hence it is clear that if the indorsement of the note was qualified, no recovery could be had thereon against defendant.

On the other hand, construing the indorsement as unqualified, in that it specified the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



indorsee (section 3113, Civ. Code), defendant's obligation to pay the note was upon condition that, unless excused by law, notice of its dishonor should be duly given to him. The notice was not given. The court, however, found that prior to the maturity of the note defendant waived demand upon the maker for payment thereof, notice of nonpayment, and protest; that prior to its maturity the maker thereof was adjudged a bankrupt, which fact was, for a period of 30 days preceding the time when said note was payable, well known to defendant; that after such adjudication in bankruptcy, and before the note matured, defendant in writing promised to pay the same. Each of these findings, other than the adjudication in bankruptcy and defendant's knowledge of such fact, is attacked by appellant for want of sufficient evidence to support it. A negotiable instrument is dishonored when it is not paid on presentment for that purpose, or a like result follows where presentment is excused. Section 3141, Civ. Code. There is nothing in the indorsement which could be construed as an excuse of the failure to present the note for payment.

[2] In the absence of such fact, respondents insist that the adjudication in bankruptcy of the maker, as to which fact defendant had knowledge, excused such presentment and demand. We cannot assent to this proposition. All of the authorities cited by counsel in support of the proposition appear to have been based upon local statutes. In the absence of such statute to the contrary, and we have none, the rule is well settled that such adjudication, whether known or unknown to the indorser, will not excuse the formality of presentment and demand. 4 Am. & Eng. Ency. of Law, p. 468, and cases in note. "A waiver of notice does not waive presentment." Section 3159, Civ. Code. "Notice of dishonor is excused: \* \* \* (4) When the notice is waived by the party entitled thereto." Section 3155, Civ. Code. In the absence of excuse or waiver, conceding all that respondents claim as to the character of the indorsement, defendant was entitled to notice of dishonor as a prerequisite to recovery against him.

[3] The only evidence relied upon to support the finding as to such waiver and promise to pay the note is a letter written on December 7, 1910, at Los Angeles, where defendant resided, addressed to plaintiffs, who resided at Covington, Tenn., wherein defendant says: "Some time ago I had a talk with McArthur (the maker of the note). He informed me that he was in bankruptcy. I was amazed, but it seems that his various properties stood in his mother's name. Regarding your note he said that he expected to handle it on the partial payment plan. He and I together will probably be able to take care of you some way. I will write again

soon." There is nothing in this statement upon which to base the claim that defendant waived notice of the dishonor of the note. Nor can the statement that defendant would *probably* be able to take care of the note in some way be construed as such waiver or promise in writing to pay the note, which, as stated, the maker "expected to handle \* \* \* on the partial payment plan."

[4] Moreover, the information, whatever value may be placed upon it, so conveyed to plaintiffs, was not given within 10 days before the maturity of the note, as required by section 3156, Civil Code. The case of Los Angeles National Bank v. Wallace, 101 Cal. 478, 36 Pac. 197, bears directly upon this point. We quote from the syllabus: "Where the drawer, three weeks before the maturity of the bills, informs the holder that the drawee could not pay, but that he would pay the bills, such promise not having been made 10 days before the maturity of the bills, as provided by section 3156 of the Civil Code, will not excuse presentment to the drawee and notice to the drawer." Even if the statement in the letter be construed as a statement made by defendant to the effect that the note would be dishonored, under the authority of the case just cited, construing section 3156, *supra*, it would be insufficient to constitute a waiver of notice, without which defendant was not liable.

The judgment is reversed.

We concur; ALLEN, P. J.; JAMES, J.

(22 Cal. App. 108)

BOYD et al. v. BIG THREE RANCH CO.  
(Civ. 1,253.)

(District Court of Appeal, Second District, California, May 15, 1913. Rehearing Denied June 14, 1913. Denied by Supreme Court July 14, 1913.)

1. BROKERS (§ 57\*) — PERFORMANCE OF CONTRACT.

Where a broker was only authorized by the contract with the owner to sell the entire tract or a certain specified part thereof, he could not recover commissions upon selling a part of a tract of a different acreage than that which he was authorized to sell.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 66, 67, 72; Dec. Dig. § 57.\*]

2. FRAUDS, STATUTE OF (§ 144\*)—SUFFICIENCY OF PERFORMANCE.

Civ. Code, § 1589, providing that the voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, does not apply to contracts required by statute to be in writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 351; Dec. Dig. § 144.\*]

3. FRAUDS, STATUTE OF (§ 131\*) — WRITTEN CONTRACTS—PAROL MODIFICATION.

While written contracts, which would be lawful if unwritten, may be modified by parol, a contract required by law to be in writing cannot be modified by parol.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 283, 284; Dec. Dig. § 131.\*]



Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by James H. Boyd and others, co-partners as Boyd, Scott & Lothrop, against the Big Three Ranch Company. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Reversed.

Waters & Goodcell, of San Bernardino, for appellant. Willis & Guthrie, of San Bernardino, for respondents.

ALLEN, P. J. The action was one by a firm of real estate brokers to recover commissions on account of the sale of real estate. The facts connected with the transaction are these: On May 10, 1910, defendant corporation, through its secretary and treasurer, addressed a communication to plaintiffs by which it appointed them agents to negotiate the sale of an orange ranch comprising 108 acres, which ranch included a number of separate tracts, upon some of which were houses, and all of which were set out in oranges in various stages of maturity, and under which communication plaintiffs were authorized to sell the ranch as an entirety, or these separate tracts independently, at a certain fixed price as to each, upon terms specified. Thereafter, on November 11, 1910, defendant addressed another communication to plaintiffs in which it expressly revoked all authority covered by the previous one and by this last communication made plaintiffs exclusive agents to sell the property as an entirety or to sell independently a certain portion not herein involved. It was averred in the complaint that this last communication was thereafter modified by which modification plaintiffs were empowered to sell also, independently, a certain 11-acre tract; that pursuant thereto they did find a purchaser ready and willing to buy said 11-acre tract at a price and upon terms agreeable to defendant, who sold the same, and this action is to recover commissions. The first count of the complaint demanded the 5 per cent. stipulated in the written communication; and by the second cause of action it was sought to recover the reasonable value of such service, the same having been averred to be \$715. The answer raised an issue as to all of the material averments of the complaint. The trial court found all of the allegations of the complaint to be true and awarded judgment to plaintiffs for \$715 and costs. A new trial was denied, and from the judgment and the order denying such new trial this appeal is prosecuted by defendant.

The rights of the parties upon this appeal rest upon the question of the sufficiency of the evidence to support the finding that the written agreement was modified in the particulars alleged in the complaint.

[1] It cannot be questioned that under the agreement of November 11th plaintiffs were

not authorized to negotiate a sale of the 11-acre tract independently, and that not having found a purchaser ready and willing to buy the ranch as an entirety, or that portion specified as subject to independent sale, no commission could be recovered on account of the sale alleged. *Witte v. Taylor*, 110 Cal. 225, 42 Pac. 807; *Cone v. Kell*, 18 Cal. App. 681, 124 Pac. 548. The modification of the written contract under the Code (section 1689, Civ. Code) could only arise through a written modification or an executed oral agreement. It is not claimed that any written modification existed, but it is claimed by respondents that the facts and circumstances connected with the sale were such as to warrant the court in finding that an oral modification was made and the same was executed. We have searched the record in vain for any suggestion of an oral agreement specifically modifying the contract, except it be inferred from the act of defendant in selling the 11-acre tract to a purchaser who had been procured by plaintiffs. Plaintiffs' evidence does not in the least tend to establish the fact that they were, when negotiating with the subsequent purchaser, acting upon the theory or in the belief that an oral modification existed. The active partner of plaintiffs conceded that he was acting under what he regarded as authority given in the original communication, but that he had no basis therefor is clearly shown by the fact that the original agreement had been by express terms canceled. Defendant possessed this right of revocation; there being no consideration for the agreement in the first instance. The question, therefore, presented relates to the effect which should be given the act of defendant in making a sale to a purchaser procured by plaintiffs. Does that fact tend to show a previous valid oral agreement? Considered by itself, the answer must be in the negative, otherwise subdivision 6 of section 1624, Civil Code, is nullified.

[2] It is true as a general proposition that the acceptance of the benefits of a transaction is equivalent to a consent to all of the obligations arising from it (section 1589, Civ. Code); but this rule has application only where the statute does not specify the character of the contract requisite to liability, and this section, like section 1698, evidently refers to contracts not required by the statute to be in writing. Section 1698 obviously presupposes that the oral modification is one valid in itself. Were it possible to make an oral modification of a contract which by the statute of frauds is required to be in writing and enforce such oral modification, the door would be open for the perpetration of such frauds as the statute seeks to prevent. "If the contract is in writing, though not required to be, as where the subject-matter is not within the statute of frauds, it may of course be changed by a new subsequent agreement not in writing." *Brown v. Everhard*, 52 Wis. 205, 8 N. W. 725.



[3] "While written contracts, which would have been lawful if unwritten, may be modified by parol, subsequently, in many cases, yet this cannot be done where the law requires the agreement to be in writing." *Abell v. Munson*, 18 Mich. 806, 100 Am. Dec. 167. While this rule has not met with universal approval, yet the great weight of authority, text-writers as well as decisions, may be said to be in its support.

Appellant contends that the finding of the court that the purchaser was procured by plaintiffs has no support from the evidence. While the matter is not very clear, yet there is some evidence to be found in the record warranting the court in so finding, and under the familiar rule it will not be disturbed.

We are of opinion that there was no valid modification of the written agreement; that no evidence of such modification exists; and the judgment resting alone upon such modification is not supported.

The judgment and order are therefore reversed.

We concur: JAMES, J.; SHAW, J.

(66 Or. 369)

#### KLEIN v. TURNER et al.

(Supreme Court of Oregon. July 22, 1913.)

#### 1. PLEADING (§ 287\*)—ANSWER—SUBSCRIPTION.

Signing the verification of an answer by the defendant from whom title to the realty in controversy was derived was a sufficient subscription of the answer so far as he was concerned, and it was error to strike such answer from the record because it was not signed by either defendants or their attorney.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 853, 856; Dec. Dig. § 237.\*]

#### 2. JUDGMENT (§ 106\*)—DEFAULT—FAILURE TO PLEAD.

Where defendant had filed an answer sufficient to prevent a default within the time specified by published summons, it was error for the court to strike the answer and render judgment against defendant by default.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 160, 162, 180-197; Dec. Dig. § 106.\*]

#### 3. ATTACHMENT (§ 322\*)—REAL PROPERTY—CERTIFICATE OF SHERIFF.

Certificate of sheriff to an attachment reciting the names of the parties, the description of certain real property levied on, and a statement that the property had been attached at the suit of the plaintiff in the action and indorsed with a certificate of the county clerk that the same had been recorded in the attachment records on a specified date, constituted a sufficient compliance with L. O. L. §§ 300, 302, providing for the attachment of real property to create a lien on the property during the pendency of the action or until dissolved.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1153-1159; Dec. Dig. § 322.\*]

#### 4. ATTACHMENT (§ 182\*)—CONTINUANCE OF LIEN—SUBSEQUENT PROCEEDINGS—INVALIDITY.

Where certain land was validly attached in an action against the owner, but the court improperly struck defendants' answer from the

files, and rendered judgment against them by default, the striking of the answer destroyed the effect of the service of summons by publication, however valid, and the subsequent proceedings, so that the action stood, thereafter, as though nothing had been done, except to file the complaint, attach the property, and issue the summons, and hence a subsequent mortgagee took subject to the pending lien.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 577-580; Dec. Dig. § 182.\*]

#### 5. ATTACHMENT (§ 151\*)—SUMMONS—ATTACHMENT—EXTENT OF LIEN.

Where a published summons under which certain land in controversy had been attached warned the defendant that plaintiff would take judgment against him for \$108.15, being the amount due on a note and interest thereon, together with attorney's fees, costs, and disbursements, while the summons delivered to the sheriff gave notice only that plaintiff would take judgment against the defendant for \$108.15 without mention of the other demands, the attachment lien was limited to the latter sum.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 422-424; Dec. Dig. § 151.\*]

Department 1. Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge.

Action by Adolph Klein against George Turner and another. Judgment for plaintiff, and defendants appeal. Modified.

The plaintiff alleging himself to be the owner of certain described land in Douglas county, Or., which is not in the actual possession of any person other than himself, brings this suit to remove from the title thereof a cloud which he asserts is cast thereon by the claim of the defendant George Turner. The latter, in turn says he is owner of the same land, and prays that the claim of the plaintiff be canceled as a cloud upon the title of the defendant George Turner. The defendant Garnet Turner is not involved except as the wife of George Turner. From a decree in favor of the plaintiff, the defendants appeal.

B. L. Eddy, of Roseburg, for appellants.  
O. P. Coshaw, of Roseburg, for respondent.

BURNETT, J. (after stating the facts as above). It appears that one John Suckert was the owner of the land in dispute, and from him both parties claim. The plaintiff's right to the property rests upon (1) a mortgage executed by Suckert and wife to plaintiff October 27, 1904, and recorded in the mortgage records of Douglas county November 25, 1904; and (2) a warranty deed executed by Suckert and wife to plaintiff December 27, 1904, and recorded in the deed records of that county January 3, 1905. The defendant George Turner claims through a judgment entered in his favor against Suckert in an action commenced in Douglas county November 19, 1904, upon a promissory note given by Suckert and another to Turner, in which action a writ of attachment was issued and levied upon the land in question. Summons in that action was served by publication. The defendant avers, in substance,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexer 133 P.-40



that he duly recovered judgment together with an order for sale of the attached realty, and that, having purchased the same at a sheriff's sale, and the sale having been confirmed, he received a deed in due time from that officer, whereby he succeeded to all the title of Suckert in the premises as the same stood at the date of the attachment, which was six days prior to the filing of the mortgage above mentioned.

The case turns upon the effect to be given to the proceedings in the action of Turner against Suckert, the judgment roll, and some other papers of which are in evidence. Among others, there appears a certificate of attachment in the case of Turner v. Suckert made by the sheriff of Douglas county, containing the title of the cause, the names of the parties to the action, a description of the real property in question, and a statement that the same had been attached at the suit of the plaintiff in the action. Indorsed thereon was the certificate of the county clerk of Douglas county, to the effect that the same was recorded by him in the Douglas county records of attachments November 19, 1904. To the affidavit of L. Wimberly, editor of the Roseburg Review, concerning the publication of summons, was attached the printed summons published in the action whereby the defendants were required to appear and answer the complaint on or before January 11, 1905. An answer was filed, according to the indorsement of the clerk thereon, January 9, 1905, containing the title of the court and cause in which the defendants pleaded a want of consideration for the note upon which the action was based, and further denied "each and every allegation, averment, statement, and every portion thereof as contained in plaintiff's complaint save what is hereby admitted, qualified, or explained." Then follows a demand for judgment, to the effect that plaintiff take nothing by his action, and that defendants recover their costs and disbursements. This is followed immediately by an affidavit as follows:

"State of Minnesota, County of Beltrami. John Suckert, being duly sworn on oath, says that he is one of the defendants above named; that he has read the above and foregoing pleading and knows the contents thereof, and that the same is true of his own knowledge. [Signed] John Suckert.

"Subscribed and sworn to before me this 29th day of December, A. D. 1904. Charles W. Scrutchin, Notary Public, Beltrami County, Minnesota. [Notarial Seal.]"

On January 16, 1905, the plaintiff in the action moved the court to "strike defendant's answer from record for the reason that said answer is not signed by either defendants nor their attorney, and for the further reason that said answer was not filed within the prescribed limit of time required by statute."

According to the record in that action the

court allowed the motion, and, reciting that "the defendants and each of them have made no appearance herein and are in default," rendered judgment in favor of the plaintiff, and against the defendants for \$108.15, with \$20 attorney's fees and \$15 costs and disbursements, and further ordered that "the plaintiff sell the real property belonging to the defendants heretofore attached in this action in the manner prescribed by law," describing the same. This judgment and the sale in pursuance thereof, followed by the sheriff's deed, constitute the muniment of title under which the defendants claim.

Numerous objections were urged against the validity of the order directing publication of summons and the record evidencing jurisdiction of the court. Conceding as a postulate, however, without deciding, that the court acquired jurisdiction by the attempt at substituted service which has been pointed out, it becomes necessary to consider the effect of striking out the answer upon the objections urged against it. The published summons having required the defendant to answer on or before January 11, 1905, such a pleading filed January 9, 1905, was in time.

[1] The signing of the affidavit of verification by the defendant from whom the title to the realty was derived was a sufficient subscription of the answer in question so far as he was concerned. In the case of *Zollicoffer v. Briggs*, 3 Rob. (La.) 236, the court held that the signature of a petitioner to an affidavit which the law requires to be annexed to the petition is a sufficient signature of the petition itself. A like doctrine is laid down in *Johnson v. Johnson*, Walk. Ch. (Mich.) 309; *Barrett v. Joslynn*, 9 Misc. Rep. 407, 29 N. Y. Supp. 1070; *Harrison v. Wright*, 1 N. Y. St. Rep. 736. Here then was an answer signed by the defendant, through whom title is deraigned, and filed within the time required by the published summons. Hence it was not amenable to the objections urged against it by the motion of the plaintiff in the action.

[2] Something was said in the argument here about there being no showing that the filing fee required of the defendant had been paid, but that question was not urged by the motion, and will not be here considered. The situation then is that although the defendant had been summoned to answer and had tendered an answer, valid as against the objections urged, the court at the instance of his adversary not only refused to hear him, but rendered judgment without such hearing. In *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914, proceedings had been commenced against the plaintiff under the confiscation act of Congress. Process of monition was issued and published, requiring all persons interested in the land, or claiming an interest, to appear and make their allegations in their behalf, and to show cause why condemnation



should not be decreed, etc. The owner of the property, in response to the monition and notice, appeared by counsel and filed a claim to the property and an answer to the libel. Later the district attorney moved that the claim, answer, and the appearance of the respondent by counsel be stricken from the files on the ground that it "appeared from his answer that he was at the time of filing the same a resident within the city of Richmond, within the Confederate lines, and a rebel." The motion was sustained. The court immediately entered its sentence of condemnation forfeiting the lands to the government as upon default, and the land was sold by virtue of the decree of condemnation. The action in which the question arose and was decided was one of ejectment brought by the defendant in the confiscation proceeding to recover the land from the grantee of the purchaser at the judicial sale. Mr. Justice Field thus characterizes the proceeding described: "It would be like saying to a party, 'Appear, and you shall be heard,' and, when he has appeared, saying, 'Your appearance shall not be recognized, and you shall not be heard.' \* \* \* The law is, and always has been, that whenever notice or citation is required the party cited has the right to appear and be heard; and, when the latter is denied, the former is ineffectual for any purpose. The denial to a party in such a case of the right to appear is in legal effect the recall of the citation to him." The court further held that the decree of confiscation was void as against the collateral attack urged in the action of ejectment. The same doctrine was approved in the case of *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215. The defendant had answered in a suit pending, during the progress of which the court made an order requiring him to pay into the registry of the court money held by him which was the subject of controversy in the suit. He did not obey the directions of the court, and in a proceeding against him for contempt, besides punishing him by fine, the court ordered that his answer be stricken from the files, and that the bill be taken pro confesso against him. The Supreme Court held that the decree thus pronounced was void because it was entered against the defendant without allowing him to be heard. The principle established in those cases is decisive of the one at bar in which, obeying the summons, the defendant, through whom both parties derails title, tendered an answer which, however, the court refused to consider, and gave judgment without a hearing. It is easily differentiated from the cases cited by the defendants wherein the paper effecting the appearance was voluntarily withdrawn or the action of the court striking it from the files was waived by a different and subsequent appearance. Voluntary withdrawal or waiver is quite different from being refused a hearing on issues properly tendered.

[3, 4] The action was properly commenced. The certificate of the sheriff necessary to create a lien by attachment under sections 300 and 302, L. O. L., was in proper form, and sufficient to create the lien described in those sections. Under the precedents cited, the subsequent proceedings in the action are void. The striking out of the answer destroyed the effect of the service of summons by publication, however valid it may have been, and the action stands as if nothing had been done therein but file the complaint, attach the property, and issue summons. The mortgage and deed from Suckert to plaintiff were not recorded within five days after their execution, and hence the lien of the attachment takes precedence over them subject to the event of the litigation in which it accrued.

[5] Referring to the published summons, we find that the defendants are thereby warned that, on failure to answer, the "plaintiff will take judgment against you for the sum of \$108.15, being the amount due on a promissory note and interest thereon together with attorney's fees and costs and disbursements in this action," while the summons delivered to the sheriff gives notice that "the plaintiff will take judgment against you for the sum of one hundred and eight and 15/100 (\$108.15) dollars," without mention of other demands. Thus the amount of the lien is fixed at the sum of money mentioned. The decree of the circuit court should be modified so as to declare the plaintiff the owner in fee simple of the land in question subject to the lien of the attachment in the sum of \$108.15.

The decree is modified accordingly, neither party to recover costs in this court.

MCBRIDE, C. J., and MOORE and RAMSEY, JJ., concur.

(65 Or. 432)

WRENN et al. v. UNIVERSITY LAND CO.  
(Supreme Court of Oregon. June 24, 1913.)

# 1. DAMAGES (§ 78\*)—PENALTY—CONSTRUCTION OF CONTRACT—PROVISION FOR INTEREST.

Where a contract for the purchase of real estate on installments provides for the payment of interest on the installments at 8 per cent., but remits the interest in case the installments are all paid promptly at maturity, the provision for the payment of interest is not a penalty, and is enforceable both at law and in equity, and the purchasers, who were one or two days late in the payment of some of the installments, are not entitled to a specific performance of the contract until the interest is paid.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 157-162; Dec. Dig. § 78.\*]

# 2. WORDS AND PHRASES—"PENALTY."

A "penalty" is an agreement to pay a greater sum to secure the payment of a less sum; it is conditional, and can be avoided by the payment of the less sum before the contingency agreed upon shall happen.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 6, pp. 5272-5276; vol. 8, p. 7750.]



Department 1. Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Action for specific performance by Sarah B. Wrenn and others against the University Land Company. Judgment for the plaintiffs, and defendant appeals. Reversed and remanded, with directions to dismiss.

This suit was brought by the respondents against the appellant, asking for the specific performance of a contract to convey lots 38, 39, and 40, as described on the plat of University Park as it appears on record in the public records of deeds of Multnomah county, Or. The contract is dated February 15, 1907. The respondents claim that they have fully performed said contract on their part, and are entitled to a deed of conveyance of said lots. The appellant claims that the respondents are not entitled to a conveyance of said lots, because they failed to pay the interest amounting to \$74.18, which the appellant asserts has accumulated and become due on the purchase price of said lots. The purchase price of the lots was \$600, and it was fully paid, but no interest thereon was paid. Whether or not the respondents were entitled to a deed of conveyance depends upon whether any interest accrued on said contract. The facts in the case were agreed upon by stipulation of the parties. The defendant appealed.

P. L. Willis, of Portland, for appellant. Platt & Platt, Palmer L. Fales, and J. O. Bailey, all of Portland, for respondents.

RAMSEY, J. (after stating the facts as above). This suit for specific performance is based on a written contract of which the following is a copy, in part, to wit: "This contract, made and entered into this 15th day of February, 1907, by and between University Land Company, a corporation of Multnomah county, Oregon, as first party hereto, and Sarah B. Wrenn, Ada A. Schlott, Susie M. Wrenn, as second party hereto, witnesseth: That the said first party, in consideration of the covenants, and agreements, herein contained and the payments herein mentioned, agrees to sell unto the second party, all the land situated in the county of Multnomah and state of Oregon, and described as follows, to wit: Lots thirty-eight (38), thirty-nine (39), and forty (40), block 182, as shown and designated on the plat of University Park as the same appears on record in the public records of deeds of said Multnomah county, and delivers the possession thereof to said second party, all for the sum or purchase price of six hundred dollars (\$600), to be paid by the second party to the first party at its office in Portland, Oregon, at the following named times to wit: Thirty dollars (\$30) in cash, the receipt whereof is hereby acknowledged and the remainder in monthly installments, as follows: Fifteen dollars (\$15) thereof on or before the 15th day of March, 1907, and

fifteen (\$15) additional dollars thereof on or before the 15th day of each calendar month thereafter until the whole of said purchase price shall be paid. All of which payments said second party hereby agrees to make at the times and place above provided therefor, with interest at the rate of eight per cent. per annum, payable in like installments immediately after the last installment of principal shall fall due. All interest shall be remitted if each installment of principal shall be paid at or before maturity." It will be perceived that the agreed purchase price of the three lots was \$600. Thirty dollars of the purchase price was paid at the time the contract was executed, leaving \$570 to be paid in 38 monthly installments on or before the 15th day of each month until the whole \$570 should be paid.

[1] The question to be decided arises upon the following clause of the contract: "All of which payments said second party hereby agrees to make at the times and place above provided for, with interest at the rate of 8% per annum, payable in like installments immediately after the last installment of principal shall fall due. All interest shall be remitted if each installment of principal shall be paid at or before maturity." The respondents failed to pay the installments of principal on or before the 15th day of ten of the months in which said installments became due, but the 15th days of three of those months fell on Sundays. In two instances the payments were made on the 17th day of the month, and in the other eight instances the payments were made on the 16th days of the months. The defaults were only for one or two days in each instance.

The respondents claim that the provision in the contract for the payment of interest was a penalty, and that no interest became due or payable. This presents the only question for decision on this appeal. While the defaults were only for a day or two in each instance, they were sufficient to preclude the respondents' having the benefit of the clause in the contract "remitting the payment of interest," unless the clause providing for the payment of interest created a penalty. The contract does not use the word "penalty" or the phrase "liquidated damages." It will be observed that by this contract the respondents agreed to make all the payments of principal imposed by the contract at the times and place provided for by the contract, "with interest at the rate of 8% per annum, payable in like installments immediately after the last installment of principal shall fall due," and then provided that all interest shall be remitted, if each installment of principal shall be paid on or before maturity. The agreement to pay interest is absolute. The clause providing for the remission of interest is an independent sentence, to be construed, however, in connection with the sentence preceding it. The provision for remission of



the interest was to be operative only on condition that the respondents should pay each installment of principal on or before its maturity. The interest was to be 8 per cent. per annum, and, according to the terms of the contract, it was to be *paid as interest*.

[2] Black, in his *Law Dictionary* (2d Ed.) p. 887, defines "penalty" thus: "A penalty is an agreement to pay a greater sum to secure the payment of a less sum. It is conditional, and can be avoided by the payment of the less sum before the contingency agreed upon shall happen." Prof. Pomeroy in section 486, vol. 1, of his work on *Equity Jurisprudence* (3d Ed.) states the rule thus as to penalties: "It may be regarded as a rule of universal application that if a party for any reason is liable to pay, or binds himself to pay, a certain sum of money, and adds a stipulation to the effect that, in case such sum shall not be paid at the time agreed upon, he shall then be liable to pay, or be bound to pay, a larger sum of money, the stipulation to pay the 'larger sum' is invariably and necessarily a penalty. Of course, in this proposition, it is understood that the 'larger sum' is not simply the lawful interest accruing upon the principal actually due." According to Prof. Pomeroy, lawful interest to be paid upon money actually due cannot constitute the "larger sum" to be paid, which is necessary to create a penalty. This is a material point in this case, because the "larger sum" to be paid in this case is the 8 per cent. interest per annum on the principal sum agreed to be paid for the three lots.

This court held in *Close v. Riddle*, 40 Or. 596, 67 Pac. 933, 91 Am. St. Rep. 580, that where a promissory note bore interest from its date until maturity at 6 per cent. per annum, and contained a clause to the effect that, if it should not be paid at maturity, it should bear interest from the day of its maturity at the rate of 8 per cent. per annum, the clause increasing the rate of interest from 6 to 8 per cent. per annum was valid, and did not create a penalty. Moore, J., delivering the opinion of the court in that case said *inter alia*: "While the decisions upon this subject are not uniform, we think the great preponderance of authority supports the rule that, where a higher rate of interest is expressly reserved to be paid after maturity, the rate so stipulated is recoverable if not usurious." That case seems to settle the law in this state upon that question. The point was directly made in that case that the clause increasing the rate of interest from 6 to 8 per cent. per annum after maturity of the debt created a penalty and that equity would not enforce it, but the court held that it was valid and enforced it. In *Rumsey v. Matthews*, 1 Bibb (Ky.) 242, the court says: "It has been always admitted that if the contract be for the payment of principal and interest by a given day, with a proviso, that, if the principal be punctually paid on that

day, the interest should be remitted, both principal and interest shall be recovered, if the principal be not punctually paid. In good sense there can exist no difference between that case and this. In both no interest is demandable if the debt be punctually paid; in both the obligor may discharge himself by paying the principal without interest on the day; and in both the obligee may, if he chooses, demand payment on the day, but without interest. In both cases the contract is equally fair, and the object is the same in both, to wit, the securing punctuality in the payment of the principal. \* \* \* It is just that interest shall be paid for the use of money. In the present case the parties had stipulated as to the time the interest should begin to run in the way most favorable to the obligor by allowing him to discharge himself on the day without interest. The parties were competent to make this agreement; it is prohibited by no statute; there is no turpitude in it, and there is no sound policy militating against it."

Referring to a contract analogous to the one in question, the court in *Rogers v. Sample*, 33 Miss. 312, 69 Am. Dec. 349, says: "There is nothing illegal or unconscientious in such a contract; for the debtor can readily avoid the payment of interest by doing that which law and good faith require him to do, viz., paying the principal at maturity. He is therefore subjected to no loss, except what he has occasioned by his own wrong." Chief Justice Christancy in *Flanders v. Chamberlain*, 24 Mich. 316, says: "As this note shows on its face that it was to draw no interest before maturity, if then paid, it is claimed that this is in the nature of a penalty; and in ordinary cases, when a note is given for a precedent debt, I am strongly inclined to think such a provision for interest from date at 10 per cent. if not paid when due, ought to be treated as a penalty rather than stipulated damages for nonpayment at the day. But it is shown that this note was given for property sold on these specific terms, such being the condition of the sale, and undoubtedly a vendor has a right to refuse to sell except upon this or any other condition; and, such being the condition of the sale in pursuance of which the note was given, I think it must draw interest from date at the rate mentioned." In *Fisher v. Anderson et al.*, 25 Iowa, 28, 95 Am. Dec. 761, the court held that where a promissory note stipulated that, if it be not paid when due, it shall draw interest at 10 per cent. per annum from date, it is not usurious, and that, if it was not paid at maturity, the principal and 10 per cent. interest from date could be recovered, and rejected the contention that it was a penalty. In the case of *Reeves, Adm'r, v. Stipp*, 91 Ill. 610, 611, the court says: "The defense insisted upon is that the interest reserved in the note from the date thereof unless paid at maturity is a penalty, and, as



the maker died before the note matured, it is contended the estate, equitably, ought not to be held for it. The fallacy of the position taken lies in the assumption that the rate of interest reserved from the date of the note, which was evidently intended to secure prompt payment, is penalty and not liquidated damages. Whether the sum named in an agreement to secure performance will be treated as liquidated damages or as penalty is often a question of much difficulty. \* \* \*

It is very clear the parties in this case intended the interest reserved should be the measure of damages in case the note was not paid when due. The parties call it neither penalty nor liquidated damages, but that is a matter of no consequence. It is simply a rate of interest which is lawful by contract under our statute from the date of the note, inserted with a view to secure prompt payment. It is a contract the maker could lawfully make, and, if living, it could be enforced against him as valid and binding in law," etc. In *Thompson v. Gorner*, 104 Cal. 168, 37 Pac. 900, 43 Am. St. Rep. 81, the court held where a promissory note, after providing for the payment of interest at the rate of 8 per cent. per annum, provided also, that, if the principal or interest is not paid as it becomes due, it shall thereafter bear interest at the rate of 1 per cent. per month, such a contract is not to be treated as a penalty, but as a contract to pay 1 per cent. per month interest upon a contingency. In *McKay v. Bank*, 27 Colo. 54, 59 Pac. 747, the court says: "On the other hand, counsel for appellee contend that the agreement to pay an increased rate of interest in case of such default (non-payment of principal at maturity) is a contract to pay a higher rate of interest on a contingency, or a contract for liquidated damages; and that such an agreement, not being in contravention of any statute, or affected by actual fraud, or such circumstances as warrants the inference of undue advantage, is enforceable both at law and in equity. We think the latter view is correct." 16 Am. & Eng. Ency. of Law (2d Ed.) p. 1049, discussing this question, says: "By the weight of authority a stipulation for a higher rate of interest after maturity is valid and enforceable, provided the increased rate which it is sought to recover does not exceed the highest rate allowed by law, and in the absence of a statute limiting the rate which may be contracted for, or where the rate provided for after maturity is not unlawful, a stipulation for a higher rate after maturity will generally be considered as liquidated damages rather than as a penalty for a breach."

We have examined all the authorities referred to in the briefs of counsel and some others, but we deem it unnecessary to refer to any additional cases. While there is some conflict in the decisions, we think that both reason and a strong preponderance of the

authorities are to the effect that the agreement of the respondents in this case to pay interest is not a penalty, and that it is an agreement to pay interest on \$570 at 8 per cent. per annum, with a condition that, if each installment of principal should be paid at or before maturity thereof, the payment of interest should be remitted. We deem such a contract valid and enforceable both at law and in equity. It was in the power of the respondents to avoid the paying of the interest by paying each installment of principal on or before its maturity as they agreed to do. Their failure to make the payments promptly when due fastens on them the liability to pay the interest stipulated to be paid. The rate of interest to be paid is only 8 per cent. per annum.

It is usual for debtors to pay interest on deferred payments, and there is nothing unreasonable in an agreement in a case like this to pay interest at 8 per cent. per annum on the principal if the installments of principal should not be paid promptly when due. The agreement to pay interest in this case is not repugnant to any statute or contrary to public policy, and fraud is not charged. The respondents are not entitled to a decree for specific performance of the contract, because they have not paid the interest provided for by the contract.

The decree of the court below is reversed, and the case is remanded to the court below, with instructions to enter in its journal the decree of this court, and to dismiss the suit without prejudice to the rights of the respondents to institute another suit for specific performance after paying said interest.

MCBRIDE, C. J., and MOORE and BURNETT, JJ., concur.

(66 Or. 345)

WILLEY et al. v. HERRETT.

(Supreme Court of Oregon. July 15, 1913.)

1. PLEADING (§ 356\*)—AMENDMENT—MOTION TO STRIKE.

Where an amended complaint restated the first cause of action pleaded identically with the allegation thereof in the original, a motion to strike out the amended complaint as a whole, because the second cause of action was changed from an action on a current account to an action on an express contract, was properly overruled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1111-1119; Dec. Dig. § 356.\*]

2. PLEADING (§ 356\*)—AMENDMENT—CAUSES OF ACTION—CHANGE.

An amendment of a second cause of action pleaded, which only segregated the amount claimed by dividing it into items aggregating the same sum as claimed in the second cause of action pleaded in the original complaint, did not so change the cause of action pleaded as to render it subject to motion to strike.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1111-1119; Dec. Dig. § 356.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**8. EXCEPTIONS, BILL OF (§ 6\*)—FORM AND REQUISITES.**

A purported bill of exceptions, composed almost entirely of questions and answers, with objections and remarks of counsel and the judge, accompanied by a certificate of the official reporter that the same was a correct transcript of all the evidence taken by him in the action, and the whole thereof, but not stating that it was all of the testimony, and showing that exhibits omitted also failed to identify the instructions, and not appearing to have been authenticated by the judge, except that the type-written matter indicated that he certified to having given an instruction concerning an application of payment which was quoted, was not a proper bill of exceptions.

[Ed. Note.—For other cases, see *Exceptions, Bill of*, Cent. Dig. §§ 8, 12; Dec. Dig. § 6.\*]

Department 1. Appeal from Circuit Court, Coos County; John S. Coke, Judge.

Action by B. F. Willey and another, co-partners doing business as Willey & Schroder, against J. T. Herrett. Judgment for plaintiffs, and defendant appeals. Affirmed.

The original complaint contained two causes of action, one for \$8.75, on account of labor performed, merchandise furnished, and money expended, and the other for like charges incurred at a different time, amounting to \$178.10, for defendant's use and benefit, which he agreed to pay to the plaintiffs. Afterwards, and before trial, the plaintiffs moved the court for leave to file an amended complaint. No showing of merits accompanied the application, but the court allowed the motion, and the revised pleading was filed, containing three causes of action. The first was the same as the first one stated in the original complaint, the second was for \$161, and the third was for \$17.10. All three were for items of labor performed, materials furnished, and money paid for the defendant's use and benefit, and for which he promised to pay the plaintiffs. The total amount demanded was the same in each complaint; the only difference being in the dates for which interest was demanded in the prayer on the several items. After the amended complaint was filed, the defendant moved to strike the same from the files, "on the ground that a new and distinct cause of action had been inserted therein as an amended complaint," but the motion was denied. Thereafter the defendant answered, denying all the allegations of the amended complaint, except his refusal to pay the demands of the plaintiffs. For a further defense to each separate cause of action, the defendant pleaded payment of the same. The reply denied all the affirmative matter of the answer. The jury trial resulted in a verdict and judgment for the plaintiffs, from which the defendant appeals.

John F. Hall, of Marshfield, James T. Hall, of Spokane, Wash., and Harry G. Hoy, of Marshfield, for appellant. George Watkins, of Marshfield, for respondents.

BURNETT, J. (after stating the facts as above). According to the language of his brief, the defendant presents two questions: "(1) The right of a plaintiff to amend his complaint by changing the cause of action from an action on current account to an action on express contract; (2) the authority of the jury to pass upon the ownership of a fund, where the evidence shows that an agent representing several different principals, each of whom is indebted to a common creditor, who is likewise the creditor of the agent, pays the money of one of his principals to such common creditor without indicating on which debtor's account such money is to be applied."

[1] The only method employed by the defendant to raise the first question was by the motion to strike out the whole of the amended complaint. The abstract discloses that the first cause of action stated in that pleading was identical with the first cause stated in the original complaint; and, in any view of the case, that part was not amenable to the objection which the defendant would urge upon us. Even if his position were correct, he asked too much by his motion, in that he sought to strike out what was confessedly legitimate matter. His motion was rightly overruled on that ground, if on no other.

[2] An examination of the amended pleading, however, shows that the quality of the action was not changed. The substance of the amendment was to segregate the amount claimed in the second of the two causes of action in the first complaint into two items aggregating the same as in the first instance; the only difference being in the dates assigned to the performance of the services mentioned. Manifestly the same kind of proof was applicable to either one of the complaints. Hence no error was committed in that respect.

[3] On the record before us we find it impossible, within the rules many times laid down by this court respecting bills of exceptions, to consider the second question. What is offered here as a bill of exceptions is a copy certified by the clerk to have been compared by him with an original bill of exceptions. It is composed almost entirely of what appears to be questions and answers of witnesses thereto, with objections and remarks of counsel and the judge, accompanied by the certificate of the official reporter that the same is a correct transcript of all the evidence taken by him in the foregoing action, and is the whole thereof, but it is not stated that it is all the testimony in the case. Sundry exhibits are alluded to in this narration of the testimony, but they are neither read into the record, nor do they accompany it. What is apparently a charge to the jury is bound in with the foregoing matter, but whether it is the charge in this



case is not stated by any one. The bill of exceptions does not appear to be authenticated by the judge before whom the action was tried, except that the typewritten matter indicates that he certifies to having given an instruction about the application of payments, which is quoted. Such a paper does not in any sense constitute a bill of exceptions, authorizing the court to consider the question raised by the defendant's brief. It has so often been held, as to amount to horn-book law in this state, that narration in the form of questions and answers, including objections of counsel and rulings of the court, as the same take place at the trial does not constitute a bill of exceptions. Neither will the court, for the purpose of discovering errors, search through such a volume of testimony. The rule governing the formation of a bill of exceptions is thoroughly discussed, and the precedents rehearsed, by Mr. Justice Slater in *Keady v. United Rys. Co.*, 57 Or. 325, 100 Pac. 658, 108 Pac. 197. This case has been followed in *Hahn v. Mackay*, 126 Pac. 12. In the absence of regular authentication of a proper bill of exceptions, we cannot determine whether the question presented constitutes error or not.

The judgment will therefore be affirmed.

(86 Or. 442)

**CHURCHILL v. CITY OF ALBANY et al.**  
(Supreme Court of Oregon. June 24, 1913.)

**1. APPEAL AND ERROR (§ 917\*)—REVIEW—PRESUMPTIONS—RULINGS ON DEMURRERS TO PLEADINGS.**

The court, on appeal from an order sustaining a demurrer to the complaint, must take as true the material allegations thereof properly pleaded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3706-3709; Dec. Dig. § 917.\*]

**2. INJUNCTION (§ 85\*)—ENFORCEMENT OF VOID MUNICIPAL ORDINANCE—GROUNDS.**

A court of equity may enjoin the threatened enforcement of a void municipal ordinance, where the enforcement will result in irreparable injury to plaintiff's business or property.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. § 85.\*]

**3. MUNICIPAL CORPORATIONS (§ 625\*)—REGULATION OF BUSINESS—REASONABLENESS.**

The power conferred on a city to regulate all business and professional occupations and callings within the city is a general one, and all ordinances passed in pursuance thereof must be reasonable, or they will be void.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1378, 1379; Dec. Dig. § 625.\*]

**4. MUNICIPAL CORPORATIONS (§ 625\*)—REGULATION OF BUSINESS—REASONABLENESS.**

An ordinance, which requires every person, firm, or corporation owning or conducting any cigar store, soft drink parlor, billiard or pool parlor, restaurant, or like place of business, selling or dealing in soft drinks or bottled goods, to close the place of business at midnight and keep the same closed until 5 o'clock in the morning, applies only to persons, firms, or corporations owning or carrying on a cigar store, soft

drink parlor, billiard or pool parlor, restaurant, or other like place of business that deal in soft drinks or bottled goods, and affects all persons, firms, or corporations of that class alike, and is reasonable.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1378, 1379; Dec. Dig. § 625.\*]

**5. CONSTITUTIONAL LAW (§ 205\*)—PRIVILEGES OR IMMUNITIES.**

The ordinance is not in conflict with Const. art. 1, § 20, providing that no law granting to any citizen or class privileges or immunities which on the same terms shall not equally apply to all citizens shall be passed.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 591-624; Dec. Dig. § 205.\*]

**6. CONSTITUTIONAL LAW (§ 205\*)—PRIVILEGES OR IMMUNITIES.**

Legislation which affects all persons pursuing the same business under substantially the same conditions is not class legislation, and is not prohibited by Const. art. 1, § 20, prohibiting laws granting to any citizen, or class of citizens, special privileges or immunities.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 591-624; Dec. Dig. § 205.\*]

**7. MUNICIPAL CORPORATIONS (§ 111\*)—ORDINANCES—VALIDITY.**

Ordinances must, as a general rule, be general in their nature and impartial in their operation, in order to be valid.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 245-256; Dec. Dig. § 111.\*]

Department 1. Appeal from Circuit Court, Linn County; William Galloway, Judge.

Suit by R. C. Churchill against the City of Albany and others. From a decree of dismissal, plaintiff appeals. Affirmed.

This is a suit brought for the purpose of enjoining the defendants from enforcing a certain ordinance of the city of Albany, for the alleged reason that the ordinance is unreasonable, discriminatory, class legislation, and unconstitutional. A demurrer to the amended complaint was filed by the respondents, alleging that the amended complaint does not state facts sufficient to constitute a cause of suit, and that the court below had no jurisdiction of the subject-matter. The demurrer was sustained by the court below, and the court dismissed the suit. The plaintiff appeals, and alleges the sustaining of said demurrer as grounds of error.

Weatherford & Weatherford, of Albany, for appellant. L. L. Swan, of Albany, for respondents.

**RAMSEY J.** (after stating the facts as above). The ordinance upon which this suit is based is set out in full in the amended complaint, and is in the following words: "Every person, firm, company, or corporation owning or conducting any cigar store, soft drink parlor, billiard or pool parlor, restaurant or other like place of business in the city of Albany, selling or dealing in soft drinks or bottled goods, shall close or cause to be closed such place or places of business

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes



at the hour of 12 o'clock midnight, and keep the same so closed until the hour of five o'clock in the morning following: and any person, firm, company or corporation violating any of the provisions of this section shall upon conviction thereof before the city recorder be punished by a fine of not less than \$5.00 nor more than \$25.00."

The appellant is engaged in the business of catering in the city of Albany, and has, at large expense, fitted up his place of business with the intention of providing the people of Albany and Linn county with a convenient and attractive place for the purpose of serving lunches, banquets, and dinners, and has an attractive and convenient lunchroom and banquet hall as a part of his place of business, and he serves lunches and banquets for hire. The appellant has two rooms, one constituting the lunchroom and banquet hall, and the other is used as a store, where he keeps for sale and sells candies, ice cream, soda water, lemonade, and similar articles of merchandise. His two rooms are so situated, that persons going to or from his lunchroom and banquet hall must go through his store room, but he alleges that he does not keep the store room open to make sales after midnight, and that it is kept open after midnight only for the purpose of enabling persons to pass to and from his lunchroom and banquet hall, which at times is kept open until after midnight.

The appellant alleges also, that there are 10 or more persons, firms, and corporations in the city of Albany besides himself who prepare and serve lunches and banquets to the same class of lodges and people to whom the appellant caters, and that these persons, firms, and corporations have no place or room in connection with their place of business where soft drinks or bottled goods are kept for sale. The appellant contends that said ordinance is void, and that its enforcement, under the circumstances, would be of great and irreparable injury to him and his business.

[1] The question for decision on this appeal being whether the respondents' demurrer should be sustained, the material allegations of the amended complaint, properly pleaded, are deemed to be true.

[2] This suit was brought to enjoin the enforcement of the said ordinance on the alleged grounds that the ordinance is void, and that its enforcement would greatly injure the appellant's business described in the amended complaint. We have no doubt that courts of equity have jurisdiction to enjoin the threatened enforcement of a void ordinance when it is shown that its enforcement would result in irreparable injury to the plaintiff's business or property. See *Dillon on Munic. Corps.* (5th Ed.) § 582; *Sandys v. Williams*, 46 Or. 327, 80 Pac. 642; *McQuillin on Munic. Corps.* § 805.

[3] The charter of the city of Albany con-

fers on that city power to "regulate" all business and professional occupations and callings within the city. The appellant correctly contends that the power thus conferred on the city is a general one, and that all ordinances passed to enforce it must be reasonable. An ordinance based upon a general or an implied grant of power must be reasonable, or it will be void. 28 Cyc. 762-763.

[4, 5] The appellant contends that the ordinance under consideration is unreasonable and void. It requires *every* person, firm, or corporation owning or conducting any cigar store, soft drink parlor, billiard or pool parlor, restaurant, or like place of business in the city of Albany *selling or dealing in soft drinks or bottled goods* to close or cause to be closed such place or places of business at the hour of 12 o'clock midnight, and to keep the same so closed until the hour of 5 o'clock in the morning following, and it prescribes, as a punishment for a violation of this ordinance, a fine of not less than \$5 nor more than \$25. The words of this ordinance make it applicable only to persons, firms, and corporations owning or carrying on a cigar store, soft drink parlor, billiard or pool parlor, restaurant, and other like places of business that deal in "soft drinks" or "bottled goods." It is clearly restricted to such places only as deal in that sort of "goods."

It was the intention of the council to compel all such places to close at midnight. The council very likely believed that "soft drinks" and "bottled goods" were not as "soft" as the unsophisticated may believe them to be, and concluded that compelling dealers in such "goods" to close at midnight would be promotive of good government in the city. Under the grant of power in the charter to regulate business houses, the city had the power to close such places at midnight or earlier. Perhaps it was fitting that such places should close at "midnight," as Shakespeare, says:

"Tis now the very witching time of night;  
When churchyards yawn and hell itself  
breathes out  
Contagion to this world."

The ordinance is reasonable and valid, unless it is vitiated by section 20 of article 1 of the Constitution of the state, which provides: "No law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

[6] Legislation which affects all persons pursuing the same business under substantially the same conditions is not such class legislation as is prohibited by said section of our Constitution. In re Oberg, 21 Or. 407, 28 Pac. 130, 14 L. R. A. 577; *State v. Randolph*, 23 Or. 74, 31 Pac. 201, 17 L. R. A. 470, 37 Am. St. Rep. 655. The ordinance affects only those persons, firms, and corpora-



tions owning or conducting places of business that deal in "soft drinks" or "bottled goods," and it affects *all* of that class alike. It is general as applied to all of that class. It has not been shown that it exempts any place of business that deals in "soft drinks" or "bottled goods." It was not intended to affect places that do not deal in such drinks or goods. We think that the classification adopted by the city is reasonable and uniform.

[7] It is a general rule that ordinances, in order to be valid, must be general in their nature, and impartial in their operation. 21 Am. & Eng. Ency. Law (2d Ed.) pp. 983, 984. But, according to the authority just cited, there may be circumstances under which this rule of uniformity does not obtain (see page 984); but we do not deem it necessary to go into that question, as we believe this ordinance is valid under the general rule.

The city of Portland passed an ordinance providing that no person engaged in selling spirituous, vinous, or malt liquors in any saloon, barroom, or restaurant in the city of Portland should sell any liquor to be delivered or used in any side room, back room, upper room, or other apartments in the same or adjoining building, but this ordinance provided that nothing contained in it should prohibit the serving of such liquors in a hotel having a valid license to sell liquors.

The validity of this ordinance was challenged in this court in the case of *Sandys v. Williams*, 46 Or. 327, 80 Pac. 642, upon the grounds analogous to the points made in this case. The Portland ordinance expressly excepted from its prohibition hotels holding licenses to sell liquors. The appellant in that case contended that the ordinance was not uniform, and that it did not affect alike all persons under the same general conditions, and claimed, also, that it was unreasonable, oppressive, arbitrary, and void. In that case the ordinance excepted hotels, but this court held that this did not invalidate the ordinance. Moore, J., delivering the opinion of the court in that case, went into the question at length, and on page 340 of 46 Or., page 647 of 80 Pac., he says: "It is maintained by the plaintiff's counsel that, as the ordinance in question expressly exempts the keepers of hotels from its operations, thereby permitting the serving of intoxicating liquors to their guests in private rooms, but denies such privileges to persons engaged in the business of conducting a saloon or a restaurant, it thereby violates section 20 of article 1 of the Constitution of this state, by granting hotel keepers having a valid license to sell intoxicating liquors privileges which on the same terms are denied to all other persons occupied in similar employments. \* \* \*" The court held the Portland ordinance valid, although it except-

ed from its terms hotels holding licenses to sell intoxicating liquors.

Counsel for the appellant placed much stress on the case of the *State v. Wright*, 53 Or. 344, 100 Pac. 296, 21 L. R. A. (N. S.) 349, and asserts that it passed on the identical question involved in this case, but the act under consideration in that case was passed by the Legislature, and required persons peddling certain kinds of goods to obtain a license to do so. It was held by this court that the act under consideration in that case was void because it required a license to sell certain kinds of goods and permitted persons to sell all other kinds of goods without being required to obtain a license therefor. Bean, J., delivering the opinion of the court in that case, says: "A statute, which directly or by implication grants special privileges, or imposes special burdens upon persons engaged in substantially the same business, under the same conditions, cannot be sound, because it is class legislation, and an infringement of the equal rights guaranteed to all. \* \* \* The statute under consideration is plainly in violation of this principle. There is no pretense that it applied to the occupation of peddlers or itinerant vendors as a whole. \* \* \* A peddler who sells stoves, buggies, or fanning mills, all of them legitimate and necessary articles, comes within the statute, but one who sells clocks, patent medicines, pianos, fruit trees, sewing machines, jewelry, dynamite, or any one of a thousand other articles, whether harmful or not, may do so without penalty and punishment, and without being required to pay a fee therefor." In that case it was clear that the law applied to only a few things sold by peddlers, and the discrimination was manifest and the court held the act void.

We have examined the authorities referred to in the briefs, but have found nothing that would justify us in holding the ordinance to be invalid. We deem it reasonable and general in its operations, and valid.

The decree of the court below is affirmed.

MCBRIDE, C. J., and MOORE and BURNETT, JJ., concur.

(66 Or. 33)

PALMER v. E. CLEMENS HORST CO.

(Supreme Court of Oregon. July 15, 1913.)

1. WORK AND LABOR (§ 27\*)—EVIDENCE—MATERNALITY.

Where, in an action for hop inspector's services, plaintiff claimed for a period of 48 days, evidence as to the extent of defendant's yards was admissible, not only as preliminary, but to show the necessity for plaintiff's services for the length of time he was employed.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. §§ 50-54; Dec. Dig. § 27.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



## 2. WORK AND LABOR (§ 27\*)—EVIDENCE—MATERIALITY.

In an action for hop inspector's services, evidence as to the number of hop houses and kilns in defendant's yard and the distance between them was material to show the extent of defendant's business and need of the services of a hop inspector for the time claimed by plaintiff.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 50-54; Dec. Dig. § 27.\*]

## 3. WORK AND LABOR (§ 27\*)—RECEPTION OF EVIDENCE—DISCRETION.

In an action for hop inspector's services, it was within the discretion of the court to permit plaintiff to testify as to the other persons who were employed by defendant during the hop season of 1910.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 50-54; Dec. Dig. § 27.\*]

## 4. WORK AND LABOR (§ 27\*)—EVIDENCE.

In an action for hop inspector's services, it was proper to permit plaintiff to testify when he began to work for defendant and how long he was employed.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 50-54; Dec. Dig. § 27.\*]

## 5. APPEAL AND ERROR (§ 501\*)—EVIDENCE—ADMISSIBILITY—OBJECTIONS.

The admissibility of evidence received at the trial will not be reviewed on appeal, in the absence of a ruling on an objection in the trial court, duly excepted to, appearing in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2300-2305; Dec. Dig. § 501.\*]

Department 1. Appeal from Circuit Court, Marion County; Percy R. Kelly, Judge.

Action by Fred Palmer against the E. Clemens Horst Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action brought by the plaintiff to recover from the defendant a balance of \$252.50, for work and labor in the capacity of hop inspector and as an accountant, rendered for the defendant. The total amount of the account was \$505, and all of the account was paid but \$252.50. The complaint alleges that the work and labor were reasonably worth said sum. The defendant denies all the allegations of the complaint, excepting paragraphs 1 and 2 and the allegation that \$252.50 had been paid on said account, and then pleads a counterclaim for \$62.50, and asks judgment for said sum. The reply denies all the allegations of the answer. This case was tried by a jury, and a judgment was rendered for the plaintiff for the sum of \$252.50. The defendant appealed, and assigned various alleged errors.

W. H. Holmes, of Portland, for appellant. John H. McNary and Roy F. Shields, both of Salem, for respondent.

RAMSEY J. (after stating the facts as above). [1] On the trial in the court below plaintiff was called as a witness in his own behalf, and testified as to the location of defendant's hopyards while he worked, and then his counsel asked him the following

question: "What is the extent of the yards?" He answered in substance, "Over 500 acres." This question was objected to by the counsel for the defendant on the ground that the extent of the yards had nothing to do with the contract upon which the plaintiff based his action. The court overruled the objection. The question was preliminary and proper. The plaintiff claimed that he performed services for the defendant as hop inspector for a period of 48 days and as an expert accountant for 5 days, and, as the answer denied this claim, it was necessary to prove it, and in order to do this it was proper to show that the hopyard was a large one, because unless it was a large yard, it would hardly appear that the defendant would need the services of a hop inspector for a period of 48 days.

[2] The defendant was asked, also, the following question: "Detail to the jury, Mr. Palmer, about the number of hophouses and kilns on the yard and the distance between them?" This was objected to as immaterial and irrelevant. The court properly overruled the objection. It was material to show the extent of the defendant's business and the distance between the hop houses and kilns, in order to show the need of services of a hop inspector for the time claimed by the plaintiff. If there were, as he testified, 13 kilns and 6 hop houses, and 6 of the kilns were easily a mile apart, these facts would tend to show that the defendant had a large hop business, and that there was much work for an inspector. It would not show that he did the work, but it would tend to show that there was a large amount of work to be done. There was no error in allowing testimony on this point.

[3] The plaintiff was permitted to answer this question: "Who else, Mr. Palmer, was employed by the E. Clemens Horst Company besides you during the hop season of 1910?" The court, in its discretion, could properly permit such a question to be answered, and, if it were error, the error would be harmless. It could not have injured the defendant to permit the jury to know who were working for it at the time the plaintiff was.

[4] It was proper for the court to permit the plaintiff to answer the following question: "When did you go to work for this company, during the month of September, 1910; how long were you employed?" The plaintiff had a right to show when he began to work and how long he was employed. The plaintiff, in answer to said question, said, in substance, that he went to work on the 1st day of September, and that Mr. Benson had the record of his time. Mr. A. S. Benson was then called by the plaintiff as a witness, and testified that during the hop season of 1910 he was employed by the defendant as time-keeper to keep the time of all the men. He testified that he kept the time of the men, and that he had a record of the days that the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



plaintiff, Mr. Palmer, worked, and he produced this record. The attorney for the defendant made a very general objection to the production of this record (see page 15 of printed record), but he did not state any ground of objection, and the court overruled it. The objection was not sufficient to raise any question for decision here. However, the record referred to was neither offered nor received in evidence.

[5] The counsel for defendant alleges, in his brief, that the court below erred in allowing Mr. Benson, the defendant's timekeeper, to testify as follows: "This record was made at the conclusion of his work. As I understood, Mr. Palmer was a sort of privileged character and kept his own time. At the conclusion of the work he made up his own time and gave me the actual time he had put in, together with his expense account. This is a copy of the original time sheet that was sent into the San Francisco office." The printed record (on page 16) shows that the above testimony was given in answer to a question, and the record fails to show that any objection was made to the question or to the answer, and no motion was made to strike out the answer. The court below made no ruling as to said answer, or as to the question to which it was a response. Hence there is nothing for this court to review in relation to said question or said answer. The said answer to which counsel for the defendant now for the first time objects is not important. The witness stated how the record of the plaintiff's time was made up, with the further statement that what he then had was a copy of the original statement which was sent to the defendant's San Francisco office. He did not state any of the contents of the record. After making this answer, he was asked how many days the plaintiff worked, and answered the question, but this copy was not offered in evidence, and these questions and answers were not objected to. Hence there is nothing for this court to decide in relation to them. This court cannot consider objections to the admission of evidence when urged for the first time on appeal. If parties desire to try questions of that sort, they must object in the court below to the questions, and obtain a ruling of the trial court thereon, and then except to such ruling. In the absence of such a procedure, there is nothing for this court to review. *Currey v. Butcher*, 37 Or. 387, 61 Pac. 631; *State v. Mizis*, 48 Or. 180, 85 Pac. 611, 86 Pac. 361; *Elliott on Appellate Procedure*, §§ 470 and 781.

The record in this case discloses no error, and the judgment of the court below is affirmed.

McBRIDE, C. J., and MOORE, J., concur.  
BURNETT, J., did not sit in this case.

(68 Or. 210)

# CARADUC v. SCHANEN-BLAIR CO.

(Supreme Court of Oregon. July 1, 1913.)

## 1. NEGLIGENCE (§ 29\*)—DANGEROUS PREMISES—NUISANCE.

A subcontractor for the construction of the granite and marble work in a building owed a duty to a servant of another subcontractor to abstain from creating a nuisance, or a condition in the building that would be likely to injure such servant, and to use reasonable care in placing stones near the building, so that they would not be dangerous to persons working in and about it.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 41; Dec. Dig. § 29.\*]

## 2. APPEAL AND ERROR (§ 866\*)—MOTION FOR NONSUIT—DENIAL—REVIEW.

Under the rule that an order overruling a motion for nonsuit will not be disturbed when the omission, if any, is subsequently supplied by either party, the ruling on the motion must be viewed with reference to the entire record.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3467-3475; Dec. Dig. § 866.\*]

## 3. NEGLIGENCE (§ 136\*)—DANGEROUS PREMISES—QUESTION FOR JURY.

Where, in an action for injuries to the servant of a subcontractor by the falling of a stone placed on the building site by the servants of another subcontractor, where the evidence was conflicting as to whether it was braced or securely fastened, or was so situated that there was danger of its falling, the question was for the jury.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 277-353; Dec. Dig. § 136.\*]

## 4. APPEAL AND ERROR (§ 927\*)—MOTION FOR NONSUIT—REVIEW.

In reviewing an order denying a nonsuit, every reasonable inference from the evidence must be deduced in plaintiff's favor, and those facts must be assumed to be true which the jury might have found from the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2912, 2917, 3743, 3758, 4024; Dec. Dig. § 927.\*]

## 5. NEGLIGENCE (§ 136\*)—QUESTIONS FOR COURT OR JURY.

The court is justified in taking a case from the jury only when the presumption and evidence of negligence is overcome by the undisputed evidence.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 277-353; Dec. Dig. § 136.\*]

## 6. APPEAL AND ERROR (§ 1001\*)—VERDICT—REVIEW.

Under Const. art. 7, § 3, relating to the jurisdiction of the Supreme Court, a verdict cannot be set aside as against the evidence, unless it affirmatively appears that there is no evidence to support it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3923-3934; Dec. Dig. § 1001.\*]

## 7. NEGLIGENCE (§ 138\*)—DANGEROUS PREMISES—RES IPSA LOQUITUR.

Where plaintiff, a servant of a subcontractor, was injured by the fall of a stone placed near the entrance to a building by the servants of another subcontractor, the court properly charged in applying the doctrine of *res ipsa loquitur* that the jury could consider the fact that the fall of the stone of its own weight called for some explanation from those who put it there, and that the jury could take the circumstance that the stone fell into consideration in determining the weight of the evidence, but



that plaintiff was bound to prove his case by a preponderance of the testimony before the jury could find in his favor.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 354-370; Dec. Dig. § 138.\*]

**8. TRIAL (§ 234\*)—INSTRUCTIONS—"INFERENCE"—"PRESUMPTION."**

L. O. L. § 793, providing that inference and presumption are indirect evidence, and sections 794 and 795, declaring that an inference is a deduction which the reason of the jury makes from facts proved without an express direction of law to that effect, and that a presumption is a deduction that the law expressly directs to be made from particular facts, it was not error for the court to define an inference and a presumption as evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 534-538, 566; Dec. Dig. § 234.\*]

For other definitions, see *Words and Phrases*, vol. 4, p. 3579; vol. 6, pp. 5535-5537; vol. 8, pp. 7687, 7761-7762.]

Department 2. Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Action by Eugene Caraduc against the Schanen-Blair Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action for damages for personal injuries sustained by the plaintiff while at work on the Lincoln high school building, Portland, Or. The cause was tried before a jury, which rendered a verdict in favor of the plaintiff. From a judgment entered thereon the defendant appeals.

The complaint charged that the injury was caused by the falling of a block of granite which the defendant had placed near the building in such a careless and negligent manner that it was liable to fall, that the block was placed on loose planks in an entrance way to the building, and so carelessly and negligently placed that it fell of its own weight and by reason of the vibrations of the building. The answer put in issue these allegations, and averred that the injury was occasioned by the act of the plaintiff in attempting to move the stone, and as a result of his negligence. The plaintiff was employed by the Roebling Construction Company which had a subcontract with the general contractor to do the concrete work on the Lincoln high school building. The defendant had a subcontract with the general contractor to do the granite and marble work. Other contracts were made with various firms for doing work necessary for the erection of the building. On August 17, 1911, one of the stones required for use in a certain part of the structure was deposited near the spot where it was to be placed, remaining there until the 22d day of August, 1911, the day of the accident. It appears from the evidence that this stone was 13 inches thick, 8 feet high, about 4 feet long, and weighed nearly a ton. It was placed upon its edge upon planks resting on, or partly on, the sidewalk, near an entrance to the building. The evidence of the plaintiff tended to show that the

stone was left standing in an unstable condition, upon its edge and partially upon a plank with about eight inches of debris, consisting of stones, brick, short pieces of lumber, earth, and rubbish, so that the surface on which it rested was uneven; that it was not braced nor securely fastened. The defendant's evidence tended to show that the stone was placed in a safe and solid position on the date mentioned, and that it was seen in that place from day to day up to the time of the injury. The stone was to be placed at one side of the entrance to the building upon a concrete surface which had been raised to a greater height than required. It therefore became necessary to cut away a portion of the concrete from the place where the stone was to rest, and plaintiff, with two other men, was engaged in such work, and was about three feet from the stone when it fell upon his feet and ankles, injuring him.

Ralph W. Wilbur, of Portland (Wilbur, Spencer & Dibble, of Portland, on the brief), for appellant. Frank S. Senn and W. P. La Roche, both of Portland (Rauch & Senn, Schnabel & La Roche, and J. B. Ofner, all of Portland, on the brief), for respondent.

BEAN, J. (after stating the facts as above).

[1] There were no contractual relations existing between the plaintiff and the defendant. The plaintiff was rightfully upon the premises. The defendant company owed a duty to the plaintiff to abstain from creating a nuisance or a condition in the building that would be likely to injure him. It was the duty of the defendant to use reasonable care and precaution in placing the stone near the building, and in maintaining it there.

[2] At the close of plaintiff's evidence, counsel for defendant moved the court for a nonsuit, which was denied, after which defendant's counsel introduced evidence and requested the court to instruct the jury to find a verdict for the defendant. These rulings are assigned as errors. In view of the rule that an order overruling a motion for a nonsuit will not be disturbed when the omission, if any, is subsequently supplied by either party, the adequacy of the motion should be considered with reference to the entire record, so that both of these assignments of error may properly be considered together. *Trickey v. Clark*, 50 Or. 518, 93 Pac. 457; *Crosby v. Portland Ry. Co.*, 53 Or. 496, 100 Pac. 300, 101 Pac. 204; *Taylor v. Taylor*, 54 Or. 560, 568, 103 Pac. 524.

[3] There was a conflict in the evidence as to whether the stone was placed upon its edge with its weight resting on a solid foundation, that is, with the plank supporting it on a cement sidewalk—or whether there was underneath the plank, between it and the sidewalk, about eight inches in depth of debris, consisting of irregular shaped stones,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



bricks, lumber, and earth, making the foundation unstable. Mr. W. M. Blair, secretary of the defendant company, testified to the effect that on the evening of the day on which the stone was deposited it was resting on planks solid and safe; that there was nothing between the plank the stone rested upon and the cement sidewalk that he could see; that he could not see underneath the plank; that he saw the stone in the same place every day until the day of the accident. Andy Rowley, witness for defendant, testified that he delivered the stone at the Lincoln high school on the 17th day of August; that he left it resting, one end on the foundation of the building, and the other end on the plank, and that the plank rested on the sidewalk; that the stone was in a safe condition. There was a direct conflict in the evidence upon this point, and it therefore became a matter for the jury to determine how the stone was placed and whether it was in a reasonably safe condition, or was so situated that there was danger of its falling and injuring whoever might lawfully be within its reach. *Conlon v. Eastern R. Co.*, 135 Mass. 195; *Cummings v. National Furnace Co.*, 60 Wis. 603, 18 N. W. 742, 20 N. W. 665; *Sheridan v. Foley*, 58 N. J. Law, 230, 33 Atl. 484.

If the jury believed the testimony of the plaintiff, they might reasonably have found from the evidence that the stone was left in an insecure and dangerous position; and that its weight naturally displaced the debris, and caused it to fall and injure plaintiff. There was no error in submitting the cause to the jury. The defendant's theory of the case was that the stone was deposited solidly upon planks laid upon a level sidewalk in a safe position. This was fairly submitted to the jury, and they found to the contrary.

[4] In considering a motion for a nonsuit every reasonable inference from the evidence must be deduced in favor of the plaintiff, and those facts must be assumed to be true which the jury might fairly find from the evidence. *Putnam v. Stalker*, 50 Or. 210, 212, 91 Pac. 363; *Sullivan v. Wakefield*, 59 Or. 401, 404, 117 Pac. 311.

[5, 6] The court is justified in taking a case away from the jury only when the presumption and evidence of negligence is overcome by undisputed evidence. *Spaulding v. Chicago & Northwestern Ry. Co.*, 33 Wis. 582; *Scarpelli v. Wash. Water Power Co.*, 114 Pac. 870. Under section 3, art. 7, of the Constitution, when there is any competent evidence upon all the issues to support a verdict, it should not be disturbed. We cannot affirmatively say that there was no evidence to support this verdict.

[7] It is contended by counsel for the defendant that the court erred in applying the doctrine of *res ipsa loquitur*, and in instructing the jury in regard thereto. In defining this the court said in substance to the jury: "That is a rule of evidence, and is simply

intended to assist the jury in reaching a conclusion on the facts. \* \* \* The plaintiff is always obliged to prove his case by a preponderance of the testimony—that is, by a weight of the testimony—and, if he does not, then you cannot find in his favor, because he has alleged negligence, and he must prove negligence and prove the negligence that he alleged." The court instructed the jury in effect that in reaching a conclusion upon that point, if the stone remained in the condition in which the defendant left it, the fact that it fell called for some explanation from the people who put it there; that they could take the circumstance of the falling of the stone into consideration to find out where the weight of the testimony was; that that was the only purpose for which they could use it. It is therefore clear that under the instructions of the court the question of negligence was not submitted to the jury solely upon the above circumstance, but with all the other evidence. We find no error in the instruction. In *Boyd v. Portland Electric Co.*, 41 Or. 336, at page 343, 68 Pac. 810, at page 813, in discussing the application of the rule *res ipsa loquitur*, referring to the case of *Bahr v. Lombard*, 53 N. J. Law, 233, 21 Atl. 190, 23 Atl. 167, Mr. Justice Wolverton said: "There must be something, however, in the facts proven in each case that speak of the negligence of the defendant; and the question to be propounded and solved in every such case is, Do the proofs speak through inference and presumption of the negligent conduct of the defendant?" Also at page 346 of 41 Or., page 814 of 68 Pac.: "But where the evidence of the plaintiff has affirmative significance in establishing negligence, and the negligence complained of is not left wholly to inference or presumption, the question becomes a matter for the jury, to be determined by the preponderance of evidence." See, also, *Wittenberg v. Seitz*, 8 App. Div. 430, 40 N. Y. Supp. 899; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Smith v. Boston Gas Light Co.*, 129 Mass. 318; *Griffin v. Manice*, 166 N. Y. 188, 196, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630; *Hill v. Tualatin Academy*, 61 Or. 190, 121 Pac. 901.

[8] Error is also predicated upon the defining by the trial court of an inference and a presumption as evidence. Defendant contends that a presumption is not evidence, and only relates to a rule of law. Whatever may be the theory of text-writers upon this subject, section 793, L. O. L., denominates inference and presumption as indirect evidence. Section 794, Id., says that an inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect. Section 795, Id., declares presumption to be a deduction which the law expressly directs to be made from particular facts. This would authorize such a definition. We find no prejudicial er-



ror in the instructions complained of. The cause was fairly submitted to the jury.

The judgment of the lower court is therefore affirmed.

McBRIDE, C. J., and EAKIN and McNARY, JJ., concur.

(65 Or. 522)

BARR v. MINTO, Sheriff, et al.

(Supreme Court of Oregon. July 1, 1913.)

1. FRAUDULENT CONVEYANCES (§ 267\*)—PLEADING—ELEMENTS OF "CREDITOR'S BILL" STATED.

Where defendants in an action to quiet title denied that plaintiff was owner, charging that the conveyance to him was without consideration and made to defeat defendants' judgment against his grantor, and that the deed was accepted with fraudulent intent, the elements of a creditor's bill to set aside a fraudulent conveyance were stated, and the cause should have proceeded as if the original bill had been filed by defendants as plaintiffs to set aside the deed, and the burden was on the defendants to plead and prove the facts constituting the fraud, and, defendants having made a prima facie case, the burden was on plaintiff to show good faith, want of notice, and payment of consideration.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 783; Dec. Dig. § 267.\*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1727, 1728.]

2. PLEADING (§ 367\*)—SUFFICIENCY—NECESSITY OF MOTION TO MAKE MORE DEFINITE.

An allegation in an answer in a suit to quiet title, charging a fraudulent conveyance to plaintiff of the lands in question, that the property was attached by defendants as that of plaintiff's grantor, and that he had no other property except that mentioned in the complaint, was an implied allegation that such grantor was then owner, and, in the absence of a motion to make more definite and certain, was a sufficient allegation of ownership.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 64, 1173-1193; Dec. Dig. § 367.\*]

3. FRAUDULENT CONVEYANCES (§ 295\*)—EVIDENCE—SUFFICIENCY.

Evidence in an action to quiet title in support of defendants' allegations that the conveyance to plaintiff was fraudulent and made to defeat their judgment held sufficient to show that the conveyance was not a bona fide sale, but was a device to defeat defendants from collecting their claim.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 867-875; Dec. Dig. § 295.\*]

Department 1. Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Action by Theo. M. Barr against H. P. Minto, as sheriff of Marion county, and the Falls City Lumber Company. Judgment for plaintiff, and defendants appeal. Reversed.

This is a suit to remove a cloud from plaintiff's title. The complaint alleges that plaintiff ever since the 8th day of September, 1911, has been and still is the bona fide owner of a certain five-acre tract of land, which is described therein, and that the said tract is not in the actual possession of another. It

further alleges that about October 26, 1911, the defendant Falls City Lumber Company caused to be issued out of the circuit court of Marion county an execution upon a judgment rendered in its favor against Herman W. Barr, Leo Barr, F. J. Barr, John Dale, and Henry Semke, for the sum of \$1,000 and placed it in the hands of H. P. Minto, sheriff of Marion county, who levied the same upon the lands mentioned in the complaint as the property of Herman W. Barr; that said defendant now threatens to sell the same to satisfy said judgment and execution, and will do so if not enjoined; that Herman W. Barr has no right, title, or interest in said premises, but that plaintiff is the bona fide owner thereof. Then follows a prayer for a decree setting aside said execution and adjudging that defendants have no lien, claim, nor interest in the land. The answer admits the levy by the sheriff upon the land in question, and the intention to sell the same upon the execution mentioned in the complaint, but denies that plaintiff is or ever was the owner thereof, or has any claim therein, except as thereafter stated in the answer. There is a further answer and defense setting up the fact that on June 11, 1911, Herman W. Barr, Leo Barr, F. J. Barr, John Dale, and Henry Semke executed a promissory note in favor of the defendant Falls City Lumber Company for the sum of \$1000, with interest at 8 per cent. per annum from date, payable 60 days after date, together with reasonable attorney's fees in case of suit; that on the 9th day of September, 1911, said defendant began an action on said note, issued a writ of attachment, and attached the property described in the complaint as the property of Herman W. Barr; that on October 16, 1911, a judgment was duly rendered against Herman W. Barr and the other makers of said note for the sum of \$1,123.15; that on the 26th day of October the Falls City Lumber Company caused an execution to issue on said judgment, directing the defendant Minto as sheriff to sell the said attached property to satisfy the same; that on the 8th day of September, 1911, defendant Herman W. Barr and his wife, for the purpose of hindering, delaying, and defrauding the Falls City Lumber Company and his other creditors, made, executed, and delivered to plaintiff a pretended deed purporting to convey the lands mentioned in the complaint for the consideration of \$800, but that the conveyance was voluntary, was without any actual consideration, and was accepted by plaintiff with knowledge and notice of its fraudulent character and with the intent to assist Herman W. Barr to defraud his creditors, including plaintiff; that all the makers of the promissory note are insolvent, and that they own no property out of which said judgment can be collected except the lands mentioned in plaintiff's complaint. The answer concludes with a prayer that the conveyance from Her-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



man W. Barr and wife to Theo. M. Barr be declared fraudulent and void as to the defendants, and that it be canceled and set aside. The reply was a general denial of the new matter in defendant's answer.

Jas. G. Heltzel and Geo. G. Bingham, both of Salem (Roy Morgan, of Brooks, on the brief), for appellants. Frank Holmes, of Salem, for respondent.

McBRIDE, C. J. (after stating the facts as above). The first question presented is as to the sufficiency of the pleadings. It is contended by the plaintiff that, while in a creditor's bill to set aside a fraudulent conveyance it is necessary for the grantee under such conveyance to plead and prove that he is an innocent purchaser for a valuable consideration and without notice of any fraudulent intent on the part of his grantor, in this proceeding a different rule prevails, and that the party claiming that a conveyance is fraudulent as to creditors must plead and prove the fraud. We are unable to perceive any difference in the method of pleading nor in the quantum of proof required in either case. In the case at bar plaintiff calls defendants into court, alleging that he is the owner of the property described, and requiring defendants to set forth any claim or lien that they may have against the property. The defendants by way of answer and defense say to the plaintiff: "It is true that you have a deed to the property, but on account of equitable considerations you are not the owner. The conveyance to you was without consideration and to avoid the payment of my claim, and was taken by you with knowledge of such fraudulent intent, and is therefore void." Herein are all the elements of a creditor's bill, and thereafter the case should have proceeded as though an original bill had been filed by defendants as plaintiffs to set aside the conveyance and subject the property to execution under the judgment.

It is true, as suggested by plaintiff's counsel, that a defendant in a suit of this character must plead and prove fraud on the part of the parties to the conveyance which they attack, but the same is true as to any party attacking a conveyance for fraud in any proceeding. A creditor attacking a conveyance for fraud must not only plead, but prove, the fraud. The same rules of pleading are required of a defendant who sets up fraud in a conveyance when he is sued by the grantee under such conveyance to quiet title as would be required of him were he a plaintiff in a creditor's bill; and, having set up the facts thus necessary to be alleged, it is incumbent upon the plaintiff by way of reply to plead the same facts showing good faith, want of notice, and payment of consideration, as he would have been required to have shown had his conveyance been attacked by an original suit instead of by an answer.

[2] In this case it is claimed that the answer is defective because it does not allege that Herman W. Barr was the actual owner of the property when it was attached. To this may be answered that both parties claim under Herman W. Barr, that the pleadings show that his interest in the property was attached, and that by implication at least he was the owner, as it appears from the complaint that he had no other property, except the lands mentioned, out of which the lumber company's demands could be realized. While this cannot be commended as an example of definite pleading, we think, in the absence of a motion to make more definite and certain, it is sufficient. When we say that a person owns no property except Whiteacre, we, by implication, assert that he owns Whiteacre.

[3] Upon the merits we think that the defendant has shown such circumstances as will warrant the court in finding that the conveyance was fraudulent. The reasons may be briefly stated as follows: (1) Herman W. Barr was insolvent and threatened with an immediate lawsuit. (2) The alleged purchase was made immediately after the threat of legal proceedings, without any extended negotiations, and without the purchaser ever having seen or examined the property. (3) The alleged purchaser never looked into the title nor saw the deed until after it was recorded, but left to the grantor the whole matter of preparing it and putting it upon record. (4) The alleged purchaser knew that his grantor was in embarrassed circumstances at the times the alleged trade was consummated. (5) The conveyance was between near relatives, who would naturally be expected to know something of each other's circumstances and financial condition; and this, coupled with the haste with which the alleged trade was consummated and the circumstances immediately preceding it, renders the whole transaction suspicious.

The testimony of Herman W. Barr is very unsatisfactory. He does not show a disposition to disclose all the facts relating to the transaction, but to avoid disclosing them. It is shown that the deed was originally written with his brother-in-law as grantee, but this name was erased and his brother's name substituted. He claims that this was done on account of some negotiations had previously with the brother-in-law in regard to a sale, but that person is not produced to corroborate this statement. When asked what he did with the \$800 he received, his answers were vague and unsatisfactory, culminating in a flat refusal to answer further. The plaintiff's memory seems equally deficient in many particulars. Taking the testimony as a whole, we are satisfied that the alleged conveyance of the land in question to plaintiff was not a bona fide sale, but was a device to defeat the Falls City Lumber Company in the collection of its claim.

The decree of the circuit court will be re-



versed and one entered here in accordance with this opinion.

MOORE, BURNETT, and RAMSEY, JJ., concur.

(65 Or. 528)

SULLIVAN v. WAKEFIELD et al.

(Supreme Court of Oregon. July 1, 1913.)

**1. TRIAL (§ 260\*)—REQUESTED INSTRUCTIONS—GIVEN INSTRUCTIONS.**

Where the charges given covered all the questions that were for the consideration of the jury, the refusal of requested charges was proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

**2. NEW TRIAL (§ 70\*)—GROUNDS—INSUFFICIENCY OF EVIDENCE—CONSTITUTIONAL LAW.**

Const. art. 7, § 3, as amended (see Laws 1911, p. 7), provides that in actions at law, where the value in controversy exceeds \$20, no fact tried by the jury shall be otherwise re-examined by any court, unless it can affirmatively say that there was no evidence to support it. In a servant's action for injuries, where the case was fairly tried, and there was legal testimony to support the verdict for defendants, under instructions requiring the jury to believe either that defendants were without fault, or that deceased was guilty of contributory negligence, a motion for a new trial on the ground of the insufficiency of the evidence to justify the verdict, and that it was against law and for errors of law, occurring at the trial and excepted to by plaintiff, was sustained by an order stating that the court "sustains the said motion." Held that, as there was legal evidence to support the verdict, and as the court did not affirmatively find that there was no evidence to support it, it was error to grant a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143; Dec. Dig. § 70.\*]

**3. NEW TRIAL (§ 125\*)—GROUNDS FOR REVIEW—MOTION FOR A NEW TRIAL.**

Under Const. art. 7, § 3, as amended (see Laws 1911, p. 7), providing that no fact tried by a jury shall be re-examined by any court, unless it can affirmatively say that there was no evidence to support it, a motion for a new trial on the ground of insufficient evidence should allege that there was no evidence to support the verdict.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 254, 255; Dec. Dig. § 125.\*]

**4. APPEAL AND ERROR (§ 987\*)—NEW TRIAL (§ 70\*)—REVIEW—VERDICT.**

Under Const. art. 7, § 3, as amended (see Laws 1911, p. 7), providing that no fact tried by a jury shall be re-examined by any court, unless it can affirmatively say that there was no evidence to support it, a verdict to be protected from re-examination must be one rendered in a court having jurisdiction of the parties and the subject-matter, on a trial where there were no reversible errors of law, and where there was some legal evidence to support the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3893-3896; Dec. Dig. § 987.\* New Trial, Cent. Dig. §§ 142, 143; Dec. Dig. § 70.\*]

**5. APPEAL AND ERROR (§ 987\*)—REVIEW—VERDICT—"TRIAL BY JURY."**

Under Const. art. 7, § 3, as amended (see Laws 1911, p. 7), providing that in actions at

law the right to trial by jury shall be preserved, and no fact tried by the jury shall be re-examined by any court, unless it can affirmatively say that there was no evidence to support the verdict, the term "trial by jury" means a verdict reached under the forms of law prescribed for a jury trial, so that the provision does not preclude the Supreme Court from reversing a judgment based on a verdict returned after the erroneous exclusion of material evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3893-3896; Dec. Dig. § 987.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7108-7107, 7821.]

Department 1. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Annie P. Sullivan, administratrix, against Robert Wakefield and William Jacobsen, partners as Wakefield & Jacobsen. Judgment for defendants was set aside, and plaintiff was granted a new trial, and defendants appeal. Reversed and remanded, with direction to enter judgment for defendants.

This is an action brought to recover from the defendants and appellants \$7,500, as alleged damages on account of the death of Wm. H. Sullivan, who was killed by an accident on the 7th day of April, 1909, while working in an excavation in East Portland. Bingham & McClelland had the contract for excavating a basement, putting in cellar walls, and for erecting a building on a block in Portland on the east side of the river. It was necessary in putting in the basement, on account of the character of the ground, to have piles driven into the ground. Bingham & McClelland made a subcontract with Wakefield & Jacobsen, the defendants, to drive the piling.

The pile-driving equipment was the usual equipment for that purpose, but in driving the piles they used a "follower," which was a round piece of timber with the bark peeled off, about 18 feet long and about 14 inches in diameter, with an iron band at each end. When a pile was driven to the ground, one end of this "follower" was placed on the pile, and the hammer operated on the top end of the "follower," the object being to drive the pile below the surface of the ground; but the "follower" was not used until the pile had been driven to the surface of the ground. When the "follower" was not in use, it was set to one side where it could be easily picked up by machinery and swung into position to be used.

The basement had been excavated, and the depth of the basement was about 15 feet below the sidewalk, which ran along the side of the excavation. The basement had been excavated by Bingham & McClelland, before the defendants began driving piles. At the time the accident occurred, the pile driver was in action, but the "follower" was not then being used, and it was standing about

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
133 P.—41



two feet from the pile driver, with its upper end leaning against the edge of said sidewalk, and the top of the "follower" extending two or three feet above the sidewalk, and the lower end standing in the basement in a leaning position about six feet out of perpendicular.

The deceased, and Mr. Martin, L. Buley, and another man, about three minutes before the accident occurred, by orders of Mr. Bingham, who, with his partner, had the original contract for the whole works, went into the excavation to brace up the sidewalk, and were working near the "follower" putting in a brace under the sidewalk when the "follower" fell, striking Mr. Sullivan on the head and killing him. When the "follower" began to fall, an employé of the appellant saw it, and shouted, "Look out!" Mr. Sullivan, Mr. Buley, and the other man, who went into the basement to brace up the sidewalk, were not in the employ of the defendants. They were employed by Bingham & McClelland, and they were there by orders of Bingham without consulting defendants and without their knowledge.

The evidence shows that the pile-driving crew were busy at work when the accident occurred, and that the working of the pile driver produced only slight vibrations. The defendants had nothing to do with the sidewalk or with bracing it up. The evidence shows that when they stood the "follower" up in a perpendicular position, they tied it, but when they leaned it up against the sidewalk, with the lower end out of perpendicular, as it was when the accident occurred, they did not tie it.

The trial resulted in a verdict and judgment for the defendants. The plaintiff moved for a new trial, for the alleged reasons that the evidence was insufficient to justify the verdict, and that the same was against law and for errors of law occurring at the trial and excepted to by plaintiff at the time of the trial. The defendants appealed, and claim that the court below erred in sustaining said motion, and setting aside said verdict and judgment, and in granting a new trial.

Arthur W. Langguth and C. M. Idleman, of Portland, for appellants. Wilbur, Spencer & Dibble, of Portland, for respondent.

RAMSEY, J. (after stating the facts as above). The question for decision on this appeal is, whether or not the court below erred in setting aside the verdict and judgment, and in granting a new trial.

We have examined the record, and find that a number of exceptions were taken by the respondent to rulings of the court on the trial, but that there was no error committed by the court in the rulings excepted to. The charge of the court is lengthy, but it was not unfavorable to the respondent, and she did not except to any part thereof.

[1] The respondent excepted to the refusal of the court to give some charges that were requested by her counsel, but the record fails to show what these charges were, and the charges that were given by the court cover all the questions that were for the consideration of the jury.

The trial appears to have been fair in every way. We find no error of law occurring at the trial and excepted to by the respondent.

The only other question for decision is, Was the evidence in the case insufficient to justify or support the verdict, or was the same against the law? It was a general verdict in the usual form in favor of the defendants, which the jury had the right to find under the law and the facts of the case, if they believed from the evidence, that the appellants were not guilty of negligence which was the approximate cause of the injury, or if they believed that the appellants were guilty of negligence, but believed that the deceased was also guilty of negligence contributing to his death.

The evidence was sufficient to be submitted to the jury, but the case was not a strong one for the plaintiff. It is not necessary to discuss the evidence at length, but we will refer to some points in it. It should be noticed, in the first place, that the relationship of master and servant did not exist between the appellants and the deceased. The deceased was working for Bingham & McClelland, and not for the appellants. He went into the excavation where the appellants were driving piles, under orders of Mr. Bingham, and was working under his orders when the accident occurred. There was no direct evidence that the appellants knew that the decedent was in the excavation. One of their employés saw him there a moment before the accident occurred, and saw the "follower" when it began to fall, and shouted, "Look out!" The evidence shows that the pile-driving crew numbered eight persons, and that there were three platforms on the pile driver on which men stood and worked, and that, when the accident occurred, some of the eight men were on those platforms and others were on the ground, and all were at work.

The pile driver was 45 feet high. The "follower," or piece of timber that fell on the deceased, was standing up against the sidewalk, which was about 15 feet above the floor of the excavation. The motion of the pile driver, when in action, produced a slight vibration, but evidently this vibration, or the bracing up of the sidewalk by the deceased and those working with him, caused the "follower" to fall. The deceased was a carpenter, and there was nothing to prevent his seeing the "follower" leaning against the sidewalk near him, and he could have felt the vibrations caused by the operation of the pile driver. He went there by orders of Mr.



Bingham, his employer, who knew the situation, but gave him no warning as to danger. The appellants did not know he was there, and they were not instrumental in causing him to be there. The accident was a sad one, but it is difficult, if not impossible, to form a definite opinion as to who was at fault for the deceased's death. The jury, under the lucid instructions of the trial court, found that the appellants were not guilty of negligence, or, if they were guilty of negligence, that the deceased was guilty of contributory negligence.

[2] The verdict is a general one, but under the clear and explicit instructions of the court, they must have believed either that the appellants were without fault, or that the decedent was guilty of negligence contributing to his death, and hence that the appellants were entitled to a verdict.

The case was fairly tried, there were no errors of law on the trial, and there was legal testimony sufficient to support the verdict. Section 3 of article 7 of the Constitution contains the following provision: "In actions at law, when the value in controversy shall exceed \$20.00, the right of trial by jury shall be preserved, and no facts tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there was no evidence to support the verdict." (See Laws 1911, p. 7.) The facts in issue in this case were tried by a jury in the court below, and the trial was, in all respects, fair and legal, and hence, under the above provision of the Constitution, the court below could not legally set aside the verdict and judgment for the appellants, and grant a new trial of the facts in issue, unless that court could properly and affirmatively say that there was no evidence to support the verdict. There was legal evidence to support the verdict, and the court below did not "say affirmatively" that there was no evidence to support the verdict. The motion for a new trial alleged two grounds for setting aside the verdict—the first ground being an allegation of "the insufficiency of evidence to justify the verdict, and that the same is against law," and the second ground being "errors in law occurring at the trial and excepted to by plaintiff at the trial." The order of the court granting a new trial states that the court "sustains the said motion," but does not state on what grounds it sustained it.

Under this section of the Constitution, a court cannot legally set aside the findings of the jury, where there has been no error of law, without affirmatively finding that there was no evidence to support the verdict. The adoption of this section of the Constitution changed the law to some extent, and it is the duty of the courts to recognize this fact, and to give effect to it.

[3] The motion for a new trial did not allege that there was no evidence to support

the verdict. To make the practice harmonize with this section of the Constitution, a motion for a new trial on the ground of insufficient evidence should allege that there is no evidence to support the verdict.

[4] A verdict to be protected from re-examination, under the section of the Constitution cited supra, must be one rendered in a court having jurisdiction of the parties and of the subject-matter, on a trial where there were no reversible errors of law committed by the court, and where there was some legal evidence to support the verdict.

[5] Burnett, J., discussing the effect of this section of the Constitution in *Forrest v. Portland Ry., Light & Power Company*, 129 Pac. 1050, says: "Finally, it is urged that as a verdict was rendered it cannot be disturbed, and for this the plaintiff relies upon section 3 of article 7 of the Constitution of this state as amended at the general election of November, 1910: 'In actions at law \* \* \* the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.' \* \* \* The Constitution, as so amended, does not purport or intend to change the signification of the term 'trial by jury,' as it has been known ever since the birth of constitutional government in this country. On the contrary, it expressly preserves that time-honored institution. A verdict that is immune from re-examination except for an entire want of evidence is not any and every decision that may be reached by a body of 12 men who happen to sit in a jury box and hear the testimony in the presence of a court, but it means one reached under the forms of law as prescribed for a jury trial within the meaning of the Constitution from the beginning. \* \* \* An invulnerable verdict must be a conclusion of fact by a jury regularly impaneled, as the result of a trial in which the rights of all parties, in respect to the admission or exclusion of testimony, have been observed in all material particulars under proper instructions of the court as to the law. By so much as the elements of this standard were wanting, namely, by the exclusion of competent testimony offered by the defendant, the procedure culminating in the decision of the jury in this case fell short of the trial by jury which the Constitution says shall be preserved." In *State v. Radder*, 124 Pac. 195, Justice McBride, in construing this section, said: "But for the jury to find the fact, the court must see that they receive only legal evidence, and no good finding of fact can ever be predicated upon illegal evidence."

In this case the trial in the court below was legal and regular, and there was legal evidence to support the verdict found by the jury, and this verdict should stand. We find that the court below erred in setting aside



the verdict and the judgment based thereon, and in granting a new trial.

The judgment of the court below is reversed, and the cause is remanded to the court below, with instructions to enter in the journal of that court the mandate of this court, and to enter a proper judgment thereon for costs and disbursements of this court, and to enter in the journal of said court a proper judgment in favor of the defendants and against the plaintiff for costs and disbursements of the court below, based upon and in accordance with the verdict of the jury, rendered in the court below in favor of the defendants.

MCBRIDE, C. J., and MOORE and BURNETT, JJ., concur.

(65 Or. 573)

#### ZOBRIST v. ESTES.

(Supreme Court of Oregon. June 10, 1913.)

##### 1. NEW TRIAL (§ 71\*)—GROUNDS—INSUFFICIENCY OF EVIDENCE.

Where, in an action for fraud in sale of corporate stock, the evidence as to the material issues was conflicting, a motion for a new trial, on the ground that the evidence was not sufficient to justify the verdict, was properly denied.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 144, 145; Dec. Dig. § 71.\*]

##### 2. APPEAL AND ERROR (§ 987\*)—REVIEW—VERDICT—SUFFICIENCY OF EVIDENCE.

Under Const. art. viii, § 3, providing that no fact tried by a jury shall be otherwise re-examined unless the court can say affirmatively that there was no evidence to support it, the Supreme Court cannot disturb a verdict rendered on conflicting evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3893-3896; Dec. Dig. § 987.\*]

##### 3. FRAUD (§ 59\*)—DAMAGES—MEASURE OF DAMAGES.

The damages recoverable by a purchaser of stock in a corporation, where the purchase was induced by fraud of the seller, is the amount of money put into the stock less the value of the stock in the hands of the purchaser.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 60-62, 64; Dec. Dig. § 59.\*]

##### 4. CORPORATIONS (§ 100\*)—STOCK ISSUE—VALIDITY.

L. O. L. § 6701, requires that the action of stockholders authorizing an increase of stock shall be certified to the Secretary of State, and that no such stock shall be issued until such certification and payment of the required fee. Section 6708 provides that when a corporation is delinquent in payment of fees, its right to do business shall be in abeyance. *Held*, that stock issued to plaintiff before actual certification to the Secretary of State and payment of license fee was not void, but merely voidable, and did not prevent a subsequent purchaser thereof from obtaining his proportionate interest in the corporation, so long as not attacked.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 450, 451; Dec. Dig. § 100.\*]

##### 5. EVIDENCE (§ 415\*)—CORPORATE RECORDS—EXPLAINING ALTERATIONS.

Where, in an action for deceit in sale of corporate stock, the defendant introduced the books of the corporation, and it appeared that

therein the figures showing the number of shares credited to defendant and another had been altered, there was no error in permitting defendant to explain how the alterations came about: the burden of doing so being on defendant by the express terms of L. O. L. § 811, before the book could be given in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1863-1873; Dec. Dig. § 415.\*]

Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by John Zobrist against George Estes. Judgment for defendant, and plaintiff appeals. Affirmed.

This is an action by John Zobrist against George Estes for \$2,000, damages for fraud and deceit in the sale of 20 shares of the capital stock of the Western Lumber & Fuel Company, a corporation. The cause was tried before a jury, and a verdict rendered in favor of defendant. From a resulting judgment, plaintiff appeals.

The following facts appear from the record: On November 7, 1908, plaintiff was a director of the Bank of Estacada, Or., and defendant, the president thereof. About that time defendant sold to plaintiff 20 shares of the capital stock of the Western Lumber & Fuel Company, a corporation of Oregon. On or about the 4th day of May, 1907, the Western Banking Company was organized, with a capital stock of \$10,000, for the purpose of selling real estate, and continued under that name until the 1st of November, 1908, when a resolution of the stockholders was adopted, changing the name of the corporation to the Western Lumber & Fuel Company, and the purposes of the corporation were enlarged so as to engage in the lumber and fuel business. Plaintiff alleges that defendant falsely represented that the Western Lumber & Fuel Company was completely organized, solvent, a going concern, had large and valuable assets, and was doing a paying business, so that it could and would increase its assets over its liabilities so as to form a surplus, and pay large dividends; that said 20 shares of the stock were of the par and actual value of \$2,000; that if plaintiff would purchase the same, he would receive not less than 10 per cent. on the par value of the stock during 1909, and good dividends thereafter; that the defendant was solvent and could pay all his obligations; that the representations were made for the purpose of deceiving Zobrist, and that they were intentionally false; that plaintiff relied upon the same. It is alleged merely as inducement, and the action is not based thereon, that at the time of the sale a written guaranty as to the value of the stock, and a promise to repurchase at par and 10 per cent. additional, was executed by defendant to plaintiff. Defendant admits the sale of the stock, but denies the gist of the allegations as to deceit and fraud, and avers, in effect, that the alleged representations were only expressions of opinion, which

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



defendant honestly entertained in regard to the company; that plaintiff was familiar with the company and its assets; that the company continued to do business at Estacada, Or., until about January, 1909, when it purchased the assets and business of the Portland Fuel Company, and thereafter operated at Portland, under the name of the Western Lumber & Fuel Company until about the 27th of January, 1910, when the name thereof was changed to the Western Fuel Company; that during all of that time plaintiff was a stockholder of the company, and for a portion of the time, a director thereof. The reply put in issue the material allegations of the answer.

R. C. Wright, of Portland, for appellant. J. F. Shelton, of Portland (Sweek, Fouts & Shelton, of Portland, on the brief), for respondent.

BEAN, J. (after stating the facts as above). Plaintiff introduced evidence tending to show that he was deceived by the defendant in the purchase of the stock, to his injury. Defendant explained the transaction at great length, and introduced evidence tending to contradict the material parts of plaintiff's evidence, and to show that the plaintiff was acquainted with the manner of conducting corporations, and that he thoroughly understood the transaction in regard to the stock. The evidence is conflicting. Plaintiff filed a motion for a new trial, for the reason that the evidence was insufficient to justify the verdict, and assigns the overruling of the motion as error. Considering this last assignment of error, it should be borne in mind that the verdict of the jury is practically a failure to find for the plaintiff; that is, the jury found that the plaintiff failed to prove the allegations of his complaint. Without incumbering the record with statements of the voluminous evidence introduced in the case, suffice it to say that it was peculiarly a question for the jury to determine. We have nothing to do with the conflict in the evidence. This is the main contention of the plaintiff upon this appeal.

[1, 2] The plaintiff's contention is in effect that the court should retry the facts that have been passed upon by the jury. Under section 3, art. 7, of the Constitution, the court is not permitted to do so. That organic law provides that no fact tried by a jury shall be otherwise re-examined in any court of this state unless the court can affirmatively say there is no evidence to support the verdict. Where there is testimony on both sides as to the material issues, and the jury has weighed the evidence and found for one party and against the other, the court is not authorized to disturb the verdict. We cannot say that there was no evidence in support of the verdict. There was no error in overruling the motion for a new trial as to that ground. The other grounds of the

motion are included in the other errors assigned.

[3] Plaintiff contends that the court erred in giving the following instruction: "Now, gentlemen, if you find that the plaintiff has been damaged less than \$2,000, \* \* \* he has got to take that amount. The damage is what you find this stock to be worth, less than what he paid for it, if plaintiff has established his case in all other respects." This is a portion of the concluding instructions given by the trial court. The court instructed the jury at length in regard to the issues and the law pertaining thereto, and informed the jury that, if Mr. Estes made no false statement concerning the matters alleged, the action could not be maintained, and that they must find for defendant; that if he did make the false statements alleged, he must have known them to be false, or if he did not know them to be false, he must have made them recklessly, and be consciously ignorant of whether they were true or false, and must have made them with intent that plaintiff would act upon his representations, and that, if the plaintiff did not act upon his representations, if, with full knowledge of the affairs, if he had that, and he acted upon his own judgment, and not upon the representations made by Mr. Estes, then, of course, there could be no recovery, and that if they found in this case that Mr. Estes did knowingly make false statements, or, not knowing them to be false, made them recklessly and consciously ignorant of whether they were right or wrong, and that if they further found that the statements deceived or were calculated to deceive the plaintiff in this case, and that if they found that he acted upon those representations to his injury, then plaintiff was entitled to recover \$2,000, or damages to the extent of which they might think he had been injured by the misrepresentations; that a director of a corporation who has invited people to purchase stock, owes a duty of confidence to the persons with whom he is dealing, so that he must not intentionally conceal any fact which is itself necessary for such persons to know. The portion of the instructions complained of is a part of the instruction as to the verdict. The court instructed that if they found for the plaintiff, they would find \$2,000, with interest at the rate of 6 per cent. per annum from November 7, 1908. Then follows the instruction above quoted. The jury did not reach the question involving the measure of damages. However, there was no error in the instruction complained of. It is stated in 2 Greenleaf (16th Ed.) § 256, that "The damages to be recovered must always be the natural and proximate consequence of the act complained of."

In the case of *Smith v. Bolles*, 132 U. S. 125, 10 Sup. Ct. 39, 33 L. Ed. 279, which was a case for damages, by reason of the purchase of stock in a corporation, induced by



false representations, it was said: "If the stock had a value in fact, that would necessarily be applied in reduction of the damages."

In *Orater v. Binninger*, 33 N. J. Law (4 Vroom) 513, at page 518 (97 Am. Dec. 737), Mr. Chief Justice Beasley, said: "The test is that those results are proximate which the wrongdoer, from his position, must have contemplated as the probable consequence of his fraud or breach of contract." In that case the plaintiff had been induced by the deceit of the defendant to enter into an oil speculation, and the defendant was held responsible for the moneys put into the scheme by the plaintiff in the ordinary course of business, which moneys were lost, less the value of the interest which the plaintiff retained in the property.

[4] The evidence in the case at bar tends to show that on the 30th of October, 1908, all the stock of the Western Banking Company having been subscribed, the stockholders of the corporation adopted a resolution increasing the capital stock of the company to \$50,000, but that the certificate of such action was not filed with the Secretary of State, and the fee therefor paid, until the 21st of the next December. Plaintiff therefore contends that the stock issued to him in the meantime was void and of no value, and that the court erred in not instructing the jury to that effect, as requested by plaintiff.

Section 6701, L. O. L., provides that the stockholders of a corporation may, by vote of the majority of the stock, increase its capital stock, and that such action shall be certified by the secretary of the corporation to the Secretary of State, and that it shall not be lawful to issue any of the increase of the capital stock of such corporation until such certificate and statement have been so filed and the payment of the required fee has been made. Upon the filing of such certificate and statement and the making of payment, the Secretary of State, if the same is in due form, shall issue to the corporation a certificate to that effect. Such certificate was issued by the Secretary of State on the 21st of December, 1908.

Section 6708, L. O. L., provides that when a corporation is delinquent in the payment of taxes, license fee, or fees, the right of such delinquent corporation to transact business shall be deemed to be in abeyance. The tenor of the statute is that, upon full compliance with such requirements, the defect theretofore existing is cured. The issuance of an increase of the stock, before the pro-

ceedings therefor were certified to the Secretary of State, was irregular.

There is a clear distinction between over-issued stock illegally issued, without authority of the charter or statute, and an irregular increase of stock. The latter occurs when there is a statutory authorization of an increase of stock, but the formalities prescribed for making such increase have not been strictly complied with. Over-issued stock is void, while an irregular increase is merely voidable. *Cook, Cor.* (6th Ed.) § 291. In the latter case, the increase is valid as against all parties except the state. *Id.* § 281.

The stock in question was not therefore as a matter of law void on account of the irregular increase thereof. This did not prevent the plaintiff from obtaining his portion of the dividends, if any, or property of the corporation. No one else is making any claim on account of such irregularity. There was no error in the refusal of the court to instruct the jury upon this point, as requested.

[5] The same stock subscription book was used by the Western Banking Company after the name of the corporation was changed. It appears from the evidence that George Estes and S. W. Stryker, each originally subscribed for 49 shares of the Western Banking Company; that afterwards the words and figures in the subscription list and in the record were changed from 49 to 17; that in addition to the latter number Estes and Stryker each subscribed for 82½ shares of the stock. The defendant, over the objection and exception of plaintiff, testified in explanation of such change. Plaintiff contends that the books of the corporation, in their present condition, are the only lawful evidence in the matter, and that the court erred in failing to instruct the jury to that effect, and in admitting the evidence of the change of figures. This would be invoking too strict a rule in such a matter. The stockbook and minutes were introduced by the defendant. The alteration appeared upon the face of the record. Under the provisions of section 811, L. O. L., it was incumbent upon defendant to explain the alteration of the stockbook and minutes; therefore when such explanation was made, it became a question for the jury to determine whether such change was honestly made, with the consent and acquiescence of the interested parties, as a matter of convenience, and with no fraudulent intent. There was no error in this respect. The case was fairly submitted to the jury.

Finding no error in the record, the judgment of the lower court is affirmed.



(65 Or. 236)

## PREMENT v. WELLS et al.

(Supreme Court of Oregon. June 10, 1913.)

## 1. MASTER AND SERVANT (§ 270\*)—ACTIONS FOR INJURIES—EVIDENCE.

In an employé's action for injuries sustained while handling lumber, where, although plaintiff attempted to show that there was a general usage among sawmill men to furnish men handling lumber a certain kind of shoes to protect them against accidents, such usage was not established by at least two witnesses, as required by L. O. L. § 801, and there was nothing to show that the wearing of such shoes would have been of any protection to plaintiff, the admission of a question asked plaintiff as to whether the foreman or any one having supervision over him told him what kind of shoes he should wear was erroneous.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 270.\*]

## 2. APPEAL AND ERROR (§ 1053\*)—HARMLESS ERROR—CURE BY INSTRUCTIONS TO DISREGARD.

The admission of such question was not reversible error under L. O. L. § 556, providing that judgments may be reversed only for errors substantially affecting the rights of appellant, where the court instructed the jury to disregard the evidence regarding the alleged custom or usage, if they found that it was testified to by only one witness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.\*]

## 3. MASTER AND SERVANT (§ 291\*)—ACTIONS FOR INJURIES—INSTRUCTIONS.

Where the evidence showed that ignorant and inexperienced employé were directed by the foreman to go on a pile of wet and slippery lumber, piled loosely as dumped from a car, without warning them of the dangers incident to working on the pile, an instruction that an employé assumed the ordinary risks incident to the work contracted to be done, but not such as the employer might have avoided by reasonable care, was proper, since it is an employer's duty to furnish employé a reasonably safe place in which to work, and his failure to do so is not one of the risks or perils assumed by the employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 599-605, 607, 610; Dec. Dig. § 291.\*]

## 4. MASTER AND SERVANT (§ 291\*)—ACTIONS FOR INJURIES—INSTRUCTIONS.

Under such evidence, it was proper to charge that if an employer directed an employé to do certain work in a manner not reasonably safe, and the performance of the work in the manner directed was the proximate cause of an injury, the employer was guilty of actionable negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 599-605, 607, 610; Dec. Dig. § 291.\*]

## 5. MASTER AND SERVANT (§ 153\*)—LIABILITY FOR INJURIES—WARNING.

It was actionable negligence for a foreman to direct inexperienced and ignorant employé to go upon a pile of lumber from 8 to 10 feet high, which was wet and slippery and piled loosely as dumped from a car, without giving them any warning as to the dangers incident to working on the pile.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 260; Dec. Dig. § 153.\*]

## 6. MASTER AND SERVANT (§ 153\*)—LIABILITY FOR INJURIES—WARNING.

It is the duty of an employer to warn an ignorant or incompetent employé of all risks or dangers incident to the employment of which the employer knows, or should know.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 260; Dec. Dig. § 153.\*]

## 7. MASTER AND SERVANT (§ 296\*)—ACTIONS—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

In an action for injuries to an inexperienced and ignorant employé, it is error to charge that it is the duty of an employé to exercise care in examining his surroundings and to acquire such knowledge of danger as "can" be obtained by observation, and that if he fails to do this the risk is his own, since it imposes upon the employé the duty of exercising more than reasonable care, which is all that is required even of an experienced workman.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 620; Dec. Dig. § 296.\*]

## 8. MASTER AND SERVANT (§ 296\*)—ACTIONS—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

In an action for injuries to an ignorant and inexperienced employé, an instruction that if plaintiff did not take care in examining his surroundings or in observing the manner in which his fellow workmen did their work, and as to whether their acts might prove dangerous, and did not use reasonable care to examine his surroundings, he was guilty of negligence was properly refused, as an ignorant and inexperienced employé is not required to use ordinary or reasonable care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 620; Dec. Dig. § 296.\*]

## 9. MASTER AND SERVANT (§ 296\*)—ACTIONS—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

In an action for injuries to an inexperienced employé while working, as directed by the foreman, on a pile of wet and slippery lumber from 8 to 10 feet high, piled loosely as dumped from a car, an instruction that the work mentioned was of a simple nature, and that any ordinary laboring man, as a matter of law ought to understand the ordinary hazards of such work, was properly refused.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 620; Dec. Dig. § 296.\*]

## 10. TRIAL (§ 260\*)—INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

In an employé's action for injuries sustained while handling lumber, where a usage to furnish employé a particular kind of boots or shoes for use in such work was proved by only one witness, and the court instructed the jury to disregard that question unless at least two witnesses to prove the usage had been produced, an instruction that the employer's failure to furnish the employé the proper kind of boots to wear was not negligence was properly refused, since that subject had been eliminated by the court's charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Action by John Prement against H. W. Wells and another, partners doing business as the Wells & Laber Lumber Company. Judgment for plaintiff, and defendants appeal. Affirmed.

This action was brought by the respondent to recover from the appellants the sum of \$10,000 as damages alleged to have been sustained by him for personal injury which he claims to have suffered when working for

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the appellants at their mill on September 3, 1910. The appellants' mill is situate in the mountains not far from Rainier, Or. The respondent is a Greek, and he and another Greek, named Cookkoolos, entered the employment of the appellants on the 27th day of August, 1910, and the respondent worked for the appellant six days; his employment ceasing on September 3, 1910, the day he was injured. The respondent was employed as a roustabout to work about the mill yard as directed; he had had no previous experience in working about a mill yard; he was about 24 years of age at the time he worked for the appellants; he had been in the United States only a few years; his previous work in this country had been as a laborer in railroad building and as an employé in hotels and restaurants. Prior to September 3d he had done various kinds of work for appellants about the mill and premises. On September 3d, under the directions of the appellants, the respondent and Cookkoolos were engaged in removing and segregating a pile of lumber that was being run out from appellants' mill by cars and dumped in large quantities by the car track near the mill. This lumber had been recently sawed from logs drawn from the water, and was heavy and wet and more or less slippery. It was sawed for making a road, and was from 3 to 4 inches thick, and the boards were of varying widths and lengths, some being 20 inches wide. The respondent alleges that this pile of lumber was in the shape of a cone, and from 8 to 10 feet high, and it was so piled that no two pieces of planks occupied the same position or angle; and that there were large holes or spaces between the different pieces, and it was very difficult and dangerous for any person on said pile of lumber to move about to or from the top thereof. The respondent alleges that he and Cookkoolos were both inexperienced in handling timber and lumber, and that they were wholly dependent upon the different orders and instructions of the appellants as to the manner of doing their work. He alleges also that he and Cookkoolos had no knowledge or information as to the danger or hazard to which they were subjected in handling and segregating the lumber in said pile. The respondent also alleges that the appellants failed and neglected to notify the respondent and Cookkoolos of the dangerous character of the work which they were required to do in segregating and piling said lumber, and that, without giving them any instructions as to the manner of doing said work, the appellants directed them to remove and segregate said pile of lumber; that the respondent and Cookkoolos began to remove and segregate said lumber, and in doing so stationed themselves on the ground surrounding said lumber pile; that while thus performing said work the appellants, by their agents and superintendent, approached them and reprimanded them for the method in

which they were doing 'the work, and with curses and abuse commanded them forthwith to mount said pile of lumber and remove and segregate the same from the top of said pile, without warning or informing them of the danger of doing said work in that manner from the top of said pile; that pursuant to said orders the respondent and Cookkoolos immediately mounted said pile of lumber, which was in the shape of a cone, and from 8 to 10 feet high, and proceeded to remove said lumber as ordered; that while thus engaged in removing a piece of said lumber from the top of said pile, the respondent carrying one end and Cookkoolos the other to the ground immediately surrounding said pile, the respondent and Cookkoolos slipped and fell, causing said stick of lumber which they were carrying to strike the respondent, greatly injuring his reproductive organs. The respondent alleges that said acts of appellants in ordering him and Cookkoolos to mount said pile and to segregate said lumber, as above stated, without warning them of the danger to which they were thereby subjected, was negligence, resulting in said injury to the respondent. The respondent also avers that the appellants by ordering respondent and Cookkoolos to mount said pile of lumber and to segregate said lumber from the top of said pile required them to work in an unsafe and dangerous place, and that this constituted negligence, resulting in said injury.

The answer denies nearly all the allegations of the complaint, and then pleads that whatever damages the respondent sustained by said accident were due to the contributory negligence of the respondent; and the answer also alleges that the respondent knew and understood the risks and dangers of his employment, and that he assumed all the risks and dangers thereof.

No questions arise on the pleadings. A motion for nonsuit was denied by the court. The defendants appeal.

S. C. Spencer, of Portland (Wilbur, Spencer & Dibble and John F. Logan, all of Portland, on the brief), for appellants. G. G. Schmitt, of Portland (L. E. Schmitt, of Portland, on the brief), for respondent.

RAMSEY, J. (after stating the facts as above). [1] The first assignment of error relates to the ruling of the court permitting the following question to be answered by the respondent: "Did any one tell you there, the foreman or any one who had the supervision there in the mill, as to what kind of shoes you should wear?" Counsel for the respondent attempted to show in the court below that there was a general usage among sawmill men to furnish men who handle lumber a certain sort of shoes to protect them against accidents, but he produced only one witness who testified to any such usage or custom. This question was probably ask-



ed as a link in the chain of evidence to show that the appellants were negligent in not furnishing such shoes, or in not informing the respondent that he should wear certain kinds of shoes when segregating the lumber, to protect him from slipping when standing or working on slippery lumber.

There is nothing in this case to show that the wearing of shoes with spikes in their soles would have been of any protection to the respondent. There was also an unsuccessful attempt on the part of the respondent to show that there was a general custom or usage prevailing among sawmill men to furnish their employes, who handled lumber that is wet and slippery, what are referred to in the complaint as loggers' or lumbermen's shoes. However, only one witness testified to that effect, and several testified that there was no such custom or usage. Under section 801, L. O. L., at least two witnesses are necessary to prove usage; and hence such a custom or usage was not proved.

[2] Under the facts of this case, the court below should have held the question above set out to be irrelevant, but allowing it to be answered was, at most, a harmless error, as the answer to it could not have influenced the verdict. A judgment may be reversed on appeal only for errors substantially affecting the rights of the appellants. Section 556, L. O. L.; Hayne, New Trial & Appeal (Revised Ed.) § 286.

The court below instructed the jury that they should disregard the evidence in regard to the alleged custom or usage concerning the furnishing by millmen to their employes, or the using by employes of spiked or calked shoes or boots when handling lumber, if they found that said supposed custom or usage was testified to by only one witness. The jury knew that only one witness testified to such supposed custom or usage; and hence must have disregarded all evidence concerning that subject.

[3, 4] The giving of the following instruction is assigned as error: "A servant in entering the employment of a master assumes the ordinary risks incident to the work contracted to be done, but not such as the master might have avoided by reasonable care. The law also provides that if a master directs his servant to do certain work in a manner not reasonably safe, and the performance of the work in the manner directed is the proximate cause of the injury to the servant, the master is guilty of actionable negligence."

The plaintiff was about 24 years of age when he was injured; he was a foreigner and had had no experience in working about mills or in handling lumber. Mr. John Bryant, the foreman of the appellants at the mill when respondent worked there, testified as a witness for the appellants as to the respondent and Cookkoolos, who worked with respondent, and swore that they were ignorant as to their work, and that he had to "demonstrate it to them"; he said that if he would tell them to do anything they would not understand it and he would have to show them how to do it; he said that he would have to "demonstrate" it to them practically. See pages 295, 296, of the evidence. This corroborates the evidence of the appellant and Cookkoolos that they were ignorant of the work in which they were engaged, and shows that the appellants' foreman was fully advised of their inexperience and ignorance before the accident occurred.

The evidence of the respondent and Cookkoolos tended to show that the pile of lumber upon which they were working had been dumped on the ground from a car; that the pile was from 8 to 10 feet high; that it was piled loosely; that it was wet and slippery; and that they had first stood on the ground and segregated the lumber; that a short time before the accident complaint was made to them that they were not earning their wages; that the foreman, John Bryant, went to where they were working and called them "God damned sons of bitches," and ordered them to go on top of the pile of lumber and to work from the top of the pile; that they at once obeyed the orders, mounted the pile, and successfully carried two boards from the top of the pile; that they took hold of a third plank, respondent carrying one end and Cookkoolos the other; that the respondent slipped and fell and Cookkoolos fell also; and that by this fall the respondent was seriously injured. The lumber in this pile was more or less wet and slippery, and the planks were from 3 to 4 inches thick, and some of them were 20 inches wide and heavy. Foreman Bryant denies ordering these men to get on top of the dump of lumber, and says that he does not remember whether or not he called them vile names, as they say he did. In his evidence he calls them "cattle."

The evidence shows that the lumber in this pile was more or less wet and slippery; that the logs from which it was sawed were drawn from the millpond and sawed; the lumber was then loaded into a car and run out and dumped on the ground in a large pile, in all kinds of shapes. The evidence shows that the respondent was without experience and ignorant of the dangers incident to the work in which he was engaged, and that the appellants' foreman, Mr. Bryant, knew this.

Neither the appellants nor their foreman instructed or warned him of the dangers incident to his standing or working on the top of the dump of lumber and segregating the lumber from that position. We believe from the evidence that the top of said dump of lumber was not a reasonably safe place for the respondent to work segregating said lumber, considering the manner in which the lumber was piled and that it was more or less slippery.

[5] The respondent and his collaborer, Cookkoolos, testified that they had been segregat-



ing the lumber from the pile while standing on the ground, and that the foreman ordered them with a curse to mount the pile and work from there, and that they immediately obeyed this order. If this evidence is true, we think that the appellants were guilty of negligence, which caused the injury, considering the unsafeness of the top of the pile of lumber as a place for the men to work, and their ignorance and inexperience, and the fact that they were not instructed as to the dangers incident to their work on the top of that pile of lumber.

The instruction set out, *supra*, states the general rule that a servant entering the employment of a master assumes the ordinary risks incident to it, and then states that he does not assume such risks as the master might have avoided by reasonable care. It states also that if the master directs his servant to do work in a manner not reasonably safe, and the performance of the work in the manner directed is the proximate cause of an injury to the servant, the master is guilty of actionable negligence. We deem this instruction correct under the facts of this case.

The place where the respondent was injured appears not to have been a reasonably safe place in which to work, and he was ignorant and incompetent and not warned by the appellants of the danger incident to his working there. Ordering him to work there under the circumstances was negligence, and the appellant did not assume the risk incident to the work, nor was he guilty of contributory negligence in working there under the circumstances.

It is elementary law that the master must furnish the servant a reasonably safe place in which to work, and that if he fails to do so he is guilty of negligence. This is a positive duty of the master, and it is not one of the risks or perils assumed by the servant by his contract of employment. See 20 Am. & Eng. Ency. Law (2d Ed.) pp. 55-57; *Johnson v. O. S. L. Ry. Co.*, 23 Or. 94, 31 Pac. 283; 26 Cyc. pp. 1097-1101.

[6] It is also the duty of the master to warn an ignorant or incompetent servant of all risks or dangers incident to his employment of which the master knows or should know. 26 Cyc. pp. 1173-1174; 20 Am. & Eng. Ency. Law (2d Ed.) 97.

Bailey in his work on *Personal Injuries*, vol. 2 (2d Ed.) p. 954, says: "On the other hand, if a servant, because of inexperience which is known to the master is incapable of understanding and appreciating a danger and the master fails to properly instruct him, the servant does not assume the risk." The same book, on page 952, says: "Ordinary risks are those incident to the business which are impliedly assumed by the contract of employment; and extraordinary risks the risks of negligence of the master which are not assumed unless known to the serv-

ant, or they should have been known by him in the exercise of ordinary care. In other words, ordinary risks are always assumed, but extraordinary risks are not assumed unless known or obvious."

The first part of this charge refers to ordinary risks which the servant assumes, and the latter part to extraordinary risks which the servant does not impliedly assume. It is the latter part of the charge to which the appellants object, which is as follows: "The law also provides that if a master directs his servant to do certain work in a manner not reasonably safe, and the performance of the work in the manner directed is the proximate cause of injury to the servant, the master is guilty of actionable negligence." This charge should be construed with reference to the facts of this case, and construing in that manner it is correct. The direction referred to in the charge had reference to the order of the appellants' foreman, Bryant, requiring the respondent to mount the dump of lumber and to work from the top of the pile, which was not a reasonably safe place to work; and the ignorance and inexperience of the respondent, and the fact that he was not warned of the danger incident to working in a dangerous place, are to be taken into account in construing it. When a master orders an ignorant and inexperienced servant to work in a place that is dangerous, without warning him of the dangers incident to working in such a place, and he obeys the orders and is injured, the master is guilty of actionable negligence. There was no error in giving this charge.

[7, 8] The third and fourth assignments of error are the refusal of the court to give the following charges: "It is the duty of a servant to exercise care in examining his surroundings and to acquire such knowledge of danger as *can* be obtained by observation, and if he fails to do this the risk is his own. If, therefore, you find that the plaintiff did not take care in examining his surroundings or in observing the manner in which his fellow servants did their work, whether in a careful or careless manner, and as to whether their acts might prove dangerous or not, and did not use reasonable care to examine his surroundings, then you are to find that the plaintiff is guilty of negligence himself and assumed the risks of his employment, and you must find for the defendants." Neither of these charges is applicable to the facts of this case. A servant who is experienced in a business is required to exercise only reasonable care to avoid injury. The first requested charge requires more than ordinary care in a servant. It requires a servant to exercise care and to acquire such knowledge of danger as *can* be obtained by observation. This seems to require more than reasonable care. It ignores the fact that the appellant is an ignorant, inexperienced servant, and would require of him more diligence than the law requires of an



experienced servant. Ordinary care is all that is required of any servant.

3 Bailey on Personal Injuries (2d Ed.) 1339, states the rule thus: "All cases agree that the care which a servant must exercise to preclude the defense of contributory negligence is ordinary care. Ordinary care is such as may be usually expected of persons of ordinary prudence under like circumstances, considering the perils of the business." The same book, on page 1339, states the rule thus as to ignorant servants: "The degree of care required of a servant of less than average intelligence is such as men of his capacity and understanding generally exercise under like circumstances, and not such as men of average intelligence exercise."

The second requested instruction is subject to the same objections as the first, excepting that it requires only reasonable care, but it is not applicable because under the facts in this case the respondent, being an ignorant, inexperienced servant, was not required to use ordinary or reasonable care. These requested charges were properly refused.

[9] The fifth assignment of error is based on the refusal of the court to give the following charge: "I charge you that the work mentioned herein was of a simple nature, such as handling lumber, and any ordinary laboring man ought, as a matter of law, to understand the ordinary hazards of this work." We think that the handling of lumber on top of the lumber dump, under the circumstances of this case, was something more than a simple case of piling lumber. The lumber was very heavy and more or less wet and slippery, and the work was more than ordinarily dangerous. The court properly refused this instruction.

[10] The sixth assignment of error contains a request for a charge to the effect that the failure of the appellants to furnish the respondent the proper kind of boots to wear when handling lumber did not constitute negligence, and it was properly refused, because the respondent failed to produce two witnesses to prove a usage among millmen to furnish boots or shoes of any sort to be used by them to protect them from slipping. The court instructed the jury to disregard that question, unless the respondent had produced at least two witnesses to prove such supposed usage. Only one witness swore that such a usage existed, and several witnesses testified that there was no such usage. That subject was eliminated by the charge of the court.

The last two questions for consideration arise on the refusal of the court to grant a nonsuit, and on the court's refusal to instruct the jury to return a verdict for the appellants. These points raise substantially the same question. We believe the rulings of the court to be correct. While the evidence was conflicting and the case for the

respondent not strong, we believe that there was enough evidence to require the case to be submitted to the jury and to sustain the verdict returned by the jury. The instructions given to the jury were quite lengthy and covered every point in the case, and they were fair to the appellants.

We find no reversible error, and the judgment of the court below is affirmed.

(24 Idaho, 365)

#### STANDROD et al. v. CASE et al.

(Supreme Court of Idaho. July 1, 1913.)

#### 1. MUNICIPAL CORPORATIONS (§ 956\*)—TAXATION—MAXIMUM LEVY.

Section 2238 of the Revised Codes, as amended by the 1911 session of the Legislature (1911 Sess. Laws, c. 81, p. 260), authorizing and empowering cities and villages to levy a tax for general revenue purposes not to exceed 20 mills on the dollar in any one year, repealed that part of section 2265 which fixed the maximum levy that might be made by cities and villages for general and incidental expenses to ten mills on the dollar.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2010-2013; Dec. Dig. § 956.\*]

#### 2. STATUTES (§ 141\*)—AMENDMENT BY IMPLICATION.

Section 18 of article 3 of the Constitution, which provides that "no act shall be revised or amended by mere reference to its title, but the section as amended shall be set forth and published at full length," is intended to prohibit the amendment of a section of the statute by reference and requires that the amended statute be set out at full length. This constitutional provision, however, does not prohibit an amendment by implication; that is, it does not prohibit or forbid the section as amended in accordance with the foregoing provision of the Constitution having the effect of repealing or amending some other section of the statute with which the amended section is in irreconcilable conflict. It was never intended by section 18 of article 3 of the Constitution to require the Legislature to set out at full length all the sections of the statute that might possibly be affected either by way of repeal or amendment of some provision thereof by reason of being in conflict with the amendment.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 43, 193, 209; Dec. Dig. § 141.\*]

#### 3. TAXATION (§ 544\*)—COLLECTION—IMPLIED POWER.

The power to levy a tax carries with it the implied power to employ the necessary means and procedure to execute the power and collect the revenue contemplated by the grant of power to make the levy.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1017; Dec. Dig. § 544.\*]

#### 4. MUNICIPAL CORPORATIONS (§ 969\*)—TAXATION—APPROPRIATION ORDINANCE—LIMITATION OF AMOUNT.

Section 2268 of the Revised Codes requires the city council or board of trustees within the first quarter of each fiscal year to pass an ordinance to be termed the annual appropriation bill, and that such ordinance shall specify the objects and purposes for which the appropriations are made and amount appropriated for each object or purpose; and it also provides that if there be any outstanding warrant indebtedness the council or board of trustees shall at the same time include in the annual appropriation "a special tax assessment of not to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



exceed ten mills on the dollar as shown by the last preceding assessment" for the purpose of paying such warrant indebtedness. This provision, however, does not contemplate an actual levy by the city authorities at the time of passing the appropriation bill for the purpose of paying the outstanding indebtedness, but it rather requires the council to make an appropriation of a lump sum for such purpose and limits the amount that can be thus appropriated to not exceeding ten mills on the dollar on the assessed valuation of the city at the last preceding annual assessment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2068-2074; Dec. Dig. § 969.\*]

**5. MUNICIPAL CORPORATIONS (§§ 890, 969\*)—TAXATION—DEFECTIVE APPROPRIATION ORDINANCE—EFFECT.**

A failure to include in the appropriation ordinance a specific appropriation for the payment of outstanding warrant indebtedness does not oust the city council of the power and authority to thereafter make such appropriation, or, in case of a failure to do so prior to the time of certifying the tax levy for the city, it does not deprive them of the jurisdiction and power to certify a sufficient levy within the maximum prescribed by section 2265 to meet the outstanding warrant indebtedness of such municipality.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1872, 2068-2074; Dec. Dig. §§ 890, 969.\*]

**6. OFFICERS (§ 110\*)—DISCHARGE OF OFFICIAL DUTIES—TIME.**

A public or official duty devolved by law on an officer, a discharge of which may be enforced by legal process, may be discharged without compulsion of such process, and although not done at the time prescribed may be voluntarily done or peremptorily enforced at any time thereafter and before it is too late for the doing thereof to accomplish the results intended to be accomplished by such act.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 176-179, 182-184; Dec. Dig. § 110.\*]

Appeal from District Court, Bannock County; Ed. L. Bryan, Judge.

Action by D. W. Standrod and another against L. B. Case and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

Standrod & Terrell, of Pocatello, for appellants. Clark & Budge and P. C. O'Malley, all of Pocatello, for respondents.

**AILSHIE, C. J.** This action was instituted by the appellants to enjoin and restrain the assessor and ex officio tax collector of Bannock county and the city of Pocatello from the collection of certain taxes levied and assessed against the property of appellants and to restrain and enjoin the assessor from selling the property for such tax. The suggestion made by counsel that it is rather an action to contest a tax levy by way of removal of a cloud from the title to the property is without merit. No such action would lie.

In the early part of August, 1912, the city council of the city of Pocatello passed ordinance No. 265, known as the annual appropriation ordinance, and thereby made the

following appropriations for the fiscal year commencing April 1, 1912: "Officers' fund (including city officers, police officers, fire department, cemetery), \$24,000; highway fund (including street sprinkling, water rent, street lighting, street work, and sidewalks and repairs), \$50,000; general fund (including printing, city jail, public buildings, contingent, outstanding warrants), \$17,500."

Thereafter, and on the 24th day of September, 1912, the council passed and the mayor approved ordinance No. 267, entitled "An ordinance providing for the tax levy of the city of Pocatello for all purposes, including the general fund, Carnegie library fund, redemption of outstanding warrants," etc., which ordinance, among other things, made a levy of 20 mills on the dollar "for the general fund" and 10 mills on the dollar "for the redemption of outstanding warrants." Appellants attack the action of the city council and seek to restrain the collection of the tax provided for by this levy upon two principal grounds: First, that the city council had no power or authority under the statute to make a levy for the general fund exceeding 10 mills on the dollar; and, second, that the levy of 10 mills on the dollar for payment of outstanding warrants was in violation of the statute and is unauthorized and void. We will deal with these questions in the order above suggested.

[1] Appellants rely on section 2265 of the Revised Codes in support of their contention that the city council has no authority to make a levy for general purposes exceeding 10 mills on the dollar. The portion of section 2265 bearing upon this point is as follows: "Sec. 2265. The council or trustees of each city or village shall, at the time provided by law, cause to be certified to the county tax collector the percentage or number of mills on the dollar of tax levied for all city or village purposes, etc. \* \* \* The amount which may be so certified, assessed and collected, shall not exceed ten mills on the dollar to defray its general and incidental expenses," etc.

Respondents, on the other hand, justify the levy under section 2238, Rev. Codes, as amended by chapter 81 of the 1911 Session Laws. The 1911 session of the Legislature amended the first subdivision of section 2238, Rev. Codes, which confers various powers and authority on cities and villages, and the amendment in this respect is as follows: "Sec. 2238. In addition to the powers heretofore granted to cities and villages under the provisions of this chapter, any city or village may, by ordinance or by law: First. Levy taxes for general revenue purposes not to exceed twenty mills on the dollar in any one year on all the property within the limits of said city or village taxable according to the laws of the state of Idaho, the valuation of such property to be ascertained from the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



books or assessment rolls of the tax collector of the proper county."

Section 2238 is found in chapter 5, tit. 13, entitled "Powers of cities and villages," while section 2265 is in chapter 7, tit. 13, entitled "Municipal finances." The two paragraphs here in question are both dealing with the same question, namely, the authority and method for collecting taxes. When the Revised Codes were adopted, these two sections were in harmony, but, when the Legislature amended section 2238, they made no reference to section 2265. The amendment of 1911 (Sess. Laws 1911, p. 266) is the latest legislative expression on the subject, and it undoubtedly amends section 2265 in so far as the latter section conflicts with the amendment to section 2238. *People v. Lytle*, 1 Idaho, 143; *Territory v. Evans*, 2 Idaho (Hasb.) 651, 23 Pac. 232, 7 L. R. A. 646.

[2] The contention has been made that under section 18 of article 3 of the Constitution which provides that "no act shall be revised or amended by mere reference to its title, but the section, as amended, shall be set forth and published at full length," prohibits an amendment or repeal by implication. The foregoing provision of the Constitution was never intended to have such an effect. It was the purpose of this provision of the Constitution to require every section of a statute which might be revised or amended to be set out at full length in the amendment, but it was never intended to require an impossible thing, and everyday experience teaches us that it would be impossible and would result in locking the wheels of legislation to require that every section of the statute which might be in some respect repealed, modified, or affected by the amendment of another section should also be set forth in full. That task would tax the ingenuity of the best skilled members of the bar. It was certainly never the intention of the framers of the Constitution to require any such impossibility from the layman who is engaged in his business or avocation and who attends perhaps only once in a lifetime upon a 60-day session of the Legislature. On the other hand, the purpose intended to be accomplished by setting out the amended or revised section at length is accomplished as effectively as if all the kindred sections that might be in any way affected thereby were set out in full. In such case the object and purpose of the amendment is made manifest by the section which is written in full. Section 2238 confers the power to levy the tax, while section 2265 provides for certifying the levy and its collection by the tax collector of the county in which the city or village is located. The power and authority, having been conferred by section 2238 upon the city to levy a tax not exceeding 20 mills, would carry with it the implied power and authority to employ the means necessary to make that power effective and carry it into

operation, even if the statutes did not elsewhere (which they do) provide the procedure.

[3] It has been held that power to levy and collect a tax carries with it the implied power to employ the necessary procedure to execute the power and collect the revenue contemplated by the grant of power to make the levy. *Gray on Limitations of the Taxing Power*, § 1174; *State v. Severance*, 55 Mo. 378; *Hanson Co. v. Gray*, 12 S. D. 124, 80 N. W. 175, 76 Am. St. Rep. 591; *City of Huntsville v. County of Madison*, 166 Ala. 389, 52 South. 326, 139 Am. St. Rep. 45; 37 Cyc. 1233-1242.

[4] This brings us to the second question urged by the appellants respecting the levy of 10 mills for the payment of outstanding warrants. Section 2268 of the Revised Codes contains, among other things, the following language with reference to the passage by the city council of an annual appropriation bill: "The city council of cities, and board of trustees in villages, shall, within the first quarter of each fiscal year, pass an ordinance to be termed the annual appropriation bill, in which such corporate authorities may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation, not exceeding in the aggregate the amount of tax authorized to be levied during that year, and at the same time said city council of cities, and board of trustees in villages, \* \* \* must, whenever any city or village shall have warrants outstanding and unpaid for the payment of which there are no funds in the city or village treasury, in addition to other taxes provided by law, \* \* \* levy and include in such annual appropriation bill, a special tax assessment of not to exceed ten mills on the dollar, as shown by such preceding assessment; \* \* \* as shall be sufficient to pay such warrants. \* \* \* Such ordinance shall specify the object and purposes for which such appropriations are made and the amount appropriated for each object or purpose," etc. This section is contained in the same chapter which contains section 2265, entitled "Municipal finances," and the foregoing provisions of the section have particular reference to the annual appropriation bill. As above noted, the city council passed an appropriation ordinance in accordance with the provisions of this statute and specified the objects and purposes for which each appropriation was to be made as above set out.

[5] The appropriation ordinance, as may be noted, did not make a separate, specific appropriation for outstanding warrant indebtedness. It did, however, contemplate the payment of outstanding warrants and recognized such an indebtedness and made an appropriation therefor. This appropriation was included with other appropriations



as follows: "General fund (including printing, city jail, public buildings, contingent outstanding warrants), \$17,500." So it will be seen that the city council intended that some part of this \$17,500 should be employed for the payment of outstanding warrants, and this afforded notice to every taxpayer that this latter appropriation was to cover some outstanding indebtedness. Of course this appropriation is not in the form contemplated by the statute. Subsequently, however, when the city council came to certifying their tax levy, as required by section 2265, they certified a 10-mill levy "for the redemption of outstanding warrants."

Appellants insist that this latter action of the council was void and unauthorized for the reason that under the provisions of section 2268, *supra*, it was the duty of the city council to make the levy for payment of outstanding warrants at the time of passing the annual appropriation bill, and that this statute is mandatory, and a failure to make such a levy at that time was fatal to any subsequent levy for such purpose. It is contended by appellants that it was the duty of the city council at the time of the passage of the annual appropriation bill to ascertain the amount of the outstanding warrant indebtedness and make a levy based upon the assessment of all the taxable property within the city for the preceding year, and that a failure to make such levy ousted the council of jurisdiction to subsequently levy and certify a tax for such purpose. We are unable to agree with appellants in this construction of the statute. Section 2268 of the statute, when read and construed in connection with the powers granted to cities and villages and the general revenue scheme providing for the levy and collection of taxes for municipal purposes, convinces us that it was the purpose of the Legislature to require the city council to include in the general appropriation ordinance or bill an appropriation for the purpose of paying the outstanding warrant indebtedness, and that the word "levy" was used in this connection, for the reason that it was the purpose of the Legislature to limit such appropriation to a sum not exceeding 10 mills computed upon the city assessment for the preceding year. At the time of passing this appropriation bill, the assessment for the current year had not been made and the city council could not tell what the total assessment of the city would be. And so it was the evident intent of the Legislature to limit any and all appropriations and assessments for the payment of outstanding warrants to a rate which should not exceed a 10-mill levy on the dollar as shown by the last preceding assessment, and that the appropriation bill should not carry more than that sum for this special purpose. After the assessment is made and the council come to figure up the percentage of levy that will be necessary to

raise the various sums appropriated by the general appropriation act, the levy may be much less than 10 mills or it might be more than 10 mills on the assessment of the current year. If the appropriation had been made for the maximum of 10 mills on the assessment of the preceding year, and it should then so happen that the assessment of the current year was less than that of the preceding year, the tax levy for the payment of this appropriation would necessarily exceed 10 mills on the current year's assessment. The law requires the appropriation bill to be passed during the first quarter of the fiscal year while the levy is not made and certified until in September.

[6] Under the requirements of section 2268, it was the plain duty of the council to include in the appropriation bill an appropriation for the payment of the outstanding warrant indebtedness, and the council might have been compelled by proper legal procedure to make such appropriation as a separate and specific item. Having failed to do this, and no legal proceeding having been resorted to in order to enforce compliance, the question arises; Was it too late for them to certify a levy along with the other tax levies when the time arrived to perform this latter act? In other words, did the failure to make the appropriation at the proper time deprive the city of the jurisdiction and power to collect any revenue for the year 1912 for the payment of outstanding warrant indebtedness? Our answer to both these questions must be in the negative. A public or official duty devolved by law on an officer, the discharge of which may be enforced by legal process, may certainly be discharged without the compulsion of such process and, although not done at the time prescribed, may be voluntarily done or peremptorily enforced at any time thereafter before it is too late for the doing to accomplish the results intended to be accomplished by such act.

It appeared on the trial in this case that a 10-mill levy on the assessed valuation for 1912 would raise more revenue than was necessary to pay the outstanding warrant indebtedness, and it was agreed at the trial that 6.5 mills would raise sufficient revenue for that purpose. The court accordingly ordered the levy reduced to 6.5 mills. It must be conceded here that the action of the city council in regard to the appropriation and levy for the payment of the outstanding warrant indebtedness was irregular and not in conformity with the statute. It appears, however, on the other hand, that it was the duty of the council to make an appropriation for this purpose and that a levy was necessary to raise revenue for the payment of the warrant indebtedness, and that all the taxable property of the city of Pocatello was liable to a tax levy for the year 1912 to meet this indebtedness. See *N. P. R. R. Co. v. Kootenai County*, 19 Idaho, 75, 112 Pac. 678.



For the foregoing reasons, the trial court properly denied the injunction. The judgment should be affirmed, and it is so ordered. Costs awarded in favor of respondent.

SULLIVAN and STEWART, JJ., concur.

(24 Idaho, 63)

**CRANE FALLS POWER & IRRIGATION CO., Limited, v. SNAKE RIVER IRRIGATION CO., Limited.**

(Supreme Court of Idaho. March 1, 1913.  
On Rehearing, June 21, 1913.)

**1. WATERS AND WATER COURSES (§ 247\*) — IRRIGATION SYSTEM — CONTRACT — PERFORMANCE.**

*Held*, under the facts of this case and the contract entered into between the C. F. P. & I. Co. with the A. C. W. U. Ass'n, that the C. F. P. & I. Co. is not entitled to an injunction in this case.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 314; Dec. Dig. § 247.\*]

**2. ESCROWS (§ 15\*)—WITHDRAWAL.**

*Held*, that the C. F. P. & I. Co. failed to perform the obligations imposed on it by the contract for the construction of an irrigation system, and that the landowners were fully justified in withdrawing their applications or contracts to purchase stock in the A. C. W. U. Ass'n from escrow.

[Ed. Note.—For other cases, see *Escrows*, Cent. Dig. § 21; Dec. Dig. § 15.\*]

**3. WATERS AND WATER COURSES (§ 247\*) — IRRIGATION SYSTEM — DAMAGES — INJUNCTION.**

*Held*, that the equities in this case are with the S. R. I. Co.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 314; Dec. Dig. § 247.\*]

On Rehearing.

**4. WATERS AND WATER COURSES (§ 242\*)—IRRIGATION—DITCHES—RIGHT OF WAY—TITLE.**

*Held*, under the "application and agreement for the purchase of stock" made by the settlers and the contract between the Apple Cove Association and the Crane Falls Power & Irrigation Company, that it was not the intention of the parties to furnish the Crane Falls Company with title to a right of way for the construction of ditches for the irrigation of the lands of the settlers.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 147, 307; Dec. Dig. § 242.\*]

**5. WATERS AND WATER COURSES (§§ 18, 141\*) — WATER RIGHTS—ACQUISITION—MODE.**

Under the laws of this state, there are two methods of acquiring water rights: (1) To proceed as the statute directs; (2) to apply unappropriated water to a beneficial use without making application to the state engineer.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 10, 147, 152; Dec. Dig. §§ 18, 141.\*]

**6. WATERS AND WATER COURSES (§ 242\*) — WATER RIGHTS—STATUTES.**

The provisions of section 2339, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1437), were intended to protect persons in their rights to the

use of water and were not enacted for the purpose of enabling contractors who construct ditches for an agreed compensation to procure title to rights of way for such ditches.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 147, 307; Dec. Dig. § 242.\*]

**7. WATERS AND WATER COURSES (§ 242\*)—IRRIGATION DITCHES—"CONTRACTOR."**

*Held*, under the facts of this case, that the appellant corporation was a construction company and as a construction company is not entitled to a title to a right of way for ditches under the provisions of section 2339, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1437).

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 147, 307; Dec. Dig. § 242.\*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1534-1537; vol. 8, p. 7616.]

**8. WATERS AND WATER COURSES (§ 242\*) — IRRIGATION DITCHES—RIGHT OF WAY—PUBLIC LANDS—TITLE—EASEMENT.**

The owner of an irrigation ditch, constructed over public lands, does not acquire title in fee to such right of way but a conditional easement which will be defeated by his failure to use it for the purpose for which it was obtained.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 147, 307; Dec. Dig. § 242.\*]

**9. WATERS AND WATER COURSES (§ 242\*)—IRRIGATION DITCHES—CONSTRUCTION—RIGHT OF WAY—COMPLETION OF WORKS—DILIGENCE.**

After the commencement of the construction of such canal, the law contemplates that the work shall be prosecuted with due and reasonable diligence to completion.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 147, 307; Dec. Dig. § 242.\*]

**10. WATERS AND WATER COURSES (§ 242\*)—IRRIGATION WORKS—RIGHT OF WAY—TITLE—SEGMENTS OF CANALS.**

*Held*, that the provisions of said section 2339, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1437), were not intended to give any one title to the right of way for segments of canals merely because they constructed them.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 147, 307; Dec. Dig. § 242.\*]

**11. WATERS AND WATER COURSES (§ 140\*)—IRRIGATION—RIGHT TO USE WATER—PRIORITY OF POSSESSION.**

Said section 2339, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1437), provides for protecting such rights to the use of water as vest and accrue by a priority of possession and such as are recognized and acknowledged by local customs, laws, and decisions of the courts.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 140.\*]

**12. WATERS AND WATER COURSES (§ 242\*)—IRRIGATION DITCHES—RIGHT OF WAY—PUBLIC LAND—STATUTES.**

The provisions of said section 2339, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1437), refer to the right of way for such ditches as are used in connection with vested water rights, and, unless one has a vested and accrued water right, he is not entitled to an easement over any public lands for the construction of ditches.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 147, 307; Dec. Dig. § 242.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**13. WATERS AND WATER COURSES (§ 242\*)—  
IRRIGATION DITCHES—COMPLETION—RIGHT  
OF WAY—TITLE.**

Such title as the provisions of said section 2339, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1437), gives does not vest until the completion of the ditch, and unreasonable delay in its completion forfeits any claim to the right of way.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 147, 307; Dec. Dig. § 242.\*]

Appeal from District Court, Ada County; Chas. P. McCarthy, Judge.

Action by the Crane Falls Power & Irrigation Company, Limited, against the Snake River Irrigation Company, Limited. Decree for defendant, and plaintiff appeals. Affirmed.

Richards & Haga and McKeen F. Morrow, all of Boise, for appellant. Edwin Snow, Perky & Crow, and Wyman & Wyman, all of Boise, for respondent.

SULLIVAN, J. This action was brought by the Crane Falls Power & Irrigation Company, a corporation (which will hereafter be referred to as the Crane Falls Company), against the Snake River Irrigation Company (which will hereafter be referred to as the Snake River Company) to quiet title in the plaintiff corporation to four partially constructed irrigation canals along the Snake river in the southeastern part of Ada county, and to enjoin the defendant corporation from trespassing thereon and appropriating the same to its own use. The respondent corporation answered the complaint, and, upon the issues joined, the court without a jury tried the case and declined to quiet plaintiff's title to either of said canals or work constructed by it, and declined to enjoin defendant, as prayed for, and also dissolved the temporary restraining order theretofore issued in said matter and entered judgment in favor of the Snake River Company for its costs.

The record shows, among other things, the following facts: There is a body of land consisting of about 8,000 acres, situated in the southeastern corner of Ada county near Snake river; in 1909 the greater portion of said tract had been entered in the United States Land Office by various settlers under desert and homestead entries, the greater part being under desert entries; the land was arid in character and the settlers desired to secure water for the irrigation of the same, but, as such land was situated at an elevation of from 50 to 200 feet above Snake river, the only feasible method of bringing water upon the land was by means of pumps, and it was necessary for many of said entrymen to have water upon their lands in the spring and early summer of 1910 in order to comply with the land laws of the United States; the only recourse of such claimants, if water failed them in 1910, was to abandon

their filings thereon and refile under some other form of entry or spend large sums of money for scrip with which to enter said lands or to abandon them. Sometime during the summer or fall of 1909, the Crane Falls Company began negotiations with some of the settlers upon said land with a view to supplying water therefor, and a written contract was entered into on the 10th of November, 1909, with the Crane Falls Company. Said contract was signed on that date but was not a direct contract between the settlers and said company but was a contract between said Crane Falls Company and the Apple Cove Water Users' Association, which association was incorporated in May, 1909, and will hereafter be referred to as the Apple Cove Association.

It appears that as early as May or June, 1909, the settlers, evidently believing that satisfactory terms would be made with said Crane Falls Company and that a contract would be entered into with it, began signing individual applications to purchase stock of the Apple Cove Association corporation, and by the end of October, 1909, more than 70 per cent. of the number of shares in said Apple Cove Association had been embraced in these written applications, as shown by plaintiff's Exhibits 1 to 31, inclusive. It also appears that the settlers appointed a committee consisting of five of the landowners to take charge on the part of the settlers of the matter of the preparation of the main contract, which is marked "Plaintiff's Exhibit 34," as well as other matters coming up during the negotiations between the settlers and the Crane Falls Company.

It appears from the testimony that the Crane Falls Company was instrumental in the formation of the Apple Cove Association. The evidence indicates that the Apple Cove Association was incorporated for the purpose of procuring the settlers to sign the contracts with the Crane Falls Company, which contracts are represented by Exhibits 1 to 31 contained in the record. After the plant was completed, the settlers were to buy the capital stock of the Apple Cove Association and take over the plant for the water users, or, as stated by witness Chattin, "They were to pay the Crane Falls Irrigation Company for building these ditches and the erection of the plant with the stock of this company, Apple Cove Association, then they were to buy back from them at so much a share." The board of directors of the Apple Cove Association was composed of the individuals who, prior to the time of its organization, had constituted the committee of the settlers and which still constituted that committee, and whose duty, as such, was to represent the landowners and protect their rights and holdings. Had such irrigation plant been completed, the Apple Cove Association would have performed the very important part that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.



an operating company performs under the Carey Act contracts with the state. The committee representing the settlers and the Crane Falls Company, which latter was represented by Hassler and Shettler, finally agreed on the terms of the contract to be entered into between the Crane Falls Company and the Apple Cove Association. That contract provided that appellant should build at its own expense a complete power and pumping plant and irrigation system, of size and capacity sufficient to deliver water for the proper irrigation of said lands; the system to consist of a power plant and diversion works at Crane Falls, Idaho, and a system of electrically driven pumps and pipe lines at Apple Cove, sufficient in size to pump the required amount of water into the heads of the canals which the Crane Falls Company was to build to carry the water upon the land. In consideration of the building of this system in the manner specified and to be completed by May 1, 1910, appellant was to receive the entire authorized capital stock of the Apple Cove Association. The form of contract agreed upon contained the provision that the Crane Falls Company should give the Apple Cove Association a bond in the sum of \$100,000 conditioned upon its faithful performance of the contract. This bond was evidently intended for the purpose of indemnifying the settlers in case they did not get water during the season of 1910, so as to make the requisite proof for the entry of their lands.

It seems clear that, up to the time of the execution of said contract, it had been understood that the Apple Cove Association was to be protected by a bond fully indemnifying the settlers against the loss occasioned by any failure of the Crane Falls Company to keep its contract. At that time a great number of the settlers had actually signed applications, such as Exhibits 1 to 31, contained in the record for the purchase from the Crane Falls Company of stock in the Apple Cove Association. The first of said applications had been signed in June, 1909. Most of said contracts were signed prior to November 10, 1909, when the contract between the Crane Falls Company and the Apple Cove Association was executed by them, but with an understanding on the part of the settlers of the general nature of the contract to be executed by said corporation, and no doubt on the supposition that a bond would be provided for. It was understood that the main contract should require the Crane Falls Company to construct the power and pumping plant, ditches, and diversion works and receive as full pay for its construction work the entire capital stock of the Apple Cove Association excepting five shares, which were to go to the directors of the association. It also provided that the Crane Falls Company should sell the stock so received of the Apple Cove Association to the settlers, and the applications for the pur-

chase of this stock, as shown by said Exhibits 1 to 31, were made and delivered to the committee of settlers for the purpose of authorizing such committee to deliver the applications to the Crane Falls Company when it had satisfied such committee of its ability to fulfill and complete its contract with the Apple Cove Association in the construction of said system and power plant.

It is provided in said application that the Apple Cove Association is organized for the main purpose of securing the construction of an irrigation system and thereafter owning and operating the same; second, that the Crane Falls Company proposes to take all of the capital stock of the association for the full payment for the construction of said system; third, that the settler is to purchase a certain amount of the stock of the Apple Cove Association owned by the Crane Falls Company at a certain price, approximately \$52.50 per share; fourth, that the settler is to assign his land in trust as security for the payment of the stock; fifth, that upon demand the settler shall give such other mortgage or lien upon his land as shall be approved by the State Land Board in order to further secure the Crane Falls Company; sixth, that the shares of stock purchased by the settler shall be put up as a further security; seventh, that the settler is to pay his pro rata share of all the tolls and assessments; eighth, that no water is to be delivered while any installment is due to the Crane Falls Company; ninth, that every share of stock is to represent one-eightieth cubic foot of water per acre; tenth, that said application and proposal is entered into with the understanding that it would be accepted and a proper bond executed by the Crane Falls Company on or before October 15, 1909. This latter provision is contained only in applications designated as Exhibits 8 and 12 to 31, inclusive. It will be noted that the applications relate to the purchase from the Crane Falls Company of the stock of the Apple Cove Association, and that no arrangement, agreement, or stipulation is made in regard to any right of way or proposed right of way therein.

In October, 1909, after the terms of the main contract between the Apple Cove Association and the Crane Falls Company had been agreed upon, but before the contract was actually executed, C. B. Smith of Smith, Kerry & Chase, who then owned nearly the entire capital stock of the appellant and were representing the appellant company, came to Mountain Home and at a meeting with the settlers' committee asked that the provisions of the main contract requiring it to give a \$100,000 bond for the performance of said contract be stricken from it. He stated that the bond, if required, would be a hardship on his company, for in order to give it the Crane Falls Company would have to put up a certified check for that amount and it



would simply be out of the use of that amount of money until the plant was completed, and that they were going to put in a plant and give the users water for the 1910 spring irrigation. At that time it was explained to him that the settlers must have water by the spring of 1910 in order to save their land. But, in consideration of the promise of said Smith for the Crane Falls Company to furnish water to the settlers the following spring, the settlers' committee consented to the elimination of the provision from the bond, and according to that agreement the provision requiring a bond was left out of the contract, and on November 10, 1909, the main contract was signed by the Crane Falls Company and the Apple Cove Association. After the signing of said contract, the settlers continued to gather individual applications and agreements for the purchase of stock until by December 13, 1909, it had agreements covering 4,939 shares in its possession ready to deposit in escrow. It seems that the settlers were dissatisfied with certain parts of the contract as it then stood and refused to proceed unless a further modification was made. Accordingly, on December 13th the appellant company, through its vice president and acting secretary, consented to such modification and sent to the Apple Cove Association an instrument modifying the contract in several respects, placing an interpretation on certain clauses, waiving the requirement that contracts for 5,600 shares be secured, and stating that the money deposited with the escrow holder should be returned upon the failure of the Crane Falls Company to prosecute such construction work with reasonable diligence until completion. Upon the receipt of said modification in the form of a letter, and relying upon it, as well as upon the agreement that water would be furnished by the spring of 1910, the 10 per cent. cash and said applications and certain approved notes were placed in escrow with the First National Bank of Mountain Home.

On an examination of said applications and agreement for the purchase of stock by the settler, it appears that the aggregated amount to be paid for the stock of the Apple Cove Association held by the Crane Falls Company was approximately \$230,000, and it appears from the record that the Crane Falls Company had expended between \$15,000 and \$17,000 in the construction of canals up to the 2d day of April, 1910, when it quit work.

It is clear from the provisions of the main contract that the Crane Falls Company was to construct said system of canals, pumps, pipe lines, etc., which when constructed was to be the property of the association, and the appellant corporation was to receive the capital stock of the association for its construction work, which capital stock it was to sell to the settlers; and in the main contract said Apple Cove Association agreed to furnish, without expense to the power company,

free sites and rights of way for pumping plants, substations, pipe, transmission, and telephone lines for such works. Under the main contract the Apple Cove Association was to secure a right of way from the settlers, and it no doubt was understood that, while the settlers were to furnish such right of way, etc., for the construction of such work, it was not intended that they should convey such right of way and sites to the Crane Falls Company. It was simply to furnish them for the erection and construction of such irrigation system, which system was to belong to the settlers when completed. The Apple Cove Association in its said agreement obligated itself to furnish such sites and rights of way for the construction of said system, but this obligation was separate from the obligations contained in the applications of the settler to purchase stock.

The individual contracts of the settler, which were offers to purchase by each settler a certain amount of stock in the Apple Cove Association, which was held by the Crane Falls Company, were placed in escrow with the First National Bank of Mountain Home to be delivered to the appellant upon the completion of its contract. They were not delivered to the Crane Falls Company but were merely placed in escrow, and the settlers did not agree that said applications should be delivered to the Crane Falls Company until it had constructed said system in compliance with said main contract.

The Crane Falls Company agreed to commence actual construction work on said irrigation system and power plant within 30 days after being notified by the association that the first payment of 10 per cent. on a certain number of shares of stock or water rights had been deposited with the First National Bank of Mountain Home. It appears from the record that the Crane Falls Company commenced construction work on its canals but did not do anything toward the construction of its power plant up to the time it ceased work in April, 1910, and as an excuse for not doing so the appellant claims that it had an application pending in the Department of the Interior of the general government for a right of way for its power plant over public land at Crane Falls, and the record shows that it had not procured that right of way up to the time this case was tried in the district court, and it appears from appellant's own showing that it not only did not comply with its contract in the matter of the construction of canals, power and pumping plant, transmission lines, etc., but it had not secured the necessary right of way from the government, without which no diversion of water for power was possible. Appellant made no pretense and now makes no pretense of showing that it now or ever will be able to pump water except for the Gem Irrigation District. It is thus made to appear that the delay in constructing said system and in furnishing wa-



ter to the settlers was due to facts which still exist as to the construction of the system described in said main contract.

After it became evident to the settlers that the appellant company could not furnish water for the season of 1910, or in any manner complete its work according to its contract, the individual applications for the purchase of stock were taken out of escrow by Smith and Chattin. The record shows that it was done on behalf of all those who had signed those contracts; and it further appears that the consent to withdraw those applications for stock from escrow was given by D. W. Shettler on the part of the company. When it was concluded to withdraw said applications from escrow, Mr. Shettler was sent for by the committee. He stated that he was a representative of the Crane Falls Company and that he was satisfied that the company had not lived up to its part of the contract and it was satisfactory to permit the withdrawal of said applications from escrow. It appears from the record that Shettler had been active on behalf of the Crane Falls Company in promoting its interests and in procuring said main contract. He had been very active in seeing that the parties got together on said main contract and had acted conjointly with the other members of the Crane Falls Company. At the time when a modification of said contract had been sent to Mountain Home, he signed the same as acting secretary. While it is claimed by counsel for appellant that he had no authority to consent to the withdrawal of said applications from escrow, it appears that he had general authority to deal with the settlers and said Apple Cove Association in relation to the contract.

We think from all of the evidence that the settlers, or the Apple Cove Association on their behalf had full right and authority to withdraw said applications from escrow. The Crane Falls Company, under its contract, was to build a power plant, which they claimed would cost \$500,000, also a pumping plant, pipe lines, ditches, etc., which would cost fully \$100,000, and the only work done up to the time the company ceased work was the building of the canals or ditches referred to at an expense of from \$15,000 to \$17,000. The main object and purpose of the settlers was to get water for the land so that they could make final proof on their desert and other entries during the year of 1910, but nearly two years elapsed after the partial construction of said canals without any further work being done. Some of the settlers lost their lands, some were required to purchase scrip with which to secure title, and others were forced to make re filings. The partially constructed ditches fell into disrepair. That apparently was the condition of things when the Snake River Company offered to supply water to said settlers, which company is known as a Carey Act company, with which company the settlers made a con-

tract for water and under which contract the respondent company proceeded with the construction of its pumping stations, transmission lines, and other facilities for furnishing water to the land of the settlers and entered into the possession of the three partially constructed ditches referred to and had possession of them at the time of the commencement of this action on March 15, 1912. It has expended considerable money in repairing and completing said partially constructed ditches, and in addition has bought an electrical equipment and pump costing about \$30,000 and a pumping station costing approximately \$12,000. It had a water permit and expected to complete its system and furnish water to the land by the 15th of May, 1912.

The respondent corporation claims a right to use said partially completed ditches in question because of an arrangement with the parties over whose lands said ditches extend, and it claims in addition that, in the absence of such an arrangement, it would have a better right to said ditches than appellant because it was in possession of them at the time when this action was brought. It is further claimed that respondent began the construction of its irrigation system and secured its right to the ditches from the settlers, on whose land said partially constructed canals were located, with no knowledge that appellant had a claim on said ditches. Said partially completed ditches were on the lands of the settlers and partly filled with sand and in places were caved and washed. Appellant, on the other hand, waited until respondent had expended large sums of money and actually delivered water to the settlers, then commenced this action, not to secure the value of the ditches on the theory that it owned them, but to enjoin the respondent company from completing said ditches, alleging in this connection that the respondent was insolvent and unable to respond in damages for its purported trespass, an allegation which was denied by the answer and which the appellant company failed to prove on the trial.

[1] The question is then directly presented on the facts: The appellant company itself failing to complete the system in accordance with its contract, to supply the settlers with water, and unable to complete said system after having abandoned it, or at least ceased work on it for nearly two years, can it now maintain this action to enjoin the defendant from using said partially constructed ditches in supplying the settlers with water? We think not.

[3] The equities of the case are with the Snake River Company and the settlers.

It is contended by counsel for appellant that the appellant company was the owner of the rights of way over which said partially constructed ditches passed. We cannot agree with that contention. It is true the settlers were to furnish the right of way un-



der the contract and they were to own the entire system as soon as it was completed. They did furnish the right of way so far as it passed over the land of the settlers, but it was not intended nor was it necessary that the title to said right of way should pass to the Crane Falls Company, as the entire system was to become the property of the settlers who purchased the stock of the Apple Cove Association which the appellant had the right to sell if it complied with its contract.

[2] Said main contract contains a provision that, in case the Crane Falls Company fails to furnish water at the time agreed upon, no interest should be charged on the purchase price of said plant until it was furnished. While that is true, it is clear that the intention was to furnish water by the spring of 1910. It failed to furnish water by that time. It has totally failed to perform more than one-fifteenth part of its construction work and has quit its work altogether. The land which it was to irrigate is now supplied from another system constructed by the respondent. Many of the settlers owning such lands now are not the original settlers who held the land at the time the negotiations were pending and said main contract was executed. The record shows that the appellant could not perform the contract, and a failure did not result from the fact that said applications were withdrawn from escrow. The failure was in part because of the action of the Secretary of the Interior and in part it would seem to be the fault of appellant for not rushing the work in the construction of said plant before the power site was withdrawn by the Secretary of the Interior, but that was appellant's misfortune and not the misfortune of the respondent company. This action is not brought to recover the value of said partially constructed ditches or for damages to appellant by reason of the respondent's use thereof, but is brought on the theory that the Crane Falls Company has an irrigation system with which the respondent is interfering.

After a most careful review of the entire case, we are fully satisfied that the judgment of the trial court must be affirmed, and it is so ordered. Costs awarded to respondent.

AILSHIE, C. J., and STEWART, J., concur.

On Rehearing.

SULLIVAN, J. A rehearing was granted in this case and respective counsel made oral argument before this court on the rehearing. In the petition for rehearing it is contended that this court was misled as to the facts of the case by the "erroneous statements, misrepresentations, and unwarranted implications" contained in respondent's brief in numerous particulars; but on the oral argument counsel for appellant did not point

out wherein the court had been misled as to the facts, and we are fully satisfied that the facts as stated in the original opinion fairly represent the facts involved in the case and that the court has not been misled in regard thereto.

It is next contended that the court failed to pass upon the rights of appellant under section 2339, Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1437), which involves the appellant's title to the rights of way for the construction of said ditches or canals. Said section is as follows: "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

[4] The question arises as to what right the appellant has secured under the provisions of said section to the right of way for the four segments of ditches referred to, when applied to the facts of this case. The record shows that none of said ditches have been completed, and that it would require the expenditure of a large amount of money to complete said irrigation system. The ditch nearest the river is 50 feet or more above the level of the river, and the highest one is over 200 feet above the level of the river. After said segments of ditches were constructed, the appellant quit all work thereon April 4, 1910, and had done no further construction work in order to complete the same at the time this action was tried. The facts are quite fully set forth in the original opinion. It does not appear from the record that the appellant company owned any water right or any rights to the use of water for the purpose of irrigating said lands; and it further appears that said appellant company was simply a construction company. It appears from the exhibits (1 to 31) referred to in the original opinion, and entitled "Application and agreement for the purchase of said stock," that the Apple Cove Association was organized for the main purpose of securing the construction of an irrigation system and thereafter owning and operating the same. It is recited in said exhibits as follows: "Whereas, the undersigned is the owner of the lands and premises hereinafter described, which are situated under and are susceptible of irrigation from said proposed canals, and by reason thereof is desirous of securing the construction of said



canals and the installation of such pumps and pumping plants and the furnishing of power for operating the same: Now, therefore, in consideration of the premises and for the purpose of inducing the said power company to undertake the construction of said canals," etc.

The object and purpose of the owners of said land was to procure the construction of such canals and works, and it was provided in the contract with the Apple Cove Association that the appellant company should take all of the capital stock of said Apple Cove Association as full payment for the construction of said canals. It is clear from the contract entered into for the construction of said canals and system and the applications referred to that the appellant company is nothing more nor less than a construction company, and that it had not by "priority of possession" rights to the use of water for the irrigation of said land, which had vested and accrued at the time said contract was entered into or at the time it quit work upon said ditches in April, 1910. Said section 2339, Revised Statutes of the United States, clearly contemplates that one who seeks the benefit of the right of way for ditches over the public lands must have some rights to the use of water which are recognized and acknowledged by the local customs, laws, and decisions of the courts of the state wherein such system is being constructed, before it is entitled to the right of way for the construction of ditches or canals for the purposes specified in said section. Said section, being reduced to its clear meaning, might be read as follows: "Whenever rights to the use of water have vested and accrued, the possessors and owners of such vested rights shall be maintained and protected in the same, and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed." "For the purposes herein specified" unquestionably means for the purpose of maintaining and protecting the owners and possessors of water rights which have vested and accrued. Appellant is claiming title to a right of way, and the only right of way claimed is that for the ditches constituting a part of the irrigation system appellant contracted to build for the Apple Cove Association. The easement for a right of way is entirely dependent upon the use, and, if there is no use for the ditches under the original purpose, there can be no easement. The appellant has entirely failed to carry out its original purpose for which said ditches were built and, in fact, cannot now carry out such purpose. It does not propose and does not offer to do so. The purpose for which said ditches were built has been accomplished by the work of the respondent company under its agreement with the settlers, and, if such right of way was ever secured, it was by the Apple Cove Association, which was to own and hold and operate the

ditches after they were built and the system completed for the benefit of the landowners. Part of the land over which said ditches extend never did revert to the United States government by relinquishment of filings or otherwise; and, unless appellant can show its right of way across such tracts of land also, it has no continuous right of way, since continuity of the right of way is wholly broken up by the land of parties who never did relinquish their land to the government after said ditches were constructed. Said appellant corporation being a construction company merely and having no water right vested and accrued, it does not come within the scope and meaning of said section 2339.

[5] Under the laws of this state there are two methods of acquiring water rights: One is to follow the statutory procedure and file an application for water with the state engineer, in which case there is a vested right which dates its inception from the time of filing the application with the state engineer. The other is to divert unappropriated water and apply it to a beneficial use without making application to the state engineer, which right dates from the application of the water to a beneficial use. The statutory method is the exclusive method by which the right can relate back to the filing of the application with the state engineer. See *Nielson v. Parker*, 19 Idaho, 732, 115 Pac. 488.

[6] Said section 2339 was enacted by Congress to protect the appropriator and user of water. It is an act to protect rights to the use of water and not an act to protect contractors who construct ditches for an agreed compensation for those who desire to use the water.

[7] Under the main contract the Apple Cove Association agreed to furnish the right of way over which said ditches were to be constructed. That, however, was for the purpose of constructing the ditches and not for the purpose of vesting title to the right of way in the appellant, the construction company. The main agreement and the applications of the settlers do not contemplate that the construction company should have absolute title to the right of way, but clearly contemplate that the title to the right of way should be retained in the settlers or in the Apple Cove Association, that being the corporation representing the settlers.

The only permission to construct said canals on the part of the appellant was the permission obtained through the applications for the purchase of said stock by the settlers and the contract of appellant with the Apple Cove Association. The only permission granted to the appellant company was a permission to construct said system for an agreed compensation. The appellant was a construction company pure and simple. As a construction company its right or demand would be for compensation for the work and labor done and not for title to the rights of way. This right would exist, if at all,



against the settlers on their application for the purchase of stock. Plaintiff's Exhibits 1 to 31 show clearly that whatever implied consent was given by the settlers to the company was merely a permission to construct said canals and not to grant title to appellant to a right of way for said canals.

Under the facts of this case, the appellant did not become the owner of the rights of way over which said segments of canals were constructed, either under the provisions of said section 2339, U. S. Rev. Stats., or under said main or any agreement or contract.

[8] In 2 Kinney on Irrigation and Water Rights, § 934, the author lays down the following rule: "But the owner of an irrigation ditch constructed over public land never has a title in fee to it, but a conditional easement, which will be defeated by his failure to use it for the original purpose for which it was obtained. Where an appropriator has become entitled to a right of way for his canal, he has a possessory right or interest in the land at the time of the inception of his right, which becomes absolute by the subsequent construction of the works, provided that the construction is prosecuted with all due and reasonable diligence to completion."

[9] If it were conceded in this case that the appellant was an appropriator of water and that it was constructing said ditches for itself and not as a construction company for another, there still remains the fact that it did not prosecute its work "with all due and reasonable diligence to completion," and that there has been an entire "failure to use it for the original purpose for which it was obtained." The appellant ceased its construction work on said ditches in April, 1910, and left the same in an unfinished condition—in a condition that they could not possibly be used for irrigating said land without spending a large amount of money in the completion thereof and in the construction of flumes connecting them with a pumping plant, and the construction of a pumping plant, work on which it is conceded was not commenced at the time this action was brought, to wit, February 15, 1912, about two years after all work had ceased on said ditches.

It appears from the record that the original purpose for which said right of way was intended cannot now be accomplished for the reason that the settlers owning the land under said canals have made other arrangements whereby they get water for the irrigation of said lands. The appellant has failed to construct said system "with all due and reasonable diligence to completion," and has failed to use it for the original purpose for which it was intended.

Said section refers to vested rights to use water; and, whatever construction may be put upon the meaning of that term, it is plain that the appellant did not have, and did not attempt to show on the trial that it had, a

vested and accrued right to use water. The manner in which any right to water could vest and accrue would be for the company to appropriate such water and eventually apply it to a beneficial use. But in this case it has lost all right to apply the water to a beneficial use to said lands, as the purpose under which the ditches were constructed has failed and it has no water. The land to be supplied with water from those ditches is now supplied from another system.

[10] Appellant claims title to the ditches in question. Said section 2339, U. S. Rev. Stats., does not purport to give title to any land but merely the right to use any land for the purpose of protecting a vested and accrued water right. All of the facts in this case show that the appellant cannot use the ditches for the original purpose for which they were constructed. It does not appear that it has any power to raise the water from the river to supply the ditches with water; that it has any water right; that it has any permission of the landowners to irrigate their lands. It has forfeited and lost the right under which said segments of ditches or canals were originally built to supply said land with water. The provisions of said section 2339 were not intended to give any one the right to secure title to the right of way for segments of canals and maintain possession thereof merely because they built them without putting them to some use, and in this case the use for which they were intended.

A number of courts of last resort have construed the provisions of said section 2339, U. S. Rev. Stats.

In *Clear Creek Land & Ditch Co. v. Kilkenney*, 5 Wyo. 38, 36 Pac. 819, the Supreme Court of Wyoming said: "The inception of the water right of plaintiff in error, without which no right of way for the irrigating ditch to carry the water could exist, arose by appropriation."

[11] In *Taylor v. Abbott*, 103 Cal. 421, 37 Pac. 408, the Supreme Court of California said: "The plaintiff is not entitled to the relief sought herein by virtue of the provisions of section 2339 of the Revised Statutes of the United States. \* \* \* It merely provides for protecting such rights to the use of water as may have 'vested and accrued' by priority of possession and as are recognized and acknowledged by local customs, laws, and decisions of courts."

In *Nippel v. Forker*, 26 Colo. 74, 56 Pac. 577, the court said: "As it is only the right to, or the right of way for, such ditches and reservoirs as are used in connection with a vested water right that the owners of the latter can assert, unless he first acquires a vested and accrued water right, he is not entitled to an easement over any public lands for a reservoir used in connection therewith."

[12] In *Cleary v. Skiffich*, 28 Colo. 362, 65 Pac. 59, 89 Am. St. Rep. 207, the court said: "In support of this proposition, sections 2339



and 2340, Rev. St. U. S., are relied upon, which provide, in substance, that, whenever rights to the use of water for mining purposes have vested and are recognized by the local customs, laws, and decisions of the courts, the owners of such rights shall be protected in the same, and the right of way for the construction of ditches for the purpose of utilizing such water is confirmed."

In *Jennison v. Kirk*, 98 U. S. 453, 25 L. Ed. 240, the Supreme Court said: "In other words, the United States by the section said that, whenever rights to the use of water by priority of possession had become vested and were recognized by the local customs, laws, and decisions of the courts, the owners and possessors should be protected in them, and that the right of way for ditches and canals incident to such water rights, being recognized in the same manner, should be 'acknowledged and confirmed.'"

[13] In *Bear Lake & River Water Works & Irr. Co. v. Garland*, 164 U. S. 1, 17 Sup. Ct. 7, 41 L. Ed. 327, it is held that it is the doing of the work, the completion of the ditches within a reasonable time from the taking of possession, that gives the right of way for the ditches over or through the public land to one who has a vested and accrued right to the use of water. It is clear from the discussion in this case by the Supreme Court of the United States that a right of way cannot be acquired under the provisions of said sections except in connection with a water right, and that title thereto does not vest until the completion of the ditch, and that any unreasonable delay in completing the ditch forfeits any claim to the right of way. The facts in this case clearly show that the construction of the system contracted for was not prosecuted with reasonable diligence; that it cannot be used for the original purpose for which it was partially constructed; and that said segments of ditches were mostly constructed over private lands, or at least lands that had been filed upon under the laws of Congress which afterward became public lands owing to the fact that the irrigation system of which said ditches were to become a part had not been constructed with reasonable diligence.

We therefore conclude that appellant has not secured any right of way for the segments of ditches constructed by it under the provisions of said section 2339 or under said main contract with the Apple Cove Association for the construction of said ditches, or because of said applications of the settlers to purchase water for the irrigation of their lands, and that the conclusion reached in the original opinion in this case must be affirmed and the judgment of the trial court sustained, and it is so ordered. Costs are awarded to respondent.

AILSHIE, C. J., and STEWART, J., concur.

(24 Idaho, 376)

# HILLCREST IRR. DIST. v. BROSE.

(Supreme Court of Idaho. July 2, 1913.)

1. IRRIGATION DISTRICT—ORGANIZATION.  
Held, that the Hillcrest Irrigation District was duly and regularly organized as an irrigation district under the laws of this state.

2. IRRIGATION DISTRICT BONDS—PROCEEDINGS.  
Held, that all the necessary steps required by statute were taken to authorize the issuance of the Hillcrest Irrigation District bonds, amounting to \$100,000.

3. WATERS AND WATER COURSES (§ 222\*)—IRRIGATION—POWER OF SECRETARY OF INTERIOR.

The Secretary of the Interior has the power to enter into a contract with an irrigation district under the provisions of Act June 17, 1902, c. 1093, 32 Stat. 388 (U. S. Comp. St. Supp. 1911, p. 662), known as the "Reclamation Act."

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 222.\*]

4. CASE FOLLOWED.

Pioneer Irr. Dist. v. Stone, 130 Pac. 382, approved and followed.

Appeal from District Court, Ada County; C. P. McCarthy, Judge.

Action by the Hillcrest Irrigation District, a Public Corporation, against J. W. Brose, to confirm the organization of an irrigation district, and to have approved a contract between the district and the Secretary of the Interior. From a judgment for plaintiff, defendant appeals. Affirmed.

J. P. Pope, of Boise, for appellant. E. H. Hulser, of Boise, for respondent.

AILSHIE, C. J. The Hillcrest Irrigation District, respondent, instituted this action in the district court praying for a decree of the court adjudging the Hillcrest Irrigation District legally organized as such in accordance with the laws of the state, and that the proceedings of the district leading up to and authorizing the issuance of the bonds of the district were in accord with the laws of the state, and that such bonds are valid, and that the execution of a contract with the United States through the Secretary of the Interior with the district, for the purpose of assisting the district in the reclamation of the lands within the district, is in harmony with the provisions of the reclamation act, and that the irrigation district has the power and authority to obligate and bind the lands of the district in the manner and for the purposes indicated in the contract as proposed. The appellant filed a demurrer to the complaint, in which he alleged that he was a party interested in the organization of the district, owning land within the boundaries, and charges that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled. The defendant filed an answer and a cross-complaint. In the cross-complaint it was alleged that the Hillcrest Irrigation District was without authority to enter into the proposed contract, and that the United States of America was



without authority to enter into a contract with the district. The cross-complaint further asked for an injunction. The plaintiff filed an answer to the cross-complaint, and denied the material allegations thereof. Evidence was introduced, and the court made findings of fact and conclusions of law and entered judgment for the petitioners. From this decision the appellant appeals to this court.

[1-3] While appellant in his brief specifies a number of errors and objections as reasons for reversal, such may be summarized into four points: (1) Was the Hillcrest Irrigation District duly organized under the laws of the state? (2) Was the bond issue of the district duly authorized as required by the statute? (3) Is the contract proposed to be entered into between the government of the United States and the district duly authorized by the electors of the district? (4) Did the United States government and the district have the power to enter into the proposed contract, and is such contract a binding obligation?

As to the findings of fact, there is no contention upon this appeal. The trial court's conclusion of law that the district was properly and legally organized is not questioned, neither is there any argument or any contention that the bond issue was not authorized by the qualified electors of the district, or that the proceedings taken, which resulted in the electors casting the required number of votes after proper notice had been given, was not as required by law, or that the procedure was not legal and valid in all respects.

The record shows that the statute was fully complied with in the organization of the district, and also in the proceedings for the issuance of the bonds. This leaves for consideration the question as to the right of the United States and the irrigation district to enter into the proposed contract.

[4] The same question presented in this case was presented to this court and determined in *Pioneer Irrigation District v. Stone*, 130 Pac. 382. In that case this court held that the water users' association had the power to enter into and execute the proposed contract under its incorporation and the statute governing such corporations, and in the same case held that the Secretary of the Interior had the power to enter into such a contract under the provisions of the act of June 17, 1902, known as the "Reclamation Act." We approve that holding and apply the rule announced in that case to the present case.

The judgment is affirmed. Costs awarded to respondent.

SULLIVAN, J., concurs. STEWART, J., did not sit at the hearing or participate in the decision.

(24 Idaho, 277)

## DE CLOEDT v. DE CLOEDT.

(Supreme Court of Idaho. June 21, 1913.)

### 1. GROUNDS OF DIVORCE—STATUTORY PROVISIONS.

Section 2647, Rev. Codes, provides as grounds for divorce the following: Subdivision 2. "Extreme cruelty." Subdivision 5. "Habitual intemperance."

### 2. DIVORCE (§ 27\*)—GROUNDS—"EXTREME CRUELTY."

Section 2649, Rev. Codes, defines extreme cruelty: "Extreme cruelty is the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage."

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 27, 62-83; Dec. Dig. § 27.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2630-2634.]

### 3. DIVORCE (§ 22\*)—GROUNDS—"HABITUAL INTEMPERANCE."

Section 2652, Rev. Codes, defines habitual intemperance: "Habitual intemperance is that degree of intemperance from the use of intoxicating drinks which disqualifies the person a great portion of the time from properly attending to business, or which would reasonably inflict a course of great mental anguish upon the innocent party."

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 41-45; Dec. Dig. § 22.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3205, 3206.]

### 4. DIVORCE (§ 22\*)—GROUNDS—"HABITUAL DRUNKENNESS"—EXTENT.

The Legislature by the provisions of section 2652, Rev. Codes, in defining habitual drunkenness, does not mean that a person would have to be drunk all the time, neither does it provide that he shall be incapacitated from pursuing his usual labors during any particular hours or at any time. It does not provide that the persons shall be generally drunk or that he is drunk more hours than he is sober. But it does mean one who has a fixed habit of frequently getting drunk, and that such drunkenness causes the innocent party to suffer mental anguish and suffering. It is sufficient that he have the habit, and that the habit is firmly fixed upon him, that he gets drunk with recurring frequency, or that he is unable to resist when opportunity and temptation is presented.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 41-45; Dec. Dig. § 22.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3204-3205.]

### 5. DIVORCE (§ 116\*)—GROUNDS—EXTREME CRUELTY.

In a suit for divorce, where the complaint alleges extreme cruelty, and acts of cruelty are alleged, as controversies and quarrels over religious matters, and evidence is introduced which shows that the defendant persisted during the period of marriage in reviling the Protestant faith and applying vile names to the Protestant reformer Luther, and in furnishing literature and insisting at different times when the plaintiff was tired and after hard work that she "pray the beads" with him, and as a result that plaintiff was sickened and affected nervously, and that such remarks became a horror and would drive her to frenzy, such evidence is admissible and may be considered as corroborative of the allegations of the complaint as to acts of cruelty.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 379-385; Dec. Dig. § 116.\*]



**6. DIVORCE (§ 116\*) — GROUNDS — EXTREME CRUELTY.**

In a divorce proceeding where the plaintiff testifies that she was not properly cared for during her marriage relation with the defendant at times when she was sick, and that vile language was used by the defendant addressed to her, calling her vile names, such evidence is proper as showing acts of the defendant, proving cruelty and improper treatment.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 379-385; Dec. Dig. § 116.\*]

**7. DIVORCE (§ 116\*) — EXTREME CRUELTY — EVIDENCE.**

In an action charging extreme cruelty where it is alleged and shown that blows were inflicted upon the plaintiff, and the defendant hit the plaintiff with his fist, such evidence is admissible and tends to prove acts of extreme cruelty when considered with other evidence in the case.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 379-385; Dec. Dig. § 116.\*]

**8. DIVORCE (§ 127\*) — CRUEL AND INHUMAN TREATMENT—CORROBORATION.**

The degree of corroboration required by section 2661 of the Rev. Codes has never been defined, and it has been said that "in the very nature of the case, it would be impossible to lay down a general rule as to the degree of corroboration which will be requisite; hence the statute only requires that there shall be some corroborating evidence," and the statute can only be construed that the testimony of the plaintiff as to extreme cruelty must be sufficiently corroborated. Approved in *Bell v. Bell*, 15 Idaho, 7, 96 Pac. 196.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 403-407; Dec. Dig. § 127.\*]

**9. DIVORCE (§ 253\*) — PROPERTY RIGHTS — POSTNUPTIAL SETTLEMENT.**

In a divorce suit where property rights are involved and a postnuptial settlement is presented and relied upon as a settlement of all property rights, and such agreement is challenged on the ground that it is unfair and inequitable and fraudulent, the evidence must show clearly and with certainty that the postnuptial settlement to be binding under the most favorable circumstances must in every way be fair and unexceptionable on equitable grounds.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 716, 717; Dec. Dig. § 253.\*]

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Action for divorce by Eliese De Cloedt against Frank De Cloedt. Judgment for plaintiff, and defendant appeals. Affirmed.

Cavanah, Blake & MacLane, of Boise, and W. A. Stone, of Caldwell, for appellant. O. M. Van Duyen, of Caldwell, and Wyman & Wyman, of Boise, for respondent.

**STEWART, J.** This action was brought in the district court by the respondent against the plaintiff for a divorce, and in the complaint judgment was prayed for in the sum of \$5,895, with interest, by reason of the fact that such sum was due her on account of defendant's securing her signature to a certain agreement upon the plaintiff's selling certain real property which had been secured by the plaintiff by a homestead entry. The complaint charges extreme cruelty consist-

ing: First, of religious persecution; second, drunkenness; third, neglect; fourth, blows; fifth, vile language; sixth, fraudulently depriving plaintiff of her property.

The answer specifically denies the material allegations of cruel treatment and denies the allegations with reference to securing the plaintiff to sign a certain agreement upon the plaintiff's selling certain real property.

The cause was tried by the court. Findings of fact and law were made and judgment was rendered for the plaintiff granting a divorce, and that plaintiff have judgment for about \$11,000 and interest. The court upon the issues of fact finds as follows:

**Finding 4.** "That defendant continuously during the entire course of the married life of plaintiff and defendant, without just cause, treated plaintiff in such manner as to cause and to inflict upon her grievous mental and physical suffering, and in the manner and form and at the times as alleged in the complaint and to such effect as to directly disturb her peace and endanger her health, and to render her life miserable and unhappy, and to such a degree as to constitute extreme cruelty."

**Finding 5.** "That a marriage settlement agreement \* \* \* was obtained from plaintiff by duress, undue influence, and with lack of opportunity for a voluntary consideration, and that plaintiff was not at the time of signing said instrument in a proper and normal mental and physical condition to voluntarily express her wishes and desires. That she did not at the time of signing said instrument voluntarily express her will and desire, and did not understand or accede to the contents of the same; that the said marriage settlement was and is unfair, unjust, and inequitable towards the plaintiff."

The court then finds upon the plaintiff's property rights, and finds, as a matter of law: "3. That the plaintiff is entitled to a decree \* \* \* dissolving the bonds of matrimony between plaintiff and defendant. \* \* \*" And it is ordered that the plaintiff should be awarded \$6,000 in cash, received by plaintiff, including any property into which plaintiff has converted the same, and \$5,000 of the purchase price notes and mortgages given by Herman Welck upon the property described as lots 1 and 2 of the east half of the northwest quarter of section 31, township 4 north of range 2 west B. M. in Canyon county, being the property owned by plaintiff at the time she married the defendant.

This appeal is from the judgment.

The first error assigned is: The evidence upon the allegation in the complaint as to drunkenness is not sufficient to justify a decree of divorce because of drunkenness, and that the drunkenness shown by the evidence is not sufficient to justify a decree of divorce. As an illustration of this evidence



we call attention to the evidence of plaintiff: "Q. Do you mean he was drunk when he came from town? A. Drunk, yes, sir, and sometimes very bad. Q. Was he drunk very often or just about once a year? A. No, sir, most every time he go to town he come home drunk. Q. Did he go to town many times? A. Every week. Q. Well, did he get pretty badly drunk, or just a little bit drunk? A. Sometimes not so bad, and sometimes awful full that he lied senseless and didn't know anything from himself. Q. How long a time did this drunkenness of the defendant continue, for what number of years? A. Why, it was all the time. Q. From the time you married him until the time you left in December, 1908? A. Yes, he really went in town and was so drunk he didn't find his home, and he had to go across the Indian ditch and he come into Mrs. Powell and she kept him over night. Q. She kept him over night because he was drunk? A. Yes, and didn't find his home. Q. Did you ever have to drag him into the house at any time because he was drunk? A. Why, he come once so drunk and he fell down from the buggy, and I had never unhitch the horses, but I tried to do it. At last I got it done and I take her in the stable and I watered her and feed her. \* \* \* Q. You say that lasted from the time you married him until you quit living together in December, 1908. Now, how did it happen many times during that interval? A. Well, I told you he was drunk most all the time less oder more when he go in town."

The evidence of plaintiff was corroborated by other witnesses to the extent of showing the drunkenness of the defendant at frequent times, and at times when drunk he became abusive and quarrelsome. This drunkenness continued for 13 years. The complaint, however, does not allege habitual drunkenness as a sole cause for the divorce, and it is not claimed upon the evidence that divorce should be granted upon that ground, but it is claimed that the drunkenness of the defendant resulted in cruel treatment and that such treatment inflicted upon the plaintiff great pain and suffering.

[1] Section 2647, Rev. Codes, provides the grounds upon which a divorce may be granted, and among such grounds is to be found subdivision 2, which provides: "Extreme cruelty." Subdivision 5 provides: "Habitual intemperance."

[2] Section 2649 of the Rev. Codes defines extreme cruelty as used in section 2647 as follows: "Extreme cruelty is the infliction of grievous bodily injury or grlevous mental suffering upon the other by one party to the marriage."

[3] Section 2652, Rev. Codes, defines habitual intemperance as used in section 2647 as follows: "Habitual intemperance is that degree of intemperance from the use of intoxicating drinks which disqualifies the per-

son a great portion of the time from properly attending to business, or which would reasonably inflict a course of great mental anguish upon the innocent party."

The argument is presented that the evidence was not sufficient to show intemperance sufficient to inflict a course of great mental anguish upon the innocent party and was not such as to show acts of cruelty of any kind whatever, and therefore should not be taken into consideration in determining the sufficiency of the evidence to show cruel treatment as alleged in the complaint.

[4] Under the statute it is clear that habitual intemperance means that degree of intemperance which occasions and inflicts great mental anguish upon the innocent party. The statute defining habitual drunkenness does not mean that a person would have to be drunk all the time, neither does it provide that he shall be incapacitated from pursuing his usual labors during any particular hours or any time, but it does mean one who has a fixed habit of frequently getting drunk, and that such drunkenness causes the innocent party to suffer great mental anguish and suffering. The statute does not provide that the person shall be generally drunk, or that he is drunk more hours than he is sober. It is sufficient that he have the habit and that the habit is firmly fixed upon him, that he gets drunk with recurring frequency, periodically, or that he is unable to resist when opportunity and temptation is presented. This general rule is clearly considered by the Supreme Court of Washington in the case of *Page v. Page*, 43 Wash. 293, 86 Pac. 582, 6 L. R. A. (N. S.) 914, 117 Am. St. Rep. 1054. This case will also be found in 6 L. R. A. (N. S.) 914, where other cases are fully annotated. We call attention also to the following citations: *Tiffany's Persons and Domestic Relations*, p. 208; *Peck, Domestic Relations*, p. 174; *Nelson on Divorce and Separation*, vol. 1, § 353; *Mahone v. Mahone*, 19 Cal. 628, 81 Am. Dec. 91; *Forney v. Forney*, 80 Cal. 528, 22 Pac. 294.

The evidence of the plaintiff is corroborated by other evidence. The drunkenness of the defendant was for about 13 years, at least once a week. Sometimes he was more drunk than at other times, sometimes when he was drunk he was incapacitated from doing his usual work, and many times when drunk he used profanity and foul names and struck blows, and every time almost when he was drunk he was led to indulge in discussions of religious questions in which he seemed to make an effort to influence the plaintiff to join his religious denomination, and the efforts and influence which he attempted to assume over the plaintiff were sufficient to show that his drunkenness was of the character that no woman, who had any respect for her womanhood or respect for her marriage vows, could endure without great suffering and pain. The conduct of the defendant was such that he exacted and re-



ceived from the plaintiff a degree of patience and endurance seldom yielded by the best element of womanhood.

[5] The next contention made in this case is that there is no evidence corroborating the allegation in the complaint as to the controversies and quarrels over religious matters, and such evidence is denied by the defendant; that the evidence does show that upon the religious question the plaintiff was as much to blame as the defendant and showed that the plaintiff was the aggressor. The evidence, however, shows that the defendant was very persistent during the period of the marriage in reviling the Protestant faith and applying vile names to the Protestant reformer Luther, by furnishing Catholic literature to the plaintiff, and by insisting at different times, when plaintiff was tired and after hard work, that she "pray the beads" with him, and such conduct sickened and affected her nerves and became a horror and would drive her to frenzy. This constant effort on the part of the defendant to convert the plaintiff to the defendant's religion was pursued frequently, and the plaintiff's testimony was corroborated by a number of witnesses, and no doubt contributed to the plaintiff's worry and caused her suffering and pain.

The right to practice and hold such faith and belief as accords with the judgment of each person must be conceded as between husband and wife the same after marriage as before, and should exist between all persons; and where one of the spouses abuses such right by exacting from the other spouse compliance with the religion of the other, where it is against the belief of the one from whom the demand is made, and such demand causes worry and pain and suffering on the part of the spouse from whom the same is demanded, such action will be taken to be a violation of the obligations and vows of their marriage contract, and likewise a violation of the sacred teachings of the particular faith and religion of the church of which the person may be a member, and such treatment in a divorce proceeding may be considered in determining the treatment of the one spouse by the other.

Another ground of cruelty alleged and upon which evidence was introduced was neglect in not properly looking after the plaintiff when she was ill in bed with pneumonia, and in not providing plaintiff with a proper nurse and medical attendance. There is some evidence that the plaintiff was not properly cared for when she was sick, and that defendant did not show the respect and attention that he should have as the husband of the plaintiff, and showed by his acts that he did not have any love or affection for the plaintiff.

The next charge of cruelty is the alleged blows that defendant gave the plaintiff. The plaintiff says that "he hit me once with his fist vee he come from town and was awful

drunk, and he got rolling around and I get him, at last I git him out of the house, but he knock the door in." In answer to the inquiry, "Where did he hit you that day he hit you with his fist?" plaintiff testified: "Yes, sir; he just hit me about my breast and then I—I went to go out and I want to see I get help, but he run after me, and there some men on the road coming from Caldwell and they laughed and went on and then he run over and went in the kitchen and I went away and vee I was coming back, he lying on the kitchen floor and was asleep." This evidence is denied by the defendant. It is corroborated, however, by other facts, by his acts when under the influence of liquor. This evidence was admissible and tended to show acts which were acts of cruelty to be considered in determining the question of extreme cruelty.

Vile language is also charged as having been addressed to the plaintiff, and the plaintiff testified that he called her a "low-down Protestant son of a gun." This, however, was denied by the defendant, but is corroborated as above stated.

[8] It is also contended that the evidence as to neglect of plaintiff during her illness and at other times is not corroborated. The plaintiff testified to such facts and the defendant denied the same. We find, however, in the record, that Isabella T. Squier testified: "I went down there and found her in an icy cold bedroom without any fire and apparently no attention had been paid whatever, and she had no one to care for her and seemed to be in a very sad condition. It was cold and snow was on the ground." This would seem to be a corroboration of the plaintiff's testimony and the trial court had a right to determine the credibility of the plaintiff's testimony and likewise the defendant's in determining the weight of the evidence.

The appellant relies upon section 2661, Rev. Codes, which provides: "No divorce can be granted \* \* \* upon the uncorroborated statement, admission or testimony of the parties, or upon any statement or finding of fact made by a referee; but the court must, in addition to any statement or finding of the referee, require proof of the facts alleged, and such proof, if not taken before the court, must be upon written questions and answers."

[7] In this connection it is well to observe that the complaint alleges as the ground upon which the divorce is prayed for extreme cruelty. In determining the cruelty all the facts shown by the evidence which tend to show the treatment and care given the plaintiff by the defendant were properly considered by the trial court.

This court in the case of *Bell v. Bell*, 15 Idaho, 24, 96 Pac. 203, had under consideration the degree of corroboration required in divorce proceedings, and in that opinion the court construes section 2661, *supra*, and quotes and approves the following from the case of *Venzke v. Venzke*, 94 Cal. 225,



29 Pac. 499: "The degree of corroboration required by section 130 of the Civil Code has never been defined; and it has been said that 'in the very nature of the case it would be impossible to lay down any general rule as to the degree of corroboration which will be requisite. Hence the statute only requires that there shall be some corroborating evidence,' meaning, as we suppose, that there must be some evidence corroborating the plaintiff aside from the testimony or confession or admissions of the defendant made in her letters to the plaintiff, or in her testimony during the trial." This same question has been discussed in a number of cases in the state of California, where the court approves the rule announced in *Venzke v. Venzke*, supra. *Baker v. Baker*, 13 Cal. 88; *Evans v. Evans*, 41 Cal. 108; *Smith v. Smith*, 119 Cal. 183, 48 Pac. 730, 51 Pac. 188; *Andrews v. Andrews*, 120 Cal. 184, 52 Pac. 298; *Avery v. Avery*, 148 Cal. 239, 82 Pac. 987. In the case of *Clopton v. Clopton*, 11 N. D. 212, 91 N. W. 46, the Supreme Court of North Dakota discusses the California cases and announces the same rule.

[8] In the present case we are satisfied that the testimony of the plaintiff as to the different acts of extreme cruelty charged in the complaint, and the acts upon the part of the defendant showing cruelty, such as habitual drunkenness, religious persecution, negligence, lack of medical attention, vile language and blows, when considered with all the evidence in the case, is sufficiently corroborated to show good grounds for a divorce upon the ground of extreme cruelty.

[9] The next contention urged for reversal is that the trial court erred in setting aside and annulling the agreement made between plaintiff and defendant for separation and division of the property rights of the plaintiff and the defendant. The courts generally agree that the rule as to contracts made prior to separation with a view of separation is that such contracts are void; while another view is held in a great many cases, especially those that have been made in recent years, that such agreements, where the separation has already taken place, or the circumstances are such that separation is inevitable, are valid; while some courts hold that such contracts are presumptively void, and place the burden of proving their validity upon the parties claiming under them.

In volume 19 Am. & Eng. Enc. of Law, p. 1248, the author announces the rule as follows: "Since husband and wife occupy to each other a relation of confidence, readily subject to abuse on the part of the husband, conveyances from the wife to the husband or settlements unfavorable to the wife are presumptively void as being produced by fraud or undue influence. The burden is upon the husband or those claiming under the conveyance to show that the transaction was fair and free from fraud." This same rule is announced in *Spenser on Domestic Relations*,

§ 285; also *Sumner v. Sumner*, 121 Ga. 1, 48 S. E. 727, and other cases.

In *Campbell et al.'s Appeal*, 80 Pa. 298, the court held: "A postnuptial contract to be binding under the most favorable circumstances must in every way be fair and unexceptionable on equitable grounds."

In *Dolliver v. Dolliver*, 94 Cal. 642, 30 Pac. 4, the Supreme Court of California announces the rule which we think should especially be applied in this case: "The relation of husband and wife creates a personal trust and confidence between them, which imposes upon each of the spouses the obligation of exercising the highest good faith towards the other in any dealings between them, and precludes either one of them from obtaining any advantage over the other by means of any misrepresentation, concealment, or adverse pressure; and this relation and the obligation arising from it are not destroyed by the mere fact that an action for a divorce is pending between them, nor does the law permit any inquiry into the extent of the trust and confidence presumed to be placed by one in the other so long as the relation exists."

There can be no question whatever but that at the time the contract of settlement was entered into the plaintiff was misled; that she was not familiar with her property rights; she did not know the distinction between community property and separate property; she was an aged woman. Her home was sold and she signed the agreement not knowing the effect or result, and by signing the same she was to receive only \$6,000 for her home when the same was of the value of about \$11,000. For six years and four months she had lived and worked on the Ada county ranch of the defendant, had done the housework for the hired men, and for seven years she had worked and cooked in the Canyon county property which belonged to the plaintiff, and all she received during that period of time was barely sufficient clothes to wear and food barely sufficient to sustain her existence. The defendant during this time had received all the proceeds from both the Canyon county and Ada county farms, and \$10,000 from the sale of the Ada county farm, and the evidence shows that the defendant, according to his own statement, had expended \$1,000 in proving the Canyon county ranch which belonged to the plaintiff. This sum, however, was shown by other witnesses to be less than \$1,000. The agreement also provided that the plaintiff should have \$6,000 for the sale of her own property, and the defendant exacted the balance. The purchase price was about \$11,000, and the defendant required notes and mortgages of the purchaser payable to himself. The trial court in setting aside the agreement had these facts before him, and the court gave the defendant credit for the amount he claimed he had expended, and deducted the same from the sum of \$5,895,



which the plaintiff originally sued for and gave her judgment for the sum of \$5,000, and interest. Upon the facts above recited the court held that the settlement was unfair; that it was made under duress and circumstances which did not give the plaintiff a fair opportunity to judge her rights in the premises.

There can be no question in this case but that there is a conflict in the evidence upon some of the issues of fact. But, admitting that to be true, we do not believe in the present case, under the particular facts as shown by the record, such conflict is sufficient to show reasonable grounds for reversal. Taking the evidence as a whole and applying the same to the charge of extreme cruelty, the evidence is not in conflict, but conclusive, and upon this question the court finds for the plaintiff. The grounds assigned in the complaint and the evidence introduced to support the allegations, when considered together show extreme cruelty. Extreme cruelty is a term of relative meaning, and a course of conduct that would inflict grievous mental suffering upon one person might not have that effect upon another. Hence no fixed legal rule for determining its existence in any given case can be laid down. The judge who tries the case and has the parties before him for observation in the light of the evidence is the one to whom the law commits the determination of this question in the first instance, and this court will not disturb a finding that particular acts constitute grievous mental suffering, unless the evidence in support of the finding is so slight as to indicate a want of ordinary good judgment and an abuse of discretion by the trial court. Whether the evidence in this case shows a course of conduct which constitutes grievous mental suffering is a question of fact, and such question must be determined from the facts, and should be considered in connection with the character, temperament, and disposition of the parties to the action.

This court in the case of *Later v. Haywood*, 15 Idaho, 716, 99 Pac. 828, held: "It must be admitted, on the other hand, that the preponderance of evidence is with the appellants, but we cannot reverse the judgment simply because the preponderance of the evidence is against the judgment. The rule is firmly established in this court that it will not reverse a judgment where there is a substantial conflict in the evidence, and this rule applies as well in equity cases heard upon oral testimony as in law cases." This rule is also approved in *Swanson v. Kettler*, 17 Idaho, 321, 105 Pac. 1059; *Snowy Peak, etc., Co. v. Tamarack, etc., Co.*, 17 Idaho, 630, 107 Pac. 60.

We are satisfied from our examination of the evidence in this case upon the various grounds alleged in the complaint that the findings of the trial court are sustained by

substantial evidence upon the charges of extreme cruelty, consisting of religious persecution, drunkenness, neglect, blows, vile language, and fraud of the defendant in depriving plaintiff of her property. The judgment is affirmed. Costs awarded to respondent.

AILSHIE, C. J., and SULLIVAN, J., concur.

(24 Idaho, 304)

TONKIN-CLARK REALTY CO. v.  
HEDGES.

(Supreme Court of Idaho. June 25, 1913.)

1. TRIAL (§ 419\*)—MOTION FOR NONSUIT—  
WAIVER—SUBSEQUENT PROCEEDINGS.

Where a motion for a nonsuit is made and overruled and the defendant introduces evidence to support the defense and makes a case upon the merits, the court or jury have a right to consider the whole case, and the motion for a nonsuit is waived.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 982; Dec. Dig. § 419.\*]

2. EVIDENCE (§ 148\*)—TELEPHONE CONVERSA-  
TION—IDENTITY OF PARTIES.

Where T. has a conversation with H. over a telephone line between two towns, and T. is called as a witness in a controversy between T. C. R. Co., of which T. was the president, and H. with reference to a sale and exchange of property owned by each of said parties, to which such conversation referred, such evidence of T. in identifying the party with whom the conversation was had, when taken into consideration with other evidence in the case, is admissible in evidence to be considered by the jury in determining whether or not the conversation was between T. and H., and there was no error in the court's admitting such evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 438; Dec. Dig. § 148.\*]

3. TRIAL (§ 139\*)—RECEPTION OF EVIDENCE—  
OBJECTION.

The evidence of D., called for the purpose of identifying H., who was defendant in the suit, as being at a certain place on a certain day, when objected to as not tending to sustain the verdict, presents a question which the jury alone was called upon to determine in arriving at the verdict in the case and was not a question to be determined by the court. This evidence might aid other evidence, and the evidence altogether might be sufficient to sustain the verdict, although standing alone it might not sustain the verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.\*]

4. BROKERS (§ 86\*)—ACTION FOR COMMISSION  
—SUFFICIENCY OF EVIDENCE.

The evidence in this case held to be sufficient to sustain the verdict and judgment.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 116-120; Dec. Dig. § 86.\*]

5. BROKERS (§ 41\*)—RIGHT TO COMMISSION—  
PRINCIPAL AND AGENT.

Where evidence as to whether or not a person making a contract is the agent of another party is of a substantial character, which shows that the agent was acting for the defendant and made the contract, and that the person with whom the contract was made made the contract upon the solicitation of the agent, and that the person for whom the agent acted accepted the contract made and accepted the benefits which resulted from the contract, such party cannot

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



evade or defeat the authority of the agent in making said contract.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 41; Dec. Dig. § 41.\*]

#### 6. BROKERS (§ 53\*)—RIGHT TO COMMISSION.

The law is well settled in this state that where a party employs a real estate broker to sell a piece of property at a stipulated price, and the broker procures a purchaser who purchases such property, or is able and willing to purchase such property upon the terms given to the agent by the owner, or where the purchaser's attention was first called to the desire of the owner of the property by the broker, and thereafter he purchases the property, the broker is entitled to his commission.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 74; Dec. Dig. § 53.\*]

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Action by the Tonkin-Clark Realty Company against Clem Hedges. From a judgment for plaintiff, defendant appeals. Affirmed.

Davidson & Davison and O. J. Hood, all of Boise, for appellant. Miller & Alexander and J. B. Eldridge, all of Boise, for respondent.

STEWART, J. This action was brought by the plaintiff against the defendant to recover the sum of \$699.27 for services on an alleged sale of real estate owned by the defendant and alleged to have been listed for sale and sold to A. H. Krullish and Charles W. Krullish. The answer denies the allegations of the complaint and alleges that the defendant listed the property involved with the A. L. Murphy Company, Limited, a corporation engaged in the real estate business, and through such agency the property was sold to the same parties alleged in the complaint as being the purchasers through the agency of plaintiff. The case was tried before a jury and a verdict was rendered for the sum of \$699.27 and costs. Judgment was rendered in accordance with the verdict. This appeal is from the judgment.

[1] The appellant assigns as error that the court erred in overruling defendant's motion for a nonsuit. Upon this alleged error it is sufficient to refer to the following cases wherein this court has determined the sufficiency of this error: *Shields v. Johnson*, 12 Idaho, 329, 85 Pac. 972; *Rippetoe v. Feely*, 20 Idaho, 619, 119 Pac. 465; *Smith v. Potlatch Lumber Co.*, 22 Idaho, 782, 128 Pac. 546. In these cases it is held that where a motion for a nonsuit is made and overruled, and the defendant introduces evidence to support his defense and makes a case upon the merits, the court or jury has a right to consider the whole case and the motion for a nonsuit is waived.

[2] The appellant combines all the assigned errors except the motion for a nonsuit in the following contentions:

(1) The alleged conversation between J. O.

Tonkin and defendant was inadmissible and does not sustain the verdict and judgment. There is no merit in this assignment of error for the following reasons: (a) The judgment is not based wholly upon the conversation of Tonkin and defendant over the telephone. There are other facts in the case which in our judgment show that the defendant did list the property owned by him, and the appellant brought the attention of Krullish Bros. to the fact that the property was for sale or exchange for the property that was owned by Krullish Bros. (b) The jury were the judges of the credibility of the evidence and the witnesses and the weight of evidence, and Tonkin testified that he had a conversation with the defendant over the telephone on the 21st day of July, 1911; this was only one fact which constituted the evidence which was submitted to the jury. (c) Tonkin is also corroborated by the evidence of Doyle and other evidence which clearly established that J. W. Hedges was the agent of the defendant and the defendant ratified the acts of J. W. Hedges and accepted the benefits of his acts by conveying the property to Krullish Bros. In the evidence of Tonkin he testifies: That when Tonkin called over the phone he asked for John Hedges, and the answer was, "This is Clem Hedges." This admission of Clem Hedges, when considered with the other evidence of the sale, identifies the party talking as Clem Hedges and was acted upon and recognized thereafter in making the conveyance of the defendant's property to the very parties that the appellant was negotiating with after the property was listed with the plaintiff, and the jury were the judges as to whether or not the person talking over the phone was Clem Hedges or J. W. Hedges, notwithstanding Clem Hedges denies the same. This question of recognizing evidence of conversations over the telephone line is well recognized by the courts generally. In *Wolfe v. Missouri Pac. R. Co.*, 97 Mo. 473, 11 S. W. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331, the Supreme Court of Missouri says: "The courts of justice do not ignore the great improvement in the means of intercommunication which the telephone has made. Its nature, operation, and ordinary uses are facts of general scientific knowledge of which the courts will take judicial notice. \* \* \* When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication, in relation to his business, through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business there carried on. The fact that the voice at the telephone was not identified does not render the conversation inadmissible. The ruling here announced is intended to determine merely the admissibility

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ity of such, conversations in such circumstances but not the effect of such evidence after its admission. It may be entitled, in each instance, to much or little weight in the estimation of the triers of fact, according to their view of the credibility, and of the other testimony in support or in contradiction of it." We approve the foregoing opinion as to the admissibility of such evidence and are satisfied that the effect of the admission of such evidence is a matter wholly with the jury, and it is within the power of the jury to determine the weight of such evidence according to the jury's view of its credibility and the other testimony corroborating the same or in contradiction of such testimony. This doctrine is also approved in the case of *Globe Printing Co. v. Stahl*, 23 Mo. App. 451; *Oskamp v. Gadsden*, 35 Neb. 7, 52 N. W. 718, 17 L. R. A. 441, 37 Am. St. Rep. 428.

[3] (2) The alleged identification of defendant by W. A. Doyle as being at the office of the plaintiff with J. W. Hedges on his second visit on or about July 26, 1911, as tending to sustain the verdict, was a matter for the jury to determine and not for the trial court or this court. It may or may not have been a force of itself which tended to sustain the verdict, but, taken with the other facts in the case, the jury might determine that it was of great force in determining whether or not Doyle saw the defendant at the office of plaintiff with Hedges on July 26th, five days later than the property was listed on July 21st.

(3) The third assignment of error is subject to the same rule as governs the effect of the evidence referred to in No. 2, whether the jury gave consideration and weight to the testimony of defendant that he might have been at the office of plaintiff about that time but heard nothing about the land deal or exchange.

[4] (4) The fourth assignment of error, that the verdict and judgment are not supported by the evidence, is the important question in this case. There can be no question but that the defendant was anxious to make a deal disposing of the real property, and through the acts of J. W. Hedges the defendant listed with the plaintiff the real property and agreed to pay plaintiff the regular commission which on all sums over \$10,000 was 5 per cent. on the first \$5,000, 3 per cent. on the second \$5,000, and 2½ per cent. on the excess over \$10,000. There can be no question also but that the plaintiff obtained Krulish Bros. as customers for the exchange of the stock of merchandise and real estate at King Hill; that through Watson and Tonkin, members of the plaintiff firm, an agreement was made with Krulish Bros. to exchange their property to the defendant for his land, and that they informed the defendant, through J. W. Hedges, that an exchange of the property was made at the listed price of \$20,000. The only issue of fact

upon which the verdict is in conflict is, Does the evidence show that J. W. Hedges acted in the transaction as agent of the appellant and had he authority to so act?

[5] (5) The fifth assignment of error is that the proofs do not show that plaintiff was the procuring cause of the exchange. There is evidence in the case of a substantial character that shows that J. W. Hedges acted as the agent of the defendant and listed the defendant's land with plaintiff for sale or trade, and that plaintiffs used their efforts and personally solicited and secured the Krulish Bros. as purchasers of said land, and that the defendant, through his agent, J. W. Hedges, was informed that Krulish Bros. would make the trade; that after plaintiff began negotiations with Krulish Bros., and while plaintiff was attempting to make the trade, the defendant completed the trade of his land as listed to Krulish Bros. and accepted the benefits of the transaction; that for his services plaintiff was entitled to the commission provided in the listing of the property.

[6] The court seems to have given the law of the case, and it was accepted by the jury, and the jury determined the issues of fact. The law is well settled in this state that where a party employs a real estate broker to sell a piece of property at a stipulated price, and the broker procures a purchaser who purchases such property or is able and willing to purchase such property upon the terms given to the agent by the owner, or where the purchaser's attention was first called to the desire of the owner of the property by the broker, and he thereafter purchases the property, the broker is entitled to his commission. *Wood v. Broderson*, 12 Idaho, 190, 85 Pac. 490; *Phillips v. Brown*, 21 Idaho, 62, 120 Pac. 454.

We find no reversible error in the record. The judgment is affirmed. Costs awarded to the respondent.

AILSHIE, C. J. (concurring). For reasons hereafter to be stated, I concur in affirming the judgment in this case, but I not able to agree with what is said by Mr. Justice STEWART with reference to the telephone conversation which is supposed to have taken place between Tonkin and Clem Hedges and to which weight seems to be attached in affirming this judgment. The property sold in this case was the property of Clem Hedges, and he is the party who is here charged with a commission on the sale. The negotiations, however, were practically all had with J. W. Hedges, and it is claimed that J. W. Hedges was the agent and representative of Clem Hedges in listing this property and procuring respondent to make the sale.

In speaking of the telephone conversation, Mr. Justice STEWART says: "When Tonkin called over the phone he asked for John Hedges, and the answer was, 'This is Clem



Hedges.' This admission of Clem Hedges, when considered with the other evidence of the sale, identifies the party talking as Clem Hedges and was acted upon and recognized thereafter in making the conveyance of defendant's property to the very parties that the appellant was negotiating with after the property was listed with plaintiff, and the jury were the judges as to whether or not the person talking over the phone was Clem Hedges or J. W. Hedges, notwithstanding Clem Hedges denies the same." I have no fault to find with the statement that the jury were the judges as to whether or not the person who talked to Tonkin over the phone was Clem Hedges, but I most emphatically dissent from the statement that there was any kind of evidence that the party with whom Tonkin talked was Clem Hedges.

The following is all the material testimony given with reference to this telephone conversation: "Q. Now, Mr. Tonkin, did you have any conversation with Mr. Clem Hedges concerning this transaction or about that time? A. A little later I did. Q. About what time was that? A. About—oh, it must have been about eight or ten days afterward perhaps. Q. Where did this conversation take place? A. Over the telephone. Q. Did you call Mr. Hedges or did he call you? A. I called him. Q. Did you recognize Mr. Hedges' voice? A. He told me who it was. Q. Who did you call for? A. J. W. Q. And Clem Hedges answered the telephone? A. Yes, sir. Q. Will you please state what was said between you and Mr. Clem Hedges on that occasion? A. I called up for J. W. Hedges and it was Clem Hedges that answered and I told him about an exchange I had at Hiantha, Mo. So instead of being John Hedges, Clem Hedges, and he told me over the phone, and I told him what I had. He told me he had nothing at all to do with it; that John was looking after that. That was the first time I knew J. W. Hedges' name was John. He told me that John was looking after that. Q. Did you have any further conversation at any time with Mr. Clem Hedges? A. No, sir." On cross-examination he testified as follows: "Q. Now, when you called up Mr. Hedges, Clem Hedges, or called up rather J. W. Hedges and got Clem Hedges did you say that Clem Hedges answered you over the phone? A. No, I couldn't swear; I didn't see him. Q. Did you recognize his voice? A. He told me it was Clem Hedges. Q. Did you recognize his voice? A. I never spoke with him over the phone before. Q. Would you swear the party told you it was Clem Hedges? A. Yes, sir. Q. You are aware of the fact that Mr. Hedges has several sons, are you not? A. Yes, sir. I don't know any of them but I understand he has. Q. You will please state just exactly what Mr. Hedges said at that time. A. I called up and I asked if it was J. W. Hedges, and he said, 'No, it is Clem.' I says, 'Mr.

Hedges,' I says, 'I have a trade for some stuff in Missouri for that 160 acres of yours down there southeast of Meridian.' And he says, 'I don't know anything about it;' he says, 'In fact, John is looking after it.' He did not say, 'In fact;' he says, 'I don't know anything about it;' he says, 'John is looking after that end of it.'"

The foregoing is the evidence given by Tonkin with reference to his telephone conversation with the respondent, Clem Hedges. Clem Hedges testified in the case and denied positively that he had any conversation over the telephone with Tonkin. It will be observed that Tonkin's telephone call was put in for J. W. Hedges and not for Clem Hedges, and that when he went to talk over the phone he supposed he was talking with J. W. Hedges until the party with whom he was talking advised him that it was not J. W. Hedges but stated that he was talking with Clem. Now it will be observed from the foregoing testimony that there was not a scintilla of evidence given which identified the party with whom Tonkin talked as being Clem Hedges. The call was put in for J. W. Hedges, and when the call was responded to and Tonkin went to the phone he went in reply to his call for J. W. Hedges, and he says that he does not know with whom he talked; he did not recognize the voice; and that the only information he has as to the identity of the party with whom he was talking over the phone is the statement that the party made that it was Clem Hedges that was talking. On the other hand, Clem Hedges comes on to the witness stand and swears positively that he never talked with Tonkin and that he was not the party who responded. *There is no identification whatever of the party talking in this kind of evidence.*

I think the case of *Wolfe v. Missouri Pac. Ry. Co.*, 97 Mo. 473, 11 S. W. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331, from which my Associate quotes, correctly states the law, but the facts of that case were widely different from this case. The conversation there had was with a business house and the call was put in for the company's office. There was no question in the case but that the conversation was had with the business office of the company, and the conversation was concerning business in which the company was interested. The court held that under those circumstances the presumption would arise that the party answering the call was an agent or employé of the house and had authority to speak for the company concerning the business in which it was engaged.

Mr. Chamberlayne in his work on the *Modern Law of Evidence*, vol. 1, § 794, after quoting from the *Wolfe Case*, makes the following comment: "E converso, where this fact of connection with a party's office is absent, more conclusive proof of identification and connection with the party to be affected by a telephone conversation may properly be demanded by a presiding judge. Thus a tele-



phone conversation is inadmissible to establish admissions of one of the parties, where it appears that the witness was not acquainted with the party's voice and could not identify it. Such a case would not be controlled by the decisions which relate to communications by telephone from an office in response to communications or inquiries, and to the presumption which arises from the transaction of business of the person in whose control the telephone is."

*Young v. Seattle Transfer Co.*, 33 Wash. 225, 74 Pac. 375, 63 L. R. A. 988, 99 Am. St. Rep. 942, is a leading case on this subject and is very much more in point on its facts as applied to the present case than the *Wolfe Case*. In the *Young Case* the Washington court analyzes the *Wolfe Case* and points out the distinction between that case and the facts on which they were passing in the *Young Case* and states what we think to be a very sound rule of law which is applicable here and is as follows: "When material to the issues, communications through the medium of the telephone may be shown in the same manner and with like effect as conversations had between individuals face to face, but the identity of the party sought to be charged with a liability must be established by some testimony, either direct or circumstantial. It is not always necessary that the voice of the party answering, or of either party for that matter, be recognized by the other in such conversations, but the identity of the person or persons holding the conversation, in order to fix a liability upon them or their principals, must in some manner be shown. To hold parties responsible for answers made by unidentified persons, in response to calls at the telephone from their offices or places of business concerning their affairs, opens the door for fraud and imposition, and establishes a dangerous precedent, which is not sanctioned by any rule of law or principle of ethics of which we are aware. A party relying or acting upon a communication of that character takes the risk of establishing the identity of the person conversing with him at the other end of the line."

As I understand the law, conversations carried on by means of telephone do not differ in their essential characteristics from those carried on verbally between the parties when face to face. The only difference is the medium through which they converse and the fact that they are at such a distance from each other that they could not make themselves heard in the ordinary conversation and by means of the voice alone. Mr. Jones in his work on *Telegraphs and Telephones*, §§ 697, 698, and 699, discusses this question, and in section 698 says: "In order for the rule to hold good, the identity of the person must be shown by the party offering to produce such communication as evidence.

This may be done by direct or circumstantial evidence, and it is not necessary that the voice of either person be recognized; but, if the identity of the person conversing be shown, this will be sufficient." I take it that extraneous evidence or facts and circumstances independent of the conversation may be shown to identify the party with whom the conversation was had. The one essential thing always remains, however, and that is that the party with whom the conversation was had must in some way be identified. It is essential to do this where the conversation is carried on verbally between the parties face to face. In the latter case, however, the identification is much easier for the reason that the person seeking to identify the other will, in all likelihood, be able to remember the face and thus establish the identity of the person, while over the telephone he cannot see the party with whom he is talking and must resort to the voice and extraneous means for identification.

In my opinion there was no identification of Clem Hedges in the present action and no proof that he was the person to whom Tonkin talked over the phone. I do not think the admission of this evidence should call for a reversal of the judgment for the following reason: Independently of this telephone conversation, there were sufficient facts and circumstances submitted to the jury to justify them in concluding that J. W. Hedges was acting for and as the agent and representative of Clem Hedges in negotiating this sale. On the other hand, the evidence admitted touching this telephone conversation did not prove anything and certainly could not have been the moving cause for intelligent jurors returning a verdict in favor of the respondent.

For the foregoing reasons, I concur in affirming the judgment.

SULLIVAN, J. I concur in the conclusion reached by Mr. Justice STEWART but am of the opinion that the telephone message referred to should not have been admitted in evidence for the reasons stated in the concurring opinion of Chief Justice AILSHIE.

(24 Idaho, 286)

BROSE v. TWIN FALLS LAND & WATER CO. et al.

(Supreme Court of Idaho. June 18, 1913.)

# 1. NEGLIGENCE (§ 15\*)—JOINT TORT-FEASORS—JOINT AND SEVERAL LIABILITY.

When two or more persons unite in the commission of a wrong, or where separate and independent acts of negligence by different persons all concur as a proximate cause in producing an injury, such wrongdoers are jointly and severally liable for the damage resulting therefrom.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 18; Dec. Dig. § 15.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 133 P.—43



## 2. NEGLIGENCE (§ 15\*)—JOINT TORT-FEASORS—CONCURRENT ACTS.

In order to hold two or more defendants jointly liable as tort-feasors, there must be some joint or concurrent act or community of action, or a neglect of some common duty, or it must appear that the several wrongful acts of the defendants done at different times all concurred in their effects as a single act to produce the injury complained of.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 18; Dec. Dig. § 15.\*]

## 3. NUISANCE (§ 10\*)—CONTINUING NUISANCE—LIABILITIES OF SUCCESSIVE OWNERS.

Under the statute of this state, section 3660 of the Revised Codes, every successive owner of property, who neglects to abate a continuing nuisance upon or in the use of such property created by a former owner, is liable therefor in the same manner as the one who first created it, but this statute does not mean that such subsequent owner is liable for damages caused prior to his acquiring the ownership, possession, or control of the property.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 41; Dec. Dig. § 10.\*]

Appeal from District Court, Lincoln County; Edward A. Walters, Judge.

Action by Robert Brose against the Twin Falls Land & Water Company and the Twin Falls Canal Company. Judgment for defendants, and plaintiff appeals. Affirmed.

Longley & Hazel and Taylor Cummins, all of Twin Falls, for appellant. Sweeley & Sweeley and Bowen & Porter, all of Twin Falls, for respondents.

AILSHIE, C. J. This is an appeal from the judgment. The court sustained a demurrer to the complaint, on the ground that there was a misjoinder of parties defendant. Plaintiff declined to amend, and judgment of dismissal was entered.

The action is prosecuted for recovery of damages caused by seepage and percolating waters from the canal owned by the Twin Falls Canal Company. The complaint, among other things, alleges that the plaintiff is the owner of certain lands in Twin Falls county under the canal system, owned by the Twin Falls Canal Company. The complaint charges that the defendant Twin Falls Land & Water Company, in the years 1905 and 1906, constructed an irrigating canal, commonly known as the "High-Line Canal of the Twin Falls Canal System," over and across the plaintiff's land, and that it owned, was in the possession of, and operated the canal and system until the 30th day of November, 1909, on which date the land and water company sold and transferred the entire canal system to its codefendant, the Twin Falls Canal Company, and that the latter company thereupon acquired the title to the property and entered into possession and control thereof.

For convenience we will hereafter refer to the Twin Falls Land & Water Company as the Land and Water Company and to the Twin Falls Canal Company as the Canal Company.

The complaint then charges that the Land and Water Company in the construction of the canal negligently failed to take such means as were necessary to prevent the water flowing in the canal from percolating, seeping, and flowing into and upon the lands of the plaintiff, and that from the time of the construction of the canal until the transfer of the same to the Canal Company, the Land and Water Company was the sole owner and in full control of the property, and that from the time of the transfer until the commencement of this action the Canal Company was the owner and in full control of the property, and that both defendants at all times since the construction of the canal, by one continuous negligent act, participated in by both of defendants during the periods aforesaid, negligently caused the water to flow in said canal so as to permit the same to percolate, seep, and flow onto the lands of the plaintiff to his damage in the sum of \$5,000. The complaint also alleges that the Land and Water Company knew that the canal was not properly constructed, and that the waters were seeping and percolating into and upon the lands of the plaintiff and injuring and damaging the same, and that the Canal Company at the time it acquired title to and took possession of the property knew of the defects in the system, and that damage was being done to the plaintiff, and that it continued to maintain and operate the canal without repairing or improving the same. The complaint contains a second count for the same tort and injury, but it is unnecessary to here recite any of the allegations of that count. The trial court sustained a demurrer to this complaint, upon the ground that it improperly united two causes of action, in that it united a cause of action against the Land and Water Company alone with a cause of action against the Canal Company alone, and that the two companies were not jointly liable on either cause of action.

The only question presented for our consideration is whether the Land and Water Company and the Canal Company are jointly liable for the tort and damage alleged in the complaint. In determining this question, it is important to understand clearly the cause of action alleged. When reduced to its last analysis, the complaint charges that the Land and Water Company constructed this canal, and was the sole owner thereof and operated the same until November 30, 1909, and that on the latter date it sold and transferred the entire system and the possession and control thereof to the Canal Company. It then alleges that this injury and damage has been continuing from the time the Land and Water Company began to run water through the canal up to the time of the commencement of this action.

[1, 2] The general rule of law with reference to the joint liability of trespassers and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



tort-feasors is well established and everywhere recognized, but it has proven one of the most difficult rules of application on account of the infinite diversity and variety or circumstances under which these wrongs are committed or which lead up to their commission.

The Supreme Court of Indiana in *Cleveland, etc., R. R. Co. v. Hilligoss*, 171 Ind. 417, 86 N. E. 485, 131 Am. St. Rep. 258, have stated the rule as to those cases in which joint liability will attach as follows: "When more persons than one unite in the commission of a wrong, each is responsible for the acts of all, and for the whole damage; also, where separate and independent acts of negligence by different persons concur in perpetrating a single injury, each is fully responsible for the trespass. Courts will not undertake to apportion the damage in such cases among the joint wrongdoers. The injured party has at his election his remedy against all or any number. 1 Cooley on Torts (3d Ed.) 153. He may elect to look to one only, and, if he accepts from that one a benefit or property in satisfaction and release, he can go no further."

On the other hand, the Supreme Court of Oregon, in *Strauhel v. Asiatic S. S. Co.*, 48 Or. 100, 85 Pac. 230, have stated the converse of this rule as follows: "To make tort-feasors liable jointly there must be some sort of community in the wrongdoing, and the injury must be in some way due to their joint work, but it is not necessary that they be acting together or in concert if their concurring negligence occasions the injury."

The same proposition is stated from another angle by the Supreme Court of California in *Marriott v. Williams*, 152 Cal. 705, 93 Pac. 875, 125 Am. St. Rep. 87, as follows: "In actions against two or more persons for a single tort, there cannot be two verdicts for different sums against different defendants upon the same trial. There can be but one verdict for a single sum against all who are found guilty of the tort. All who are guilty at all are liable for the whole amount of the actual damages arising from the injury inflicted, irrespective of the degree of culpability."

In 38 Cyc. p. 484, the author says: "The fact that it is difficult to separate the injury done by each from that done by the others furnishes no reason for holding that one tort-feasor should be liable for the acts of others with whom he is not acting in concert. Furthermore, if defendant's act was several when it was committed, it cannot be made joint because of a consequence which followed in connection with the result of the same, or a similar act done by others."

In *Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 566, the Court of Appeals of New York said: "Where different parties pollute a stream by the discharge of sewage therein, each from his own premises, and each

acting separately and independently of the others, one of the number is not liable for all the injury suffered by another because of the nuisance thus created. Each is liable only to the extent of the wrong committed by him."

Mr. Kinney in volume 3 of his work on *Irrigation and Water Rights*, at section 1685, under the subject of "Joint and Several Tort-Feasors," says: "It is a well-settled principle of law of procedure that an action at law for damages cannot be maintained against several persons as parties defendant when each acted independently of the others and there was no concert or unity of design or action between them. It is held that in such a case the tort of each defendant is several when committed, and that it does not become joint because afterward its consequences united with the consequences of several other torts committed by other persons. If the rule were otherwise, the authorities hold that one defendant, however little he might have contributed to the injury of the plaintiff, would be liable for all the injury caused by the wrongful acts of all the other defendants, and he would have no remedy against the latter because no contribution can be enforced between tort-feasors."

The following are some of the many authorities which support the general rule above stated: *Walton v. Miller*, 100 Va. 210, 63 S. E. 458, 132 Am. St. Rep. 908; *Wiscarver & Stone v. C., R. I. & P. Ry. Co.*, 141 Iowa, 121, 119 N. W. 532; *Verlinda v. Stone & Webster Engr. Corp.*, 44 Mont. 223, 119 Pac. 573; *Blaisdell v. Stephens*, 14 Nev. 17, 33 Am. Rep. 523; *Miles v. Du Bey*, 15 Mont. 340, 39 Pac. 313; *Pomeroy on Code Remedies* (4th Ed.) § 209; *Sutherland on Damages* (8d Ed.) §§ 137, 141.

Counsel for appellant cite a number of cases in support of their contention, but place their chief reliance on the case of *Gunder v. Tibbitts*, 153 Ind. 591, 55 N. E. 762. That was an action for damages resulting from a personal wrong and injury. In that case the action was prosecuted for damages against the plaintiff's seducer and a physician who attended her later. As we read and understand that case, there is no similarity between the facts of the case there considered and the case at bar. There it appeared that each contributed to the wrong and injury, and that the act of each was ratified and approved by the other, so that both could well be termed and dealt with as joint wrongdoers and co-conspirators. In discussing the law applicable to such a case, the court said: "If each had acted independently, the plaintiff might have been compelled to pursue them separately, although the consequences of their acts united. But Kimball was the hand of Gunder in furthering Gunder's wrong. The consequences of the operation were necessarily intermingled by



Kimball with the natural consequences of Gunder's sexual intercourse with plaintiff. When Gunder came to Kimball, the incident was not closed, and Kimball willingly joined in and helped on a wrong that was not completed—a wrong that constituted, when completed, but one cause of action against Gunder. And so, if Kimball chose to come in at any stage, he, too, is liable for the whole; for the law will not undertake to apportion damages in such cases."

Let us now revert to the facts of the present case to see if they bring it within the rule of law recognized by the foregoing authorities. The Land and Water Company constructed this canal and operated it alone and independent of the Canal Company up to the time of the transfer November 30, 1909. Indeed, it was stated on the argument that the Canal Company was not in existence during the greater portion of this period, and was not organized until shortly before it acquired this property. Whatever damage was done by the Land and Water Company during its ownership and operation of this system and up until the 30th day of November, 1909, when it parted with its ownership and possession, was a separate and independent act for which appellant might maintain his action for the damages sustained by reason of that act, and the damages sustained by reason of that act could have been computed and ascertained with reasonable certainty. To this injury the Canal Company in no way contributed and in no way aided, abetted, or advised therein. The liability and responsibility of the Canal Company commenced only when it acquired title and took possession of this property and began to operate it and run water through the canal and allowed the same to percolate through and upon the lands of the appellant. The Canal Company might have immediately repaired this defect in the canal and prevented the seepage and percolation which was causing damage to appellant, and thereby have avoided doing any injury to appellant or subjecting itself to liability for damages. The Land and Water Company was in no respect liable or responsible for the continuation of any injury on account of seepage and percolation after it parted with title and right of possession. The acts of the two companies are severable and separable, and the wrong of the one did not carry over into the act of the other. In other words, there was no concurrence either in point of time or act; there was no community of action, and there was no joint action by these two companies. So far as we have been able to discover from the authorities, they all require that in order to hold defendants jointly liable there must be some joint or concurrent act or community of action or

duty or neglect of some common duty, or that the several wrongful acts of the defendants done at different times concurred in their effects as one single act to produce the injury complained of.

It seems clear to us that the respondents, the Land and Water Company and the Canal Company, are not shown to have acted either jointly and concurrently to produce the injury of which appellant complains, nor have they neglected a duty that was common to them both at one and the same time, nor have they so acted that the several acts of the two have at any one time joined and concurred to produce a single injury. When the Canal Company's first duty arose to repair or improve this canal so as to prevent water seeping and percolating onto appellant's land, the like duty which had previously devolved upon the Land and Water Company ceased, and the same duty was never incumbent upon both at the same time.

[3] It has been suggested that under the provisions of section 3660 of the Revised Codes, "Every successive owner of property who neglects to abate a continuing nuisance upon or in the use of such property, created by a former owner, is liable therefor in the same manner as the one who first created it." It is contended that under this statute a man who purchases property containing a nuisance is liable for the damage previously inflicted by that nuisance. This statute does not impose such a liability. It was enacted for the purpose of rendering the purchaser of a property that contains a nuisance liable to an action to abate the nuisance in the same manner as if he had created the nuisance, and to render him liable for all subsequent damages the same as if he had created the nuisance. In other words, it was intended to preclude the purchaser of property containing a nuisance defending against an action for damages or to abate the same, on the ground that he did not create the nuisance, and that he was not responsible for its creation. It was never intended, however, to render the purchaser liable for damages previously incurred. *Pierce v. German, etc., Society*, 72 Cal. 180, 13 Pac. 478, 1 Am. St. Rep. 45; *Castle v. Smith*, 36 Pac. 859; <sup>1</sup>*Ahern v. Steele*, 115 N. Y. 203, 22 N. E. 193, 5 L. R. A. 449, 12 Am. St. Rep. 778; 34 Am. St. Rep. note at page 267; *Plumer v. Harper*, 3 N. H. 88, 14 Am. Dec. 333.

The demurrer to the complaint was properly sustained, and the judgment should be affirmed, and it is so ordered. Costs awarded in favor of respondents.

SULLIVAN and STEWART, JJ., concur.

<sup>1</sup> Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 102 Cal. xvii.



(24 Idaho, 275)

**PARTRIDGE v. TWIN FALLS LAND & WATER CO. et al.**

(Supreme Court of Idaho. June 20, 1913.)

Appeal from District Court, Lincoln County; Edward A. Walters, Judge.

Action by H. A. Partridge against the Twin Falls Land &amp; Water Company and the Twin Falls Canal Company. Judgment for defendants, and plaintiff appeals. Affirmed.

Longley &amp; Hazel and Taylor Cummins, all of Twin Falls, for appellant. Sweeley &amp; Sweeley and Bowen &amp; Porter, all of Twin Falls, for respondents.

**AILSHIE, C. J.** This action involves the same question of law that has just been passed on in the case of *Brose v. Twin Falls Land & Water Co.*, 133 Pac. 673. The only difference between the two cases is that the *Brose* Case was prosecuted for damages caused on account of seepage and percolation, and in the present case the action is prosecuted against the defendants for allowing a considerable volume of water to overflow and escape from the company's canals and flow over and upon the plaintiff's land, cutting out and washing away the soil in places and washing gravel and debris upon the soil in other places, thus damaging and injuring the plaintiff's lands.

The action was commenced against both the Twin Falls Land & Water Company and the Twin Falls Canal Company. The same facts were pleaded in this case as in the *Brose* Case with reference to the ownership of the two companies and the interest and control that each had in and to this canal and water system. The district court held that the plaintiff had improperly united a cause of action against the Twin Falls Land & Water Company with an action against the Twin Falls Canal Company, and that the facts pleaded did not show a joint liability against both the defendants.

The judgment in this case must be affirmed for the same reasons stated in *Brose v. Twin Falls Land & Water Company* and *Twin Falls Canal Company*.

Judgment is affirmed, and it is so ordered. Costs awarded in favor of respondents.

**SULLIVAN and STEWART, JJ., concur.**

(47 Mont. 533)

**TITUS v. ANACONDA COPPER MINING CO.**

(Supreme Court of Montana. June 28, 1913.)

**1. PLEADING (§ 16\*)—ALLEGATIONS.**

Terseness of expression in pleading cannot always be required.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 32, 36, 42; Dec. Dig. § 16.\*]

**2. PLEADING (§ 69\*)—ALLEGATIONS OF COMPLAINT—ADMISSIONS.**

A complaint in a stationary engineer's action for personal injuries alleged that a bracket which supported a valve rod on the end of which was a clutch which raised the dashpot rod was broken and repaired, and kept in use until it became unstable so that the valve rod and clutch were no longer kept in place, and that the defect in the bracket was known to defendant, but was latent and unknown to plaintiff and undiscoverable in the exercise of ordinary care, while the engine was running, and that plaintiff was informed by defendant's foreman in charge of the engine that the machinery was in proper condition, except perhaps that the tension spring was loose, and that such information was false and misleading, but was believed by plaintiff to be true, and when the

clutch failed to attach to the dashpot rod, plaintiff, relying upon such assurance, undertook to tighten the spring while the engine was running, resulting in his hand being cut. Held, that the complaint did not admit knowledge of the danger by plaintiff at the time injury occurred.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 69.\*]

**3. MASTER AND SERVANT (§ 270\*)—INJURIES—ADMISSION OF EVIDENCE—SUBSEQUENT REPAIRS.**

Evidence of repairs of machinery by the employer after the injury is not admissible on the question of negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.\*]

**4. MASTER AND SERVANT (§ 265\*)—INJURY—BURDEN OF PROOF.**

An employé injured by defective machinery has the burden of proving in an action for such injuries that the machinery was out of repair as claimed, and that its defective condition was due to the employer's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.\*]

**5. MASTER AND SERVANT (§ 270\*)—INJURIES—ADMISSION OF EVIDENCE.**

In a stationary engineer's action for personal injuries by reason of an alleged defective bracket on the engine, evidence of the bracket's condition on the day following the injury was admissible on the question of its condition when the injury occurred, though not to prove prior negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.\*]

**6. APPEAL AND ERROR (§ 216\*)—PRESENTATION BELOW—INSTRUCTION.**

Where defendant employer did not request an instruction that the consideration of evidence as to the condition of the alleged defective machinery on the day after the injury be limited to the question of its condition before the injury, but, instead, he requested an instruction that the jury should disregard such evidence when it was in fact admissible on that question, though not to show negligence, defendant cannot on appeal complain of the refusal of the instruction requested by it.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216; Trial, Cent. Dig. §§ 627, 637.]

**7. APPEAL AND ERROR (§ 1048\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.**

Any error in unduly restricting cross-examination was harmless where the same witness was recalled by appellant, and testified at length as to the matters involved in the cross-examination.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.\*]

**8. MASTER AND SERVANT (§ 205\*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.**

Where an employer's foreman assured an employé that the only thing the matter with an engine was a loose tension spring, and did not refer to a defective bracket from which the employé was injured, the employé did not assume the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 547-549; Dec. Dig. § 205.\*]

**9. MASTER AND SERVANT (§ 245\*)—CONTRIBUTORY NEGLIGENCE—OBEDIENCE OF ORDERS.**

A servant is not guilty of contributory negligence in going into a place of danger pursuant

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



to the master's orders, unless the danger was so apparent that no prudent man would have exposed himself to it even at the orders of his superior.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 682, 778-788; Dec. Dig. § 245.\*]

Appeal from District Court, Ravalli County; R. Lee McColloch, Judge.

Action by Ezra D. Titus against the Anaconda Copper Mining Company. From a judgment for plaintiff and an order denying a motion for new trial, defendant appeals. Affirmed.

R. A. O'Hara, of Hamilton, and Henry C. Stiff, of Missoula, for appellant. C. S. Wagner, of Helena, and Baker & Kurtz, of Hamilton, for respondent.

**HOLLOWAY, J.** The plaintiff was employed by the defendant company as a stationary engineer, and while in the discharge of his duties was injured. He brought this action to recover damages. In his complaint he describes somewhat minutely certain working parts of the engine, and alleges that a bracket which supported a valve rod, on the end of which rod was a clutch designed to engage and raise the dashpot rod, had been broken; that it had been repaired and kept in use until it became loose, rickety, unstable, and failed properly to perform its function, with the result that the valve rod and clutch no longer kept in place, also failed to perform their duties; that this defect in the bracket was known to the defendant company, or should have been known to it, but that such defect was latent, unknown to the plaintiff, and undiscoverable in the exercise of ordinary care while the engine was running; that there was a tension spring attached to the clutch for the purpose of regulating the contact of the clutch with the dashpot rod; that on August 5, 1908, when plaintiff went to work, he was informed by the defendant's foreman, who was then in charge of the engine, that the machinery was in proper working condition, except perhaps that the tension spring was loose; that this information was false and misleading, but believed by the plaintiff to be true, and was relied upon by him; that, when the clutch failed to attach to the dashpot rod, he, relying upon the information given him by the foreman, undertook to tighten the spring while the engine was running, with the result that his hand was caught in the machinery and cut and injured, and that his injury was caused proximately by the broken and defective condition of the bracket. The defendant interposed a demurrer and motion to strike, and, these being overruled, answered, denying the allegations of its negligence, and pleading contributory negligence and assumption of risk. Upon these affirmative pleas there was issue by reply. The trial of the

cause resulted in a verdict for the plaintiff; and from the judgment entered thereon, and from an order denying it a new trial, the defendant appealed.

[1] 1. We are unable to agree with counsel for appellant in their analysis of the complaint. In the statement above we have fairly epitomized the allegations; and, while the pleader might be convicted of prolixity, the essential facts necessary to a statement of the cause of action are not difficult to detect. Terseness of expression is a most refined accomplishment, but it cannot be enforced as a rule of pleading.

[2] Counsel for appellant err in construing an allegation of knowledge at the time the complaint was prepared into an admission of knowledge at the time the injury occurred. A careful reading of the complaint makes clear the plaintiff's meaning.

[3-5] 2. Over the objection of defendant, evidence was introduced of certain things done by the defendant after the accident, in the nature of repairs and replacements. Upon the submission of the cause, defendant requested an instruction withdrawing this evidence from the consideration of the jury altogether. The request was denied, and error is predicated upon the ruling. It is elementary that evidence of repairs or improvements is not evidence of prior negligence. The plaintiff assumed the burden in this instance of showing (a) that the bracket was out of repair at the time he was injured; and (b) that such condition was due to the defendant's negligence. While evidence of the condition of the bracket on the day following the injury would not tend to prove negligence, it might throw light upon the condition of the bracket when the injury occurred, and for this purpose the evidence was admissible. In support of their contention that error was committed, counsel for appellant cite *Limberg v. Glenwood Lumber Co.*, 127 Cal. 598, 60 Pac. 176, 49 L. R. A. 33. That case was decided upon the authority of *Sappenfield v. Railway Co.*, 91 Cal. 62, 27 Pac. 590. In each of these cases the court proceeded upon the theory that the only purpose for which the evidence of after repairs was offered was to prove prior negligence. However, in the later case of *Dow v. Sunset T. & T. Co.*, 157 Cal. 182, 106 Pac. 587, the same court clearly distinguishes between the rule which excludes evidence of after repairs as proof of prior negligence, and the rule which admits evidence of defective condition after the injury, as tending to prove the like condition at the time of the injury. In 3 *Bailey on Personal Injuries* (2d Ed.) § 782, p. 2101, it is said: "So the fact that a defective appliance was repaired after an accident may be shown upon the question of what was broken and how, and what was wanting, although improper for the purpose of showing the employer was negligent in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



not making repairs and alterations before the accident."

[6] When the evidence was offered, counsel for plaintiff announced: "This is for the purpose of showing that the bracket absolutely was unstable and rickety at the time Mr. Titus was hurt. We propose to show the next day that they propped it up with a block of wood." For the purpose indicated the evidence was admissible. Pullen v. City of Butte, 45 Mont. 46, 121 Pac. 873, approving Dow v. Sunset T. & T. Co., above. Instead of requesting the trial court to charge the jury to disregard the evidence, the defendant should have asked for an instruction limiting the effect of such evidence. Having failed to make a proper request, it cannot complain that the court refused their erroneous instruction.

[7] 3. Complaint is made that counsel for defendant were restricted unduly in their cross-examination of the witness Howley. The record discloses, however, that the same witness was thereafter called by the defendant, and testified at length as to the matters involved in his cross-examination while a witness for plaintiff; so that, if any error was committed, it was error without prejudice. It is idle for counsel to appeal to this court for a reversal upon a bare apex juris.

4. It is urged that this record discloses that in attempting to tighten the spring plaintiff assumed the risk of injury. If his act had been entirely voluntary, there might be some ground for this contention; but it appears that, when plaintiff went on shift, he was informed by the foreman, who was then and had been during the preceding shift in charge of this engine, that, if there was anything the matter with the engine causing it to miss, the fault was in the loose spring. Plaintiff had a right to rely upon this information coming from one whose business it was to know, and he testified that he did so.

[8] Under the circumstances as here disclosed, the forman in effect substituted his own judgment for that of the plaintiff, and the defendant company must bear the responsibility for the consequence of the error of its vice principal due to his negligence in failing to make investigation which would have disclosed the true nature of the trouble. 4 Labatt's Master & Servant (2d Ed.) §§ 1373-1375; Toone v. O'Neill Constr. Co. (Utah) 121 Pac. 10. The question of assumption of risk properly went to the jury.

[9] 5. Plaintiff's situation was not materially different from what it would have been had the foreman specifically ordered him to attempt to tighten the tension spring with his fingers while the engine was in motion. The evidence is all to the effect that, if the trouble had been caused by a loose tension spring, it could have been cured safely by the method adopted by the plaintiff. The real difficulty was with the loose bracket, and

because of the engine's vibration this could not be discovered while the engine was running under a load. Under these circumstances, the plaintiff may properly invoke the rule that "if the master orders the servant into a situation of danger, and in obeying the command he is injured, the law will not charge him with contributory negligence, unless the danger was so glaring that no prudent man would have entered into it, even under orders from one having authority over him." Wurtenberger v. Metropolitan St. Ry. Co., 68 Kan. 642, 75 Pac. 1049.

The other alleged errors do not demand separate consideration. The judgment and order are affirmed.

Affirmed.

BRANTLY, C. J., and SANNER, J., concur.

(47 Mont. 547)

STATE ex rel. CENTENNIAL BREWING CO. v. DISTRICT COURT OF SECOND JUDICIAL DIST. IN AND FOR SILVER BOW COUNTY et al.

(Supreme Court of Montana. June 20, 1913.)

1. MANDAMUS (§ 52\*)—PURPOSE OF WRIT.

Mandamus will not be issued by the Supreme Court to correct a judgment rendered by the district court.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 101; Dec. Dig. § 52.\*]

2. MANDAMUS (§ 4\*)—ADEQUACY OF LEGAL REMEDY.

Where the question sought to be reviewed in a mandamus proceeding to review a judgment in unlawful detainer can be reviewed by the remedy of appeal which is plain, speedy, and adequate, mandamus will not issue to review the judgment; Rev. Codes, § 7215, requiring the writ to issue where there is not a plain, speedy, and adequate remedy at law.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 9-21, 24-34; Dec. Dig. § 4.\*]

Mandamus proceeding by the State, on the relation of the Centennial Brewing Company, against the District Court of the Second Judicial District in and for Silver Bow County and others. Proceeding dismissed.

Charles R. Leonard and Frank C. Walker, both of Butte, for relator. John Lindsay and Canning & Geagan, all of Butte (Henry C. Smith, of Helena, of counsel), for respondents.

HOLLOWAY, J. On March 21, 1913, an action in unlawful detainer was commenced in the district court of Silver Bow county by the Centennial Brewing Company against O. Rouleau and Louis Tetreault, and such proceedings were had that upon the trial a verdict was returned in favor of plaintiff and against the defendants. Thereupon counsel for plaintiff requested the district court to render judgment upon the verdict in favor of plaintiff and against the defendants, and as a part of the judgment to treble the dam-



ages. This request was refused, and the court rendered and had entered a judgment in favor of the plaintiff for the restoration of the premises in controversy and for damages as found in the verdict and for costs.

[1] In effect, we are asked by the writ of mandate to correct the judgment entered by the district court, but such is not the office of the writ. *State ex rel. Montana Central Ry. Co. v. District Court*, 32 Mont. 37, 79 Pac. 546. Assuming that the circumstances are such that mandamus would issue if the plaintiff in the action in the district court had no other plain, speedy, or adequate remedy, we would do a grave injustice to other litigants before this court if we permitted this relator here to invoke the remedy by mandamus to secure an early hearing of its controversy, while others who pursue the remedy by appeal are compelled to wait.

[2] Every question sought to be presented in this proceeding can be reviewed by appeal, and the remedy by appeal is plain, speedy, and adequate. Under such circumstances mandamus will not lie. Section 7215, Rev. Codes.

The proceeding is dismissed.  
Dismissed.

BRANTLY, C. J., and SANNER, J., concur.

(47 Mont. 545)

LATIMER et al. v. NELSON et al.

(Supreme Court of Montana. June 19, 1913.)  
EXCEPTIONS, BILL OF (§ 56\*)—CERTIFICATE OF JUDGE—NECESSITY.

Rev. Codes, § 7113, provides that on appeal from an order, except one relating to a new trial, the appellant must furnish the court a copy of the notice of appeal, order appealed from, and the papers used on the hearing below, and section 7115 provides that such copies must be certified to as correct by the clerk or attorneys. *Held*, that the information as to the correctness of the copies of the order, etc., must be embodied in a bill of exceptions settled by a certificate of the judge in the usual way, and not by a certificate by the clerk or attorneys, and an order denying an injunction cannot be reviewed in the absence of a bill of exceptions containing the order, etc.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 94-96; Dec. Dig. § 56.\*]

Appeal from District Court, Missoula County; Asa L. Duncan, Judge.

Action by John R. Latimer and others against Frank Nelson and others, as the Board of County Commissioners of Missoula County, Mont. From an order denying an injunction *pendente lite*, plaintiffs appeal. Affirmed.

James L. Wallace, Chas. N. Madeen, and W. J. McCormick, all of Missoula, for appellants. Dan J. Heyfron and Frank A. Roberts, both of Missoula, for respondents.

BRANTLY, C. J. This is an appeal from an order of the district court of Missoula

county refusing to issue an injunction *pendente lite*.

The principal question submitted for decision involves the validity and construction of chapter 30 of the Laws of the Twelfth Legislative Assembly. When the appeal was perfected, the plaintiffs presented to this court their petition asking that an injunction issue pending the appeal under the rule of this court relating to appeals from injunction orders. Rule 21, 44 Mont. xxxix, 123 Pac. xiv. The petition was granted upon terms, and thereafter the hearing was upon motion of counsel expedited. We are precluded, however, from considering the appeal on the merits for the reason that counsel for the appellants have failed to file a properly authenticated transcript of the record of the district court upon which the order was made. The record submitted consists of the petition presented to this court at the time the injunction was issued embodying copies of the pleadings, certain affidavits, and a stenographic report of the evidence of one of the defendants. But while these are certified to by the clerk as correct copies, they are not embodied in a bill of exceptions identifying them as the papers used at the hearing in the district court. Section 7113, Revised Codes, provides: "On appeal from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the judgment or order appealed from, and of papers used on the hearing in the court below." Section 7115 provides that the copies referred to in the preceding sections must be certified to as correct by the clerk or attorneys. As has been repeatedly announced by this court, while this latter section authorizes the clerk or attorneys to certify that the copies furnished are correct copies, it does not authorize either to convey to this court in a certificate the information that the copies furnished are copies of the papers actually used as the basis of the order from which the appeal is taken. This information can be furnished only by a bill of exceptions, settled by a certificate of the judge in the usual way. *Rumney Land & Cattle Co. v. Detroit & Mont. C. Co.*, 19 Mont. 557, 49 Pac. 395; *Cornish v. Floyd-Jones*, 26 Mont. 153, 66 Pac. 838; *Emerson v. McNair*, 28 Mont. 578, 73 Pac. 121; *In re Dougherty's Estate*, 34 Mont. 336, 86 Pac. 38.

Since we are not furnished with a transcript which we can accept without question as a copy of the record upon which the district court based its order, we must observe the rule adopted in the cases cited and decline to consider the appeal on the merits. The order is therefore affirmed.

Affirmed.

HOLLOWAY and SANNER, JJ., concur.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



(47 Mont. 377)

**DAILY v. MARSHALL et al.**

(Supreme Court of Montana. May 14, 1913.)

**1. CORPORATIONS (§§ 338, 360\*)—LIABILITY OF DIRECTORS—FAILURE TO FILE REPORTS.**

The liability of directors for the debts of a corporation because of failure to make the annual report required by Rev. Codes, § 3850, as amended by Laws 1909, p. 217, while penal only in the sense that it was unknown to common law, and is entirely of statutory origin, may not be construed to include cases which do not clearly fall within the statute.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1460, 1461-1466, 1503, 1505; Dec. Dig. §§ 338, 360.\*]

**2. CORPORATIONS (§ 360\*)—DIRECTORS—LIABILITY—PLEADING—SUFFICIENCY.**

While Rev. Codes, § 3822, recognizes that there may be corporations without a capital stock, yet section 3833 declares that directors of corporations for profit must be holders of stock therein, and hence a complaint averring that defendants were directors in a corporation organized and operated for profit clearly warrants an inference that it has capital stock, and so is a sufficient allegation of that fact to state a cause of action, under Rev. Codes, § 3850, declaring that every corporation having a capital stock shall annually file reports, and in case of a failure the directors shall be personally liable for its debts; for whatever is necessarily implied from the allegation in the pleading is to be taken as directly averred.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1503, 1505; Dec. Dig. § 360.\*]

**3. PLEADING (§§ 350, 428\*)—TRIAL (§ 165\*)—ATTACK—EFFECT.**

Motions for judgment on the pleadings, objections to introduction of evidence, and motions for nonsuit, so far as the sufficiency of the complaint is assailed, raise only such questions as can be raised upon general demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1053, 1054, 1070-1077, 1433-1436; Dec. Dig. §§ 360, 428;\* Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.\*]

**4. CORPORATIONS (§ 354\*)—CORPORATE EXISTENCE.**

Rev. Codes, § 3892, provides that if a corporation does not organize and commence business within one year from the date of incorporation its corporate powers cease, but the due incorporation of any company doing business as a corporation shall not be inquired into collaterally in any suit to which such de facto corporation may be a party. Sections 3807 and 3825, respectively, declare that private corporations may be formed by the voluntary association of any three or more persons, by the preparation and filing of the articles with the clerk of the county in which the principal business of the company is to be transacted, and by filing with the secretary of state a copy thereof, who must then issue to the incorporators a certificate. Section 3905 declares that a corporation may be dissolved by the expiration of the time limited by its charter, or by judgment of dissolution or an act of the legislative assembly, while section 3898 provides that a sale by the corporation of all its property ipso facto operates as a dissolution, and section 6944 authorizes quo warranto against a corporation when it has forfeited its franchise by nonuser. *Held*, that where a corporation was duly licensed the mere failure of the incorporators to organize the company by the adoption of by-laws and election of directors, which are purely internal matters, would not affect the right of one dealing with the corporation as such to hold the directors liable for

corporate debts because of failure to file the annual reports required by statute; for even though the corporation had forfeited its franchise by nonuser, yet, as the forfeiture could not be set up by a private individual, the incorporators cannot set it up as a defense to an action against them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1496; Dec. Dig. § 354.\*]

**5. CORPORATIONS (§ 391\*)—DOMESTIC CORPORATIONS—DISCRIMINATION.**

Const. art. 15, § 11, providing that no company or corporation formed under the laws of any other state shall be allowed to exercise any greater rights than those possessed by the corporations of the same or similar character created under the laws of this state, merely restrains the Legislature from granting to foreign corporations privileges which cannot be enjoyed by domestic corporations, and does not limit the power of the Legislature to impose burdens upon domestic corporations, so long as the laws do not discriminate against them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1573, 1578; Dec. Dig. § 391.\*]

**6. CORPORATIONS (§ 326\*)—DIRECTORS—LIABILITY.**

Rev. Code, § 3850, as amended by Laws 1909, p. 217, providing that the directors of stock corporations organized for profit, which shall fail to file annual reports of the corporation's condition, shall be liable for corporate debts, is not a discrimination against domestic corporations, although in terms it imposes the duty of filing the report upon the corporation; for it in fact imposes the penalty for nonobservance upon the officers individually.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1443, 1460½, 1469, 1498; Dec. Dig. § 326.\*]

**7. CORPORATIONS (§ 326\*)—DIRECTORS—LIABILITY—"FINE."**

Rev. Codes, § 3850, as amended by Laws 1909, p. 217, providing that directors of a corporation shall be liable for its debts in case of failure to file annual reports, is not invalid under Const. art. 3, § 20, declaring that excessive bail shall not be required or excessive fines or cruel punishments inflicted, for the statute merely deprives the directors of a corporation of the corporate exemption from liability under certain circumstances, and does not impose a fine or punishment upon them; a "fine," in the purview of the Constitution, being a penalty exacted for some criminal offense, while the statute in question is penal only in that it imposes a liability unknown to common law.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1443, 1460½, 1469, 1498; Dec. Dig. § 326.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2810-2813.]

**8. CORPORATIONS (§ 361\*)—LIABILITY OF DIRECTORS—ACTIONS—EVIDENCE.**

In an action to hold the director of a corporation liable for the corporation's debts on account of his failure to file annual reports as required by statute, evidence of previous annual reports, as well as the affidavits made by the director upon his attachment of the corporate property, is admissible to show that the concern was ostensibly a corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1506; Dec. Dig. § 361.\*]

**9. CORPORATIONS (§ 354\*)—DIRECTORS—LIABILITY OF DIRECTORS.**

Where defendant was liable for the debts of a corporation because of his failure, as a director, to file the required reports, and it appeared from all the evidence that the corpora-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



tion was in existence, either de jure or de facto, the fact that defendant had agreed with a third person to sell him the corporate business under certain circumstances is no defense; there being no outward change in the conduct of its affairs.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1496; Dec. Dig. § 354.\*]

Appeal from District Court, Missoula County; F. C. Webster, Judge.

Action by John R. Dally against Thomas C. Marshall, W. P. Mills, and others. From a judgment for plaintiff, defendant Mills appeals. Affirmed.

Frank A. Roberts, of Missoula, and Gunn, Rasch & Hall, of Helena, for appellant. A. N. Whitlock and H. H. Parsons, both of Missoula, for respondent.

BRANTLY, C. J. Action by respondent to recover from appellant the sum of \$5,347.13, alleged to be due on account of goods, wares, and merchandise sold and delivered to the Missoula Palace Market, a corporation organized and existing under the laws of Montana. The theory upon which appellant is sought to be held is that, as president and director of the corporation, he failed to file, or have filed, in the office of the clerk and recorder of Missoula county, the place where the corporation has its principal place of business, for the year 1910, the report required by section 3850 of the Revised Codes. On August 2, 1906, the appellant, W. P. Mills, filed with the county clerk of Missoula county articles of incorporation of the "Missoula Palace Market." These were executed and acknowledged by Mills, Thomas C. Marshall, and Thomas N. Marlowe. Thereafter a certified copy was filed with the secretary of state, and there was duly issued by him a certificate under the seal of the state. The articles recited that Mills, Marshall, and Marlowe were the directors having charge of the corporation during the first three months of its existence; that its corporate stock was \$3,000, divided into 3,000 shares of \$1 each; and that each of the incorporators was a subscriber for one share. The stock was declared nonassessable, but was to be fully paid when issued. It does not appear that the directors formally organized by the election of officers or the adoption of by-laws, or that an election of directors was thereafter had. No certificates of stock were thereafter issued. On December 12, 1907, the appellant, Mills, entered into a written contract with one J. D. Watts, wherein he represented himself to be the owner of all the capital stock of the corporation, and agreed to sell to Watts three-fourths of it for the sum of \$3,000. The writing provided that Watts should have charge, management, and conduct of the business of the corporation; the same being the "butcher and meat business now carried on" in Missoula. Watts was to receive a salary of \$125 per month, and

he and Mills were to divide "the proceeds or dividends of said business in the proportion of their holdings." Watts took charge at once and conducted the business until March 6, 1910. He did not pay the note given to Mills as the purchase price under the terms of the agreement. He never received any shares of stock. Prior to Watts' connection with the business, Mills was manager and, according to his own testimony, sole owner of it until it was closed up by an attachment by himself in March, 1910. From its establishment until Watts took charge, and thereafter until it was closed up, the business was conducted in the corporate name. When Watts assumed charge, an indebtedness of about \$2,200 had been incurred. Checks issued by him were signed with the corporate name, by Watts himself or his daughter, who was the bookkeeper. On January 17, 1908, Mills verified an annual statement, such as was required by the statute (Rev. Codes, § 3850), signed by himself, Marshall, and Marlowe, and caused it to be filed with the clerk and recorder of Missoula county, wherein it was recited that the Missoula Palace Market is "a corporation organized and existing under the laws of Montana," and that Mills was the president and a director of it; that Watts was its general manager; and that Marshall was its secretary. A report reciting the same facts, verified by Mills, was filed for record on January 19, 1909. In each of these reports is the statement that "the amount of capital stock actually paid in cash is the sum of \$3,000."

The testimony given by Mills at the trial was, in part, as follows: "Q. Who was doing business before Mr. Watts got there? A. The Missoula Palace Market it was called. Q. What is the company of which you were president part of the time and Mr. Watts part? A. The business ran there, we called it the Missoula Palace Market. Q. Who was manager when Watts came? A. I was. \* \* \* Q. Where did you get the money to pay that rent with? A. Why, he took it out of the corporation, I guess. \* \* \* Q. Did you ever call a meeting or advertise for a meeting? \* \* \* A. I know the secretary, Marshall, called a meeting. \* \* \* We met several times—Col. Marshall, Mr. Watts, and myself. \* \* \* I was trying to get Mr. Watts to settle the business up; I was being told I might be held responsible. \* \* \* I think I met Mr. Dally about January, 1910. \* \* \* I told him not to give any more credit to the Market. \* \* \* The meat market of which Mr. Watts was in charge did business up to the time that I attached it." Touching the contract between himself and Watts, he testified: "That paper was made out in that form as security; I transferred the entire property to Mr. Watts for \$3,000. The understanding was that I sold Mr. Watts this property for \$3,-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



000; that he was to have absolute control of it; that he was to allow me to remain as a quarter owner that I might, as security, have some control of the shop, while I verbally was never to receive anything from it, except the original cost. When he paid that \$3,000, it was to be his—any day he wanted to pay the \$3,000." The plaintiff testified: "Q. Tell what Mr. Mills said in relation to the corporation. A. He said that he was willing to give me all he could get out of the Missoula Palace Market, but he didn't want to go down in his pocket and give any more."

In his affidavit to obtain the attachment in his action against the corporation, it was stated by Mills that "the said John D. Watts, on or about the 12th day of December, 1907, became the manager of the business of the defendant corporation, Missoula Palace Market, and continued in that capacity until about the 6th day of March, 1910," when his "authority as said manager was severed and terminated." This was brought about by a letter to Watts from Mills; Watts being "requested to stay away from the Market and to receive no more mail \* \* \* belonging to the Missoula Palace Market." The attachment suit was subsequently dismissed, and Mills' attorney took possession of the assets of the concern. On January 8, 1910, Marshall, with the consent of Mills, published a notice in the Daily Missoulian calling a meeting of the "stockholders of the Missoula Palace Market." The notice stated that the meeting was to be the annual meeting for the election of directors for the ensuing year. It was signed by Mills as president and director. It does not appear whether a meeting was held pursuant to this notice. The business had been conducted in a leased building; the lease running to the corporation by name. This lease was renewed in March, 1910. At one time Watts had some stationery printed for the corporation. By mistake the printer designated Watts as the proprietor instead of manager. This was made use of during the course of the business. No annual report for the year 1910, as required by section 3850, supra, as amended by the act approved March 11, 1909 (Laws 1909, p. 217), was filed by the president or directors of the corporation, or by any director thereof. From November, 1909, and up to March 9, 1910, there became due from the Missoula Palace Market, for goods, wares, and merchandise sold and delivered to it by respondent, the sum of \$5,347.13. Demand was made by respondent upon Mills for payment. Upon his refusal to pay this action was brought, resulting in a verdict and judgment for respondent. These appeals are from the judgment and an order denying appellant's motion for a new trial. There was substantially no conflict in the evidence; the appellant himself being the principal witness examined by respondent.

[1] 1. The first contention made is that the complaint does not state a cause of ac-

tion, in that it does not allege that the Missoula Palace Market is a corporation having a capital stock. The allegation on this subject is "that at all times herein mentioned the Missoula Palace Market was, has continued to be, and is, a corporation, organized and operated for profit," etc. Amended section 3850, supra, declares: "Every corporation having a capital stock, except banks, trust companies and building and loan associations, shall annually, within twenty days from and after the thirty-first day of December, file, in the office of the clerk of the county in which the principal place of business of such corporation is situated, a report which shall state," etc. The argument of counsel for appellant is that, since this section is penal in character, it is incumbent upon one who seeks to hold directors of a corporation liable upon failure to comply with it to allege and prove affirmatively every fact and circumstance upon which his right to recover depends; nothing being presumed in his favor. The rule invoked is undoubtedly sound. It was recognized by this court in *Wethey v. Kemper*, 17 Mont. 491, 43 Pac. 716. While the liability imposed by the statute is often called penal, it is not so in the sense in which that term is commonly used. It is so only in the sense that the liability was not known at the common law, but is entirely of statutory origin. For this reason the legislative declaration of the rule may not be construed to include cases which do not fall clearly within its terms. 2 Morawetz on Corporations (2d Ed.) § 908. In every case, therefore, the pleading should allege facts and circumstances showing that the liability has attached.

[2] Under section 3833 the corporate powers, business, and property of all corporations must be controlled by not less than 3 nor more than 13 directors, to be elected from among the holders of stock, or, when there is no capital stock, from among the members of such corporation. Among other things, it provides: "Directors of corporations for profit must be holders of stock therein in an amount to be fixed by the by-laws of the corporation, except those named in the articles of incorporation for the first three months, who shall be directors until their successors are elected and qualified. Directors of all other corporations must be members thereof." This section, and also section 3822, recognizes that there may be corporations without a capital stock; yet since, under section 3833, a corporation for profit must have a capital stock and stockholders, the allegation that the Missoula Palace Market was organized and operated for profit clearly and necessarily implies that it is of the class which must, in order to have any legal existence at all, have a capital stock. This renders the complaint sufficient, within the rule stated in *County of Silver Bow v. Davies*, 40 Mont. 418, 107 Pac. 81, viz., that whatever is necessarily implied or reasonably to



be inferred from an allegation in a pleading is to be taken as directly averred. See, also, *Harmon v. Fox*, 31 Mont. 324, 78 Pac. 517.

[3] The sufficiency of the pleading was questioned in the trial court by general demurrer, by motion for judgment on the pleadings, by objection to the introduction of evidence, and by motion for nonsuit. If open to attack at all, it was by special demurrer for indefiniteness, and not by general demurrer or any of the other methods resorted to, each of which raises, so far as the sufficiency of the complaint is assailed, only such questions as arise upon general demurrer.

[4] 2. The next contention is that after the certificate had been issued by the secretary of state no steps whatever were taken by the incorporators to organize the corporation by the adoption of by-laws, the election of directors, the organization of the board, the election of officers, or the observance of other similar requirements prescribed by sections 3829, 3830, 3832, 3833, 3834, 3836, and 3848 of the Revised Codes. Hence it is argued that, though the articles were properly executed and filed and the certificate issued by the secretary of state, the failure to observe these requirements resulted automatically in the death of the corporation by the forfeiture of its franchise at the end of one year, with the result that thereafter it could not transact business as a corporation. Counsel rely upon section 3892, Revised Codes, which provides: "If a corporation does not organize and commence the transaction of its business or the construction of its works within one year from the date of its incorporation, its corporate powers cease. The due incorporation of any company, claiming in good faith to be a corporation under this part, and doing business as such, or its right to exercise corporate powers, shall not be inquired into, collaterally, in any private suit to which such de facto corporation may be a party; but such inquiry may be had at the suit of the state on information of the attorney general." In order to ascertain the scope and meaning of the first provision of this section, it is necessary to notice what steps must be taken to bring a corporation into existence and how a dissolution of it or a forfeiture of its franchise may be wrought. Section 3807 provides: "Private corporations may be formed by the voluntary association of any three or more persons in the manner prescribed in this article." Under section 3825 a corporation may be formed for any of the purposes enumerated in section 3808, (1) by the preparation and filing of the articles with the clerk of the county in which the principal business of the company is to be transacted, and (2) by filing with the secretary of state a copy thereof certified by the clerk. The secretary must then issue to the corporation his certificate that a copy of the articles, containing a statement of the facts

required by section 3825, has been filed in his office. "Thereupon the persons signing the articles and their associates and successors, shall be a body politic and corporate by the name stated in the certificate," etc. Section 3905 declares: "A corporation is dissolved: (1) By the expiration of the time limited by its charter; or (2) by a judgment of dissolution, in the manner provided by the Code of Civil Procedure. \* \* \* (3) By an act of the Legislative Assembly." By section 3898 a sale by the corporation of all of its property ipso facto operates as a dissolution. By reference to section 6944 it will be seen that an action lies in the name of the state to dissolve a corporation in the several instances therein enumerated, among which are: "2. When it has forfeited its privileges and franchises by nonuser;" and, "3. When it has committed or omitted an act which amounts to a surrender of its corporate rights, privileges, and franchises."

Considering all of these provisions together, we think the intention of them is obvious, viz., that when the steps required by section 3825 shall have been observed, the corporation comes into existence; that failure to observe the requirements as to the adoption of by-laws, the subsequent election of directors, the election of officers, and the like (sections 3829 et seq., supra), renders the franchises and privileges subject to forfeiture, but does not ipso facto work a dissolution, nor permit question to be made as to the corporate capacity in a collateral way by any private citizen in a controversy between him and the corporation. In other words, after the corporation has come into existence as provided by section 3825, it continues to exist for the period fixed by the statute (*Gans v. Sweitzer*, 9 Mont. 408, 24 Pac. 18), or until by affirmative action the state has had a forfeiture judicially declared. This is clearly the import of the last provision of section 3892, for it says so in terms the meaning of which cannot be mistaken; and this is in full accord with the theory of the inhibition in section 3810, which provides: "One who assumes an obligation to an ostensible corporation, as such, cannot resist the obligation on the ground that there was in fact no such corporation until the fact has been adjudged in a direct proceeding for the purpose." This must be deemed to be the legislative intention in enacting these several provisions, or else the question whether there is or is not a corporation is left open to investigation in every case in which an ostensible corporation seeks to avoid liability as such, or whenever, as here, it is sought by one or more directors to avoid liability for their omission to observe the requirements of the statute. Therefore, construing the first provision of section 3892 together with the last, in the light of the other provisions referred to, it can be assigned no other effect than to fix a rule by which judicial decision shall be controlled



whenever the question of corporate capacity is properly presented by the state itself.

The Legislature may make such requirements as it deems proper as conditions precedent to the exercise of corporate power. For illustration: It may require the payment of a license tax as a condition precedent to the doing of any business by the corporation. A failure to comply with such a requirement ipso facto works a forfeiture, and the corporation ceases to exist. In such a case a judgment of a court is not necessary to render the forfeiture effective, because the statutory declaration is self-executing. *Kaiser Land & Fruit Co. v. Curry*, 155 Cal. 638, 103 Pac. 341. So, also, it may declare that a failure to comply with a requirement imposed as a condition subsequent shall ipso facto work a forfeiture; such statutes are also self-executing. *Los Angeles Ry. Co. v. Los Angeles*, 152 Cal. 242, 92 Pac. 490, 15 L. R. A. (N. S.) 1269, 125 Am. St. Rep. 54. Ordinarily, however, requirements to be observed subsequent to the creation of a corporation, even though forfeiture for failure to comply with them is declared to be the penalty, are not self-executing. The only acts by which the incorporators notify the public of the creation of a corporation are the records required by section 3825, supra. When these have been completed, the corporation becomes, as to those who deal with it, a living, active, responsible entity. The requirements to be observed for the perfection of the organization, the election of officers, and the like pertain exclusively to its private affairs, of which the public can have no information, and in the absence of statutory provisions to the contrary, or of inquisition at the instance of the state, are to be deemed directory only. 10 Cyc. 223; *Mechem on the Law of Corporations*, § 163. Therefore, while the courts differ as to whether particular enactments, such as the one found in section 3892, supra, should be held self-executing or only directory, they quite generally agree that different results flow from the failure of the directors or officers of the corporation to do those acts which are required as conditions precedent, and those which are required as conditions subsequent. The failure to observe the first results ipso facto in forfeiture; omission with reference to the second merely exposes the corporation to the peril of dissolution upon inquisition by the state. Until the forfeiture has been judicially declared at the instance of the state, the corporate existence continues. *Murphy v. Wheatley*, 102 Md. 501, 63 Atl. 62; *Brown v. Wyandotte & S. E. Ry.*, 68 Ark. 134, 56 S. W. 862; *Briggs v. Canal Co.*, 137 Mass. 71; *Cluthe v. Evansville, etc., Co. (Ind.)* 95 N. E. 543; *Cheraw & Chester Ore Co. v. White*, 14 S. C. 51; *Toledo & Ann Arbor R. Co. v. Johnson*, 49 Mich. 148, 13 N. W. 492; *In re Kings County Elevated R. Co.*, 105 N. Y. 97, 13 N. E. 18; *Railway Co. v. Railway Co. (C. C.)* 103 Fed. 747. The

principle applicable is the same as when a grant of land is made, subject to forfeiture of title upon failure to perform conditions subsequent. The forfeiture can be enforced only at the instance of the grantor himself by judicial action, or, if the grantor is the state, by legislative action also. *Van Wyck v. Knevals*, 106 U. S. 360, 1 Sup. Ct. 336, 27 L. Ed. 201; *Bybee v. O. & C. R. Co.*, 139 U. S. 663, 11 Sup. Ct. 641, 35 L. Ed. 305.

Accordingly, therefore, when the corporation has regularly been brought into existence, it is not deprived of the right to exercise corporate functions by the failure of the directors, designated by the statute to perfect the organization, to issue stock (*Fayetteville, etc., Ry. Co. v. Aberdeen R. Co.*, 142 N. C. 423, 55 S. E. 345, 9 Ann. Cas. 683), or to obtain subscriptions for its stock (*National Bank of Jefferson v. Investment Co.*, 74 Tex. 421, 12 S. W. 101; *Johnson v. Kessler*, 76 Iowa, 411, 41 N. W. 57; *Thornton v. Balcom*, 85 Iowa, 198, 52 N. W. 190; *Chicago, K. & W. R. Co. v. Commissioners of Stafford County*, 36 Kan. 121, 12 Pac. 593), or to elect directors (*Drake v. Herndon*, 122 Ky. 206, 91 S. W. 674; *Middleton v. Aarstraville Min. Co.*, 146 Cal. 219, 79 Pac. 889; *Morrison v. Clark*, 24 Mont. 515, 63 Pac. 98), even though the taking of these various steps is necessary to the proper use of the franchise. It would be a gross injustice to those who propose to deal with an ostensible corporation to make it incumbent upon them first to ascertain whether, in the conduct of its private affairs, its directors have proceeded in strict conformity with all the statutory requirements as to the organization of the board of directors, the election of officers, etc., at the peril of being cast in actions subsequently brought by them to enforce their rights against it, upon a plea by it that it has no capacity to be sued. In our opinion it was the purpose of the Legislature in enacting section 3892, supra, to prohibit inquiry in any private civil action into the question whether the ostensible corporation has a legal existence, further than to ascertain whether the requirements prescribed by section 3825, supra, have been observed. If this action had been brought by the Missoula Palace Market as a corporation to collect an indebtedness due it from the respondent, the latter could not, under section 3810, supra, have made defense on the ground that there is no such corporation. On the other hand, since the corporation has been engaged in business apparently in good faith, it could not, by the same rule, avoid liability, on the ground that its directors had not, in the conduct of its private affairs, observed the forms of law in perfecting the organization, and therefore that it had ceased to exist as a corporation. It could not be heard to say that it is not such in fact, on the ground that the persons who have assumed to act as its directors have omitted to do anything looking to the perfection of its



organization, or to the conduct of its business according to the forms of law.

Counsel have devoted some space in their briefs to a discussion of the question whether the Missoula Palace Market should be regarded as a corporation de jure or de facto. We shall not undertake to determine which it is. The rule denying the right to collateral attack applies to the one as well as to the other. The following cases are sufficient for illustration: *Merges v. Altenbrand*, 45 Mont. 355, 123 Pac. 21; *Miller v. Coal Co.*, 31 W. Va. 836, 8 S. E. 600, 13 Am. St. Rep. 903; *Dean v. Davis*, 51 Cal. 406; *Gunderson v. Illinois T. & S. Bank*, 199 Ill. 422, 65 N. E. 326; *Johnson v. Corser*, 34 Minn. 355, 25 N. W. 799; *Emery v. De Peyster*, 77 App. Div. 65, 78 N. Y. Supp. 1056; *City of Ashland v. Wheeler*, 88 Wis. 607, 60 N. W. 818; 2 *Thompson on Corporations*, § 1124.

Upon the undisputed facts, so far as concerns the public, the business of the corporation has been conducted in the name of the Missoula Palace Market as a corporation. Liabilities have been incurred under this name and discharged in the same way. To an outward observer, or any one dealing with it, it has exhibited all the characteristics of a legal person living the life and pursuing the calling for which it was created, according to the course prescribed by law. The appellant has made it serve his purpose. He must, therefore, be held to bear the penalty which attention to duty on his part as a director would have enabled him to avoid; and this, too, whether he was properly chosen by the board as such director or not. In the section cited from Mr. Thompson, *supra*, it is said: "It follows naturally and logically from what has been said heretofore that persons acting as directors or other corporate officers without right, or where they assume to act rightfully by color of office, are subject to all the personal liability which attaches to the rightful incumbents of such offices, whether by the common, the equitable, or the statute law. De facto directors and officers cannot plead that they are not such de jure in order to escape liability to the corporation or to its creditors for their acts as such, whether such infirmity in their title arises from the fact that they were irregularly elected, or were not legally chosen, or were ineligible at the time they were elected. This principle is illustrated in cases holding directors personally liable for the debts of the corporation, where they fail to file an annual report as required by statute; in such cases it is sufficient to show that the directors or trustees were such de facto at the time the debt was contracted."

[5] 3. It is next contended that amended section 3850 is repugnant to section 11 of article 15 of the Constitution of Montana, in that it imposes liabilities and burdens upon domestic corporations from which foreign corporations are exempt. This section

provides: " \* \* \* No company or corporation formed under the laws of any other country, state or territory, shall have, or be allowed to exercise, or enjoy within this state any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of the state." The plain purpose of this provision is to restrain the Legislature from granting to foreign corporations rights and privileges which cannot be enjoyed by domestic corporations of like character under similar circumstances. *Criswell v. Montana Central Ry. Co.*, 18 Mont. 167, 44 Pac. 525, 33 L. R. A. 554; *State v. Thomas Cruse Savings Bank*, 21 Mont. 50, 52 Pac. 733, 45 L. R. A. 760. Within this limitation the Legislature is free to impose such burdens upon domestic corporations as it sees fit. In the nature of things, exactly the same system of laws cannot be devised for both domestic and foreign corporations. Necessarily, laws intended to apply to foreign corporations must be framed upon the theory that they are created under conditions and limitations over which the state Legislature has no control. So long as it does not in framing laws discriminate against domestic corporations, its acts will not be construed as discriminating, within the inhibition of the Constitution.

[6] It is clear, however, that section 3850 does not discriminate against domestic corporations. Though, in terms, it imposes the duty of filing the annual report upon the corporation, it in fact imposes it upon the officers and directors, and exacts the penalty for nonobservance from them individually, and not from the corporation. In effect, therefore, it is nothing more nor less than a requirement that the officers and directors shall give to the public, from time to time, a statement of the financial affairs of the corporation, at the peril, in case of disobedience, of being held personally for the liabilities which they have permitted the corporation to incur under their management. This is a complete answer to counsel's contention. *First Natl. Bank v. Weidenbeck*, 97 Fed. 896, 38 C. C. A. 131.

[7] 4. It is said that the statute is violative of section 20 of article 3 of the state Constitution, which declares: "Excessive bail shall not be required or excessive fines imposed, or cruel and unusual punishments inflicted." The argument is that since there is no limit to the liability which may be incurred by a failure of the officers and directors to comply with the statute, and since this court has declared the liability penal in its nature (*Gans v. Sweitzer*, *supra*; *Wethey v. Kemper*, *supra*; *Teltig v. Boesman Bros. & Co.*, 12 Mont. 453, 31 Pac. 371; *Elkhorn T. Co. v. Mining Co.*, 16 Mont. 322, 40 Pac. 606; *State Savings Bank v. Johnson*, 18 Mont. 442, 45 Pac. 662, 33 L. R. A. 552, 56 Am. St. Rep. 591), the result is the imposition of excessive fines and the infliction of unusual punish-



ments, within the meaning of the constitutional inhibition. As already pointed out, the statute is not penal in the sense in which that term is generally used. It is so only in the sense that it creates a liability which was not known at the common law, and therefore must be construed strictly. The very purpose of the legal device known as a corporation is to enable natural persons to engage in business enterprises through the agency of others without incurring personal liabilities. The extent of immunity is fixed by the law providing for the creation of the artificial body or person, and such a provision as the one in question, being a part of the law of creation, declares the immunity of those who manage the business, viz., the officers and directors, dependent upon their observance of the conditions imposed by it. They may render their immunity effective by doing this; otherwise they are conclusively presumed to have assented to stand good as sureties for all the liabilities which they have permitted the corporation to assume. In considering the statute in force in 1894 (Comp. Stat. 1887, 5th Div., § 460), the court, in *Fitzgerald v. Weidenbeck* (C. C.) 76 Fed. 695, said: "But, while the statutory liability of trustees has some of the characteristics of a penalty, and attaches upon such kind of default or omission of duty on the part of the trustees as is frequently in like statutes punished by the infliction of a penalty; yet, under this statute, such liability of the trustees is not a penalty, but the withdrawal, as to them, as a consequence of their failure to perform certain duties, of the exemption from personal liability which the statute allowing the incorporation of the company would otherwise afford them, and an allowance to the creditors of the corporation, at the time of such default or during such omission of duty, of the further remedy of having the right to proceed in the collection of their debts directly against the trustees from whom such exemption is withdrawn."

A fine, in the sense in which the term is used in the Constitution, is a penalty exacted by the state for some criminal offense. The provision of the Constitution has no application to the liability involved here.

[8] 5. It is argued that the court erred in admitting in evidence copies of the annual reports filed by appellant for the years 1908 and 1909, the affidavit on attachment in the action brought by him against the corporation in March, 1910, and the written agreement made by him and Watts on December 2, 1907. It is argued that the only purpose for which they were introduced was to show that the Missoula Palace Market was a corporation and doing business as such; whereas its existence had been terminated by operation of law. That it was, in contemplation of law, up to March 10, 1910, a corporation we have already shown. The documents in question tended directly to show,

not only that it was engaged in business as such, but also that appellant and his associates were assuming to act, and were acting, as its directors. It is true that the appellant assumed to control the business as his own; his associates taking no active part in it. At the same time, they were acting ostensibly as directors of the corporation; their purpose evidently being to assist appellant by permitting him to use their names and thus the corporate franchise. The evidence was competent to show this.

[9] 6. The court submitted to the jury an instruction in which it directed them to find for the plaintiff if they believed that the respondent sold and delivered the goods, wares, and merchandise, the value of which is in controversy in this case, to the Missoula Palace Market, for the reasonable value thereof, with interest from the time demand for payment had been made upon the appellant. It is argued that the court erred in withdrawing from the jury the question whether the Missoula Palace Market was a corporation. As we view the evidence in the record, however, it presents no disputed question of fact requiring a finding by the jury. Whether the corporation was in existence *de jure* or *de facto* was a question for the court to determine. The court should have directed a verdict for the plaintiff. There was evidence which lent some support to the inference that, as between the appellant and Watts, the latter was to be the owner of the business upon the payment of the \$3,000 note executed by him to the appellant under the contract of December 12, 1907. This, however, was a mere private, secret agreement between them. As to those dealings with Watts, there had been no outward change, and we think the court properly treated the evidence in this behalf as immaterial.

The judgment and order are affirmed.  
Affirmed.

SANNER, J., concurs. HOLLOWAY, J. did not hear the argument, and takes no part in the foregoing decision.

(47 Mont. 401)

#### CALLAHAN v. CHICAGO, B. & Q. R. CO.

(Supreme Court of Montana. May 17, 1913.)

1. EVIDENCE (§ 128½, New, vol. 17 Key-No. Series) — RES GESTÆ — DETERMINATION OF ADMISSIBILITY — QUESTIONS FOR COURT.

Under Rev. Codes, § 7867, providing that declarations or acts forming part of a transaction, which in itself is in dispute, are admissible in evidence as part thereof, which declares the exception in favor of the reception of hearsay evidence which is part of the *res gestæ*, it is the province of the trial judge to determine in limine the admissibility of such declarations and leave the question of their weight to the jury.

2. APPEAL AND ERROR (§ 970\*) — REVIEW — DISCRETION OF COURT.

As the trial court must, in the first instance, determine whether evidence offered is

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



admissible as part of the *res gestæ*, the question of the admissibility of such evidence must be left largely to the sound discretion of the court, subject to review only in cases of abuse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3849-3851; Dec. Dig. § 970.\*]

### 3. EVIDENCE (§ 123\*) — ADMISSIBILITY — RES GESTÆ.

Under Rev. Codes, § 7867, providing that, where the declarations or acts form a part of the transaction itself in dispute, evidence of such declarations are admissible, declarations to be admissible as part of the *res gestæ* must be made while the excitement producing the accident still dominates the mind, although they need not be strictly contemporaneous; hence, in an action by one injured by the sudden stopping of part of the cars of a train which broke in two, neither evidence of statements by the conductor, some 30 or 40 minutes after the accident, as to the cause thereof, nor of statements by the trainmaster, who was not present at the time of the accident, as to the reason therefor, are admissible as *res gestæ*.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 351-368; Dec. Dig. § 123.\*]

### 4. EVIDENCE (§ 244\*) — DECLARATIONS — ADMISSIBILITY.

In an action by one injured by the sudden stopping of part of the cars of a train which broke in two, evidence of statements by the conductor and trainmaster as to the cause of the accident is admissible, where they were required by the railroad company to ascertain and report the cause of the accident, for such declarations were within the scope of their duty, and being so are declarations of the principal.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916-936; Dec. Dig. § 244.\*]

### 5. MASTER AND SERVANT (§ 265\*)—INJURIES TO SERVANT—ACTIONS—PRESUMPTIONS.

In an action by a railroad employé, injured by the sudden stopping of a car in which he was riding, which broke loose from the main train, a showing of the happening of the accident, and that it was caused by defective couplings, casts upon the master the burden of establishing lack of negligence, and in the absence of evidence showing lack of negligence negligence may be presumed, under the doctrine of *res ipsa loquitur*.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.\*]

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

Action by Matthew Callahan against the Chicago, Burlington & Quincy Railroad Company, a corporation. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Enterline & La Fleiche, of Sheridan, Wyo., and Walsh & Nolan, of Helena (T. J. Walsh, of Helena, of counsel), for appellant. O. F. Goddard and E. T. Clark, both of Billings, and Gunn, Rasch & Hall, of Helena, for respondent.

BRANTLY, C. J. Action by the plaintiff for damages for personal injuries suffered by him during the course of his employment by the defendant. The accident occurred on September 20, 1909. The defendant owned and was operating a line of railway extend-

ing through the states of South Dakota, Wyoming, and into and through portions of the state of Montana, and was engaged as a common carrier in interstate commerce. The plaintiff was in its employ as extra gang foreman, having under his charge a crew of laborers engaged in making repairs upon its tracks. He and the crew were required to occupy and live in outfit cars, so that they could be readily moved from place to place as the exigencies of their service required. One of these cars was occupied by plaintiff and his wife. It was fitted up with a stove, bedding, and other household furniture necessary to make it habitable. On the day of the accident the cars were being transferred from Dewey, S. D., to New Castle, Wyo., so that the crew could effect repairs near the latter place. They were attached to the rear end of a freight train consisting of 51 cars. At a point about seven miles east of Dewey, while ascending a grade, the train parted, with the result that by the sudden stoppage occasioned by the automatic setting of the airbrakes the plaintiff was thrown violently back and against a box in the rear end of the car, and thereby suffered the injuries complained of. It is alleged that the defendant was negligent in placing in the train a car equipped with a coupler which was unsafe, defective, and insecure, in that the part thereof known as the lock block had become worn and loose, a fact which was known to the defendant, or by the exercise of ordinary diligence on its part ought to have been known to it, but was not known to the plaintiff. The complaint then alleges:

"Sixth. That on the said 20th day of September, 1909, while said train was being moved by the defendant along and upon its said track and railroad from Dewey, S. D., to New Castle, Wyo., at a rate of speed of about 20 miles per hour, the said coupler upon said car in said train, by reason of its being defective, worn, and insecure, and because the defendant carelessly and negligently failed and neglected to keep the same in good repair and in a safe and sound condition, and because of the negligent and careless operation of said train by said defendant, loosened and came apart, causing the said train instantly to part, thereby breaking the air hose of said train which controlled the brakes upon the cars. That the parting of said train and the breaking and separating of said air hose caused the brakes upon the cars to which said outfit car was still attached, including the brakes on said outfit car, to become suddenly and violently set, thereby causing said train and cars last mentioned violently and suddenly to stop, whereby the said plaintiff was thrown with great force and violence backward a distance of about 12 feet along and in the interior of said car, wherein he was then riding, against and upon a box in said car."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



The answer denies all of the allegations of the complaint, except that it admits that at the time of the accident the defendant was engaged in interstate commerce. It alleges certain matters as affirmative defenses, upon which there was issue by reply. The issues presented on this branch of the case do not require notice. At the close of plaintiff's case the court sustained a motion for nonsuit and directed judgment for the defendant. This appeal is from the judgment. The two questions presented for decision are whether the exclusion of certain evidence was error, and whether the evidence was sufficient to take the case to the jury.

[1-3] 1. During his examination in chief, counsel for plaintiff inquired of him whether he was acquainted with the duties of a conductor on the defendant's road. He was not permitted to answer. Counsel then offered to have him testify, in substance, that when such an accident as the one in question occurs it is the duty of a conductor to ascertain its cause, to restore the connection, if possible, and proceed with the train, to ascertain if any person has been injured, and, if so, also the nature and extent of the injury, and to make full report of the facts to his superior officers; that when the train parted the conductor at once proceeded forward from the caboose, where he then was, to ascertain the cause; that in passing the car in which plaintiff and his wife were he ascertained that plaintiff had been injured; that he then said that he was going forward to inquire the cause of the accident; that, the connection being restored, the train proceeded immediately to New Castle, arriving there 30 or 40 minutes later; that the conductor then returned to the plaintiff's car and made inquiry as to the extent of the injury, in order to make his report of it; and that during the course of the inquiry, in response to a question by plaintiff as to the cause of the accident, he said that the train had parted "because of a defective coupler—a worn lock block." An offer was also made to show by this witness that a similar duty to investigate and make report is required of a roadmaster; that when the train arrived at New Castle defendant's roadmaster came to plaintiff's car and, after inquiry as to the nature and extent of the injury, wrote out his report; and that while so doing he stated to plaintiff that the parting of the train was caused by a "defective coupling—a worn lock block." This evidence was excluded, on the ground that the declarations were not part of the *res gestæ*, and were therefore incompetent.

The statute provides that where "the declaration, act or omission forms part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission is evidence, as part of the transaction." Rev. Codes, § 7867. This provision was not intended to embody the statement of a rule by which to determine

the competency of such declarations as those in question, but to be a mere direction that they must be deemed competent when they are so connected with the main transaction as to form a part of it. It states one of the exceptions to the general rule recognized by all the courts in common-law jurisdictions which requires the exclusion of hearsay statements, viz., that when declarations by the participant in or an observer of the litigated act are so nearly connected with it in point of time that they may be regarded as a spontaneous, necessary incident, explaining and characterizing it, they may be proved as a part of it without calling the person who made it. The principle upon which the exception is founded is that the declarations were made while the mind of the speaker was laboring under the excitement aroused by the incident, before there was time to reflect and fabricate, and hence the solemnity of the oath is not necessary to give it probative value. Such statements need not be strictly contemporaneous with the main incident. They may be in the form of narrative; yet if the circumstances show they were made while the excitement produced by the incident still dominated the mind and was the producing cause they are nevertheless part of the main incident and competent. On the contrary, if they are in fact mere narrative, they are not competent. In *State v. McDaniel*, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661, the court said: "If the declarations are a mere narration of a past occurrence, they are not admissible as *res gestæ*. \* \* \* When the declarations are not precisely concurrent with the transaction, a delicate and complex question is presented to the trial judge in determining their admissibility, and each case must be decided upon its own circumstances. In the nature of the case there can be no hard and fast rule as to the precise time near an occurrence within which declarations explanatory thereof must be made, in order to be admissible. The general rule is that the declarations must be substantially contemporaneous with the litigated transaction and be the instinctive, spontaneous utterances of mind while under the active, immediate influences of the transaction; the circumstances precluding the idea that the utterances are the result of reflection or design to make false or self-serving declarations. \* \* \* Questions of this kind must be very largely left to the sound judicial discretion of the trial judge, who is compelled to view all the circumstances in reaching his conclusion, and this court will not reverse his ruling, unless it clearly appears from undisputed circumstances in evidence that the testimony ought to have been admitted or rejected, as the case may be." The tendency of recent decisions is to relax the rule of admissibility rather than to restrict it, and to consider the weight to which the evidence is entitled.



*Jack v. Mutual Reserve Fund Ass'n*, 113 Fed. 49, 51 C. C. A. 36, and cases cited. Accordingly, this court, in *State v. Tighe*, 27 Mont. 339, 71 Pac. 3, held that, as in case of confessions, it is the province of the trial judge to determine in limine the admissibility of declarations and leave the question of their weight to the jury, in view of the circumstances under which they were made. This must necessarily be the case whenever a question of fact arises upon conflicting evidence as to whether they are part of the *res gestæ*, or depends upon contradictory inferences, either of which may fairly be drawn from uncontradicted evidence; and since this is so the solution of the question of the admissibility of such evidence must in every case be left largely to the sound legal discretion of the trial court, subject to review only in cases of manifest abuse. 3 *Wigmore on Evidence*, § 1750; *State v. McDaniel?*; *Walters v. Spokane International R. Co.*, 58 Wash. 293, 108 Pac. 593.

Even under this liberal rule, however, we do not think the declarations admissible on the theory that they were prompted by the excitement produced by the accident itself. The conductor did not return to plaintiff's car until the train had reached New Castle, some half hour or more after the accident. Apparently he would not have spoken on the subject at all, if he had not been questioned by the plaintiff. His statement assumed the form of narrative, rather than that of a spontaneous utterance as a necessary incident of the accident itself, explaining and characterizing it. The roadmaster did not witness the accident, but learned of it after the train had reached New Castle. His statement, therefore, could not have been due to any excitement aroused by his witnessing the accident or his presence when it occurred.

[4] But we think the evidence competent upon another theory, viz., as admissions by the agents of the defendant within the scope of their employment, while engaged in the discharge of their duties. Whether it was in fact among the duties of these employes to ascertain the cause of the accident and the nature and extent of any injury caused by it and make report to their superior officers, we need not stop to inquire. The plaintiff offered to show that this was so. If such was the case, the statements were made while these employes were in the discharge of their duties. Now, it is a well-settled rule that when an agent is vested with authority to perform any act for his principal his words—his verbal acts—while engaged in that business, are a part of the *res gestæ* of that business. They are therefore the words and acts of the principal, and may be proved against him. *Hogan v. Kelly*, 29 Mont. 485, 75 Pac. 81; *Hupfer v. National Distilling Co.*, 119 Wis. 417, 96 N. W. 809; *Hyvonen v. Hector Iron Co.*, 103 Minn. 331, 115 N. W. 167, 123

Am. St. Rep. 332; *Turner v. Turner*, 123 Ga. 5, 50 S. E. 969, 107 Am. St. Rep. 76; *Lynchburg Telephone Co. v. Booker*, 103 Va. 594, 50 S. E. 148; *Baker v. Westmoreland Co.*, 157 Pa. 593, 27 Atl. 789; *Anderson v. Great Northern Ry. Co.*, 15 Idaho, 513, 99 Pac. 91; *Leach v. Oregon S. L. R. Co.*, 29 Utah, 285, 81 Pac. 90, 110 Am. St. Rep. 708; *Redmon v. Metropolitan St. Ry. Co.*, 185 Mo. 1, 84 S. W. 26, 105 Am. St. Rep. 558; *McNicholas v. N. E. Telephone & Telegraph Co.*, 196 Mass. 138, 81 N. E. 889. For the time being, the agent is the alter ego of the principal; and while he is not employed to talk about the business of his principal, or to admit away the rights of the latter, declarations and admissions by him touching the business in hand, *dum ferveat opus*, are those of the principal. "This rule is especially applicable to corporations, which can speak and act only through agents. Justice to the rights of others requires that acts of such intangible entities must be significant, and the basis for conduct by others, as in the case of individuals. When, therefore, a corporation selects an individual to do an act in its behalf, the individual, in doing that act—I e., within the scope of his authority—is, in legal effect, the corporation." *Hupfer v. National Distilling Co.*, supra. If, however, the appointed work has been completed, any statement made by the agent with reference to it is, under all the authorities (2 *Chamberlayne's Law of Evidence*, § 1346), a mere narrative of a past transaction, and is not admissible under the *res gestæ* rule. It is, as to the principal, mere hearsay.

Counsel for defendant cite and rely on the cases of *Ryan v. Gilmer*, 2 Mont. 517, 25 Am. Rep. 744, and *Poindexter & Orr L. S. Co. v. Oregon Short L. R. Co.*, 33 Mont. 338, 83 Pac. 886. In the latter of these cases the person whose declaration was held incompetent was not the agent of the corporation to do the act with reference to which the declaration in question was made. With reference to the former, it may be noted that the admission held incompetent was made by the driver of a vehicle, immediately after it had been overturned, the accident resulting in injury to a passenger, and while the driver was still in charge of it. Under the more liberal rule observed by many of the courts, the evidence was competent. The case serves only to illustrate the difficulty the courts have experienced in ascertaining and declaring any definite rule by which to determine whether the admission under consideration was or was not made while the agent was acting within the scope of his authority. It is not in point because, as we have shown, the declarations in question here were made while the conductor and roadmaster were in the actual discharge of the duties delegated to them. The exclusion of the evidence was error.

2. Counsel contend that, inasmuch as the parting of a train is not an ordinary occur-



rence in the operation of railroads, the fact that such an accident occurred in this instance, there being no explanation of the cause of it, was sufficient to raise a presumption of negligence by the defendant or some of its servants, and therefore that a case was made for the jury without regard to the excluded evidence. They insist upon two propositions, either of which, if accepted as sound, they say, will require a reversal of the judgment in this case, viz.: (1) That plaintiff for the time being occupied the position of a passenger; hence the presumption of negligence arising from the happening of the accident made out a *prima facie* case; (2) that the reason for indulging this presumption in favor of a passenger and not in favor of a servant is that an accident may be due as well to the negligence of a fellow servant as to the lapse of duty by the carrier with reference to some nondelegable duty; that this action was brought under the federal Employer's Liability Act (25 Stat. at Large, 65, 1909 Supp. Fed. Stat. Ann. p. 584 [U. S. Comp. St. Supp. 1911, p. 1322]), which cuts off the defense of negligence by a fellow servant; and that, since this is so, logically the same presumption must be indulged in favor of the servant as in favor of the passenger. We shall not undertake to determine at this time whether these contentions are maintainable. We think both of them involve questions which are at least debatable. Upon the presumption that the plaintiff proved his case according to his offer, however, we think he was entitled to go to the jury without regard to the theory advanced by counsel in either of these contentions.

[8] For present purposes we shall assume that it is settled law that in an action by a servant against his employer for an injury caused by the negligence of the latter proof of the accident alone does not furnish a basis for an inference of culpable negligence, but that the servant must go further and show by direct proof, or by circumstances, that his injury sprang wholly or partly from some omission of duty by his employer. If he fails to do this, he has failed to make a case for the jury. If, however, in proving the injury, the facts and circumstances disclosed tend to show that the instrumentality which caused the injury was exclusively in the control of the employer, and the injury occurred by reason of some defect therein, the existence of which is attributable to a negligent omission of duty by the employer rather than to any other cause, he has made a case justifying a presumption of culpable negligence. The burden then devolves upon the employer to rebut the presumption by explaining the circumstances so as to render their existence consistent with the exercise of due care. The general rule applicable to this class of cases, viz., that the plaintiff must prove negligence, is qualified by way of

exception by what is termed the doctrine of *res ipsa loquitur*, which means merely that the circumstances under which the accident occurred charge the defendant with culpable negligence. In *Hardesty v. Largey Lumber Co.*, 34 Mont. 151, 86 Pac. 29, the rule is stated thus: "Of course, the general rule of law is that negligence is not inferable from the mere occurrence of the accident; but to this rule is the well-understood exception that, where the thing which causes the injury is shown to be under the management and control of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have such management and control use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from the want of ordinary care by the defendant. 1 *Shearman & Redfield on Negligence*, § 59. Under such circumstances proof of the happening of the event raises a presumption of the defendant's negligence, and casts upon the defendant the burden of showing that ordinary care was exercised. This rule has been invoked in numerous similar cases." The train upon which plaintiff was riding was under the control and management of the defendant. The defendant knew, or ought to have known, by whom it was made up, how it was made up, how it was equipped, and what degree of care had been exercised in making it safe to run. The duty to see that it was properly equipped was a primary, nondelegable duty of defendant. It separated because of a "defective coupler or worn lock block." Ordinarily, when a train is equipped with couplers which are sound and suitable for use, it does not part. Therefore the fact that one of those in use at the time of the accident was defective and worn to such an extent as to permit the train to part points to neglect by defendant to perform a primary duty, rather than to any other cause, and properly calls for explanation. In the absence of such explanation, the jury would be justified in holding it responsible for the accident and the injury resulting from it. *Griffin v. Boston & Albany R. Co.*, 148 Mass. 143, 19 N. E. 106, 1 L. R. A. 698, 12 Am. St. Rep. 526, and cases cited.

The judgment is reversed and the cause remanded for a new trial.

Reversed and remanded.

HOLLOWAY and SANNER, JJ., concur.

(48 Mont. 17)

BROWN v. ERB-HARPER-RIGNEY  
CO. et al.

(Supreme Court of Montana, June 28, 1913.)  
CHATTEL MORTGAGES (§ 281\*)—FORECLOSURE—  
RECEIVERS.

Appointment of a receiver, in an action to foreclose a mortgage on a stock of goods, is prop-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



erly denied; it appearing the property is being devoted to the purposes for which it was set apart by the parties, and that the creditors are not suffering or liable to suffer any substantial injury before final decree.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 529; Dec. Dig. § 281.\*]

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

Action by C. F. Brown, trustee, against the Erb-Harper-Rigney Company and others. From an adverse order, plaintiff appeals. Affirmed.

F. B. Reynolds, of Billings, for appellant. C. L. Harris and O. F. Goddard, both of Billings, for respondents.

BRANTLY, C. J. Action to foreclose a chattel mortgage. This appeal is from an order of the district court refusing to appoint a receiver pendente lite. On February 3, 1912, the defendant Erb-Harper-Rigney Company, a mercantile corporation doing business at Laurel, Yellowstone county, being financially embarrassed, made an assignment of all its property, real and personal, to George F. Clawson for the benefit of its creditors. Clawson immediately qualified as such assignee and entered upon the discharge of his duties. On June 8, 1912, under an order of the district court of Yellowstone county, the creditors of the corporation consenting thereto, the assignees sold and conveyed all the property to the defendant Erb, a stockholder and the manager of the corporation. The consideration of the sale was the assumption by Erb of the indebtedness of the corporation, amounting in all to \$24,450.87. Thereupon Erb executed and delivered to the plaintiff, as trustee for the benefit of the creditors and to secure the indebtedness due them, a mortgage upon certain real estate, including all owned by the corporation at the date of the assignment, and certain other belonging to Erb in his own right. He also, and for the same purpose, executed a chattel mortgage upon the stock of merchandise theretofore owned by the corporation, consisting of hardware, farming implements, etc., together with the bills receivable and accounts due it from its customers. The real estate mortgage, it seems, was to run for the period of two years, though this fact does not distinctly appear. The chattel mortgage contained this provision: "That said mortgagor shall remain in possession of and sell and dispose of the above-described goods and chattels in the regular course of business for the benefit of the mortgagee and that an accounting shall be made by the mortgagor to said trustee on the first of each and every month during the time this mortgage is in force, and the proceeds of the sales, after deducting the expenses of the business not to exceed \$150 per month together with taxes, insurance and the interest on a real estate mortgage held

by E. Vaughn, of Laurel, Montana, for \$2,400, shall be turned over to said trustee by said mortgagor and shall be held by said trustee and shall be applied on said indebtedness by said trustee whenever the sums in his hands shall amount to 10 per cent. of the total indebtedness." It describes the debts secured as evidenced in part by promissory notes, and in part by open accounts due and payable at different dates. It further provides: "In case of default in the payment of the aforesaid principal sums of money, or any part thereof, then it shall be optional with said party of the second part, the mortgagee, and obligatory on him at the request of a majority (in number and amount) of the creditors to consider the whole of said principle sums immediately due and payable, and immediately to enter in and sell all and singular the premises hereby granted, and to sell and dispose of the same and all benefit and equity of redemption of the said mortgagor according to law. \* \* \* It is further agreed by the parties hereto that at the expiration of this mortgage it shall be renewed for the period of one year from the date of expiration."

Upon the execution of the mortgages the defendant Erb took possession of the property and proceeded to sell the merchandise in the regular course of business. He continued to do so until June 22, 1912. On this date he sold to Fred. Darrow 51 per cent. of his equity under the mortgages, and to defendant Rigney 33 per cent., who, having assumed to discharge the debts secured thereby in proportion to the amounts of their respective shares, thereafter conducted the business under the firm name of Darrow & Erb. This arrangement was continued until October 1st, when Rigney sold his interest to defendant Steele, who assumed Rigney's obligation. On January 22, 1913, Erb repurchased the interest theretofore sold to Darrow, and thereafter, on February 19th, sold his entire interest to defendant Harris. This action was brought on April 11th. At that time Steele and Harris owned and were in possession of the entire property subject to the mortgage.

The complaint, after making a statement substantially as above, alleges that from and after the transfer to Harris on February 19th, Erb ceased to have any further interest in the business; that he has not been in the possession of the property, and has not rendered any accounting to plaintiff; that he has not paid the debts secured by the mortgage, or any part of them, except the sum of \$1,517.72; that the balance with interest is wholly due and unpaid, and that by virtue of the option contained in the mortgage, and upon request by a majority of the creditors, to whom is due the greater portion of the indebtedness, the plaintiff has elected to declare the whole thereof immediately due and payable. The prayer is for the usual

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



decree in foreclosure, and for costs, including attorney's fees.

The material allegations for the petition for the appointment of the receiver are substantially the following: That it was the understanding by the creditors, and it was part of the arrangement whereby the mortgage was given, that the defendant Erb was to give the business his personal attention and supervision; that the obligation assumed by him was personal to the creditors; that he has not continued in possession of the property as in the mortgage provided, but has sold it in bulk, and has ceased to have any interest therein or in the business; that the property has gone into the possession of defendants Steele and Harris; that through the sales made by him, Erb received a valuable consideration, for which he has failed to account to plaintiff; that Steele is a resident of the state of Colorado; that neither he nor Harris is personally conducting said business; that these defendants are selling said property in the usual course of business, and will continue to do so unless a receiver is appointed; that by reason of said sales the mortgaged property will be materially injured; and that it is therefore necessary for the protection of the creditors that a receiver be appointed pending the action.

The hearing was had after notice, upon affidavits and oral testimony. While there was some controversy upon the question whether the dealings had by Erb with Darrow, Steele, Rigney, and Harris were consented to by the plaintiff, the evidence shows clearly that Erb was never in the active conduct of the business, but that it was conducted by Rigney prior to the date of the assignment, and that it has been conducted by him since the execution of the mortgage, and this with full knowledge by the plaintiff and the creditors. Since Erb took charge under the mortgage, Rigney has been making sales in the usual way. Prior to Erb's sale to Steele and Harris, Rigney kept strict account of all transactions. He deposited the proceeds of sales to the credit of the plaintiff and Erb in strict accordance with their instructions, and they have been devoted by the plaintiff to the discharge pro tanto of the claims of the creditors. So, also, the evidence discloses that he was in charge for Harris and Steele, and was pursuing this course at the time this action was commenced. There has been no diversion or misappropriation of any of the property or proceeds of sale. The sales of the different interests by Erb were in fact all subject to the rights of plaintiff and the creditors, and were understood to be so both by himself and the plaintiff; the purpose in each case being to substitute the purchasers in Erb's place to carry out the terms of the mortgage contract. In none of the transactions did Erb receive any money, but merely exchanged his equity in the property for equities in

real estate which was also subject to incumbrances. In short, Erb and the other defendants have faithfully observed all the terms of the mortgage, except that Erb has not been at all times actually in physical possession of the mortgaged property and in personal management of the business. It is true that the net result to the creditors has not been large, only one small dividend having been paid to them during the year of 1912. This fact is explained by the statement of Rigney that when the mortgage was executed and he resumed charge under Erb, the season for the sale of farm implements for the year 1912 had passed, and hence that sales were limited exclusively to other portions of the stock. He expressed the opinion, however, that if the business should be allowed to go on without interference, the sales for the season of 1913 would produce funds enough to make substantial payment to the creditors. It will be observed that it is not alleged, either in the complaint or in the petition, that Erb is not entirely solvent and able to meet all the demands of the creditors, or that the real estate held under the other mortgages is not amply sufficient to secure them. The evidence does not disclose what the facts in this connection are. The breach of the contract alleged as the ground upon which foreclosure is sought is that the obligation assumed thereunder was personal to the creditors, and that Erb has failed to continue in possession of the property and give the business his personal supervision. Assuming that the plaintiff may, on this ground, maintain his action for foreclosure prior to the maturity of the mortgage, do the facts disclosed warrant the appointment of the receiver? The statute itself (Rev. Codes, § 6698) in our opinion answers this inquiry in the negative. It requires a showing that the property is in danger of being lost, removed, or materially injured. It will be noticed that the ground of the application is that by reason of sales being made by defendants, the mortgaged property may be materially injured unless a receiver is appointed. This statement is a mere bald conclusion, and is without support in the facts proved. The mortgage itself provides for the sales just as they are being made. It was well known and understood at the time the mortgage was executed that the stock was not of sufficient value to secure all the indebtedness. The very purpose of it was to have the business continue, and thus to preserve the value of the security. While the defendant Erb is not personally in charge of the business, sales are being made, and the proceeds are being devoted to the discharge of the claims of the creditors in strict conformity with the terms of the mortgage. Hence the creditors are not suffering any injury, nor is their security being impaired further than as a consequence of the depletion of the stock, a result



which must necessarily follow from an observance of the terms of the mortgage; for it is provided therein that Erb shall sell the property and account for the proceeds. If this provision is observed, the creditors cannot suffer injury.

The remedy of a receivership, drastic and violent as it is in effect, because it deprives the defendant in limine of the possession of his property, should not be allowed in any case except upon a statement of facts showing that it is necessary to prevent injury to the rights of the plaintiff pending the action. "The power to appoint a receiver is to be exercised sparingly and not as of course. A strong showing should be made, and even then the authority must be exercised with conservation and caution." *Hickey v. Parrot S. & C. Co.*, 25 Mont. 164, 64 Pac. 330. "The appointment of a receiver is an extraordinary remedy, to be resorted to only in cases of emergency." *Benepe-Owenhouse Co. v. Scheidegger*, 32 Mont. 424, 80 Pac. 1024. The exercise of the power is lodged in the discretion of the court, but the discretion is not arbitrary. It must be exercised in conformity with the rule that a receiver is necessary as an auxiliary to the attainment of the ends of justice, by the preservation of the property in controversy pending an adjustment of the ultimate rights of the parties. *High on Receivers* (3d Ed.) § 19.

Since it appears that the property involved here is being devoted to the purposes for which it was set apart by the parties, and that the creditors are not suffering, nor are liable to suffer, any substantial injury before final decree, we do not think the district court abused its discretion in denying the application. The appointment of a receiver would serve no useful purpose, but would tend rather to impair the value of the security by subjecting it to the expense which is always a necessary incident of a receivership.

The order is affirmed.  
Affirmed.

HOLLOWAY and SANNER, JJ., concur.

(47 Mont. 238)

# COOK-REYNOLDS CO. v. CHIPMAN.

(Supreme Court of Montana. May 2, 1913.)

## 1. VENDOR AND PURCHASER (§ 335\*) — CONTRACTS—DEFAULTING PURCHASER—RETURN OF MONEYS PAID.

Though the stipulation in a contract of sale of real estate that the purchaser, if defaulting, shall forfeit all payments made by him, and the vendor shall retain them and improvements in liquidation of all damages, is invalid because prohibited by Rev. Codes, § 5054, the defaulting purchaser is not entitled to a return of the money paid, in the absence of an equitable showing.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 981-983; Dec. Dig. § 335.\*]

## 2. VENDOR AND PURCHASER (§ 78\*) — CONTRACTS—TIME AS OF THE ESSENCE—DEFAULT OF PURCHASER—EFFECT.

Where the defaulting purchaser, in a contract for the sale of real estate, stipulating for partial payments, pleaded his inability to perform the contract, the rights of the parties must be determined as if time had been made of the essence.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 121-125; Dec. Dig. § 78.\*]

## 3. VENDOR AND PURCHASER (§ 93\*) — CONTRACTS—VALIDITY.

Where a vendor retains the legal title, Rev. Codes, §§ 5715, 5800, providing that contracts for the forfeiture of property subject to a lien in satisfaction of the obligation secured thereby are void, and that one who sells real estate has a vendor's lien thereon for the unpaid price, do not apply; and, since there is no lien, there can be no basis for denying a forfeiture of the contract of sale on the ground of the purchaser's default.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 153, 154; Dec. Dig. § 93.\*]

## 4. VENDOR AND PURCHASER (§ 93\*) — CONTRACTS—DEFAULT OF PURCHASER—RIGHTS OF VENDOR.

In an action by a vendor to cancel the contract of sale, stipulating for payment in installments, on the ground of the purchaser's breach, the remedies afforded by the contract will be enforced unless they impinge on some rule of equity or law, and the rule that one who comes into equity asking its aid to rescind a contract must return to the adverse party the money paid in excess of the amount, sufficient to compensate him for the damages, does not apply.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 153, 154; Dec. Dig. § 93.\*]

## 5. VENDOR AND PURCHASER (§ 93\*) — CONTRACTS—BREACH OF PURCHASER—RIGHTS OF PARTIES.

Rev. Codes, § 6039, providing that where by the terms of an obligation a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, because of his failure to comply with the terms, he may be relieved therefrom on making full compensation to the adverse party, except in case of a grossly negligent, willful, or fraudulent breach of duty, applies where a purchaser in a contract of sale of real estate, stipulating for payment in installments, fails to make all the payments specified; and, where the actual damages sustained by the vendor are less in amount than the money paid by the purchaser, the vendor suing to cancel the contract cannot retain the excess unless the purchaser was grossly negligent, or was guilty of willfulness or fraudulent conduct.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 153, 154; Dec. Dig. § 93.\*]

## 6. APPEAL AND ERROR (§ 1011\*)—FINDINGS—CONCLUSIVENESS.

A finding on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

## 7. VENDOR AND PURCHASER (§ 104\*) — CONTRACTS—DEFAULTING PURCHASER—RIGHTS OF PARTIES.

Where, in a suit by a vendor for the cancellation of a contract of sale and the forfeiture of the partial payments made by the purchaser, the purchaser in his answer alleged that he had offered to restore the property to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the vendor on condition that he return the partial payments made, less a reasonable allowance for the use of the property during the time the purchaser was in possession, that the purchaser was entitled to withhold possession until the partial payments were returned, less a reasonable sum for the use of the property, and attempted to allege facts constituting an estoppel, and pleaded a counterclaim for the return of partial payments and taxes, and prayed for such relief as might be equitable, the purchaser, establishing facts estopping the vendor from relying on a forfeiture of the partial payments, was entitled to a return of the partial payments, less damages sustained by the vendor, and less compensation for the use of the property by the purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 178-182; Dec. Dig. § 104.\*]

**8. VENDOR AND PURCHASER (§ 104\*) — CONTRACTS—BREACH BY PURCHASER—EVIDENCE.**

Evidence held to show that a purchaser breaching the contract of sale, stipulating for partial payments, was not guilty of a grossly negligent, willful, or fraudulent breach within Rev. Codes, § 6039, authorizing a party incurring a forfeiture because of his failure to comply with the contract to be relieved therefrom on making full compensation, except in case of a grossly negligent, willful, or fraudulent breach, and he was entitled to relief.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 178-182; Dec. Dig. § 104.\*]

**9. VENDOR AND PURCHASER (§ 104\*)—BREACH OF CONTRACT BY PURCHASER—DAMAGES—SPECIAL DAMAGES.**

A claim by a vendor to damages resulting from the purchaser's breach of contract, based on the fact that the vendor was obliged to maintain an action to obtain possession of the premises after the breach, is a claim for special damages, and must be supported by specific allegations in the pleadings, to be recoverable.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 178-182; Dec. Dig. § 104.\*]

**10. VENDOR AND PURCHASER (§ 105\*) — BREACH OF CONTRACT BY PURCHASER—LIABILITY.**

A purchaser, who breaches the contract of sale, stipulating for partial payments, and declaring that a failure to make any payments shall operate to make all the payments due, and declaring that the vendor at his option may declare the contract forfeited, in which event the purchaser shall forfeit payments made by him, may not refuse to surrender possession of the premises on demand of the vendor, but in adjusting the equities between the parties, the vendor is entitled to the full value of the use of the property by the purchaser up to the time of restoration thereof to the vendor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 183-187; Dec. Dig. § 105.\*]

Appeal from District Court, Fergus County; E. K. Cheadle, Judge.

Action by the Cook-Reynolds Company against L. H. Chipman. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Edward C. Russel and J. C. Huntoon, both of Lewistown, for appellant. Belden & De Kalb, of Lewistown, for respondent.

SANNER, J. On June 17, 1910, the parties to this action entered into a written agreement for the sale by respondent, plaintiff below, and the purchase by appellant, defendant below, of certain real and personal property situate in Fergus county, Mont. The purchase price as fixed by the agreement was \$29,605, payable, with interest, as follows: \$5,000 at the execution of the contract; \$5,819 on or before February 1, 1911; \$9,786 on or before December 1, 1911; \$1,000 on or before December 1, 1912; \$1,000 on or before December 1, 1913; and \$7,000 on or before December 1, 1914. It was further provided in the agreement that the purchaser should pay all taxes thereafter accruing; that when the purchaser should make the payment of \$9,786 due December 1, 1911, he should be entitled to a warranty deed of the lands, giving back to the seller a mortgage or mortgages to secure the balance of the unpaid purchase price; that "in case of the failure of the said purchaser to make either of the payments or interest thereon, or any part thereof, or to perform any of the covenants on his part hereby made and entered into, then the whole of said payments and interest shall become immediately due and payable and this contract shall, at the option of the seller, be forfeited and determined, \* \* \* and the said purchaser shall forfeit all payments made by him on this contract, and all his right, title and interest in all buildings, fences or other improvements whatsoever, and such payments and improvements shall be retained by the said seller in full satisfaction and in liquidation of all damages by them sustained, and they shall have the right to re-enter and take possession of the premises aforesaid, and the purchaser shall redeliver to the seller the personal property hereinbefore enumerated, or the value thereof."

The amended complaint is in two causes of action. The first cause of action alleges that defendant defaulted in the payment due February 1, 1911; that plaintiff after such default made demand upon defendant for the surrender of the property, both real and personal, which was refused; that plaintiff is the owner and entitled to the immediate possession of all said property; and that it is unlawfully withheld, to plaintiff's damage in the sum of \$5,000. The plaintiff's theory of its rights is set forth in the following allegation: "That by reason of the acts complained of on the part of the defendant, and defendant's failure to keep and perform the said contract, a copy of which is hereto attached, at the time and in the manner therein specified, under and by virtue of the terms thereof, defendant has abandoned and forfeited all his right under said contract, together with the right of possession of said premises in said contract prescribed, and to the right of the possession of the personal

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



property therein enumerated, which plaintiff has demanded of defendant that he quit and surrender up to this plaintiff." The second cause of action is for interest, and attorney's fees for collecting the same, upon a promissory note for \$3,000, given as part of the first payment; the principal having been paid.

The prayer contains no specific demand for damages, but asks, among other things: "That the said contract be declared to be ended and determined, and all rights of the said defendant, L. H. Chipman, thereunder, together with all payments made thereon, be forfeited according to the terms of said contract," and "that plaintiff have such other and further relief in the premises as \* \* \* may seem meet and agreeable to equity." The answer admits default in the payment due February 1, 1911; denies that the plaintiff is the owner or entitled to the immediate possession of the property, or that he, the defendant, unlawfully withholds the same, or that plaintiff is damaged by such withholding, or that plaintiff ever made demand for possession of the same prior to the commencement of the action, and alleges that he, the defendant, made an offer to restore the property to the plaintiff upon the condition that the plaintiff return to him the \$5,000 paid down on the contract "less a reasonable amount to be allowed to the plaintiff for the use of said property, for the time defendant was in possession thereof," which offer the plaintiff ignored; that he, defendant, has an equity in said real estate, and is the owner of said personal property, and is entitled to withhold possession of both until the sum of \$5,000, paid down by him, is returned, with interest, "less a reasonable sum for the use of such property from the 17th day of June, 1910, until the same is restored to the possession of plaintiff." By way of affirmative defense an estoppel is attempted, and there is also a counterclaim pleaded for the return of the first payment of \$3,000 with interest, and for the return of \$143.58, taxes paid, with interest, less a reasonable sum for the use of the property. The defendant's prayer is specific, but concludes with a demand for such other relief as may be just and equitable.

The findings and conclusions of law by the trial court were in favor of the plaintiff, and judgment was entered accordingly. In the judgment was included an award of "\$370 damages incurred by the plaintiff by reason of the refusal of defendant to deliver possession of said premises and property on the 11th day of July, 1911," and a decree that all right, claim, and interest of the defendant in and to the property involved "is ended and determined, and all payments made thereon are adjudged and decreed to be forfeited to the plaintiff."

The principal contention is that the trial court erred in decreeing the defendant's payments forfeited, and in decreeing the return

of the property involved "without imposing the condition that the plaintiff return to the defendant the payments made by him, less a reasonable rental for the use of the property and any damages suffered by the plaintiff by reason of the breach of contract." As we understand the argument of appellant, it is that the provision of the contract above quoted, being a stipulation for liquidated damages, is void; that time was not of the essence of the contract, hence there was no basis for a forfeiture; that a forfeiture was precluded because the property was subject to a vendor's lien; that the appellant was entitled to be relieved from the forfeiture of his payments in view of his offer to make full compensation; that the respondent was estopped by its conduct in the premises from claiming a forfeiture; that this suit is based upon an election of respondent to rescind, and, having appealed to equity to vindicate its action, equity forbids that it retain more of appellant's payments than will suffice to recoup its damage.

[1] 1. Whether the provision of the contract above quoted is a stipulation for liquidated damages, and whether, as such, it is within the inhibition of section 5054, Revised Codes, we need not inquire. Even if it be so, this fact would not of itself require that in every, or in any, case the defaulting purchaser should have a return of the moneys paid by him; on the contrary, its effect is to leave the parties where they would be if no such stipulation had been made (*Bennett Bros. Co. v. Tam*, 24 Mont. 457, 468, 62 Pac. 780; *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; *List v. Moore* [Cal.] 129 Pac. 962; *Egerton v. Peckham*, 11 Paige [N. Y.] 352); and it is settled that without such a stipulation the defaulting purchaser is not, in the absence of an equitable showing, entitled to a return of any part of the moneys paid. *Perkins v. Allnut*, 47 Mont. —, 130 Pac. 1; *Chilton v. Willson*, 47 Mont. —, 132 Pac. 424; *Hansbrough v. Peck*, 5 Wall. 497, 18 L. Ed. 520; *List v. Moore*, supra; *Glock v. Howard & Wilson Colony Co.*, supra.

[2] 2. But it is urged that neither the principle last stated nor the stipulation itself could be a proper basis of the court's decree, because time was not expressly made as of the essence of the contract. Whether time is or is not of the essence of the contract is material to the application of the above rule only where there has been a tender or offer of performance by the party in apparent default, with a refusal of acceptance by the other. Here the appellant not only has made no such tender or offer, but expressly pleads his inability to perform. The situation thus presented is in effect the same as though time had been expressly made as of the essence of the contract.

[3] 3. Nor can we sustain the contention that forfeiture was precluded in this case because of the following provisions of the



Revised Codes: "All contracts for the forfeiture of property subject to a lien, in satisfaction of the obligation secured thereby, and all contracts in restraint of the right of redemption from a lien, are void" (section 5715)—and: "One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured, otherwise than by the personal obligation of the buyer" (section 5800). Neither section is pertinent. By the argument the application of section 5715 is made to depend upon the existence of a vendor's lien under section 5800. We think that section does not apply where the legal title is retained by the vendor. As an expression of our views we quote from Professor Pomeroy as follows: "It has been said, in English and American decisions, that the vendor's lien may arise before conveyance as well as after; and the interest or right of the vendor, under an ordinary contract for the sale of land, \* \* \* has been called a vendor's lien, and treated in the same manner as the equitable lien arising in favor of the grantor upon an actual conveyance of the land where the purchase price in whole or in part is left unpaid. This is an unnecessary and an incorrect use of terms; it confounds legal notions which are essentially different. There is a plain distinction between the lien of the grantor after a conveyance and the interest of the vendor before conveyance. The former is not a legal estate, but is a mere equitable charge on the land. \* \* \* In the latter, although possession may have been delivered to the vendee, and \* \* \* the vendee may have acquired an equitable estate, yet the vendor retains the legal title, and the vendee cannot prejudice that legal title, or do anything by which it shall be divested, except \* \* \* by paying the price according to the terms of the contract. To call this complete legal title a lien is certainly a misnomer. In case of a conveyance, the grantor has a lien, but no title. In case of a contract for sale before conveyance, the vendor has the legal title, and has no need of any lien." 3 Pomeroy's Equity Jurisprudence, § 1260. Where it appears that the intention of the parties was in fact to create the relationship of mortgagor and mortgagee, title being retained with the idea it should operate as a mortgage, there might indeed be occasion to apply the provision of section 5715, but that position is not, and could not well be, taken here, because the contract will bear no such construction (Arnold v. Fraser, 43 Mont. 540, 117 Pac. 1064), and because it is not the forfeiture of the property to which a vendor's lien might, under proper circumstances, attach that is complained of, but the forfeiture of the money paid thereon. Of course, if there is no lien within the meaning of section 5800, there can be no basis for denying a forfeiture upon this ground, or for complaint because a

period of redemption was not provided in the decree.

[4] 4. In the brief of appellant we find a vigorous discussion of the proposition that, since the respondent "has come into a court of equity asking its aid to rescind the contract," equity commands the return to appellant of all of the purchase money paid in excess of an amount sufficient to compensate the respondent in damages. Granting the premise, the conclusion is inevitable; but, although the suit is in equity, it is not an action to rescind, or to judicially vindicate a rescission. The respondent is standing upon the contract seeking a cancellation of it because of appellant's breach. It is quite true that in *Arnold v. Fraser*, supra, an action similar to this was tried on the theory that the vendor should have returned, or offered to return, the purchase money paid, less the value of the use of the property, and that that cause was affirmed on appeal; but in the opinion the correctness of this theory was questioned, it being expressly stated that this court would determine the case as made without dissent by any one in the court below, reserving the question itself for future treatment. We are now convinced that that case was, and the present case is, of the character referred to in *Clark v. American D. & M. Co.*, 28 Mont. 476, 72 Pac. 980, wherein it is said: "There is a wide difference between the rescission of a contract and its mere termination or cancellation. \* \* \* 'It is well settled that a technical rescission of the contract has the legal effect of entitling each of the parties to be restored to the condition in which he was before the contract was made, so far as that is possible, and that no rights accrue to either by force of the terms of the contract. But, besides technical rescission, there is a mode of abandoning a contract as a live and enforceable obligation, which still entitles the party declaring its abandonment to look to the contract to determine the compensation he may be entitled to under its terms for the breach which gave him the right of abandonment.' *Hayes v. City of Nashville*, 80 Fed. 641 [26 U. C. A. 59]. 'Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about.' *Anvil Mining Co. v. Humble*, 135 U. S. 540 [14 Sup. Ct. 876, 38 L. Ed. 814].'" The consequence of this is that the rule of equity invoked by appellant has no necessary application to an action upon the contract to cancel it for a breach, and that in such an action the remedies afforded by the contract will be enforced unless they impinge upon other rules of equity or law.

[5-8] 5. This brings us to the consideration of the question of appellant's rights under the affirmative pleas of the answer, and in virtue of the provisions of section 6089, Revised Codes. That section provides: "Whenever, by the terms of an obligation, a



party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty." There is some contention by respondent to the effect that this statute is not intended to apply to a case of this nature; but if it does not, we are at a loss to understand where it might better apply. If as a matter of fact the actual damages sustained by the vendor in this case are less in amount than the moneys paid by the purchaser, and if, under the principles above stated, the vendor can retain the excess, then most assuredly the purchaser will have incurred a loss in the nature of a forfeiture authorized by the terms of the contract, by reason of his failure to comply with the same. From such a loss he may be relieved upon a showing that he is equitably entitled to such relief, if his breach of duty was not grossly negligent, willful, or fraudulent. As mentioned above, the appellant made an affirmative plea by way of estoppel, which, whether defective as such or not, must under the prayer for general relief be noticed as a statement, in part, of his equities in the matter. From this and other portions of his answer it is made to appear that immediately after making the contract the appellant became fearful that he would not be able to comply strictly with its terms, and was reassured and encouraged by the respondent's officers to the effect that he would not suffer damage at its hands if he would continue and endeavor to comply with its terms; that relying on such assurances he did in good faith endeavor to comply with the terms of the contract, and in doing so expended large sums of money and gave more than a year of his time and labor in attempting to carry out its terms, and would be damaged to the amount of many thousands of dollars by the enforcement of the strict terms of the forfeiture; that respondent by its officers frequently waived the strict performance of the contract as to terms of payment, extending the time of the payment due February 1, 1911; and that on July 11, 1911, the appellant, finding himself unable to meet the payments, submitted the proposition to return the property as hereinabove referred to; that the property can be returned undiminished in value; that the value of its use is \$500, and that appellant stands willing to have the property returned and to have full compensation made to respondent for the use of the property, and for any damages sustained by respondent on account of his breach of the contract.

The evidence touching some of these allegations is conflicting, and of course the findings of the court as to them may not be disturbed; but as to others it is undisputed. For instance, the appellant testified to three

distinct conversations with Mr. Reynolds, the president of the company, all before the payment of the \$3,000 note, which was given as part of the first payment. Concerning the first conversation held about August 8, 1910, the appellant says: "We came down and told him we saw we were not able to go through with the payments, couldn't sell our ranch in the east; times had tightened up so, and we wished they would take it back, and he said: 'Mr. Chipman, you go out there and show good intentions, we will see you through with this. We will see that you don't lose any money.'" This conversation was in the presence of appellant's son, who corroborates his father concerning it. About a week after this the second conversation occurred, as follows: "I came down then in about a week again, after some stuff, and I went in and I says, 'I wish you would take this ranch back.' And he said: 'Well, now, don't be faint-hearted. You go out there, and we will see that you don't lose anything.' I says, 'Do you think you could sell this ranch?' and he says, 'Why, yes; I think we could.' So I listed it with them for sale." The appellant's wife, being dissatisfied, went with him to the respondent's office, still in August, 1910, and there found Mr. Reynolds, and the third conversation occurred in her presence, which she renders as follows: "We visited Mr. Reynolds in reference to going out on the place; we were a little afraid we would not be able to make the payments, and he wanted to know what we wanted to do, and I told him—he asked me what I wanted to do—he wanted to know if we wanted to go out in September and try it. I told him we would if we would be able to make the payments. 'Well,' he said, 'we have never foreclosed on any one yet, and we won't begin on you people.'" There is not in the record any semblance of contradiction of this testimony, and the findings of the jury that no such assurances were given is without any foundation whatever. After these conversations the appellant went on the land and paid the note, and concerning that matter he says, "If Mr. Reynolds had not made us these promises we would have throwed it up right then when we had \$2,000 paid on it," instead of that he estimates his detriment, by going ahead, at \$3,000. The appellant also testified that he had tried to sell his Iowa land to raise the money for the payments, but was unable to do so, and he sought to show in detail, and as evidence of his good faith, the particular efforts he had made to meet the terms of the contract, but in this he was checked by the trial court.

We think the evidence as a whole shows that the appellant's breach of duty was not grossly negligent, willful, or fraudulent, and that it was entirely practical and not difficult to ascertain the damages of respondent on principles of compensation, in accordance with the provisions of the statute. In these circumstances, appellant was in position to



ask relief from the forfeiture of his payments in excess of respondent's damage, and that relief should in this case have been granted to him because of the conduct of respondent towards him and its effect upon him, as detailed above. We subjoin a few authorities, which lend support to these views: *Barnes v. Clement*, 12 S. D. 270, 81 N. W. 301; *Cue v. Johnson*, 73 Kan. 558, 85 Pac. 598; *Parsons v. Smlie*, 97 Cal. 647, 32 Pac. 702; *Sherburne v. Hirst* (C. C.) 121 Fed. 998; *Placer Co. v. Maxwell*, 24 Colo. 87, 92, 48 Pac. 815; 1 *Pomeroy's Equity Jurisprudence*, §§ 432-460; 16 *Cyc.* 79, b, vi; *Id.* p. 80, c.

6. If, as we have held, the appellant should have been relieved from the forfeiture of his payments in excess of respondent's damages, it necessarily follows that the findings and judgment relative to the second cause of action cannot be upheld. Seeking, as it did, the unpaid interest (with attorney's fees for collecting the same) of the \$3,000 note, given as part of the first payment, the principal of which was paid, it was a mere incident to the main transaction, and, upon the case presented, it necessarily falls with the forfeiture.

[9] 7. In addition to the forfeiture of all appellant's payments without regard to the amount of respondent's damage, the judgment also awards the respondent the sum of \$870 damages for withholding the property after demand. Counsel for respondent, addressing the trial court, stated his position concerning this matter to be that, had appellant surrendered possession after the breach, respondent would be entitled only to the payments made as liquidated damages for the breach, "but we claim that under the law and under the contract we are entitled to an additional damage by reason of having to maintain this action for the purpose of getting possession after the breach." This is a clear claim for special damages of a particular character, which, if recoverable in this sort of action at all, must be supported by specific allegations in the pleadings (*Gordon v. Northern Pac. Ry. Co.*, 39 Mont. 571, 104 Pac. 679, 18 Ann. Cas. 583; *O'Brien v. Quinn*, 35 Mont. 441, 190 Pac. 166; *Root v. Butte, A. & P. Ry. Co.*, 20 Mont. 354, 51 Pac. 155); and no such allegations appear. Moreover, the evidence does not show any special damage due to withholding the property after demand. The jury found that the value of the real estate had not been diminished, and that the value of the use for the whole period from June 17, 1910, to the date of trial

was \$2,610; this being much less than the appellant's payments, there was no basis in fact for the award of \$870 over and above the forfeiture, and the judgment must be disaffirmed as to that.

[10] 8. It was possible for the trial court to adjust the equities of the parties as presented at the time of the trial, and this court should do likewise, so far as it can, to the end that the litigation may have a speedy close. Rejecting, then, the items of \$870, damage for withholding after demand, rejecting also the allowance for interest and attorney's fees upon the second cause of action, and taking into account the moneys paid by appellant, with interest at the legal rate since such payment, on the one hand, and, on the other, \$2,610, the value of the use of the property, and \$362.45, damage from personal property depreciated or not returned, we determine the difference in appellant's favor to have been \$2,706.40; and this amount the judgment should have provided that appellant recover from respondent. The appellant, however, was entitled to this only as a relief from forfeiture. Having defaulted, he was in no position to refuse possession; hence the respondent is entitled to the value of the use of the property up to the time of restoration. As we are not informed whether respondent has taken possession, we do not know what, if any, allowance should be made for the use of the property since the date of trial. We are therefore unable to make final adjustment of these equities, but must remand the cause for further proceedings.

The judgment and order appealed from are reversed, and the cause is remanded to the district court of Fergus county, with directions to find what, if any, further allowance should be made to respondent for the use of the property in question since the date of the trial of this cause, and to deduct the amount so found from the above balance of \$2,706.40, after adding thereto interest at the legal rate since the date of trial, and thereupon to enter its judgment and decree canceling the contract in question, awarding possession of the property to respondent, and providing that appellant have and recover from the respondent the sum ascertained to be due after taking the proceedings aforesaid.

Reversed and remanded.

BRANTLY, C. J., and HOLLOWAY, J., concur.



(47 Mont. 487)

FRATT et al. v. DANIELS-JONES CO. et al.  
(Supreme Court of Montana. June 14, 1913.)

1. QUIETING TITLE (§ 34\*)—CANCELLATION OF CONTRACT—PLEADING.

Where a contract for the sale of land was claimed by the vendors to have terminated automatically by force of its own provisions, on the vendee's failure to meet the requirements imposed, and the vendors sued to quiet title and cancel the contract as a menace thereto, the cause of action was not for rescission, and hence the complaint was not defective for failure to state facts required by Rev. Codes, § 5065, to be alleged in a bill to rescind.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 69, 71, 72, 76, 77; Dec. Dig. § 34.\*]

2. QUIETING TITLE (§ 34\*)—PLEADING—FORFEITURE OF CONTRACT.

Where vendors sued to quiet title and cancel a contract of sale for the vendee's failure to perform its requirements, but did not pray for a forfeiture of the payments made, and the judgment for plaintiff made no disposition thereof, the action could not be treated as one to enforce a forfeiture.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 69, 71, 72, 76, 77; Dec. Dig. § 34.\*]

3. VENDOR AND PURCHASER (§ 185\*)—CONTRACT—"FORFEITURE."

Where a land contract provided that if the vendee failed to pay any deferred installment when it became due, such failure should work an immediate forfeiture of the contract, without any notice, and that any sums paid thereon should be retained by the vendors as liquidated damages, the word "forfeiture" meant nothing more than that, on the vendee's failure to perform the terms of the contract within the time limited, the contract should terminate.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 369-372; Dec. Dig. § 185.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2893-2899; vol. 8, p. 7665.]

4. QUIETING TITLE (§ 15\*)—CANCELLATION OF CONTRACT—LIQUIDATED DAMAGES—DEFENSE.

Where vendors sued only to cancel a contract as a cloud on their title, for the vendee's failure to perform the requirements thereof, without any claim that the amount paid should be forfeited, it was no defense that the provision of the contract that such amount should be retained by the vendors, in case of the vendee's failure to perform, as liquidated damages was void, as provided by Rev. Code, § 5054.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 47; Dec. Dig. § 15.\*]

5. VENDOR AND PURCHASER (§ 334\*)—TERMINATION OF CONTRACT—PART PAYMENT—RETURN.

In the absence of a showing by a defaulting purchaser of land, such as would appeal to the conscience of a court of equity, he is not entitled to a return of the purchase price paid on the termination of the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959-980; Dec. Dig. § 334.\*]

6. VENDOR AND PURCHASER (§ 93\*)—CONTRACT OF SALE—TIME OF ESSENCE.

Under Rev. Codes, § 5047, declaring that time is never considered of the essence of a contract unless by its terms expressly so provided, it is proper for the parties to a contract for the sale of land to declare that time shall

be of the essence, and such provision, when inserted in a contract, will be enforced unless waived, or unless the vendor is estopped to insist on its enforcement, or performance has been prevented by some intervening circumstance sufficient to relieve the party therefrom.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 153, 154; Dec. Dig. § 93.\*]

7. VENDOR AND PURCHASER (§ 101\*)—CONTRACT—CANCELLATION—NOTICE OF ELECTION.

Where a contract for the sale of land provided that time should be of the essence thereof, and that on the vendee's failure to perform the requirements specified the contract should be terminated ipso facto, the vendors were not required to notify the vendee that a deferred payment under the contract would be due on a specified date, and that strict compliance with the terms of such contract would be insisted on, in order to prevent a termination thereof by a failure of the vendee to make the payment within the contract period.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 170-174; Dec. Dig. § 101.\*]

8. QUIETING TITLE (§ 29\*)—CANCELLATION OF CONTRACT—LACHES.

Where a contract for the sale of land provided for ipso facto termination, on the vendee's failure to pay a deferred installment of the price, as required thereby, and an installment due March 26th was not paid for four months, and no other excuse was offered than that the vendee's officers, being engrossed with other business, forgot that the payment was due, the vendors' failure to take action to enforce the cancellation of the contract until July 22d following was not such laches as to bar their right to relief.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 63; Dec. Dig. § 29.\*]

9. VENDOR AND PURCHASER (§ 186\*)—RELIEF FROM FORFEITURE—REQUISITES.

A vendee is not entitled to relief from forfeiture of a land contract for failure to make payments as provided, under Rev. Codes, § 6039, providing for relief from a forfeiture, or loss in the nature of a forfeiture, unless facts appealing to the conscience of a court of equity are alleged; mere forgetfulness to make a payment within the time prescribed, because the vendee's officers were engrossed in other business, being insufficient.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 841, 373; Dec. Dig. § 186.\*]

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

Action by David Fratt and another against the Daniels-Jones Company and another. Judgment for plaintiffs, and defendant company appeals. Affirmed.

Wm. V. Beers, of Billings (J. Van Valkenburg, of Minneapolis, Minn., of counsel), for appellant. W. M. Johnston and H. J. Coleman, both of Billings, for respondents.

HOLLOWAY, J. On March 26, 1909, David Fratt and wife entered into a contract in writing with the Daniels-Jones Company, a corporation, by which they sold and agreed to convey to the company section 7, Tp. 4 N., R. 25 E., for \$6,370, payable \$637 in cash and the balance in 10 equal annual in-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



stallments, with interest at the rate of 6 per cent. per annum, payable annually. The vendee was to have possession on May 15, 1909, and was to pay all taxes upon the land after the year 1909. The contract contains this provision: "It is hereby expressly understood and agreed that time is of the essence of this contract and if the party of the second part fails to pay any deferred installment, with interest thereon, or any portion thereof, when the same becomes due and payable, such failure shall work an immediate forfeiture of this contract, without any notice whatever, and the money paid on this contract shall be retained by the parties of the first part as liquidated damages." In 1911 this suit was instituted. The complaint states two causes of action. The first contains the usual allegations in an ordinary suit to quiet title; and the second sets forth the facts concerning the execution of the contract, copies the agreement at length, alleges that the defendant Daniels-Jones Company entered into some kind of an agreement to sell the property to the defendant Luke; that the defendant Daniels-Jones Company failed to pay the installment of the purchase price and interest due March 26, 1910, and failed to pay the taxes for that year; that plaintiffs notified the company soon after March 26, 1910, and took possession of the property. There are certain allegations of the complaint and certain portions of the prayer which relate to the defendant Luke alone, and further reference to which is omitted. The prayer is that the defendants be required to set forth the nature of their claim for adjudication, that plaintiffs' title be quieted, that the contract of March 26, 1909, be canceled, and that the defendants be enjoined from asserting any interest or claim to the property by reason of such contract. The answer of defendant Daniels-Jones Company contains some general admissions and denials, and then sets forth affirmatively, and at length, the facts concerning the execution of the contract of March 26, 1909; alleges that the company took possession of the land in controversy, on May 15, 1909, and thereafter continued in such possession; that it paid plaintiffs \$637 upon the execution of the contract; that it did not pay the installment due March 26, 1910, because the company's officers were engrossed with other business, and overlooked the fact that a payment was then due; that while it did not pay the taxes for the year 1910, it intended to pay them before they became delinquent, if the plaintiffs had not paid them; that on July 22, 1910, it received from the plaintiffs notice, signed by the plaintiff David Fratt, which, after referring to the contract of March 26, 1909, continued, "You have forfeited your part of the contract by failing to pay the deferred payment that came due March 26, 1910"; that immediately thereafter it tendered to the plaintiffs the amount due with interest, but the tender was refus-

ed; that again in March, 1911, it made another tender of the amount then due, and this was also refused; that plaintiffs have never repaid the \$637 paid on the purchase price at the time the contract was executed, or any part thereof; that the land has increased in value; and that the company is now ready, able, and willing to pay the amount which may be found due by the court. The reply does not raise any material issues. Plaintiffs moved the court for judgment on these pleadings, and this motion was granted and a decree rendered and entered according to the prayer of the complaint. It is from that judgment that the defendant Daniels-Jones Company appealed.

[1] 1. Counsel for appellant contend that the complaint does not state facts sufficient to constitute a cause of action for the rescission of a contract, and cite section 5065, Revised Codes, and authorities applying the rules there announced; but they misapprehend the character of this suit. Plaintiffs are not seeking to rescind the contract; they are relying upon it and upon the provision for its own termination automatically upon the failure of appellant to meet the requirements imposed, and are now asking the court to decree that the contingency has arisen which, by the terms of the contract, renders it of no further force or effect. They ask, further, that the contract, as a menace to their title, be canceled. The purpose of such an action is so far distinct from that of one to rescind a contract that the rules governing rescission do not have any application here. The question is not a new one in this state. It has been considered a number of times. *Clark v. American D. & M. Co.*, 28 Mont. 468, 72 Pac. 978; *Merk v. Bowery Min. Co.*, 31 Mont. 298, 78 Pac. 519; *Arnold v. Fraser*, 43 Mont. 540, 117 Pac. 1064; *Cook-Reynolds Co. v. Chipman*, 47 Mont. —, 133 Pac. 694 (May 2, 1913).

[2, 3] 2. Counsel for appellant contend also: "That this action seeks to enforce a forfeiture which is against the law and against public policy: (1) As to liquidated damages; (2) As to time of essence of contract; (3) as to necessity of giving notice." But again they are mistaken as to the character or purpose of this action. Plaintiffs are not asking the court to declare the payment of \$637 forfeited to them, and the judgment entered does not make any disposition of that sum or mention it at all. The language of the contract quoted above, in which the word "forfeiture" appears, does not mean anything more than that upon the failure of this appellant to keep and perform the terms of the contract by it to be kept and performed and within the time limited, the contract thereupon terminates.

[4, 5] (a) It is said that in so far as the contract provides for liquidated damages it is void and of no effect under section 5054, Revised Codes. This may be conceded, but still it does not avail the appellant; for, as



said before, there is not any contention by plaintiffs that the amount paid to them shall be forfeited, and neither is there any adjudication upon the subject. But in any event, in the absence of a showing on the part of the defaulting purchaser such as would appeal to the conscience of a court of equity, he is not entitled to a return of the part payment of the purchase price even though he asked for it, and that was not done in this instance. *Perkins v. Allnut*, 47 Mont. 13, 130 Pac. 1; *Clifton v. Willson*, 47 Mont. —, 132 Pac. 424; *Cook-Reynolds Co. v. Chipman*, above.

[6] (b) That neither the provision "time is of the essence of this contract" in a contract, nor the contract, containing such a provision, is invalid as against positive law or public policy is too well settled to merit serious consideration. At common law such a provision was read into every contract, but in equity the rule was that it must appear affirmatively that the parties regarded time as of the essence of their agreement, or courts of equity would not regard it so. 2 Page on Contracts, §§ 1160, 1161. To set the question at rest and to avoid giving expression to an intention which the parties may not have entertained, our Code (section 5047, Rev. Codes) declares: "Time is never considered as of the essence of a contract, unless by its terms expressly so provided." This is a distinct recognition of the rights of parties to a contract to include such a provision, and when it is included, as in the present instance, it is the duty of courts to carry out the intention of the parties by giving effect to that provision: for to ignore or circumvent it when deliberately written into a contract by the parties, or by any sort of construction to nullify its effects, is to make a new contract for the parties different from the one which they themselves constructed—something even a court of equity is not authorized to do. This is the rule declared by the Supreme Court of the United States, in *Cheney v. Libby*, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818, which was a suit in equity to compel specific performance of a contract to convey land. The court said: "The parties in this case, in words too distinct to leave room for construction, not only specify the time when each condition is to be performed, but declare that 'time and punctuality are material and essential ingredients' in the contract, and that it must be 'strictly and literally' executed. However harsh or exacting its terms may be, as to the appellee, they do not contravene public policy; and therefore a refusal of the court to give effect to them, according to the real intention of the parties, is to make a contract for them which they have not chosen to make for themselves."

In 1 Pomeroy's *Equity Jurisprudence* (3d Ed.) § 455, the same rule is stated as follows: "It is well settled that where the parties have so stipulated as to make the

time of payment of the essence of the contract, within the view of equity as well as of the law, a court of equity cannot relieve a vendee who has made default. With respect to this rule there is no doubt."

The phrase "time is of the essence of this contract" is employed for the benefit of the vendor (*Dana v. St. Paul Investment Co.*, 42 Minn. 194, 144 N. W. 55), and, being for his special benefit, he may waive the provision or by his conduct estop himself to insist upon its enforcement. In *Cue v. Johnson*, 73 Kan. 558, 85 Pac. 598, it was held that by the failure to insist upon the enforcement of the provision when appealed to for further time, and by tacitly extending the time for performance as requested by the vendee, the vendor waived his right to insist upon the enforcement of the clause which made time of the essence of the agreement. In *Robinson v. Cheney*, 17 Neb. 673, 24 N. W. 378, there was involved a contract for the sale of real estate upon installments. Notes were executed for the deferred payments, and these were made payable at a particular bank. When the notes maturing August 27, 1883, became due, the vendor failed to have them at the bank, and the court held that by this failure on his part the vendor waived his right to insist upon payment on that particular day, as provided in the contract. In *Cheney v. Libby*, above, a court of equity intervened to save the purchaser, who had not complied literally with the terms imposed upon him by his contract, but only upon the ground that by his course of conduct the vendor had misled him into the belief that a strict or literal compliance would not be insisted upon, with the result that it would have been unconscionable to have permitted the vendor to profit at the vendee's expense. Probably the Supreme Court of Pennsylvania went further than it is necessary for us to go in this instance, when, in *Miller v. Phillips*, 31 Pa. 218, it is said: "Where parties choose by clear and explicit terms to make time of the essence of the contract, performance to be entitled to compensation must be within it, and nothing but the act of God, rendering compliance physically impossible, will excuse a failure." These cases are cited to show that courts will not undertake to make contracts for parties different from those which the parties themselves intended, but that they will enforce a provision making time of the essence of a contract, unless the party for whose benefit it was inserted has waived the provision or is estopped to insist upon its enforcement, or performance has been prevented by some intervening circumstances sufficient to relieve the party from the performance of any other provision of the contract.

[7] (c) Proceeding upon the assumption that this is a suit to rescind, counsel for appellant complain that plaintiffs failed to notify appellant that the payment of March 26th would be due upon that day, and that strict



compliance with the terms of the contract would be insisted upon. There is not anything in the contract to impose any such duty upon the vendors; and, as we have already determined that this is not a suit to rescind, nothing further need be said upon this subject.

[8] Counsel for appellant further contend that plaintiffs were guilty of laches in failing to take action until July 22d, after the default of March 28th, and cases are cited which hold that the failure of the vendor to act for two or three months after a payment becomes due will be held to constitute a waiver. But counsel fail to discriminate between a contract like the one now under consideration, by the very terms of which the failure to pay an installment when due ipso facto ends the contract, and one which provides that, upon the failure of the vendee to make payment on time, the vendor shall have the right to declare the agreement at an end; time being expressly made of the essence of each contract. Recalling that this last provision is for the benefit of the vendor, the difference in the two classes of contracts becomes manifest at once. Under an agreement of the first class the breach by the vendee terminates the contract unless the vendor elects to waive the time provision and continue the agreement in force. Under such a contract notice is not required unless the vendor elects to continue it in force. Under a contract of the second class the breach by the vendee does not ipso facto terminate the agreement. It merely creates the condition under which the vendor may terminate it if he elects to avail himself of the power conferred; but an election is necessary on his part to the termination of the agreement, and notice of some sort of such election is necessary to make it effective. *Gaughen v. Kerr*, 99 Iowa, 214, 68 N. W. 694; *Pier v. Lee*, 14 S. D. 600, 86 N. W. 642. Since the contract under consideration was terminated by the default of the Daniels-Jones Company, notice was not necessary, and fault cannot be found with the plaintiffs for their delay in giving a notice which they were not required to give.

[9] Our attention is directed to section 6039, Revised Codes, which provides for relief from a forfeiture or loss in the nature of a forfeiture. Whatever may be the correct interpretation of the language of that section, this much is apparent: the very minimum requirement is that the party invoking the protection afforded by that section must set forth facts which will appeal to the conscience of a court of equity. "He may be relieved upon a showing that he is equitably entitled to such relief, if his breach of duty was not grossly negligent, willful, or fraudulent." *Cook-Reynolds Co. v. Chipman*, above. In the present instance, the only excuse offered by the Daniels-Jones

Company for its default is that its officers, being engrossed with other business, forgot that a payment was due March 26, 1910. Apparently they continued to forget for the ensuing four months. It appears affirmatively that the defendants had possession of the land for more than a year. There was but \$637 paid on the purchase price. The value of the use of the premises does not appear; and, even conceding that these are proper subjects of consideration in a case of this character—and upon that we do not express any opinion at all—yet, when all is said by appellant that can be said in its behalf, it failed to make any excuse, or to disclose wherein the conscience will be shocked by permitting the plaintiffs to take advantage of the term in the contract which made time of its essence. If the facts disclosed here will excuse, then the provision so carefully inserted in this contract to compel performance at the precise time indicated becomes a dead letter. If these facts are sufficient to relieve a defaulting party, then any sort of excuse is sufficient. But, as we have indicated above, when parties deliberately make time of the essence of their agreement, the obligor must expect that the provision will be given full force and effect, unless the party for whose benefit it was inserted waives the provision, or by a course of conduct estops himself to insist on its enforcement, or the obligor is prevented from performing by circumstances which would be sufficient to relieve him from the performance of the most important provision of the contract.

The answer interposed does not constitute any defense, and the judgment of the district court is affirmed.

Affirmed.

BRANTLY, C. J., and SANNER, J., concur.

(90 Kan. 347)

VAN ARSDALE v. BALDWIN PIANO CO.

(Supreme Court of Kansas. July 5, 1913.)

(Syllabus by the Court.)

SALES (§ 457\*)—CONTRACT OF AGENCY—MORTGAGE BY AGENT.

An order and contract for the consignment of a piano are examined, and held to create an agency and that a mortgage made by the agent is not effective against the principal.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1335; Dec. Dig. § 457.\*]

Appeal from District Court, Stafford County.

Action by G. B. Van Arsdale against the Baldwin Piano Company. From a judgment for plaintiff, defendant appeals. Reversed.

Robert Garvin, of St. John, for appellant. Charles C. Calkin, of Kingman, for appellee.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**BENSON, J.** The question in this appeal is whether the plaintiff, as mortgagee, or the piano company has the right to the possession of a piano upon the following facts:

A. E. De Mars, a piano dealer of Wichita, sent the following order, dated April 15, 1911, to the company:

Ship to A. E. De Mars.  
Place: Wichita, Kans.  
How ship: Santa Fe. When: At once.  
The Terms: Net cash 30 days, with 1½ per cent. per month thereafter.

This order is subject to the conditions as noted on the reverse side of this sheet. This order is subject to the approval and acceptance of the Baldwin Piano Co. at their office.

Quantity.	Style.	Wood.	Make.	Price.
1.	306.	Mah.	Ellington.	160.00.

Also send 1 player bench. No chg. for bench.

#### On the reverse side:

I or we will take your pianos and organs on consignment, to be accounted for at agreed prices, and upon the following conditions:

First. The instruments and proceeds of sale are your property, subject to your order and free from any claim whatsoever. I or we agree to take good care of all the instruments consigned to me or us, and to be responsible for the safekeeping of the same; also to keep them insured for your benefit, with the policies made payable to you in case of loss, to an amount not less than the consignment price of same.

Second. I or we agree to send the cash to you for each and every instrument as soon as sold, or at such time as may be designated by me in my written order to you for shipments, but in either or any event I agree that the same shall not exceed four months, and agree that all instruments shall be settled for in cash within four months from date of shipment, or returned to you as provided for in fourth clause of this contract. \* \* \*

Fourth. Upon your demand or that of your authorized representative I or we will deliver, as you may direct, boxed, free of charge, or expense to you of any kind, including return freight to St. Louis, Mo., all of said consigned goods remaining unsettled for at the time of said demand; I or we agree, in addition to returning the said stock, to pay you an amount, for depreciation of value at the rate of 8 per cent. per annum, from date of original shipment, on the consignment prices quoted on said stock. \* \* \*

The fifth clause requires monthly reports of goods on hand not settled for and of goods in the hands of prospective purchasers, and the seventh clause provides that the agreement may be terminated by either party on written notice. The agreement contained many other provisions not deemed material in the decision of the question presented.

De Mars received the piano as ordered, and on May 11, 1911, to secure the payment of a loan of money, mortgaged it to the plaintiff, who commenced an action in replevin to recover its possession from Peacock & Solce, who, it appears, had taken possession for the company. The company thereupon

intervened and was substituted as defendant, and pleaded ownership and right of possession under the contract above set out.

If the order and contract constituted a conditional sale, the company cannot prevail for the reason that the agreement was not filed for record as required by section 5237 of the General Statutes of 1909. If the agreement was only for a consignment to an agent for sale and accounting, the mortgagee cannot recover. It seems to the writer that whether a sale or agency is intended in such cases, instruments might easily be drawn containing a few simple provisions clearly expressing the real purpose, which is often concealed in a multiplicity of words. However, it is the duty of the court to construe rather than to criticize. A similar agreement was construed in *McKinney v. Grant*, 76 Kan. 779, 93 Pac. 180. The material difference appears to be that in that case it was provided that cash should be sent for every piano as soon as sold. The same provision in this contract is qualified by a stipulation that cash may be sent at the time designated in the order, not exceeding four months from date of shipment, or the piano shall be returned as provided in the fourth clause, which provides for the return on demand of goods remaining unsettled for. If these provisions make the return optional with the company, the consignee became indebted for the amount specified in the order, and the stipulation for return on demand a mere security. Considering all the terms of the order and contract together, several of which are inconsistent with a sale, it is concluded that the relation of principal and agent was created, and not that of debtor and creditor. The provision for return is deemed to confer reciprocal rights. The consignor had the right to require a return of the piano after four months, and the consignee the right to return it without demand. It therefore was the property of the company and the mortgagee acquired no interest in it. The district court sustained a demurrer to the answer of the company thereby holding contrary to these views.

The duty of construing similar contracts containing obscure and doubtful or apparently conflicting provisions has frequently been placed upon the courts, and many cases are cited in the briefs. Each instrument however must depend on its own peculiar provisions, and a review will not be undertaken. The question in each case is whether the relation of debtor and creditor or that of bailment is established, and that must be determined by the intention to be found upon an examination of the entire agreement.

The judgment is reversed, with directions to overrule the demurrer. All the Justices concurring.



(90 Kan. 314)

O'NEIL v. EPPLER.

(Supreme Court of Kansas. July 5, 1913.)

(Syllabus by the Court.)

1. PROCESS (§ 73\*)—SERVICE—RESIDENCE.

The statutory definitions of the terms "residence" and "usual place of residence" applied to the facts, and held that the service of a summons returned as served at the appellant's usual place of residence was void.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 90; Dec. Dig. § 78.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6151-6161; vol. 8, pp. 7243, 7783.]

2. EXECUTION (§ 172\*)—INJUNCTION—PLEADING AND PROOF.

In an action to enjoin the execution of a money judgment void for want of any service, the plaintiff is not required to plead in detail and fully prove a meritorious defense to the cause of action upon which the judgment was founded. It is sufficient that he satisfy the court by a fair showing that he is not simply delaying justice by compelling the adverse party to resort to regular procedure.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 519-539; Dec. Dig. § 172.\*]

Appeal from District Court, Ellis County.

Action by Frank O'Neil against W. A. Eppler. From judgment for defendant, plaintiff appeals. Reversed.

O'Neil & Warfel, of Topeka, and H. L. Pestana, of Hays, for appellant. F. A. Rea, of Hays, for appellee.

BURCH, J. The action in the district court was one to enjoin the execution of a money judgment rendered against the plaintiff, O'Neil, and in favor of the defendant, Eppler. The relief prayed for was denied, and the plaintiff appeals.

The judgment, which was assailed, rests upon a summons issued by a justice of the peace of Ellis county and returned by a constable as served on July 5, 1910, by leaving a copy at the usual place of residence of the plaintiff with his wife. The copy was, in fact, left at the residence of one Morton in the city of Ellis, and the contention was that the Morton house was never the residence or usual place of residence of either the plaintiff or his wife. The plaintiff and his wife formerly resided in their own house in Ellis. In February, 1909, they sold this house, but rented it from the purchaser and continued to occupy it until September, 1909. The plaintiff then went to Parsons, where he secured employment in a hardware store, and his wife went to the country to teach a school some seven miles from Ellis. They stored their household goods at the Morton house; the consideration being that the Mortons should have the use of the piano. In February, 1910, the plaintiff became the representative of a threshing machine company, and established headquarters at Smith Center; his territory comprising several northern counties not including Ellis. On the last of June or the 1st of July, 1910, he rented two rooms

in a house in Smith Center, paying the rent in advance for July. On the 1st or 2d of July his wife joined him, and they kept house, doing light housekeeping and sometimes taking their meals out, until the latter part of August, when the plaintiff's company sent him to Canada. His wife went to Hiawatha, and that winter taught school in Brown county. Since September, 1909, the plaintiff has not resided in Ellis county, and previous to the pretended service of summons on July 5, 1909, was never in the Morton house. Before going to Smith Center, Mrs. O'Neil stayed at the Morton house for a number of days packing the goods for shipment, and she did sewing for Mrs. Morton for about a week, but she did not make Mortons' her home, and was not there on the 5th day of July. She did not take the household goods with her when she went to Smith Center, although they were boxed for shipment, except the piano, because it was then uncertain whether or not her husband would be called away on his company's business. The trial court found generally for the defendant without indicating its views as to either the facts or the law and the defendant has not seen fit to aid the court either by brief or oral argument.

[1] The statute reads as follows:

"Twenty-third. The term 'residence' shall be construed to mean the place adopted by a person as his place of habitation, and to which, whenever he is absent, he has the intention of returning. When a person eats at one place and sleeps at another, the place where such person sleeps shall be deemed his residence.

"Twenty-fourth. The terms 'usual place of residence' and 'usual place of abode,' when applied to the service of any process or notice, shall be construed to mean the place usually occupied by a person. If such person have no family, or do not have his family with him, his office or place of business, or if he have no place of business, the room or place where he usually sleeps shall be construed to be such place of residence or abode." Gen. Stat. 1909, § 9037.

It is quite clear that the plaintiff had no residence usual or otherwise at the Morton house in Ellis at any time. He did not adopt it as his place of habitation in any sense of the word. His wife's presence there was for transient and temporary purposes only, and the place was not the settled abode of either of them, where they intended to remain permanently even for a time, or to which they expected to return to live when absent. In the light of the statute, Smith Center was the plaintiff's residence from the time he established headquarters there in February, 1910, until after the summons was returned; and, while his wife was with him, the rented house in Smith Center was his usual place of residence.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 133 P.—45



[2] The plaintiff claimed in his petition a meritorious defense to the cause of action upon which the judgment was founded. The paragraph of the petition stating this claim was in effect stricken out (a so-called demurrer to it by the defendant was sustained), probably because it was regarded as too general in its allegations, but this court regards it as sufficiently specific for the purpose for which it was inserted. The service upon which the judgment rested was a nullity, and the judgment was not merely voidable, but was void. Under these circumstances, there were no equities in favor of the defendant, and the plaintiff was required to do no more than make a fair showing that he was not simply delaying justice by compelling the defendant to resort to regular procedure. He was not obliged to try out the merits of his defense in the injunction suit. *True v. Mendenhall*, 67 Kan. 497, 73 Pac. 67.

The plaintiff made an assertion of facts in his petition sufficient to satisfy the requirements which equity imposed upon him. After the paragraph in question was eliminated, no further objection was made to the petition, and the case was tried as if the only matter in issue were the validity of the judgment. Therefore the defendant cannot in justice ask that the cause be remanded, and that the plaintiff be called upon to prove what he stood ready to prove at the trial.

The judgment is reversed, and the district court is directed to render judgment for the plaintiff. All the Justices concurring.

(90 Kan. 350)

#### HUNT et al. v. REMSBERG.

(Supreme Court of Kansas. July 5, 1913.)

(Syllabus by the Court.)

#### 1. JUDGMENT (§ 743\*) — SUBSEQUENT PROCEEDINGS—LAW OF CASE.

The decision in *Hunt v. Remsberg*, 83 Kan. 665, 112 Pac. 590, 32 L. R. A. (N. S.) 246, 21 Ann. Cas. 1267, was an adjudication that the insurance money involved belonged to the estate, and not to the plaintiffs, and was binding on the parties.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1252, 1253, 1275-1277, 1284; Dec. Dig. § 743.\*]

#### 2. FORMER OPINION ADHERED TO.

This appeal amounts to a second application for a rehearing of the former case, and the decision thereof and the opinion therein are adhered to.

Appeal from District Court, Allen County.

Action by Nettle Hunt and another against John D. Remsberg, administrator. From judgment for plaintiffs, defendant appeals. Reversed, with directions.

Chas. H. Apt and Frederick Apt, both of Iola, for appellant. Frank Forrest and Chris Ritter, both of Iola, for appellees.

WEST, J. This case presents a question of res judicata and no other demanding consid-

eration. After the decision in *Hunt v. Remsberg*, 83 Kan. 665, 112 Pac. 590, 32 L. R. A. (N. S.) 246, 21 Ann. Cas. 1267, the plaintiffs filed in the probate court an application for an order requiring the administrator to pay to them the proceeds of the insurance. The administrator set up the former adjudication, which defense was sustained by the probate court, and on appeal to the district court this ruling was reversed, and the administrator was ordered to pay the insurance money to the plaintiffs in equal shares. The defendant appeals.

[1] The administrator insists that the former adjudication settled the rights of the parties, and was therefore binding and final. The plaintiffs contend that the former decision was wrong per se, and having been concurred in by a majority only of the court is not to be considered obligatory as a precedent. Their serious contention, however, is that the real question now at issue was not raised in the former action, and therefore has not been adjudicated. This proposition is based upon the theory that, while it was decided that the administrator was entitled to collect the insurance money, it was not determined what he must do with it after its collection.

The former action was upon the administrator's bond to recover the insurance money received upon the life of John H. Hunt and used as a part of his estate. It was claimed that this money belonged exclusively to the children and was no part of the estate, and that neither the administrator or the probate court had any right to assume control or to exercise dominion over it. The terms of the policy were considered as stated in the opinion, and although it was said (83 Kan. 667, 112 Pac. 590, 32 L. R. A. [N. S.] 246, 21 Ann. Cas. 1267) that it was contended by the plaintiffs that the proceeds belonged to the legal representatives, and that the children were special representatives, while it was contended by the defendants that the administrator was the legal representative, and that this constituted the sole question in controversy, it was also said (83 Kan. 669, 112 Pac. 591, 32 L. R. A. [N. S.] 246, 21 Ann. Cas. 1267): "We do not know why he neglected to appoint another beneficiary. We only know that he allowed to stand unchanged language which, in its ordinary meaning, justified the interpretation placed upon it by the insurance company when it paid the money, and by the administrator and probate judge who officially exercised jurisdiction over it. The ordinary meaning of the language used would lead to this conclusion, and we are unable to find anything either in the instrument where this language is used or elsewhere in the case which, to our minds, shows any other intent. The judgment is reversed, with directions to enter costs in favor of the defendants."

In a special concurring opinion by Mr. Jus-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



tice Benson it was said: "The policy was made payable directly to the legal representative, subject only to the death of the wife before the death of the insured. It was not issued to creditors, but for the benefit of the estate. Whether creditors might ultimately share in it was a contingency which, if contemplated at all, was not prohibited by the statute nor by public policy, which is not inimical to the payment of debts. The other statutory provision only declares that, in the absence of an agreement or assignment to the contrary, the policy shall inure to wife or children. Here the agreement to the contrary is expressly made in the contract. The statute thus recognizes the right to make insurance available to creditors if the insured so desires. Both of these statutory provisions, however, relate to insurance payable to creditors directly, and not to any contingent or possible benefits they may receive through the administration of an estate." 83 Kan. 671, 112 Pac. 592, 32 L. R. A. (N. S.) 246, 21 Ann. Cas. 1267. Again, at page 673 of 83 Kan., at page 592 of 112 Pac. (32 L. R. A. [N. S.] 246, 21 Ann. Cas. 1267), after stating that the answer admitted that the money had been disbursed under the orders of the probate court, and the administrator had duly performed all the orders and judgments and had not violated any condition of the bond, it was said: "There is no averment in the petition that the appellees ever presented their claim in the probate court, although the sum due on this policy appeared on the inventory. A grave question is presented whether, even if the appellees were entitled to the fund, they should not have presented their claim in the probate court. The right of the administrator to collect the money is expressly held in *Kelley v. Mann*, 56 Iowa, 625, 10 N. W. 211. The fund was thus brought within the jurisdiction of the probate court, and the question remains whether there is any breach of the bond until there is a violation of some order of the court respecting its distribution."

In the dissenting opinion of Chief Justice Johnston, concurred in by Justices Smith and Porter, it was said: "The declared purpose of the statute was to provide protection for widows, heirs, orphans, and legatees, and deceased members. In cases of doubt the intention of the insured is an important element in determining the meaning of words used in a certificate. Now, the assured had a wife and children, and he became a member of an association that was organized to provide insurance for wives and children. He designated his wife as a beneficiary, and when his wife died the children still needed the protection. He did not, it is true, name another beneficiary after the death of his wife, but it was not to be supposed that he was planning and intending to make provision for the protection of creditors at the expense

of his children. It is rather to be inferred that he regarded the term 'legal representatives' as broad enough in its meaning to include his children, and, so far as intention can go, it would not take much evidence to raise the presumption that he intended the insurance for his children, and not for his creditors." 83 Kan. 675, 676, 112 Pac. 593, 32 L. R. A. (N. S.) 246, 21 Ann. Cas. 1267. The closing sentence of the syllabus is: "The administrator was the legal representative of the deceased within the meaning of that term, and was entitled to the money as a part of the estate of the insured."

It would be difficult to use language which could more plainly show the views of the various members of the court that the majority opinion held that the estate, and not the children, were entitled to the proceeds of the insurance, and that the administrator having used the money and paid it out as belonging to the estate could not be required to pay it to the children. The very basis of the action was the claim that the children were entitled to it by the terms of the policy, in accordance with the intention of the deceased and the provisions of the Iowa statute under which the insurance company was organized, and, had this claim been successful, the inevitable result would have been to render judgment in favor of the plaintiff against the administrator instead of rendering judgment in favor of the latter for costs, and expressly holding and saying that the children ought not to recover. This question therefore—as to whom this money rightfully belonged—was adjudicated and determined. The decision, therefore, became the law of the case and binding on all the parties.

[2] The only remaining question is whether the law, as thus declared, is now to be changed by a departure from the former holding. The court, including those who dissented, is not disposed to make such departure. The very vigorous oral argument of plaintiffs' counsel and the brief and authorities cited have been given full consideration, but the controversy having been once decided the former ruling must stand.

The judgment is therefore reversed, with directions to enter judgment in favor of the defendant for costs. All the Justices concurring.

(90 Kan. 224)

REMY v. FOWLER PACKING CO.

(Supreme Court of Kansas. July 5, 1913.)

(Syllabus by the Court.)

1. RELEASE (§ 58\*)—VALIDITY—EVIDENCE.

Under the circumstances of which there is evidence in this case, it is a question of fact whether or not the written release was executed with a fair understanding of its provisions, and is valid and conclusive of the rights of the parties.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 109-114; Dec. Dig. § 58.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



## 2. APPEAL AND ERROR (§ 1005\*)—REVIEW — SUFFICIENCY OF EVIDENCE.

The evidence of the appellee was evidently believed by the jury, and their verdict was approved by the court in rendering judgment in accordance therewith; and, following the well-established rule, we cannot reverse the judgment here.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.\*]

Appeal from District Court, Wyandotte County.

Action by N. H. Remy against the Fowler Packing Company. Judgment for plaintiff and defendant appeals. Affirmed.

Boyle & Howell, of Kansas City, Mo., Angervine, Cubblison & Holt, of Kansas City, Kan., and J. S. Woodford, for appellant. McFadden & Claflin, of Kansas City, Kan., for appellee.

SMITH, J. The appellee brought this action against the appellant, the Fowler Packing Company, and the St. Louis & San Francisco Railroad Company, to recover damages for personal injuries alleged to have been received while in the discharge of his duties in taking the temperature of refrigerator cars which had been placed by the railway company upon appellant's side track for the purpose of being loaded with meat and other articles for transportation. It was alleged that it was the custom and duty of the appellant to have a watch kept and to inform the appellee when the cars in which he was working were to be moved; that the appellant neglected and omitted to discharge its duty in this respect; and that while appellee was about to pass from one of the refrigerator cars to another an engine of the railway company was run upon and against the refrigerator cars violently, and by the impact the door was thrown against him, and bruised his head and face and body, his right arm was severely wrenched, and the bone thereof broken in two places, by reason whereof he was caused great physical pain and mental anguish, and the injury to his arm, legs, and nervous system have become permanent, all to his damage in the sum of \$5,000. The appellant answered by a general denial; also that, if any injury occurred as alleged, the cause of action had been fully compromised and fully settled by a written release, a copy of which was attached to the answer; also, that the defendant was guilty of contributory negligence.

The plaintiff in reply denied generally the allegations of the answer, and alleged that, if the appellant had any writing or paper purporting to be a release signed by the plaintiff, the same was obtained and procured by means of false and fraudulent representations, acts, and conduct of the appellant and its agents, attorneys, and servants. In the reply it was alleged that one McClain, who

was the superintendent and vice principal of the appellant, and one Beggs, who was then assistant superintendent, knowing that appellee had received severe and lasting injuries by the negligence of the appellant, verbally contracted that, if he would refrain from bringing suit against the appellant, the appellant would give appellee a lifetime job at the wages he was receiving at the time of his injury. There is no complaint urged against the pleadings nor of the instructions given by the court. A demurrer by the defendant railroad company to the petition, so far as it was attempted to state a cause of action against the railroad company, was sustained, and there is no appeal from such ruling.

Only one question is presented in appellant's brief, viz.: Is the evidence sufficient to sustain the verdict and judgment for the appellee? The appellant contends that the reasons assigned by appellee for avoiding the written release executed by him are insufficient, and calls the attention of the court to *Railway Co. v. Vanordstrand*, 67 Kan. 386, 73 Pac. 113, and to several other decisions of this and other courts. It is especially contended that the doctrine announced in the *Vanordstrand* Case, supra, determines the decision of this case. There is a wide difference between the circumstances under which the settlement was made in that case and in the other cases cited and the circumstances attending this settlement, but it is unnecessary to trace the distinctions further than to say that as a question of law, under the evidence, the appellee is not debarred from showing his former agreement with McClain, the superintendent, and that he relied thereon, if his condition of mind, from his pain and the effects of opiates and intoxicants taken, was such that at the time of signing the release he was incapable of understanding the effect thereof or of giving attention to the language thereof when it was read to him. Under all the evidence on this point, it was a question of fact for the jury whether the appellee entered into that contract with a fair understanding of its import, and was bound thereby, and whether he did, in fact, rely upon his alleged agreement with McClain for employment for life. From the verdict of the jury, it must be assumed that they found those questions in favor of the appellee.

The evidence of the conversation between Remy and McClain is substantially as follows: Appellee said to McClain: "I am hurt awful bad, and am suffering very bad, and I think you ought to do something for me." McClain said: "Well, we aim to do you right." Appellee then said: "Well, I expect pay for my time while I am injured, and I expect a lifetime job out of this, and I need some money. I want some money to help me through while I am in such a bad fix."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



McClain said: "Well, we will do right by you." Appellee then said: "Well, Mr. McClain, what do you advise me to do?" McClain said: "I will tell you, I would rather not advise you any further on this, only we will give you the work all right. You go up town, see—to our lawyer, a man up there, see, he will fix you up." Appellee then said: "I need a little money to help me through with my misery and trouble." McClain said: "Go up there, and whatever he does is all right, will be all right; go up and see him." McClain then called a man from another office, and said to him: "See, you take Mr. Remy up to Boyle & Howell's office, our lawyers there, and take him up there, and tell them to do something for him." Appellee, being further questioned, said that McClain said to him: "Yes; we will treat you right, we will give you work as long as you live and do the right thing. Yes; you go on up there, what those men tells you will be all right." Appellee then said to McClain: "I will expect a lifetime job at the wages I am getting, the same as I have been drawing." McClain then said: "Yes, sir; we will treat you right." The appellee testified that, when he went to the law office and at the time he signed the release, he was suffering great pain, and had been taking opiates and whiskey on the advice of his physicians and was intoxicated, that he was unable to concentrate his mind when the release was read to him, and understood that it was only a receipt for the money then paid to him.

From this, if believed, the jury might well conclude that the superintendent did not send the appellee for a full settlement of the claim against appellant, but only for money to sustain him, and pay his expenses during his inability to work, and that appellee so understood it. Also, that if the appellee went to the lawyers only for money for temporary purposes, and received the sum of \$200, in his condition he might have been misled, although the release was fairly read to him. The fact that Remy only asked for \$200, as testified to by Woodford with whom the transaction was had, lends probability to Remy's version of his understanding. It may have seemed incredible to the jury that he should have proposed and intended to release a claim against appellant for that amount when the jury, after hearing all the evidence of each party, returned a verdict in his favor for \$3,000, after offsetting the \$200 paid to him by Woodford. Again, his subsequent action, which is not disputed, in presenting himself at appellant's packing house for work as soon as he was able and working, until he was told he must work for less wages than he had received before the accident, may well have been regarded as consistent with and corroborative of his alleged understanding of the transaction.

[1, 2] The appellee himself was the only

witness called upon his side of the case, and his evidence was disputed as to several statements therein by several witnesses called by the defense, but it is the province of the jury to determine the facts after hearing all the evidence, and considering all the circumstances disclosed. The release being signed and acknowledged as the free act of the appellee is conclusive of the rights of the parties if fairly executed with knowledge of its contents, and the burden of impeaching it rested upon the appellee. Yet we cannot say that the verdict which was approved by the court is not sustained by the evidence.

The judgment is affirmed. All the Justices concurring.

(90 Kan. 420,

# BUCHANAN v. BLAIR et al.

(Supreme Court of Kansas. July 5, 1913.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 121\*) — INJURY TO EMPLOYEES—"MANUFACTURING ESTABLISHMENT."

An elevator operated by machinery, and used for buying, selling, storing, cleaning, sorting, shelling, and mixing grain, improving its grades, and converting it into new and improved or different form by shelling corn and cleaning wheat, is, within the provisions of the factory act, a "manufacturing establishment." Laws 1903, c. 356, Gen. St. 1909, §§ 4676-4683.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228-231; Dec. Dig. § 121.\*

For other definitions, see Words and Phrases, vol. 5, pp. 4346-4358; vol. 8, p. 7716.]

Appeal from District Court, Atchison County.

Action by Jennie Buchanan, administratrix of E. E. Buchanan, against William A. Blair and J. Wesley Blair, partners as Blair Elevator Company. Judgment for plaintiff, and defendants appeal. Affirmed.

James W. Orr and Waggener & Challiss, all of Atchison, for appellants. W. W. & W. F. Guthrie, of Atchison, for appellee.

WEST, J. The only question presented concerns the applicability of the factory act to the elevator, operated by unguarded machinery, in which the plaintiff was injured.

The jury returned the following answers to special questions submitted:

"Q. 17. Were the defendants, at the time of the accident complained of, operating a grain elevator at the place where said Buchanan was injured? A. Yes.

"Q. 18. If question No. 17 is answered 'Yes,' then state whether, in the operation of such elevator said defendants did anything, other than buying, selling, storing, cleaning, sorting, and shelling and mixing grain. A. Yes.

"Q. 19. If question No. 18 is answered 'Yes,' then state what else was done there

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



by the defendants in the transaction of such business. A. Improving grades.

"Q. 20. Did the defendants manufacture anything in their elevator? A. Yes.

"Q. 21. If question No. 20 is answered 'Yes,' then state what it was that was so manufactured. A. More improved grades of grain.

"Q. 22. Was the grain which was handled by the defendants at their elevator at the time of the injury complained of, by reason of such handling, converted into a new, improved, or different form? A. Yes.

"Q. 23. If question No. 22 is answered 'Yes,' then state what grain, and into what new, improved, or different form it was so changed. A. By shelling corn and cleaning wheat."

Section 7 of the factory act (Gen. Stat. 1909, § 4682), furnishes the definition of manufacturing establishments. "Manufacturing establishments," as those words are used in this act, shall mean and include all smelters, oil refineries, cement works, mills of every kind, machine and repair shops, and, in addition to the foregoing, any other kind or character of manufacturing establishment, of any nature or description whatsoever, wherein any natural products or other articles or materials of any kind, in a raw or unfinished or incomplete state or condition, are converted into a new or improved or different form."

In *Casper v. Lewin*, 82 Kan. 604, at page 610, 109 Pac. 657, at page 659, in speaking of the last clause of this section, it was said: "Then, in order that the full scope of the act might not be mistaken, the broadest possible definition of a manufactory was added. \* \* \* Although somewhat elaborate in phraseology, in essence, and in substance, this is the universally inclusive definition of a manufactory which is found in the dictionaries, encyclopedias, and works on economics." It was held that an establishment wherein railroad iron, old stoves, old waste iron, and scrap iron of every description is cut into lengths known as grade No. 1, grade No. 2, and busheling scrap, by means of machines known as alligator shears, and operated by power to meet the standing specifications of mills which purchase the product, is a manufacturing establishment. It was said in the opinion that the process of manufacturing may be complicated or simple, and have primary and secondary stages, but that the Legislature has said that all establishments for the modification of natural objects to adapt them to human needs are embraced in the act. This was followed in *Clark v. Stock Food Co.*, 86 Kan. 982, 122 N. W. 895, and *Raines v. Stone*, 87 Kan. 116, 123 Pac. 871. In *Ward v. City of Norton*, 86 Kan. 906, 122 Pac. 881, a gasoline engine, used in connection with belts, pulleys, and cogwheels to pump water through pipes to

supply the inhabitants of the city, was decided to be not within the act. This was upon the ground that it was not even contended that the water was modified in any way to adapt it to human needs, or in any sense manufactured or changed, but simply conveyed from one place to another.

The findings make it clear that the elevator containing the machinery which injured the plaintiff's husband was used for cleaning, sorting, shelling, and mixing grains, improving their grades, and converting them into new, improved, or different forms. It is true, as suggested by the defendants, that the Legislature did not use the word "elevator," but the mere elevation and storage of grain would be one thing, while shelling, cleaning, and converting grain into new, improved or different forms would be essentially a different thing. Corn in the ear is quite a different commodity from its constituent elements of cob, kernel, and particles of husk, silks, and soil separated and removed by the process of shelling by machinery. It must be remembered that the provisions of the act do not require conversion of the raw material into the last-completed product, as corn into meal, or wheat into bread, but only into a new or improved or different form, and it is attaching no elasticity to the language used to hold that the processes carried on at the elevator in question were within the meaning and intention of section 7.

The factory act presents an example of modern legislation expressing a higher regard for the sacredness and safety of life and limb than shown in the past by the lawmakers. While the courts are not required or permitted to add to or extend laws passed for this commendable purpose, it is nevertheless their duty to give to them their full and natural meaning, and to construe them in the spirit which characterized their enactment, and which marks the progress of the law in its regard for human safety. We think the ruling of the trial court was not only sustained by the facts, but that it was clearly correct.

The judgment is therefore affirmed. All the Justices concurring.

(30 Kan. 229)

KEENER v. LLOYD.

(Supreme Court of Kansas. July 5, 1913.)

(Syllabus by the Court.)

LIMITATION OF ACTIONS (§ 200\*)—TOLLING OF STATUTE—PAYMENT—INSTRUCTIONS.

In a controversy as to whether or not an action upon a promissory note was barred by the statute of limitations, in which it was claimed that a partial payment indorsed upon the note tolled the statute, and where there was testimony by the holder that a payment was made on the date of the indorsement, and also testimony of such payment by another witness who was unable to fix the particular day when it was made, an instruction to the effect

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



that, unless it was shown that the payment was made on the particular date of the indorsement, the bar of the statute had fallen, and no recovery could be had upon the note, and the refusal of a request for an instruction that the action would not be barred if a payment had been made at or near the date of indorsement, and within the statutory period of limitation, was error.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 731, 732; Dec. Dig. § 200.\*]

Appeal from District Court, Clay County.

Action by S. E. Keener against Robert Lloyd, as executor, etc. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Dawes & Miller, of Clay Center, for appellant. O. Vincent Jones, of Clay Center, and F. L. Williams, of Jefferson City, for appellee.

JOHNSTON, O. J. The principal question involved in this litigation was whether the action brought by the appellant, S. E. Keener, against the representative of John Lloyd, deceased, was barred by the statute of limitations. It was alleged by appellant that on January 28, 1903, John Lloyd executed a promissory note to appellant for \$1,700, and that subsequently he made four payments upon the note as follows: On May 1, 1905, \$475; on June 7, 1905, \$300; on November 19, 1907, \$90; and on November 18, 1909, \$75. The bar had fallen unless a partial payment had been made by Lloyd within the statutory period. There is little controversy as to the two payments made in 1905, but the indorsements upon the note as of 1907 and 1909 are contested by appellee. If either of these was in fact made, the debt is not barred. On the back of the note indorsements as of 1907 and 1909 were written. Appellant testified circumstantially as to these payments, and stated that the indorsements were entered on the note when the payments were made. Another witness testified as to circumstances tending to show that a payment was made on the note by Lloyd some time after the 1st of June, 1909. He was not able to state positively the date on which the payment was made, but he testified that he returned from a Colorado trip on June 1, 1909, and that the payment was made in his presence after that time. The verdict of the jury was against appellant, which was, in effect, a finding that the action was barred. The appellant asked the court to instruct the jury that, if the payments mentioned were made at or near the dates of indorsement, they would operate to interrupt the running of the statute of limitations. The court, however, instructed the jury that: "If you shall fail to be satisfied by a preponderance of the evidence that either on the 19th day of November, 1907, \$90 was paid by John Lloyd upon this note, or that on the 18th of November, 1909, \$75 was paid by

John Lloyd upon this note, then your verdict would be for the defendant." In charging that unless the evidence showed that a payment was made on one of the designated days the action was barred the court committed prejudicial error. While the date of an indorsement upon an instrument is prima facie evidence of the time at which the payment was made, and while appellant testified that the payments were made upon the dates shown by the indorsements, he was not concluded by the entries of indorsement, nor yet by his testimony as to the particular days of payment, and the debt would not be barred if the payments were really made and received at any time within the statutory period. *Fear v. Bank*, 86 Kan. 140, 119 Pac. 539. As was said in *Hastie v. Burrage*, 69 Kan. 580, 77 Pac. 268: "It is the payment of a portion of a debt, and not the actual indorsement of such payment upon the instrument evidencing such debt, which tolls the statute of limitations." Syllabus par. 3.

Testimony was offered with a view of proving that the parties were not together on November 18, 1909, the date of the last indorsement upon the note, and the jury may have believed that appellant was mistaken as to a payment on that day, and yet have been satisfied that a payment was made on another day of that year. One witness, as we have seen, testified as to a \$75 payment being made in the latter part of that year, but was not certain as to the date of payment. The payment might be fixed in the memory of the witness by some circumstance, and yet the day of the year when it was made take no hold on his mind. If, as he testified, a payment was made in the latter part of the year of 1909, whether before or after November 18, 1909, it would operate to toll the statute. It can hardly be said that the appellant's position compels a holding that the payments were made on the dates of the indorsements or not at all, as he requested an instruction that a payment at or near the date of the indorsement would take the note out of the statute of limitations.

We think it cannot be said that the omission or error was without prejudice, and therefore the judgment of the district court will be reversed, and the cause remanded for a new trial. All the Justices concurring.

(90 Kan. 184)

STATE ex rel. JACKSON, Atty. Gen., v. CITY OF COFFEYVILLE et al.

(Supreme Court of Kansas. July 5, 1913.)

1. CONTEMPT (§ 54\*)—PROCEEDINGS—SUPPLEMENTAL CHARGES.

Defendants cannot complain of the filing of supplemental charges in contempt proceedings after the hearing was begun where they were not denied an opportunity to meet such charges.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 143-149; Dec. Dig. § 54.\*]



## 2. INJUNCTION (§ 232\*)—VIOLATION—PUNISHMENT.

In assessing punishments for contempt in violating an injunction restraining a city and its officers from licensing persons to sell liquor, etc., the court must consider the authority vested in and the duties of the several officers and will impose a more severe penalty upon the officers having the greater power and responsibilities.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 519-528; Dec. Dig. § 232.\*]

Contempt proceedings by the State of Kansas, on relation of Fred S. Jackson, Attorney General, against the City of Coffeyville and others. Judgment of contempt as stated.

Jno. S. Dawson, Atty. Gen., and Hal R. Clark, of Independence, for plaintiff. J. B. Tomlinson, of Independence, for defendants.

**PER CURIAM.** On July 3, 1908, a judgment of this court was entered permanently enjoining the city of Coffeyville, its officers and agents, from licensing persons to sell liquor or to maintain places for the sale thereof by levying fines in simulated prosecutions or other makeshifts and devices, and also from licensing bawdyhouses and disreputable places of like character, and from all attempts to set at naught the laws of the state enacted for the suppression of the sale of intoxicating liquor and for the suppression of prostitution and of houses of ill fame. *State v. Coffeyville*, 78 Kan. 599, 97 Pac. 372, 130 Am. St. Rep. 386. On September 10, 1912, on complaint of the county attorney that the injunction was being violated by the officers of the city, a citation for contempt was issued accusing the mayor, the chief of police, and four policemen with violating the judgment of injunction. A denial of the charges was made by the respondents. A commissioner was appointed to take evidence and to make findings of fact and conclusions of law thereon. This was done and the commissioner found, upon what appears to be sufficient evidence, that five of these officers attempted to set at naught the intoxicating liquor laws of the state as well as those for the suppression of prostitution and of houses of ill fame; that during their incumbency of office they took and received from a number of persons in the city sums of money for the privilege of remaining inmates of houses of ill fame and also as license fees for the privilege of selling intoxicating liquor as well as for keeping and maintaining places where intoxicating liquors were kept and sold. There was no finding of a violation of the judgment by the respondent Donnelly.

The respondents contest the sufficiency of the evidence and contend that they were not given sufficient notice of the injunction. The injunction violated was not a preliminary order but was the final judgment in an action in which notice was given and where in the city appeared and defended. The

judgment rendered was against the city and its officers and forever enjoined them from doing the prohibited acts. The things done by respondents were not only violations of the permanent injunction but were plain violations of statutory law. In *State v. Porter*, 76 Kan. 411, 91 Pac. 1073, 13 L. R. A. (N. S.) 462, a permanent injunction was granted prohibiting certain parties, and all others from maintaining a liquor nuisance in a building, and it was held that it constituted a judgment of which owners, tenants, and occupants must take notice and that no actual knowledge or notice is necessary to a prosecution for the violation of the judgment. There are equally good reasons for holding that officers who take possession of the offices of a city that has been permanently enjoined from licensing lawbreakers and doing other illegal acts are bound to take notice of the judgment, and especially where the acts are in themselves public offenses. But, whether we regard notice to be a matter of right or only give it consideration in determining the punishment for violation of the injunction, the respondents must be deemed to have had knowledge of the injunction. The evidence in the case practically brings it within the rule of *State v. Pittsburg*, 80 Kan. 710, at page 712; 104 Pac. 847, at page 848 (25 L. R. A. (N. S.) 226, 133 Am. St. Rep. 227), in which it was held that it was not necessary that the respondents should have been parties to the original action, and that: "No official notice of the order was necessary. If actual notice was not inferable from the publicity of the proceedings, knowledge of the rendition of the judgment follows from the efforts made to evade it, which had no other possible purpose."

The proceeding against the city with the result reached necessarily attracted general attention of the people and could not easily escape the knowledge of those who were in control of city affairs or who shortly afterwards came into control. The respondents came into office in April, 1911, about two years and nine months after the judgment was rendered. It appears, too, that the mayor had served an earlier term since the judgment; only a year intervening between the former and the present term. These facts and the efforts made to cover up the violations of the judgment and to evade its effects gave good ground for the inference that respondents had knowledge of the judgment. As was said in *State v. Porter*, 76 Kan. 413, 91 Pac. 1074, 13 L. R. A. (N. S.) 462: "In willfully embarking upon an unlawful business they might well be presumed to have scanned every possible source of danger and to have not overlooked so public a proceeding as the injunction suit."

[1] There is no reason to complain of the filing of the supplemental charges after the hearing was begun, as respondents were not

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



denied an opportunity to meet them; nor is there any doubt as to the identity of the transcript upon which the abstracts of counsel on both sides are based and the arguments of counsel are founded. Detail findings of fact were made by the commissioner which show repeated violations of the injunction by each of the respondents; and, while the findings are attacked as unsupported by testimony and also that testimony was given by witnesses unworthy of belief, a reading of the testimony leaves no doubt that the respondents are guilty of violating the judgment of injunction.

[2] E. C. Rice, Fred Wannewetsch, J. H. Fletcher, H. A. Thacker, and P. K. Smith must therefore be adjudged to be in contempt. In assessing the punishment regard must be had to the authority vested in and the duties required of the several officers. Considering the greater power and larger responsibility of E. C. Rice, the mayor, and Fred Wannewetsch, the chief of police, a fine of \$500 will be assessed against each of them. The policemen who held subordinate places and consequently had less responsibility should not suffer so heavy punishment as the others, and hence fines of \$100 each will be assessed against J. H. Fletcher, H. A. Thacker, and P. K. Smith. Payment of these fines will be enforced by commitment in the county jail of Montgomery county.

(90 Kan. 446)

**WILSON v. BOARD OF COM'RS OF CLOUD COUNTY et al.**

(Supreme Court of Kansas. July 5, 1913.)

On petition for rehearing. Denied.

For former opinion, see 132 Pac. 1176.

Theo. Laing, of Concordia, Pierce E. Butler, of Glasgow, and Pulsifer & Hunt, of Concordia, for appellant. R. M. Anderson and Chas. L. Kagey, both of Beloit, and M. V. B. Van De Mark, of Clyde, for appellees.

**PER CURIAM.** The petition for rehearing in this case asserts that the case was decided upon a misstatement of facts established by the evidence. We have examined the opinion and the abstracts, and find that two recitals of fact in the opinion are inaccurate, but that the decision of the case in no way depended upon either of them. On the other hand, the petition for rehearing is inaccurate as to some very material facts as shown by the abstracts.

The report of the viewers on the laying out of the road omitted any reference to damages. In a subsequent report they assessed the damages to appellant's land at \$250, which was allowed by the board of county commissioners. From this allowance Wilson appealed. He could have as well appealed from the refusal to allow any damages. The amount of damages is immaterial.

The decision is plainly based upon the point that the appellant cannot in the same court, at the same time, claim in one action that his land has been appropriated for a public highway and demand damages therefor, and in another action claim that the land has not been appropriated and seek to enjoin the board of county commissioners from opening a public road thereon.

Whether the hearing of the application for a temporary injunction was submitted on evidence taken on a motion to stay proceedings or on a motion for a temporary restraining order is also immaterial, and in no way affected the decision.

The petition for rehearing is denied.

(90 Kan. 365)

**WEEKS v. SEYMOUR PACKING CO.**

(Supreme Court of Kansas. July 5, 1913.)

(Syllabus by the Court.)

**MASTER AND SERVANT (§ 129\*) — INJURY TO SERVANT—FACTORY ACT.**

Where it clearly appears, in an action for personal injuries under the factory act, that the injuries did not result from a failure to inclose the elevator complained of, and that such failure did not contribute thereto, no recovery can be had.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 257-263; Dec. Dig. § 129.\*]

Appeal from District Court, Shawnee County.

Action by J. E. Weeks against the Seymour Packing Company, a corporation. From judgment for plaintiff, defendant appeals. Reversed and remanded.

R. W. Blair, B. W. Scandrett, and C. A. Magaw, all of Topeka, for appellant. D. H. Branaman, of Topeka, for appellee.

**SMITH, J.** In his petition the appellee summarized his grounds of complaint against the appellant as follows: "That said elevator and elevator shaft were improperly constructed in that the same were placed too close to the west wall of the refrigerator room as aforesaid, and in not leaving space enough to get to said fuse box excepting through the elevator shaft. In placing the large post at the southeast corner of said elevator shaft and thus preventing access to the fuse box through the small opening between said shaft and the west wall of said refrigerator room. In placing said fuse box in such a position as to make it impossible to reach the same excepting through the elevator shaft. In not properly and substantially inclosing said elevator shaft so as to secure, protect, and guard the lives and limbs of its employes. In failing to provide plaintiff with a reasonably safe place to work."

As will be seen, the petition sets forth a common-law action for failure to provide the appellee a reasonably safe place to work, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



also a cause of action under the requirements of the factory act for not inclosing the elevator shaft in accordance with the factory act set forth in sections 4676 and 4683 of the General Statutes of 1909.

The briefs of both parties say that the case comes within the factory act. The court by its instruction No. 6 also limited the consideration of the case to the factory act. The instruction reads: "On the other hand, if you find from the evidence that the defendant did cause said elevator shaft to be properly and substantially inclosed or secured, or if you find that, even though it did not cause the same to be properly and substantially inclosed or secured, the absence of such safeguard or precaution or the failure to provide the same did not directly contribute to the plaintiff's alleged injury, or in case you find that the building or structure in which said elevator shaft was contained or located was not a manufacturing establishment, then and in either of said cases the plaintiff is not entitled to recover, and your verdict must be for the defendant." In defense the appellant pleaded the contributory negligence of the appellee, and it is urged that the evidence supports this plea. If there is cause of action against the appellant for noncompliance with the factory act, and such noncompliance was the cause or a contributing cause of the injury to appellee, contributory negligence on the part of the appellee is no defense. *Caspar v. Lewin*, 82 Kan. 604, 109 Pac. 657; *Bailey v. Spelter Co.*, 83 Kan. 230, 109 Pac. 791; *Sibley v. Cotton-Mills Co.*, 85 Kan. 256, 116 Pac. 889. The defense of contributory negligence would, however, have been available had the case been tried upon the common-law charge of negligence of the appellant.

The appellant assigns three grounds of error, each of which depends upon the question whether the evidence was sufficient to sustain the verdict and judgment.

By the undisputed evidence the elevator which caused the accident was in and a part of a manufacturing establishment and consisted of simply a platform, supported by upright posts and framework, which was raised and lowered from the first to the third story of the building for the purpose of carrying freight. On the second floor, where the accident occurred, the only protection to prevent people from walking into the elevator shaft was a wall on one side and a 2x4 scantling fastened on two sides. On the fourth side, where it was designed to enter and depart from the elevator with freight, a 2x4 scantling was fastened by a hinge joint to the post on one side and at the other side it was caught when lowered to a horizontal position. It was opened by simply lifting the unfastened end of the bar to a perpendicular position along the post to which the other end of the bar was hinged.

There is no controversy as to the evidence in the case. In fact, the appellee was the only witness introduced on the trial. Photographs of the elevator at different floors, open and closed, and a model of the building and elevator were introduced in evidence and have been exhibited here for our examination in considering the questions involved. That the elevator was inclosed as required by the factory act is not contended, but it is contended that the evidence entirely fails to show that the failure to inclose the elevator in any way contributed to appellee's injury.

According to appellee's evidence, it became his duty to open a fuse box which was fastened upon the wall at the side of the elevator in such manner that one could not get to it to open it without entering, partially at least, into the elevator shaft. He had to open the fuse box to adjust the electric wires in the building. To gain access to the fuse box, he leaned over the movable bar, before described, bringing the upper part of his body within the shaft. He says the bar was down in the horizontal position at the particular time of the accident; that he put it down himself; that the bar was about 36 inches from the floor; that while he was leaning over the bar and looking at the fuse box the elevator was lowered from the floor above and crushed him to the floor.

Having the model, which it is agreed is correct, before us and reading appellee's evidence, it is impossible to conceive how the failure to inclose the elevator as required by the factory act contributed to his injury. If the elevator had been completely inclosed on that floor, with a door for ingress and egress, he would have been compelled to open it to get to the fuse box. With the elevator at the floor above him, the bar over which he leaned to examine the fuse box was apparently the best protection he could have to keep him from falling into the shaft and which would at the same time permit him to lean around the post and examine the fuse box. Had the elevator been inclosed with a door at the landing, the appellee, to get to the fuse box, would have been compelled to open it and to have stood, partially at least, over the shaft. If, then, the elevator had descended upon him oblivious as he seems to have been to his surroundings, he would not only have received injury from the impact but would almost inevitably have been knocked to the bottom of the elevator shaft.

It was a deplorable accident, terrible in its consequences to appellee, but we are unable to see that any evidence produced tended to prove that the failure of the appellant to inclose the shaft contributed thereto.

The judgment is therefore reversed, and the case is remanded, with instructions to render judgment for the appellant. All the Justices concurring.



(90 Kan. 355)

**WILSON et al. v. GERMAN-AMERICAN INS. CO.**

(Supreme Court of Kansas. July 5, 1913.)

(Syllabus by the Court.)

**1. INSURANCE (§ 136\*)—CONTRACTS—EXISTENCE.**

The owner of property contracted with an agent representing several insurance companies to insure property for a certain amount, but did not designate the particular company in which the insurance should be taken, and at the same time he paid the premium and arranged with the agent to hold the policy and thereafter to keep the property insured. A policy was issued in a company which shortly afterwards was canceled, and the agent then placed the insurance in another company represented by him, and that policy, too, was canceled. He then placed the insurance in the defendant company and began to write out a policy, but an interruption prevented its completion at the time, and before it was finished the property was destroyed by fire. *Held*, that the steps taken by the authorized agent of the company constituted a binding contract of insurance with the defendant.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 219-230; Dec. Dig. § 136.\*]

**2. INSURANCE (§§ 536, 645\*)—PROOF OF LOSS—FAILURE TO FURNISH—PLEADING AND PROOF.**

Under the contract as pleaded the failure to furnish proofs of loss did not operate as a forfeiture.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1323, 1554, 1632-1644; Dec. Dig. §§ 536, 645.\*]

**3. INSURANCE (§ 129\*)—CONTRACT—VALIDITY—PRINCIPAL AND AGENT.**

The action of the agent in agreeing with the property owner to hold the policy and keep his property insured was not repugnant to the duty of the agent to the defendant, nor did it affect the validity of the contract of insurance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 180-182, 1849, 1850; Dec. Dig. § 129.\*]

Appeal from District Court, Shawnee County.

Action by Charles M. Wilson and others against the German-American Insurance Company. From judgment for plaintiffs, defendant appeals. Affirmed.

Thomas Bates, of Chicago, Ill., Hazen & Gaw, of Topeka, and Seymour Edgerton, of Chicago, Ill., for appellant. Eugene S. Quinton, of Topeka, and Stanford & Stanford, of Independence, for appellees.

**JOHNSTON, C. J.** This was an action begun by the appellees, Charles M. Wilson and P. L. Montague, as partners, to recover upon a contract of insurance between them and the appellant, the German-American Insurance Company. The facts in the case are not in dispute. Charles F. Yost was the agent of several insurance companies at Caney and among them the appellant, and was intrusted with signed policies with power to complete contracts and to fill out and deliver policies as occasion required. In 1909 the appellees owned an air dome theater which they

converted into a skating rink of steel construction with a pyrold roof. After the completion of the improvements they contracted with Yost for insurance on the building for \$375, and on the stage equipment, picture machine, and other property in the building to the amount of \$500, without designating the company in which the insurance should be taken. The premium was paid and received, and at the same time it was arranged that Yost would place the policy in his safe and should thereafter keep the property insured. Policies were written by him on the property in two other companies which he represented one after the other, but upon directions from each of these companies the policies issued were canceled, and then he determined to place the insurance in the appellant. After resolving to insure with appellant he began to write out the policy, but darkness intervened and he concluded to postpone the completion of the policy until the following morning. During the night the building was totally destroyed by fire, and no policy was ever delivered to appellees by appellant or its agent. After the fire Yost informed appellees of the action he had taken, but refused to complete and deliver the policy to them. At first they undertook to enforce the policies which had been issued by other companies and thereafter canceled, but finally pressed their claim against appellant to a judgment from which an appeal has been taken.

[2] It is first contended that the contract of insurance not being in writing is subject to the terms and conditions contained in the written policies usually and customarily issued by the appellant. One of the conditions of these policies, it is said, was that proofs of loss should be furnished within 60 days, and that no action could be maintained for a loss unless compliance with this requirement had been made. No proofs of loss were furnished by appellees, and, in explanation of this omission, they say that it resulted from the refusal of the appellant to give them a policy from which they could learn the conditions of policies customarily issued by the appellant. Failure to make proofs of loss within a specified time, however, does not operate to forfeit the rights of the insured, unless there is an express provision in the policy imposing a forfeiture for noncompliance with the requirement. *Insurance Co. v. Owens*, 69 Kan. 602, 77 Pac. 544. It is said that there was a provision in the policy usually issued by the appellant that no action could be maintained or recovery had until proofs of loss were made, but the condition pleaded in the answer upon which the case was tried does not provide for a forfeiture of any kind. In the form of policy introduced in testimony a forfeiture clause is written, but the case must be considered and determined upon the issues formed by

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the pleadings in the trial court. Under the circumstances the appellant is hardly in a position to complain of the omission to furnish proofs of loss. It is insisting on compliance with the conditions of a contract and denying that a contract was made. It is insisting that appellees shall observe the requirements of the policy usually issued, and still refuses to issue or furnish the policy which would inform and enable appellees to comply with its conditions. The furnishing of proofs of loss is for the benefit of the insurer, and when the company withholds the policy and the necessary information it ought not to be permitted to take advantage of its own neglect. In any event, the failure to furnish the proofs did not operate as a forfeiture of any condition named in the answer of appellant.

[1] It is next contended that a valid contract of insurance was never made between the parties. Yost was an agent of appellant with authority to complete contracts and to issue policies. A contract made by him is as binding in its effect as if it were made by any officer or representative of the company. Although no policy was issued, a contract was in fact made, and, as has been determined, a binding contract of insurance may be made without the issuance of a policy. *Insurance Co. v. Stone*, 81 Kan. 48, 58 Pac. 986; *Insurance Co. v. Corbett*, 69 Kan. 564, 77 Pac. 108; *Brown v. Insurance Co.*, 82 Kan. 442, 108 Pac. 824.

[3] Another contention is that Yost was the agent of the insured as well as of the insurer, and that the interests were so conflicting that any contract made by him was without force. The arrangement that the agent should retain the policy when issued and keep the property insured thereafter is the only basis for the claim that he was acting as the agent of appellees. There is nothing substantial in the claim of agency of the insured and, in any event, nothing approaching a conflict of interests. It is a common practice among agents to notify the insured of the expiration of their policies, and to send renewals to those who have been insured with the companies represented by them. These are duties which the companies expect the agents to perform. While it is a convenience to the insured, it is really done in the interest of the insurer in order to hold the patronage of the insured. The

fact that the policy was to have been left in the safe of the agent after the contract was made was a mere matter of accommodation to appellees, and did not operate to create a conflicting agency any more than the custody of a written contract by one of the parties to it would make him the agent of the other. No evidence was offered to show, nor in fact was there any claim, that there was fraud in the transaction or collusion between Yost and the appellees. Duality of agency is permissible under the law in some instances. Thus it has been said that: "The maxim that 'no man shall serve two masters' does not prevent the same person from acting as agent, for certain purposes, of two or more parties to the same transaction when their interests do not conflict, and where loyalty to the one is not a breach of duty to the other." *Nolte v. Hulbert*, 37 Ohio St. 445, 447. See, also, *Todd v. German-American Insurance Co.*, 2 Ga. App. 789, 59 S. E. 94; *Herman v. Martineau*, 1 Wis. 151, 60 Am. Dec. 368; *Casey v. Donovan*, 65 Mo. App. 521; *Stone v. Slattery's Adm'r*, 71 Mo. App. 442; *Williams v. Baldwin*, 7 Vt. 503. Whether Yost can be regarded as an agent of appellees, or whatever his relationship to them may be designated, it is certain that his duty to them is in no sense repugnant to that which he owed to the appellant. *Schauer & Others v. Queen Ins. Co. of America*, 88 Wis. 561, 60 N. W. 994; *Insurance Co. v. Reynolds*, 36 Mich. 502; *Dibble v. Assurance Co.*, 70 Mich. 1, 37 N. W. 704, 14 Am. St. Rep. 470.

The case is quite unlike one where an agent represents two insurance companies, between which there is a controversy as to the liability for a loss. The policies of insurance previously issued by other companies is a matter of no concern of appellant. They were regularly canceled, and appellant is not now contesting the validity of the cancellation. The cancellations were made before the contract with appellant was made. Its representative took the steps essential to the completion of a contract of insurance with appellees. He had the authority to do so. There was good faith in the transaction, and no reason is seen why the contract is not enforceable.

The judgment of the district court will, therefore, be affirmed. All the Justices concurring.



(90 Kan. 189)

ROGERS v. DOCKSTADER et al.

(Supreme Court of Kansas. July 5, 1913.)

*(Syllabus by the Court.)*

LANDLORD AND TENANT (§ 109\*)—"SURRENDER" OF LEASE—WHAT CONSTITUTES.

A written lease for a term of years may be surrendered by agreement of the parties thereto, without the execution and acceptance of a release in writing. If the facts and circumstances show a mutual understanding and agreement to terminate the relation of landlord and tenant, a surrender of possession by the latter, and the recognition of another tenant by the former, such lease will be deemed to have been "surrendered."

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 350-360, 363-365, 368-371; Dec. Dig. § 109.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 6819-6821.]

Appeal from District Court, Marion County.

Action by J. N. Rogers against F. L. Dockstader and G. W. Goff. Judgment for plaintiff, and defendants appeal. Reversed.

Dean & Williams, of Marion, for appellants. H. S. Martin, of Topeka, for appellees.

WEST, J. This was an action to recover rent claimed to be due by the terms of a written lease. Neither the abstract nor the transcript for which we have sent sets out the lease, but it is stated in the brief of the appellee that it was a long-time written lease containing an agreement to pay \$50 a year and all taxes and assessments of whatsoever kind or nature whether general or special which might be levied against the real estate. It appears that the lease was made to the defendant Goff, who after occupying the land about two months sold the livery barn upon the property to the defendant Dockstader. Goff testified that after he sold to Dockstader he saw the plaintiff and asked him if it would be all right to sell and was told that it would; that he then settled for the rent up to the 1st of July and told the plaintiff he would have to look to Dockstader for the rent, to which the plaintiff replied, "All right." Dockstader testified: That when he was buying the livery barn he asked Goff what kind of a lease he had on Dr. Rogers' lots and was told that he had none. That after he bought he saw the plaintiff and said, "What about this lot, what are you going to charge me for it?" And that the plaintiff replied, "\$50 a year and taxes." That he paid the taxes in 1909 and boarded the plaintiff's horse, and when he went to pay the taxes for 1910 he found the tax was \$246 and some cents, of which it appears that \$238.97 was sidewalk tax and \$7.72 sewer tax. From the transcript we learn that plaintiff testified as follows: "Q. It was at that time, was it, Doctor, that Mr. Goff came to you and told you he had sold the barn to Dockstader and he figured up the amount he

said was due you and you paid him some money? A. I think so." On cross-examination Goff testified: "In regard to that lease, I says: 'Now I have settled up with you until the 1st day of July. You are to look to Dr. Dockstader for your rent.' He said he would. Q. That was all he said, was it? A. Yes, sir; that was about all he said that I remember of. Q. You are sure that is all he said? A. Yes, sir." He further testified that since that time the plaintiff had never said anything to him in regard to the rent or made any demand upon him. Dockstader testified that the board bill for the plaintiff's horse amounted to about \$151; that he also paid the taxes for 1909 and offered to pay the taxes for 1910 except the special assessments. Plaintiff denied that he had any agreement whatever with Goff to release him from his written lease and denied the recollection of any talk with Dockstader, except that the latter at one time asked him something about the lease. By consulting the defendants' brief we learn that the court instructed the jury that as to the defendant Goff there was no evidence offered that would relieve him from liability for whatever rent was due and unpaid upon the lease in question; that his testimony to the effect that he made an oral or verbal agreement with the plaintiff from which he was to be released was not binding in law, and, even if such oral release was attempted to be made, Goff would still be liable for any rent which was still due and not paid upon the lease; that to be relieved by the lessee the release must be in writing and the verdict should be for the plaintiff against Goff for the amount of rent including the taxes assessed and levied against the property. It also appears from the same document that the court refused an instruction to the effect that, if Dockstader was in possession under a verbal agreement to pay a stated sum and the tax as annual rent, special assessments for improvement upon the premises are not taxes. It is also stated that the jury returned a verdict for the plaintiff, but for what sum and against whom we are not advised.

As nearly as we can ascertain from these various sources, it would seem that the question presented is whether or not a lease for a term of years can be surrendered otherwise than by a release in writing. In *Weiner v. Baldwin*, 9 Kan. App. 772, 59 Pac. 40, an instruction that the agreement to surrender a lease need not be in writing was approved.

"A surrender, as the term is used in the law of landlord and tenant, is the yielding up of the estate to the landlord, so that the leasehold interest becomes extinct by mutual agreement between the parties. The rescission of a lease, when by express words, is called an express surrender or a surrender in fact; and when by acts so irreconcilable to a continuance of the tenure as to imply the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.



same thing it is called a surrender by operation of law." 24 Cyc. 1366.

"While the definitions of what constitutes a surrender by operation of law differ somewhat in the language used, the rule may safely be said to be that a surrender is created by operation of law when the parties to a lease do some act so inconsistent with the subsisting relation of landlord and tenant as to imply that they have both agreed to consider the surrender as made." 24 Cyc. 1367.

"Where a landlord grants a new lease to a stranger with the assent of the tenant during the existence of an outstanding lease, and the tenant gives up his own possession to the stranger who thereafter pays rent, or where in any other way a new tenant is by agreement of the tenant and the landlord substituted and accepted in place of the old, there is a surrender by operation of law. It is immaterial that the old lease is not canceled, or that the original lessee signs the new lease as surety." 24 Cyc. 1370.

"An express agreement to accept the premises need not be shown, but the landlord's consent may be implied from circumstances and from the act of the parties. There must, however, be some unequivocal act on the part of the landlord which unmistakably evinces an intention on his part to terminate the lease and the relationship of landlord and tenant." 24 Cyc. 1373; Taylor's Landlord & Tenant (9th Ed.) §§ 509, 514, 575.

It must be true upon principle that when prior to the expiration of a written lease the landlord and tenant agree to terminate the relation, and possession of the premises is surrendered up by the tenant to the landlord who lets to another and agrees to and does look to such other for the rent, the same result is effected as by a written release and acceptance. Section 5 of the frauds and perjury act of General Statutes of 1909, § 3837, is referred to. This provides that no lease, estates, or interests of, in, or out of lands exceeding one year in duration shall be assigned or granted unless by deed or note in writing, etc. The succeeding section prescribing that any contract for the sale of lands or any interest in or concerning them must be in writing is also referred to, but the manifest application of these sections is to grants of interest rather than to a surrender of an interest already granted. But even if directly applicable, still the law would not permit the landlord, after having settled in full and accepted a surrender of the possession of the premises and assumed full dominion and control by reletting to another, to claim the aid of a court to disregard such acceptance and recognition on his part and still hold the lessee for rent for which the

landlord had agreed to look to another. In Northrop v. Andrews, 39 Kan. 567, 569, 18 Pac. 510, cited by the plaintiff, it was said in the opinion that land cannot be conveyed by parol and that a person cannot divest himself of any interest therein by the mere use of oral declarations, which, of course, is a correct statement of the law. The language quoted in Durham v. Hadley, 47 Kan. 80, 27 Pac. 105, from the decision in O'Neill v. Douthitt, 40 Kan. 689, 20 Pac. 493, to the effect that everything affecting real estate must be in writing, was used with reference to an attempted release of a mortgage by one not shown to have authority to release it. In Engstrom v. Tyler, 46 Kan. 317, 26 Pac. 735, it was held to be a good defense to an action for rent that during the term of the lease the landlord entered and took possession and leased to various parties and collected and retained the rent. It is true that if the plaintiff merely acquiesced in a change of tenant without an agreement to accept him in lieu of the lessee, and without any agreement or understanding to terminate the latter's tenancy, he would be entitled to recover upon his lease. Bonetti v. Treat, 91 Cal. 223. 27 Pac. 612, 14 L. R. A. 151.

As we are not advised whether or not the jury included the special assessments in the amounts of their verdict, we are unable to say that the refusal of the requested instruction touching the definition of the word "taxes" was prejudicial. While as ordinarily used in the statutes taxes are not special assessments, or vice versa, still the use of the word "taxes" in a contract may call for a meaning to be determined by the terms of the instrument and by the circumstances surrounding the transaction. Railway Co. v. Railway Co., 75 Kan. 167, 88 Pac. 1085.

The instruction that there was no evidence offered that would relieve Goff from liability, and that the verbal agreement testified to by him would not be binding in law, and that a release could only be had by a written instrument, was incorrect, and testimony touching the transaction between the parties should all have been considered for the purpose of ascertaining whether or not the relationship of landlord and tenant was by mutual agreement terminated.

We have been embarrassed by the lack of information as to what was really done in the court below, but from such means as we have been able to obtain we reach the conclusion that the instruction referred to was erroneous.

The judgment is therefore reversed, and the cause remanded for further proceedings in accordance herewith. All the Justices concurring..



(90 Kan. 180)

LOWREY v. MISSOURI, K. & T. RY. CO.  
(Supreme Court of Kansas. July 5, 1913.)

(Syllabus by the Court.)

1. CARRIERS (§ 322\*)—INJURIES TO PASSENGER  
—INCONSISTENT FINDINGS.

A new trial ordered because of inconsistent findings.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 322.\*]

2. EVIDENCE (§ 106\*)—ADMISSIBILITY—SPECIFIC ACTS OF MISCONDUCT.

Specific acts of misconduct are not ordinarily admissible upon an issue of character which arises collaterally.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 177-187; Dec. Dig. § 106.\*]

Appeal from District Court, Bourbon County.

Action by J. A. Lowrey against the Missouri, Kansas & Texas Railway Company. From judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

John Madden and W. W. Brown, both of Parsons, and J. H. Crider, of Ft. Scott, for appellant. J. I. Sheppard and W. F. Jackson, both of Ft. Scott, for appellee.

MASON, J. J. A. Lowrey sued the Missouri, Kansas & Texas Railway Company, alleging that, while a passenger on one of its trains, he had been assaulted and beaten by the conductor and a porter. He recovered a judgment from which the defendant appeals.

Complaint is made that the petition did not sufficiently allege, nor the proof show, that the plaintiff's assailants were acting within the scope of their employment. The defense was that the plaintiff was the aggressor and that no more force was used against him than was reasonably necessary. The real controversy was upon this issue. Whatever was done by the conductor and porter was obviously in the course of their employment, and specific rulings upon that matter cannot have been prejudicial. The plaintiff testified that the porter and conductor made a wholly unprovoked assault upon him. Two fellow passengers, who were called by him as witnesses, testified to the fact of the conductor striking him with a lantern, but did not profess to have seen enough of the encounter to tell who was the aggressor. The version of the affair given by the company's employes was that the plaintiff was under the influence of liquor, that without provocation he became violently abusive, using profane and indecent language, and that the trainmen used only so much force against him as the occasion justified. This evidence was in substance corroborated by two passengers. It cannot be said that there was no evidence to support the verdict, but the apparent preponderance against it suggests that if any errors were committed they may have had an influence upon the result.

[1] A number of specific findings were made, most of which were in favor of the plaintiff. The question was asked "If you find that plaintiff struck Conductor Knox, you may state what, if anything, Knox did." The answer returned was, "No." The probable meaning is that the plaintiff did not strike the conductor. But this question was also asked: "If you find that plaintiff again struck Conductor Knox (state) what he did to defend himself from second assault from the plaintiff." The jury answered: "Struck at him with stove poker." This seems to mean that the plaintiff struck the conductor a second time, and that the conductor acted in self-defense, a finding abundantly supported by the evidence, but in conflict with that first quoted, and with the verdict. In view of this inconsistency we think a new trial should be granted.

[2] Complaint is also made of the rejection of evidence that upon two previous occasions the plaintiff had, without provocation, assaulted employes of another railroad company. It is not claimed that the conductor had heard of these prior assaults. The matter was relevant as tending to show the plaintiff's bad character, but specific acts of misconduct are not ordinarily admissible for that purpose, where the issue is raised collaterally. 16 Cyc. 1278. McKelvey on Evidence (2d Ed.) pp. 207-208; Lowe v. Ring, 123 Wis. 107, 101 N. W. 381; Id., 123 Wis. 370, 101 N. W. 698, 3 Ann. Cas. 731; Golder v. Lund, 50 Neb. 867, 70 N. W. 379; H. & T. C. Ry. Co. v. Bell (Tex. Civ. App.) 73 S. W. 56, affirmed 97 Tex. 71, 75 S. W. 484; note 14 L. R. A. (N. S.) 689, 694, 773. In some circumstances the admission of such evidence may be within the discretion of the trial court (Spain v. Rakestraw, 79 Kan. 758, 101 Pac. 466), but its rejection is not error. One of the altercations referred to had taken place but a few days before, and resulted in the plaintiff's discharge from the employment of another railroad company. The occurrence being so recent, testimony concerning it might have had some bearing upon the plaintiff's frame of mind toward the railroad employes, and therefore upon the relative probability of the conflicting versions of the controversy on which this action was based.

The defendant offered in evidence the record of the police court, showing that after the disturbance the plaintiff had been found guilty of drunkenness and fined. The plaintiff had already testified that he had been arrested, tried by the police court, and fined, and the rejection of the record cannot have been very material.

Instructions were refused which seem to have correctly stated the rights of the parties; but, as their essential features were covered by the charge given, no material error was committed.

The judgment is reversed, and a new trial ordered. All the Justices concurring.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



(90 Kan. 253)

**VAN GUNDY v. SHEWEY.**

(Supreme Court of Kansas. July 5, 1913.)

*(Syllabus by the Court.)***1. VENDOR AND PURCHASER (§ 130\*)—MARKETABLE TITLE—DECEASED OWNER.**

A vendor's title is not necessarily unmarketable because derived through deeds from the heirs of a deceased owner whose estate was not probated.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 245, 246, 247; Dec. Dig. § 130.\*]

**2. VENDOR AND PURCHASER (§ 130\*)—MARKETABLE TITLE—ABSTRACT—DECEASED OWNER.**

In such a case an abstract of title may be made to exhibit a good title by attaching to it the affidavits of credible persons who know the facts, showing intestacy, heirship, capacity to convey, and the satisfaction of all claims against the estate of the deceased.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 245, 246, 247; Dec. Dig. § 130.\*]

**3. SPECIFIC PERFORMANCE (§ 119\*)—MARKETABLE TITLE—ACTION BY VENDOR—BURDEN OF PROOF.**

When such a showing has been made it devolves upon the vendee objecting to the title to show wherein it is bad or doubtful or that the evidence necessary to establish the facts is so uncertain or inaccessible as to render the title doubtful.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 382, 383; Dec. Dig. § 119.\*]

**4. VENDOR AND PURCHASER (§ 130\*)—MARKETABLE TITLE—MORTGAGES.**

In 1888 the owner of a tract of land gave a trust deed or mortgage to a person designated as trustee for a third person designated as beneficiary. The beneficiary assigned the mortgage and the assignee released it. The trustee has acquiesced in the release for a period of time exceeding that prescribed by the statute of limitations. *Held*, the trustee has no interest in the land which is now or may hereafter become substantial, and that the title is not doubtful because he did not join in the release.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 245, 246, 247; Dec. Dig. § 130.\*]

**5. PROCESS (§ 96\*)—SERVICE BY PUBLICATION—AFFIDAVIT—SUFFICIENCY.**

Under section 79 of the Civil Code (Gen. St. 1909, § 5672), which takes the place of section 73 of the old code, an affidavit for service by publication which wholly fails to show either by direct statement or by way of inference from other statements that the plaintiff diligently inquired as to the residence of the defendants to be served by publication and was unable to learn the place of such residence is void.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 108-120; Dec. Dig. § 96.\*]

**6. VENDOR AND PURCHASER (§ 130\*)—MARKETABLE TITLE—TAX TITLE—POSSESSION.**

Various objections by a vendee to a title based upon a tax deed which is good on its face, which has been of record for more than 15 years, and under which the vendor has been in possession for more than 5 years considered, and *held* that the tax deed and the vendor's possession constitute a title sufficient to extinguish all rights, titles, and interests of prior origin.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 245, 246, 247; Dec. Dig. § 130.\*]

**Appeal from District Court, Norton County.**  
Action by Estella Van Gundy against Clum C. Shewey. From judgment for plaintiff, defendant appeals. Affirmed.

Willard Simmons, of Norton, for appellant.  
H. O. Caster, of Oberlin, for appellee.

**BURCH, J.** The action in the district court was brought by the plaintiff, Estella Van Gundy, as vendor to compel the defendant, Clum C. Shewey, as vendee to specifically perform a contract for the sale of a quarter section of land. Judgment was rendered for the plaintiff and the defendant appeals.

The defendant declined to perform on his part because he was not satisfied with the title offered. The contract did not guarantee a perfect record title and consequently the defendant must be satisfied with a marketable title. The subject of what is a marketable and what a doubtful title is sufficiently discussed in the case of McNutt v. Nellans, 82 Kan. 424, 108 Pac. 834.

The plaintiff derived title through deeds from the heirs of George Fossler, deceased, whose estate was not probated. Attached to the abstract furnished to the defendant is a showing by the affidavit of a person having knowledge of the facts that Fossler died intestate possessed of the real estate in question, that the grantors in the deeds referred to were his heirs and only heirs, that they were of legal age when they conveyed, and that all of Fossler's debts at the time of his death and his funeral expenses were paid in full.

[1-3] A title is not unmarketable because there is a break in the record occasioned by the death of the owner and consequent devolution of title by operation of law. From the very nature of the case, however, the only way in which an abstract can be made to exhibit a good title in such instances is by a showing of the kind just described. When a vendor has by this means exhibited a title free from doubt it devolves upon a vendee objecting to it to show wherein the title is bad or doubtful. Maupin on Marketable Title to Real Estate (2d Ed.) p. 749, § 295. The defendant does not dispute any of the facts set forth in the affidavit referred to or show that he would labor under any difficulty in proving them should occasion arise. Therefore the title appears to be free from doubt so far as the matter under consideration is concerned.

[4] In 1888 the then owner of 40 acres of the land gave a mortgage upon it to Edward E. Holmes, as trustee for Willis G. Myers, as beneficiary. The beneficiary assigned the mortgage and the assignee released it many years ago. Technically, perhaps, the release may be said to be defective because the trustee did not join. Since, however, satisfaction of the debt has been acknowledged by the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



party entitled to the benefit of the security, and since the release has been acquiesced in by the trustee and the beneficiary for a period of time exceeding that prescribed by the statute of limitations, there is no fair ground for doubting that the mortgage is no longer a lien upon the land. The plaintiff invokes the aid of chapter 301, Laws of 1905, which provided that recorded assignments and releases of mortgages in certain instances shall be deemed to be valid, and required them to be challenged if at all within one year from the time when the act took effect (June 8, 1905). It is possible that by a liberal interpretation of the statute the release in question may be brought within its terms, but it is not necessary to decide the question, since it is plain that the trustee has no interest in the land which is now or which may hereafter become substantial.

[6] A number of claimed defects in the title to the south half of the quarter section were pointed out, and time was extended to the plaintiff in which to cure them by an action to quiet title. Service was made upon the defendants in such action by publication. Section 79 of the new code radically changed the requirements of section 78 of the old code respecting the contents of the affidavit for service by publication. It reads as follows: "Before service by publication can be made, an affidavit must be filed, stating the residence, if known, of the defendant or defendants sought to be served, and if not known, stating that the plaintiff has diligently inquired as to the residence of such defendant or defendants and has been unable to learn the place of such residence and that the plaintiff is unable to procure actual service of summons on such defendant or defendants within this state, and showing that the case is one of those mentioned in the preceding section. When such affidavit is filed the party may proceed to make service by publication." Civ. Code, § 79 (Gen. St. 1909, § 5672).

In the suit to quiet title the affidavit stated that the defendants were nonresidents of the state of Kansas, that their residence was unknown to the plaintiff, and that actual service could not be made upon them in the state of Kansas, but it wholly failed to show even by way of inference from other statements that the plaintiff had diligently inquired as to the residence of the defendants and had been unable to learn the place of such residence. Under the well-known rule the total omission of a material averment renders the affidavit and the service based upon it void, and consequently the decree rendered did not aid the title.

[6]. The plaintiff has title to the south half

of the quarter section by virtue of a tax deed issued in 1893, good on its face, and of record for more than 15 years at the time of the trial, during all of which time the land has been in the possession of the plaintiff and her grantors. The plaintiff herself had been in possession for more than 3½ years when the decree quieting her title was rendered, and there is no pretense that possession for more than five years is not readily provable. The defendant claims the tax deed is void on its face because the consideration stated cannot be arrived at from the data furnished by the antecedent recitals, but it is easy enough to do so under the liberal rules which have been adopted for the interpretation of tax deeds which have been of record for five years or more. This deed effectually extinguishes the basis of all claims which might, according to the abstract, be asserted by the defendants in the action to quiet title. Indeed, the defendant made no serious objection to the tax title until after judgment had been rendered in the suit to quiet title. He now argues that the suit to quiet title exposed the tax deed to attack for irregularities in the proceedings upon which it was based, and consequently destroyed its impregnability as a muniment of title should any of the defendants choose to treat the void service as valid and ask to be let in to defend.

The decree quieting title purports to be based upon adverse possession and there is nothing whatever in the proceedings to indicate that the right of action was predicated upon the tax deed. The only defendants who have shown a disposition to assert an interest in the land (the most insistent one being the holder of a mortgage now 25 years in default) were promptly notified of the commencement of the suit. They made default and consequently cannot now open the judgment. The possible claims of the other defendants, all of whom defaulted, are quite negligible and the time for opening the judgment has almost expired. If, however, any one should come in, the defendant as successor to the plaintiff's title will have the right to be substituted and to dismiss, and the tax deed and the present plaintiff's possession alone constitute a title sufficient to extinguish all rights, titles, and interests of prior origin. Laws 1911, c. 232, § 3.

Several questions of practice have been presented, but the court has passed them by and has given its attention to the real character and strength of the title which the defendant has been ordered to accept. Believing that such title is good beyond all reasonable doubt, the judgment of the district court is affirmed. All the Justices concurring.



(90 Kan. 360)

HAUGHTON et al. v. BILSON et al.

(Supreme Court of Kansas. July 5, 1913.)

*(Syllabus by the Court.)***1. NEW TRIAL (§ 159\*)—NEWLY DISCOVERED EVIDENCE—REVIEW BY TRIAL COURT.**

When deciding whether or not a petition for a new trial founded upon newly discovered evidence should be granted, the court considers the pleadings and all the evidence offered at the trial in connection with the evidence offered in support of the petition for a new trial, and upon the whole case determines whether or not the verdict or decision given at the trial was wrong. Code Civ. Proc. § 307 (Gen. St. 1909, § 5901).

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 319; Dec. Dig. § 159.\*]

**2. APPEAL AND ERROR (§ 1005\*)—REVIEW—DENIAL OF NEW TRIAL.**

When the trial of the action was by the court without a jury, an order denying a petition for a new trial, based on newly discovered evidence, will not be reversed if, upon the whole case considered in the manner stated in paragraph 1, the decision is sustained by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.\*]

**3. NEW TRIAL (§ 159\*)—DECISION—FINDINGS OF FACT AND CONCLUSIONS OF LAW.**

The court is not obliged, upon request, to state findings of fact and conclusions of law separately when ruling finally upon a petition for a new trial based on newly discovered evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 319; Dec. Dig. § 159.\*]

Appeal from District Court, Greenwood County.

Action by John Haughton and others against W. J. Bilson and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

M. M. Suddock and O. S. Samuel, both of Emporia, for appellants. Howard J. Hodgson, of Eureka, and S. F. Wicker, of Madison, for appellees.

BURCH, J. This litigation originated in an appeal from the report of a survey which located the center of a section of land. The district court sustained the survey. Afterwards a petition for a new trial was filed on the ground of new evidence, discovered too late to be used in support of a motion for a new trial. The district court sustained a demurrer to the petition. On appeal to this court it was held that the ruling was erroneous, and the cause was remanded for further proceedings. *Haughton v. Bilson*, 84 Kan. 129, 113 Pac. 400. The district court then heard the evidence offered in support of the petition, the newly discovered portion of which consisted of the oral testimony of two witnesses and the deposition of another. A new trial was denied, and this appeal followed.

[1] Section 306 of the Code of Civil Procedure

provides for an application for a new trial by a written motion, which must be filed within three days after the verdict or decision is rendered unless unavoidably prevented. Gen. Stat. 1909, § 5900. Section 307 relates to the procedure when the ground of the motion is the exclusion of evidence, want of fair opportunity to produce evidence, or newly discovered evidence. This is a new section added to the Code by the Revision of 1909. It contains the following provision: "A new trial shall not be granted as to any issues in a case unless on the pleadings and all the evidence offered at the trial and on the motion for a new trial the court shall be of the opinion that the verdict or decision is wrong in whole or in some material part, and the new trial shall be only of the issues as to which the verdict or decision appears to be wrong, when such issues are separable." Gen. Stat. 1909, § 5901. Then follows the provision for an application for a new trial by way of petition when the grounds are not discoverable with reasonable diligence in time to be presented by motion. Section 308 (Gen. St. 1909, § 5902). Very clearly the quoted provision is general in its scope, and applies whether the application be by motion or by petition. Under the former practice the question was whether or not the newly discovered evidence was of such strength and character that it probably would have compelled a different decision. *Sexton v. Lamb*, 27 Kan. 432. Now the court is required to go further and consider the whole case, including the newly discovered evidence, and determine whether or not the verdict or decision is wrong. It is quite manifest that the Legislature did not intend that one course should be pursued when the application is by motion, and another when the application is by petition.

[2] The original trial was by the court without a jury. There was evidence that the corner in dispute was marked by a stone placed in its present position upon the occasion of a former survey. Besides this, there was evidence that the stone was properly located. Certain measurements so indicated. Permanent improvements had long ago been established with reference to it, the land affected had been bought and sold upon representations by proprietors when the first survey was made that it marked the true corner, and the boundaries depending upon it had long been acquiesced in. At the hearing upon the petition for a new trial all this evidence was reconsidered in the light of the statements of the newly discovered witnesses, and upon the whole case thus made the court passed judgment that the original decision was correct. Under these circumstances the situation is the same as if all the evidence had been heard together at one trial, and the question is whether or not the judgment of the court is sustained

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



by the evidence. The solution of this question is governed by the ordinary rules.

[3] At the hearing on the petition for a new trial a request for findings of fact and conclusions of law separately stated was denied. The provision of the Code under which the request was made (section 297; Gen. Stat. 1909, § 5891), applies only to trials proper of the issues of fact in the cause itself, and not to the determination of the question whether or not the decision upon the trial was wrong, and a new trial should be granted.

The judgment of the district court is affirmed. All the Justices concur.

(90 Kan. 253)

SMITH, CAREY & CO. (McDERMOTT, Intervener) v. ATCHISON LIVE STOCK CO. et al.

(Supreme Court of Kansas. July 5, 1913.)

(Syllabus by the Court.)

1. DISCOVERY (§ 97\*)—EXAMINATION OF BOOKS—APPLICATION.

To entitle a party to an order under section 365 of the Code of Civil Procedure (section 5960 of the General Statutes of 1909) it is necessary for him to produce evidence not only that he has given the opposite party notice of the application but also that the book, paper, or document is in existence.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 122, 124-131; Dec. Dig. § 97.\*]

2. APPEAL AND ERROR (§ 1043\*)—HARMLESS ERROR—PRODUCTION OF CORPORATE BOOKS.

Although the allowance of such order without evidence of such fact or facts constitutes reviewable error, such error becomes not prejudicial when the party who procures the order does not, on the trial, rely upon affidavits to prove the contents of the book, paper, or document but produces the evidence of competent witnesses to prove both the existence and the contents of such book, paper, or document.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4115-4121; Dec. Dig. § 1043.\*]

Appeal from District Court, Atchison County.

Action by Smith, Carey & Co. against the Atchison Live Stock Company and others. William McDermott intervened. Judgment for intervener, and plaintiff and receiver of defendant corporation appeal. Affirmed.

James W. Orr and Waggener & Challis, all of Atchison, for appellants. C. J. Conlon and J. L. Berry, both of Atchison, for appellee.

SMITH, J. The parties to this action are designated as plaintiff, defendants, intervener and receiver. The plaintiff, Smith, Carey & Co., a corporation, brought action to recover an indebtedness against the Atchison Live Stock Company and four brothers, J. D., E. D., D. J., and E. J. Small, doing business as partners under the name of Small Bros., and had the receiver appointed to convert the property of the defendants into cash and

apply the money upon the order of the court to the payment of their claims.

The plaintiff in its petition alleged the expiration of the charter of the Atchison Live Stock Company October 2, 1905; that on August 15, 1906, the Small Bros. copartnership was indebted to plaintiff in the sum of \$15,000 and executed to plaintiff two notes for \$7,500 each and prior to October 2, 1905, assigned to plaintiff practically all of the stock of the Atchison Live Stock Company.

The intervener interpleaded in the action and in his petition asked judgment against the receiver for \$8,500, with interest at 6 per cent. from December 1, 1906, the balance claimed to be due upon a loan made to the live stock company June 1, 1905, and to secure the payment of which J. D. Small, as manager and an officer of the corporation, together with the Smalls individually, executed a promissory note. He alleged that the charter of the live stock company expired October 2, 1905; that the officers and directors thereof continued to carry on the business of the corporation and represented that it was an existing corporation; that, relying upon such representation and having no knowledge to the contrary, the intervener on June 1, 1905, agreed to a further extension of the time of payment and accepted certain renewal notes; that no part of the original indebtedness had been paid at the last extension and surrender of the last \$10,000 note.

The plaintiff in answer denied the allegations of intervener's petition, denied J. D. Small's authority to execute the note to the intervener. The receiver also answered to the same effect.

The case was tried in the district court to a jury, a verdict and judgment for intervener were rendered and entered, and a motion for new trial was overruled. The plaintiff and the receiver appeal.

[1] The first assignment of error, which is repeated and presented in various forms, is that the intervener obtained from the court an order to all the opposing parties and their attorneys, after having made demand therefor, for the inspection and copy, or permission to make a copy, of each book, paper, etc., in their possession or under their control relating to the indebtedness in question. There was no affidavit showing that there was any particular paper or book in the possession of the appellees or in existence. There is no authority to make such an order without such showing. *Railway Co. v. Burks*, 78 Kan. 515, 96 Pac. 950, 18 L. R. A. (N. S.) 231. The order is reviewable on appeal, and the only question is whether it was prejudicial.

[2] It seems that practically the only evidence sought to be obtained through the order was a copy of a letter written by the intervener to E. D. Small, one of the defendants. The intervener, however, did not rely

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



upon the order or his affidavit of the contents of the letter; he took the deposition of E. D. Small in California, who therein admitted that he received the letter and testified that the letter was lost or destroyed. The intervenor on the trial testified that he wrote the letter and produced in evidence a paper which he testified from recollection was a copy thereof; that he was also permitted to introduce an affidavit to which the same copy of the letter was attached, was unauthorized by the notices he had given or the order made by the court, as we have seen, but it did not add to or detract from his oral testimony upon which he was subject to cross-examination. The letter being lost or destroyed, he, as the writer thereof, was competent to give his recollection of the contents. It was the best evidence available under the circumstances. Had they seen fit to do so, the appellants could have produced the recollection of the recipient, E. D. Small, as to the contents of the letter. We have considered also the numerous other technical objections to the evidence and manner of producing the evidence of appellee but find nothing substantial therein.

There is a substantial question of fact as to whether the original loan of \$10,000 made by the intervenor was made to the Atchison Live Stock Company or to the firm of Small Bros. It is, however, only a question of fact, of which the evidence is conflicting, and the verdict and judgment in favor of the intervenor find ample support therein.

On April 10, 1901, E. D. Small wrote a letter to the intervenor in which he gave a glowing account of the business of the Atchison Live Stock Company, which, he says, he and his brothers organized. The letter fairly indicates that the brothers were the sole owners of the corporation. In this letter E. D. Small also says that they were feeding about 6,000 cattle and a few hogs every year and shows how the business of running the two corn mills, at about the capacity of 300 barrels each per day, operated in connection with the cattle feeding, and how certain products of the mill were fed to the cattle and the loss which other grinding mills suffered, by selling their offal at a low price, was so obviated. In fact, this letter would indicate that both the mill business and the cattle business were jointly operated by the Atchison Live Stock Company. Just a month later E. D. Small again wrote the intervenor, saying, among other things: " \* \* \* Our sales at Atchison average \$3,000 all cash. The demand is more than our plant will produce and we have decided to increase its capacity one-third. Will require about \$10,000 to do what we think of, and will be a chance for you to make a gilt edged personal loan of that amount if you desire. You could send me \$7,000 and your check on your account here for \$3,000 [E. D. Small had been loaning money for the intervenor in the bank at North Topeka and indicated that there was about

\$3,000 to his credit therein], for which I would send you Small Bros.' note running two years at 6 per cent. (interest payable quarterly)." He goes on then to tell of the increased financial ability of Small Bros. E. D. Small was then the president of the American Bank and wrote the letter on the stationery of that bank at North Topeka, Kan.

The intervenor testified as to his answer to this letter as follows: "I said: 'Yours of May 10th at hand, requesting a loan of \$10,000 for the Atchison Live Stock Company. I have concluded I will let the company have the money, but will also require the signature of the three Smalls, yourself and two brothers, to the note, with the company; you may turn over the \$3,000 of my credit in your bank and apply it and I will send the balance.' I had a balance of a little over \$3,000 at the time in his bank." As before said, he also offered in evidence his affidavit as to the contents of this letter, which varies somewhat from his oral testimony but also indicates that he was proposing to loan the money to the Atchison Live Stock Company. In a letter which intervenor wrote to E. D. Small in June, he acknowledged the receipt of the note for \$10,000 and said, "I notice the Atchison Live Stock Company signs on the back instead of on the face of the note, which is not as understood."

There is evidence that a renewal note was executed for the indebtedness of \$10,000 which was dated June 1, 1903, and was signed on the face thereof by the three Smalls and by the Atchison Live Stock Company, by J. D. Small, manager. This note and those following were given after the expiration of the charter of the Atchison Live Stock Company, but it is in evidence that the intervenor did not know of the expiration of the charter. It appears also that this note was canceled soon after it was given and four other notes, signed in the same way, for \$2,500 each were given in lieu thereof and the interest was paid on all these notes until September 1, 1906. There is also evidence that, before the expiration of the charter of the Atchison Live Stock Company, an amendment thereto was filed which authorized any of the officers of the corporation to sign the name of the corporation to any business instrument and that the Small brothers held all the offices of the corporation.

J. D. Small, in a deposition, testified that the corporate stock of the Atchison Live Stock Company was all owned by himself, E. D. Small, and J. D. Small, except two shares of \$100 each.

There was some other evidence tending to show that the loan was made to Small Bros. and also some evidence to show that it was made to the Atchison Live Stock Company, which is the determining fact of the case; but, as before said, we think the judgment in favor of the intervenor is sustained by the evidence.



We have examined the numerous trial errors assigned but find nothing to justify a new trial of the case.

The judgment is affirmed. All the Justices concurring.

(90 Kan. 302)

BROWN v. STUART et al.

HASKIN et al. v. SAME.

(Supreme Court of Kansas. July 5, 1913.)

(Syllabus by the Court.)

1. COURTS (§ 497\*)—JURISDICTION OVER PROPERTY.

The rule that, where property is in the possession and subject to the jurisdiction of one court, another court of concurrent jurisdiction cannot interfere with the possession merely operates to protect the immediate possession of the first court and does not deprive another court of jurisdiction to determine controversies over the same property.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1386, 1397, 1398, 1404-1406; Dec. Dig. § 497.\*]

2. COURTS (§ 497\*)—ANOTHER ACTION PENDING.

The jurisdiction of a state court in a suit to cancel a deed conveying to a railroad company land for use as a right of way is not ousted by the pendency of a former suit in a federal court to foreclose a mortgage given by the railroad company on its right of way.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1386, 1397, 1398, 1404-1406; Dec. Dig. § 497.\*]

3. RAILROADS (§ 82\*)—RIGHT OF WAY—FOREFEITURE BY NONUSE—DEEDS.

Under the facts of this case it is held that the long-continued failure of the railroad company to commence the construction of its road constituted a breach of a condition in the deed providing that, if the land shall cease to be used for the purposes of a right of way, it should revert to the grantors.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 213-219; Dec. Dig. § 82.\*]

Appeal from District Court, Johnson County.

Two actions, one by George W. Brown, the other by W. P. Haskin and others, both against J. A. Stuart and others. From judgments for plaintiffs, defendants appeal. Affirmed.

John T. Little and C. B. Little, both of Olathe, for appellants. J. W. Parker, of Olathe, for appellees.

PORTER, J. These are suits brought to forfeit and set aside deeds made to defendant the Kansas City & Olathe Electric Railway Company on the ground of the failure of the company to construct the road. At the time they were commenced, December 28, 1906, a suit was pending in the Circuit Court of the United States, brought by a trust company to foreclose a mortgage given by the railway company upon all its property, including its right of way. Judgment of foreclosure had been entered and the prop-

erty was sold on December 17, 1906, under an order of that court. The sale was not confirmed until January 2, 1907, which was seven days after these suits were commenced in the district court. J. A. Stuart, who purchased at the master's sale, was joined as a defendant. On September 28, 1907, he filed motions to dismiss on the ground that the court had no jurisdiction because of the pendency of the foreclosure suit when these actions were begun. The motions were overruled. Afterwards supplemental petitions were filed alleging that Stuart claimed an interest in the property as successor in interest to the Kansas City & Olathe Railway Company. The defendants answered setting forth the pendency of the former action and also denied generally the averments of the petitions. The district court found for the plaintiffs and canceled the right of way deeds. From the judgments defendants have appealed and still contend that the court was without jurisdiction; further that the judgments are not sustained by the evidence.

[1, 2] In the first place, defendants are in no worse position than if the suits had been dismissed and new ones instituted. Every defense open to them on the merits has been preserved. It is wholly within the sound discretion of the court to permit the filing of supplemental petitions. Code Civ. Proc. § 145 (Gen. St. 1909, § 5738); *Drelling v. National Bank*, 43 Kan. 197, 23 Pac. 94, 19 Am. St. Rep. 126. The question of jurisdiction was first raised by motions filed September 28, 1907, long after the termination of the former suit. There was no attempt in these suits to interfere with the actual or constructive possession of the property by the federal court. The rule that one court of concurrent jurisdiction cannot interfere with property in the possession of another has no application. "Nor does the rule oust the jurisdiction of all other courts to determine the same controversy, so far as they may rightfully do so, but only operates to protect the immediate possession of the first court." 11 Cyc. 988.

The plaintiffs were not parties to the action in the federal court, and moreover, aside from the rule mentioned, there was nothing in the former action to prevent the state court from acquiring jurisdiction of the parties and the subject-matter involved here. "The pendency of a suit in a state court is no ground even for a plea in abatement to a suit upon the same matter in a federal court." *Gordon v. Gilfoil*, 99 U. S. 168, 25 L. Ed. 383.

The rule works both ways. The defendants might have been willing to litigate in the state court the questions involved in these actions. Moreover, the former suit had terminated before these suits came to trial. "According to the later cases, the objection of a former suit pending is remov-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ed by its dismissal or discontinuance, even after plea in abatement in the second suit." And "a dismissal or discontinuance of the former action at any time before the question as to its pendency actually comes before the court for trial removes the bar." Encycl. Pl. & Pr. 756.

[3] The condition in both deeds was that "this grant is for the purpose only, of a right of way for an electric railway, and if it shall cease to be used for that purpose it shall revert to the said grantors and their assigns."

The trial court upon the evidence found among other facts that: "The defendants or the present owners of said railway have no intention of immediately constructing the road over the land in question, and they have no time in the future set for the construction of the said road, and no future time fixed within which they intend to commence the construction of said road, and the delay in the construction of said road is an unreasonable delay."

The conclusions of the law were as follows:

"(1) The plaintiff is entitled to have the deed in suit forfeited and set aside by reason of the unreasonable delay in the construction of said road, and the same is set aside.

"(2) The defendants should have the privilege of removing from said right of way the fences and poles placed there by the defendants and are given 90 days to remove them."

The cases were not tried until 1911. Eight years had elapsed since the deeds were executed; and shortly before trial other supplemental petitions were filed by leave of court, setting up the continued delays. While the court found that the defendants had not, as alleged in the petitions, abandoned the intention to construct the road at some time in the future, the long-continued failure to begin construction amounted to a breach of the conditions of the deeds and entitled plaintiffs to the relief prayed for. We think the judgments are sustained by the evidence and findings. While the specific grounds alleged for the cancellation of the deeds was the abandonment of the intention to construct the road, proof showing a failure for so long a period to begin construction was well within the issues and constituted a breach of the conditions mentioned in the deeds.

In *Hamlin v. Railway Co.*, 73 Kan. 535, 85 Pac. 602, it was held that the court cannot say, as a matter of law, that the mere failure to build the road for any fixed period works a forfeiture of all rights acquired by condemnation for a right of way. That was an action to quiet title brought by the owners. These are suits to cancel deeds for failure to comply with certain conditions,

and the court has found against the railway company.

The judgments are affirmed. All the Justices concurring.

(90 Kan. 405)

### GILMORE v. HARPSTER.

(Supreme Court of Kansas. July 5, 1913.)

(Syllabus by the Court.)

#### 1. JUDGMENT (§ 858\*) — SURVIVAL — ASSIGNMENT—CORPORATIONS.

Where, after a judgment has been assigned the assignor, a corporation, is dissolved, no revivor in the name of the assignee is necessary, and the judgment may be kept alive by execution issued in the name of the plaintiff corporation after its dissolution.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1584, 1587-1589; Dec. Dig. § 858.\*]

#### 2. JUDGMENT (§ 847\*) — ASSIGNMENT — ENFORCEMENT.

A judgment may be assigned by parol, and after the assignment may be enforced by the assignee in the name of the original plaintiff.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1548-1555; Dec. Dig. § 847.\*]

Appeal from District Court, Sheridan County.

Action by J. D. Gilmore against B. F. Harpster. From judgment for plaintiff, defendant appeals. Reversed and remanded.

Taylor, Spencer & Spencer, and Alcid Bowlers, of St. Joseph, Mo., for appellant. J. J. Baker, of Troy, and W. H. Clark, of Hoxie, for appellee.

PORTER, J. Action to enjoin the levy of an execution upon real estate. The sole question in this case is, after a judgment has been assigned and the assignor, a corporation, has been dissolved, is a revivor of the action in the name of the assignee necessary, or may the judgment be kept alive by executions issued in the name of the plaintiff corporation after its dissolution? The trial court held the judgment dormant and the execution void, and issued a permanent injunction. The assignee, defendant below, appeals.

In 1896 the State National Bank, a corporation, recovered a judgment in Doniphan county against J. D. Gilmore and others upon a promissory note belonging to B. F. Harpster, which he had transferred to the bank as collateral security upon his individual indebtedness. Shortly after the judgment was rendered Harpster settled with the bank, and the bank assigned the judgment to him by a parol assignment. Some time thereafter the bank dissolved as a corporation and went out of business. Harpster had executions issued from time to time upon the judgment in the name of the bank, which were returned. "No property found," and the judgment was thus kept alive, unless it became dormant for a failure to have the action revived in the name

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



of the assignee. A transcript of the judgment having been filed in Sheridan county, an execution was levied upon the lands of Gilmore, who thereupon brought this action against the sheriff. B. F. Harpster upon his own application was made a defendant. There being no controversy over the facts, the cause was submitted upon a demurrer to his answer.

[1, 2] "A judgment may be assigned by parol." 23 Cyc. 1416, and cases cited in notes. In *Garvin v. Hall*, 83 Tex. 295, 18 S. W. 731, it was held that a judgment may be assigned by parol, and must be enforced in the name of the original plaintiff, and that this would be permitted after the death of the plaintiff. To the same effect is *Clark v. Moss*, 11 Ark. 736.

In 23 Cyc. 1417, it is said: "The effect of a valid assignment of a judgment is to divest the assignor of all interest in it and all control over it, and to transfer to the assignee the ownership of the judgment debt and all remedies and means of enforcing and collecting it."

In *MacRae v. Piano Co.*, 69 Kan. 457, 460, 77 Pac. 94, it was said: "The dissolution of a corporation operates, as to it, the same as the death of an individual; all its powers, prerogatives and authority—its life—ceased, and all legal proceedings then pending were at once suspended." Upon the death of the plaintiff, in an action upon which a judgment has been rendered, the judgment becomes dormant, and executions issued after the death of the judgment plaintiff, without a revivor of the judgment, are void. *Newhouse v. Hellbrun*, 74 Kan. 282, 86 Pac. 145, 10 Ann. Cas. 955. Practically the same question involved here was decided in *Harris v. Frank*, 29 Kan. 200. The judgment in that case had been rendered in the name of L. Hall, who transferred it to Frank and Kuhnle, and afterwards died. It was contended that the judgment became dormant upon the death of the plaintiff. Justice Valentine spoke for the court, and said in the opinion: "We do not think that the judgment was dead, as the plaintiff in error claims. It was valid and in full force and effect when it was transferred by L. Hall & Co. to the present defendants in error, Frank and Kuhnle; and the subsequent death of Hall, who had no possible interest in the judgment at the time of his death, could not destroy its force, or effect, or operation. It was still valid and operative in the hands of Hall's assignees, Frank and Kuhnle, and they still had the right to enforce it, just the same as though Hall had continued to live. Besides, what good reason could there be for reviving the judgment in the name of Hall's administrator, when the administrator could take no possible interest in the judgment? But suppose that Hall died without leaving any as-

sets to be administered upon, then for what purpose would an administrator be appointed? Would he be appointed for the mere purpose of having the judgment, then owned by Frank and Kuhnle, revived in his name, so that Frank and Kuhnle could enforce the same? Such a transaction would seem to be ridiculous and absurd. We do not think that the death of Hall, after he assigned the judgment to Frank and Kuhnle, could make any possible difference with respect to the rights of Frank and Kuhnle. They would still have the right to enforce the judgment, just the same as though Hall had lived." 29 Kan. 202, 203. The opinion states the decision of the court in the following language: " \* \* \* We think that there was no necessity for any revivor of the judgment in the name of the legal representatives of Luther Hall, deceased, or otherwise." 29 Kan. 204.

This decision was followed in *Weaver v. Lock*, 4 Kan. App. 335, 45 Pac. 1039.

The case relied upon by the appellee is *K. O. & T. Ry. Co. v. Smith*, 40 Kan. 192, 19 Pac. 636, holding that where a railroad company is consolidated with other railroad companies under a new name, it ceases to exist as a corporation, and an action brought by or against it before its consolidation cannot afterwards be prosecuted by or against it in its original name. The consolidation was held in effect the same as the death of an individual. The opinion was written by Justice Valentine, who does not refer in it to the earlier opinion of *Harris v. Frank*, supra, doubtless for the reason that it was not regarded as at all in conflict with the principles controlling the latter. At the time of the consolidation of the plaintiff railroad with other railroads in the *Smith Case* the action was pending. In *Harris v. Frank*, as in the case at bar, the disability of the original plaintiff occurred after judgment had been transferred to the assignee. It is where the owner of a judgment dies that revivor is necessary. We think the case of *Harris v. Frank* is controlling. The executions were rightly issued in the name of the original plaintiff. The general rule where no statute controls is that, after a judgment has been assigned, execution "should be issued at the instance of the assignee in the name of the assignor," for the reason that it must conform to the judgment. 17 Cyc. 938; *McHany v. Schenk*, 88 Ill. 357; *Wilgus v. Bloodgood*, 33 How. Prac. (N. Y.) 289; *Corriell v. Doolittle*, 2 G. Greene (Iowa) 385.

For cases to the contrary, holding that upon the death of the original plaintiff the judgment becomes dormant, notwithstanding that previous to his death he had assigned it to another person, see 61 L. R. A. note page 359.

The judgment will be reversed, and the cause remanded for further proceedings. All the Justices concurring.



(90 Kan. 183)

**EDWARDS v. UNION PAC. R. CO.**

(Supreme Court of Kansas. July 5, 1913.)

*(Syllabus by the Court.)***1. CARRIERS (§ 347\*)—INJURY AT DEPOT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.**

Upon the facts stated in the opinion, it is held that whether or not the plaintiff was guilty of contributory negligence in walking along a depot platform so near to the tracks that she was struck by the engine of an incoming train which she was intending to board was a question for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346, 1350–1386, 1388–1397, 1402; Dec. Dig. § 347.\*]

**2. CARRIERS (§ 320\*)—INJURY AT DEPOT—NEGLIGENCE—QUESTION FOR JURY.**

Upon the facts stated in the opinion, it is held that the question whether defendant was negligent in the manner in which it constructed and maintained its depot platform was likewise one for the jury to determine.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1128, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315–1325; Dec. Dig. § 320.\*]

Appeal from District Court, Ellis County.

Action by Florence Edwards against the Union Pacific Railroad Company. From judgment for plaintiff, defendant appeals. Affirmed.

R. W. Blair, C. A. Magaw, and B. W. Scandrett, all of Topeka, for appellant. S. I. Hale, of La Crosse, and E. A. Rea, of Hays, for appellee.

PORTER, J. This is an appeal from a judgment in plaintiff's favor for injuries caused by the engine of a passenger train, which plaintiff was intending to board, striking her as it pulled into the station at Hays City.

The depot at Hays City is on the north side of the track, with the waiting room near the east end. The depot platform is 612 feet long, constructed of gravel, and is level with the tracks. Fifteen feet west of the door of the waiting room a bow window extends part way across the platform, and against the south side of the window stands a signal post. West of the bow window the platform for a distance of 350 feet is 17 feet wide; east of the window, and in front of the door of the waiting room, it is 19 feet wide. Between the window and signal box and the north rail of the track the width is 7 feet 8 inches; and, by reason of the fact that locomotives extend over about 27 inches, the platform space at this point which is safe for travel is less than 5 feet. At the time the accident occurred there was no mark or notice to indicate the point of danger from moving trains to a person walking or standing on the platform. On August 7, 1908, the train arrived from the east in the evening about 8 o'clock, which was before sunset. Plaintiff had purchased a ticket for

Denver, and when the train whistled she came out of the south door of the waiting room in company with two other ladies and started along the platform, intending to board the chair car which stopped about 90 feet west of the bow window. There were several persons standing and moving about the platform near the window. Plaintiff, who was walking with her back to the incoming train, failed to realize how close she was to the track, and was struck by the pilot of the engine and seriously injured.

[1] Several persons testified that they saw that plaintiff was in danger, and one of them who was within reach tried to pull her out of the way. Plaintiff was familiar with the station and surroundings, having lived most of her life in Hays. She testified that all she could remember of the circumstances was that she was trying to get around the signal post through the crowd, where it would be safe for her, and at the moment she supposed she was nearer to the bow window than she really was. She had heard the train whistle, but supposed it was farther away; that she did not look toward the track or in the direction of the train; she was looking straight in front of her and trying to get through the crowd. Her testimony was that she knew it was dangerous there between the post and the track, and that if she had seen or realized her situation she would not have stood so near; that she did not believe she could have seen how near she was to the track if she had looked. A number of persons who witnessed the accident testified that she did not look back or toward the track at any time before she was struck, and some of them said she was laughing and talking with her companions as she walked along.

Having stood upon a demurrer to the evidence and a request for a peremptory instruction, defendant contends that there was no showing of any negligence on its part, and further that the proximate and only cause of plaintiff's injuries, as shown by the testimony, was her own negligence in walking so close to an approaching train. Upon the question of contributory negligence the court gave this instruction: "If you find and believe from the evidence that the plaintiff knew when she went upon the platform that train No. 103 was pulling into the station, and if she walked along the platform on the side of the crowd nearest the track without noticing whether or not she was dangerously near said track, and if she could have seen that the train was near her if she had looked, but failed to look to see where the train was, or where she was, and if in that position, while walking west with her back to the incoming train, she was struck by that train, then she was guilty of contributory negligence, and you should find for the defendant." If, as defendant argues, this instruc-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



tion is correct, it was the duty of the court to sustain the demurrer, for every fact upon which the instruction is predicated is established by uncontroverted evidence, and is admitted by the plaintiff. There was no objection, so far as the record shows, to the giving of the instruction, and neither in the oral argument nor in the brief has plaintiff questioned its correctness. As applied to the facts of this case, we think the instruction was too favorable to the defendant. It correctly states the general rule, but it fails to authorize the jury to take into consideration the conditions and circumstances in which the plaintiff was placed, the presence of a crowd of persons between her and the narrow space in front of the window, the confusion which ordinarily occurs at such times and the natural inclination of persons who are situated as plaintiff was to concentrate their faculties upon efforts to secure a favorable position from which to board the cars. After all is said, the sole question is, Are the admitted facts such that reasonable minds could not differ as to her contributory negligence? If, from all the evidence, reasonable minds might reach different conclusions, it becomes a question for the jury; otherwise for the court. *Railroad Co. v. Powers*, 58 Kan. 544, 50 Pac. 452; *Davis v. City of Holton*, 59 Kan. 707, 54 Pac. 1050; *Cummings v. Railroad Co.*, 68 Kan. 218, 74 Pac. 1104, 1 Ann. Cas. 708. Had the evidence shown that the platform space about the window had been comparatively free and unobstructed, and that plaintiff, with ample opportunity to choose a safe place to walk, had put herself or remained in a position of obvious danger from incoming trains, the instruction would have stated the law correctly. Her testimony, however, is that she was endeavoring to get past the narrow space in front of the window, and because of the crowd of persons about her she was prevented from realizing her danger, and believed she was nearer to the signal post and window than in fact she was. In view of all the circumstances we find ourselves unable to declare, as a matter of law, that the plaintiff was guilty of contributory negligence, and therefore hold that the question was for the jury to determine.

[2] The remaining question is whether the evidence supports a finding that the defendant was negligent in the manner in which it constructed and maintained its platforms. In the construction of stations and platform grounds the carrier is not held to that high degree of care which must be exercised in the transportation of passengers. The defendant has no quarrel with the instructions of the court in this respect, and concedes that the law is as stated in *Sweet v. Railroad Co.*, 65 Kan. 812, at page 814, 70 Pac. 883, where it was said: "It is true a railroad company owes a duty to its passengers, and, perhaps, to all others who are there on proper business, to use ordinary care in con-

structing and maintaining platforms about its depots. It is not required to make it impossible for one to injure himself. Such ordinary precautions must be used to prevent injury as suggest themselves to a reasonably prudent person." The contention is that in determining whether the defendant has exercised reasonable care in the construction of the platform a court and jury must be governed by the kind of platform in general use by railroad companies, and cases are cited in support of the doctrine that an inexperienced jury will not be permitted to say that a structure which has been adopted generally by railroad companies is an improper one. Conceding the general doctrine for the purpose of the argument, we think it can hardly be made to apply to the present situation. There is no proof that the alleged defect in this platform is one that is common to railway platforms as generally constructed and maintained. We know from experience and observation that depots and platforms are frequently constructed with a bow window which extends toward the tracks, and which has the effect of reducing, to some extent, the space left for platform purposes, but observation has not shown us that, as a general rule, they are constructed and maintained with relation to the waiting room and the place where trains stop to take on passengers, as was the platform in question. Of course the mere fact that a railroad company has adopted a particular plan in the construction of a depot and platform does not cut off all inquiry as to whether in so doing it has exercised reasonable care for the safety of passengers. In this case we think it was a proper question to be submitted to the jury. They might have determined that reasonable care for the safety of passengers was not exercised, in view of the location of the waiting room and the place over which persons coming from the waiting room to board their trains were obliged to pass. One test is said to be the usual and ordinary way generally adopted by those in the same line of business. There is, however, nothing in the record to disclose that the way this platform was constructed and maintained was that in common use by railroads generally; nor as before stated, can we say from our observation that station platforms are generally maintained in the same way. If the door of the waiting room had opened upon that part of the platform west of the bow window so that, in order to reach the train, persons would not have been obliged to walk along the narrow space between the signal box and the tracks, it is quite obvious that the danger from accidents of the kind would have been materially lessened. Whether ordinary prudence would not have suggested that precautions of some kind be taken to prevent injury to persons using the narrow space at times when it should become crowded by passengers hurrying from the waiting



room to get on board the train, was, we think, a jury question.

The defendant argues that no platform could be constructed which would be safe if all the people gathered there should attempt to occupy one part of it, and contends that the space of less than five feet was sufficient to enable the patrons of the road to pass from one part of the platform to the other, if too great a number did not attempt to pass at one time. The question whether defendant exercised reasonable care in maintaining a platform with this narrow space depends, we think, upon whether a reasonably prudent person would not have anticipated that at times when more or less confusion would naturally occur, by reason of crowds being on the platform and trains coming into the station, too great a number might attempt to use the narrow space at one time.

It follows that the judgment must be affirmed. All the Justices concurring.

(90 Kan. 369)

DUNCAN v. ATCHISON, T. & S. F. RY. CO.  
(Supreme Court of Kansas. July 5, 1913.)

(Syllabus by the Court.)

MASTER AND SERVANT (§ 276\*)—INJURIES TO SERVANT—EVIDENCE.

Upon the facts stated in the opinion, it is held that a finding that deceased, in the performance of his duties as head brakeman, stepped from a moving freight train, that he was exercising ordinary care at the time, and that his death was caused by the negligence of the defendant railway company, was not based upon mere speculation, nor drawn from facts or conditions imagined or assumed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.\*]

Appeal from District Court, Sumner County.

Action by M. A. Duncan against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 86 Kan. 112, 119 Pac. 356.

W. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, for appellant. Ed. T. Hackney, of Wellington, for appellee.

PORTER, J. The plaintiff recovered a judgment against the defendant for \$8,000 damages for the death of her husband, F. E. Duncan, while in defendant's employ as brakeman of a freight train. The accident occurred on the night of March 9, 1908, about 11 o'clock. Duncan was head brakeman of a freight train coming east through the station of Noel, Okl., where there was a switch leading to an elevator on the south side of the track, and a switch stand on the north side. Seventy-eight feet east of the switch stand there was a bridge 56 feet in length over a ravine. The north side of this bridge was provided with a plank runway and handrail so that brakeman could get down from that

side in safety. On the south side there was no runway or handrail, the ends of the ties being 18 inches from the south rail. The train consisted of about 25 empty cars, and was drawn by two engines. Two cars in the rear of the train were to be cut out and set upon the switch. Duncan was standing in the gangway of the second engine, with a lantern in his hand, passing signals from the rear of the train to the engineer of the head engine, who controlled the movements of the train. He was seen by his engineer to be falling from the bridge as the second engine crossed it, and was found unconscious in the roadway beneath, and died next day from his injuries.

This is the second appeal of this case, the first judgment in favor of plaintiff having been reversed and a new trial ordered on account of error in the admission of testimony, and for the further reason that the known facts and circumstances shown in the evidence were not, in the opinion of the court, of such a nature and so related one to another as to justify the jury in their conclusions as to the manner in which Duncan met his death and the cause thereof. The case has been retried on the same pleadings and substantially upon the same evidence. The petition sets up two claims of negligence, both of which were relied upon at the first trial, a defective engine step and failure to have a runway and handrail on the south side of the bridge. It is alleged in the petition that Duncan "either attempted to step to the ground, or to take a position on the steps of the engine," and fell through the bridge. The jury at the former trial made a finding that deceased fell out of the gangway, and that the cause of his death was a defective step and lack of runway and handrail. At the second trial the claim of negligence by reason of a defective engine step was abandoned, the only negligence relied upon being the failure to provide a flooring or runway and handrail on the south side of the bridge. The jury find this negligence to have been the cause of Duncan's death; that the bridge in question was not a standard bridge as approved and adopted by the defendant and railway companies generally; that Duncan had been over this bridge 23 times while acting as fireman, and 27 times while serving as a brakeman; that he would not have been injured if he had remained on top of his train, or had waited until the train stopped before getting off; that he knew there was no runway on the south side of the bridge. They expressly find that he did not fall out of the gangway, or from the engine, and that he was not required by any emergency to go from the engine to the rear of the train to assist in switching the cars. They find that he was not attempting to get down for the purpose of throwing the switch, that the urgent reason for him to get off in the dark before the train stopped was to cut

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



off the two rear cars, and that the conductor and rear brakeman were not at the rear of the train preparing to perform that duty.

The only person who knew anything about how the accident occurred was W. H. Wright, the engineer of the second engine. He testified: "I saw him just prior to the injury. He was on the engine that I was running. He was taking signals from the rear men and giving them to the head engineer. It was about 11 o'clock p. m. The signals were being given from the south side, and Mr. Duncan was receiving them from the south side. The last I saw of him he was standing in the gangway. Something called my attention inside of the engine. When I looked back next he was lying lengthways on the bridge for a second; the next second he disappeared. Just as soon as I saw that, I whistled the head man down. As soon as he stopped, I told the head man what had happened, and went down there and found him lying in the middle of the road. \* \* \* When I caught sight of Mr. Duncan lying on the bridge for a second he was lying with his feet to the east and head to the west. The train was moving about four or five miles an hour when Mr. Duncan was injured."

The plaintiff claims that some additional evidence was produced at the second trial which, in connection with the other facts and circumstances shown, was sufficient to justify a finding that Duncan attempted to step from the engine to the ground for the purpose of assisting in switching the train by uncoupling the two rear cars, and that by reason of the absence of any protection upon that side of the bridge he fell through it. George McCarty, the rear brakeman, in answer to a question asked by the defendant, said that Duncan stepped off. When asked how he knew that fact he answered: "Engineer Wright came back and met us and said the brakeman got off on that bridge and got hurt. I don't remember exactly whether he said fell off or got off." This was hearsay evidence of an opinion said to have been expressed by the engineer, who himself testified that just before the accident his attention was called to his duties inside the cab, and that the first he knew or saw of the accident was when he noticed Duncan falling from the bridge.

There was a direct conflict in the evidence in reference to the duties of the head brakeman at the time and place. The head engineer testified: "After we get over the switch the conductor throws the switch, backs in on the siding, and cuts off the cars. The rear brakeman flags to protect the rear end of the train. The front brakeman gives signals, takes signals from the conductor, and passes them to me. The best place for him to receive and see those signals is where he can be seen from both the head and the rear end, and that is ordinarily on the top of the train. At that place, where the train was

straight, situated as that was, the signal could be seen from the top better than from anywhere else. That is where the rule required him to be. \* \* \* I got the signals from the rear end. \* \* \* The front brakeman did not have any duty to perform that took him off the train at that place at the time this accident occurred. No one outside of the conductor and rear brakeman had any duty to perform with reference to cutting off those two cars and pulling them in on the switch. There was no emergency there. There was no occasion for unusual hurry to complete the work there, or any instructions to hurry. It was an ordinary freight train making an ordinary trip."

The rear brakeman, the conductor, and all the men employed on the train testified in positive terms that the head brakeman had no duty of any kind to perform in connection with the work of cutting out the two cars, except to remain on the top of the train giving and passing signals. On the other hand, plaintiff produced three witnesses, former railway employes, who testified that it would be the duty of the head brakeman to uncouple the two cars, and to do that would require him to get down from the train while it was in motion, and as near as he could estimate the place where the cars that were to be cut out would stop. The defendant produced as a witness its general foreman of bridges, who had 36 years' experience in building bridges, and had charge of the erection, of details, bills for materials, and supervision of all bridges on that division, who testified that he was familiar with the bridge in question, and that it was a standard bridge such as was approved and accepted by railroad companies generally. Will Pitts, brakeman, formerly in the employ of the defendant, testified that defendant's bridges, inside yards, and adjacent thereto, where cars were switched, were constructed usually with runways on both sides. The court instructed as follows: "If the bridge in question was of standard make, and such as was approved and used by defendant and railway companies in general for the purposes and under like circumstances that this bridge was used by the defendant, the plaintiff cannot recover."

To a special question asked by the defendant the jury answered that this bridge was not such as was approved and adopted by the defendant and railway companies generally. This finding must be construed in connection with the instruction, which defined a standard bridge as one adopted and in general use by the defendant and railways in general "for the purposes and under like circumstances that this bridge was used by the defendant,"; and this, we think, is the vital point in the case. The defendant limited its proof, and failed to show that the bridge was constructed in the same manner as those generally adopted which are adjacent to yards or places where cars are to be



uncoupled and switching done. There was, as observed, a direct conflict in the evidence respecting the duties of a head brakeman when switching is required at stations. It is inconceivable that railway men of experience could honestly differ in their understanding of such important matters; and the conflict cannot be reconciled except upon the theory that, for some reason, one set of witnesses have not told the truth. The jury saw fit to believe the witnesses of the plaintiff, and we are bound by their verdict. While the evidence is not at all clear as to the exact cause of Duncan's death, and does not clearly show whether he fell from the gangway or attempted to step down to the ground and failed to remember that the bridge was there, and by reason of the absence of a runway and handrail fell through the bridge, nevertheless we are inclined to believe that when the jury determined from the evidence that his duties required him to get off the train at or near the bridge, it cannot be said to have based its verdict upon mere speculation, nor to have drawn an unreasonable inference in finding that his death was caused by the negligence of the defendant. Whether or not he was guilty of contributory negligence in failing to remember the location of the bridge was a question for the jury. *Rouse v. Ledbetter*, 56 Kan. 348, 43 Pac. 249; *Edwards v. U. P. Ry. Co.*, 133 Pac. 728.

The judgment is affirmed. All the Justices concurring.

(90 Kan. 168)

### WELLS v. SWIFT & CO.

(Supreme Court of Kansas. July 5, 1913.)

#### (Syllabus by the Court.)

#### 1. MASTER AND SERVANT (§ 258\*)—INJURY TO SERVANT—PETITION—SUFFICIENCY.

In a personal injury case, the petition alleged that the plaintiff was injured by the unexpected starting up of a rotary motor, driven by compressed air, caused by the opening of a lever valve in a double connection attached to a movable hose; the mechanism was described, and negligence was charged in that the valve was defective. The jury returned a verdict for the plaintiff and found specially that the defendant's negligence consisted in using a valve without a locking or safety device, and that they did not know what caused the valve to open. *Held*, although the petition was attacked for indefiniteness with respect to the allegation of negligence, no substantial prejudice resulted to the defendant from the want of more specific averments.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 816-836; Dec. Dig. § 258.\*]

#### 2. MASTER AND SERVANT (§ 236\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

The fact that a screw valve was provided at another point by which the plaintiff could have cut off the compressed air is not fatal to his recovery, since to have used that valve would have cut the air off from another machine as well as from that which he was using.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 681, 723-742; Dec. Dig. § 236.\*]

#### 3. MASTER AND SERVANT (§ 289\*)—INJURY TO SERVANT—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

Although the jury were unable to say in what manner the valve was opened, their verdict is sustained on the ground that it was a fair question for their determination whether, under all the conditions shown, it was negligence to use a lever valve, without a locking device, in a situation such that it might in various ways be accidentally opened.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.\*]

#### 4. APPEAL AND ERROR (§ 1051\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of opinion evidence that the valve, when used in the situation described, was unsafe, is not sufficient ground for the reversal of the judgment, even if erroneous, as it does not seem probable that the verdict was affected by it; there having been competent evidence from which the jury could draw the same conclusion.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.\*]

#### 5. NO ERROR.

Upon the entire record no error is shown which justifies a reversal.

#### (Additional Syllabus by Editorial Staff.)

#### 6. APPEAL AND ERROR (§ 1068\*)—REFUSAL OF INSTRUCTIONS—CURE OF ERROR.

A refusal to instruct, in an employe's action for injuries, that plaintiff could not recover if he had been directed to use a screw valve to shut off the air from the machine he was operating, was cured by a finding of the jury that no such direction had been given.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.\*]

#### 7. EVIDENCE (§ 513\*)—OPINION—ADMISSIBILITY.

Opinion evidence that a machine is unsafe is admissible where the machine is so complicated that the grounds of the opinion cannot be fully exhibited to the jury.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2317, 2318; Dec. Dig. § 513.\*]

#### 8. MASTER AND SERVANT (§ 217\*)—ASSUMPTION OF RISK—KNOWLEDGE ESSENTIAL.

To charge an employe with having assumed the risk of injury from defective machinery he must know or be under obligation to know of the danger, and not merely know the physical facts regarding the mechanism.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

Appeal from District Court, Wyandotte County.

Action by W. E. Wells against Swift & Co. From judgment for plaintiff, defendant appeals. Affirmed.

Angevine, Cubblison & Holt, of Kansas City, for appellant. James F. Getty and D. F. Carson, both of Kansas City, for appellee.

MASON, J. W. E. Wells recovered a judgment against Swift & Co., a corporation, for personal injuries received while in its employ, and it appeals.

The plaintiff had been cleaning the flues of a boiler, using for the purpose a rotary boring machine, made of steel, about ten



inches long and four inches in diameter, operated on the turbine principle, by compressed air. The air was brought from the compressor in the engine room to the boiler room by an iron pipe. To this pipe was attached a piece of inch hose 12 or 15 feet long. The end of this hose was coupled to the middle of an iron double connection, or "T," weighing about 12 pounds, to each arm of which another piece of hose was attached, about 25 feet long. At the end of one of these pieces of hose was the boring apparatus operated by the plaintiff; at the end of the other was a somewhat similar device, used for smoothing and grinding the ends of the flues. At the point where the single hose connected with the iron pipe containing the compressed air was a screw valve for turning it on and cutting it off. On each arm of the "T" was a quick-action "gate" or lever valve, regulating the supply of air to each of the pieces of hose to which the turbines were attached. The plaintiff while cleaning the flues stood upon a platform about 6 feet high and 12 by 15 feet in size. Having completed his work, he shut off the air from the hose he was using, by turning the lever of the valve at the "T" or double connection. He then undertook to disconnect the boring apparatus from the hose. While he was doing so, in some way the lever valve was opened, and the boring machine began to run. It fell from his hands, and the cutting edge of the revolving cylinder struck his leg, inflicting the injuries on account of which he sued.

[1] The petition alleged two grounds of negligence: (1) Defective ventilation by which the boiler room was permitted to fill with steam, so that vision was obscured; and (2) defective construction of the valve. The jury found that the room was filled with steam, so that the plaintiff's view was obstructed, but that the defendant's negligence consisted in the defective construction of the double connection, in that the valves had no lock or safety device. The trial court overruled a motion to make the petition more definite by stating specifically what acts of negligence caused the injury. The ruling is complained of. The petition described the manner in which the air supply was furnished and regulated, alleged that the valves at the "T" were "negligently constructed to be operated by a lever," and added that "said double connection could be moved from place to place by picking it up or dragging it by means of the hose attached thereto for the purpose of operating the aforesaid appliances, and said valves when said double connection was so moved were liable to be opened or shut by the aforesaid levers coming in contact with any hard substance." The defendant maintains that it was difficult to tell whether the plaintiff intended to charge generally that the valve was negligently constructed, or that the negligent construction consisted in the fact that the valve was operated by a lever. We think the petition is fairly to be

interpreted as charging that in view of the surroundings and conditions stated it was negligence to use the kind of a valve described; but, in any event, it does not appear that any prejudice resulted from a failure to make the charge more specific. There was no express allegation in the petition that there should have been a lock or safety device on the lever, but this was implied from the statement that the valve was capable of being opened or shut by an accidental blow.

[2] The defendants argue that, even if there had been a lock upon the lever valve, it is reasonable to infer that the plaintiff would not have used it, because he did not use the screw valve referred to. This screw valve regulated the supply of air to both machines. The plaintiff used the valve which cut off the air from the machine he was using, without interfering with the operation of the other. This consideration prevents the act of the plaintiff in this regard from amounting to contributory negligence.

[3] An instruction was asked and refused to the effect that, if the plaintiff had been directed to use the screw valve to shut off the air from the machine he was operating, he could not recover. The refusal of the instruction is rendered immaterial by the fact that the jury found that no such direction had been given.

[4] Witnesses were allowed to testify that the valve was not safe. This is assigned as error. Such evidence is admissible where it relates to machines so complicated that the grounds of the opinion cannot be fully exhibited to the jury. *King v. King*, 79 Kan. 584, 100 Pac. 503.

[5] Whether or not the case falls within that rule, no serious prejudice could have resulted, for all the facts were fully brought out, and whether the device was safe was a fair question for the jury. The judgment in the recent case of *Root v. Packing Co.*, 88 Kan. 413, 129 Pac. 147, was not reversed merely because a witness was erroneously permitted to give his opinion as to the safety of a device, but because there was no other evidence on the subject to support the verdict. Evidence as to the action of another valve, said to be of the same sort, was objected to; but the objection seems to affect its weight rather than its competence.

The defendant argues that it was not obliged to furnish any particular form of mechanism, or the latest and best devices. But we do not find that the judgment rests on any contradiction of that rule.

[6, 7] It is contended that even if the machinery was defective the plaintiff cannot recover because he assumed the risk. In order for this principle to apply it is not enough that an employé should know the physical facts regarding the mechanism from which he receives an injury; he must also know, or be under an obligation to know, of the danger to which he is subjected. *Railway Co. v. Bancord*, 66 Kan. 81, 71 Pac. 253;



Brinkmeier v. Railway Co., 89 Kan. 738, 77 Pac. 586; Thompson on Negligence, § 4652. The plaintiff testified that he had seen the valve, but had not examined it closely, that he had had considerable experience in cleaning boilers, but was not positive whether or not he had used this particular contrivance before. It cannot be said as a matter of law that he knew or ought to have known of the danger to which he was subjected. It was competent for the jury to find that the plaintiff did not know, and from want of experience was not reasonably to be expected to know, of the danger, but that it was the duty of the defendant to know of it from the obligation the law places upon an employer with respect to appliances furnished for the use of employes. King v. King, 79 Kan. 584, 100 Pac. 503. The jury returned an affirmative answer to a question thus worded: "Was not the plaintiff an experienced boiler cleaner and perfectly familiar, before he was injured, with the stationary air line and air line hose and the lever valve in question, and the turbine flue cleaner, and fully competent to do the work he was doing at the time he was injured?" In view of the compound and involved character of the question, the answer does not necessarily imply that the plaintiff knew the details of the construction of the valve, or that he knew or ought to have known of the danger resulting from its use.

The more important special findings were the following: "Q. Is it not a fact that there was no fog of steam in the room where the plaintiff was working at the moment he claims to have been injured? A. No; there was steam. Q. If you find that there was a fog of steam in the boiler room, what had that to do with causing the plaintiff's injuries? A. Obstruct his view. Q. If you find that the defendant was guilty of any negligence, state of what such negligence consisted, giving full particulars thereof. A. Defective construction of double connection, with valves without locks, and not being stationary located. Q. If you find that the lever valve in question was negligently constructed, state in what particular it was negligently constructed. A. Absence of lock or safety device. Q. What caused the lever valve in question to be opened at the time the plaintiff was injured? A. Don't know. Q. Is it not a fact that the plaintiff and defendant were equally competent to judge of the risks and hazards of the plaintiff's employment, and did both of them have equal knowledge of the surroundings and construction of the lever valve in question? A. No. Q. If you find that the plaintiff did not have equal knowledge of the surroundings with the defendant, state in what particular he did not have such knowledge? A. Not being qualified. Q. If you find that the plaintiff was not as competent to judge of the risks and hazards of his employment as the defendant,

state in what particular he was not competent to judge of such risks and hazards. A. Not qualified."

We think these findings support the verdict. They show that the jury took substantially this view of the matter: The fact that the room was filled with steam did not of itself constitute negligence, but it was one of the conditions the employer was bound to take into account in providing appliances for use in the boiler room. It is not possible to say just how the valve was opened, whether by some one accidentally hitting the lever, or stumbling over the hose, or by the action of the air. But the defendant should have anticipated that an easily acting lever valve, attached to a movable hose, might be accidentally opened in a variety of ways, and that the starting up of the boring machine so occasioned would be dangerous to the employes. Therefore it ought, in the exercise of reasonable diligence, to have provided a lock or safety device to prevent such accidental opening of the valve. The plaintiff was not sufficiently experienced or skillful to enable him to realize the risk to which he was exposed by the use of a valve without a locking device.

[5] To several of the questions submitted the jury merely responded, "Don't know." Complaint is made of the refusal of the court to require more definite answers. We do not find any of the questions to be of such importance that a new trial should be ordered for want of answers to them, assuming that they could have been required.

The judgment is affirmed. All the Justices concurring.

(90 Kan. 396)

FIRST NAT. BANK OF OLATHE v. LIVERMORE et al.

(Supreme Court of Kansas. July 5, 1913.)

(Syllabus by the Court.)

1. AUTHORITY OF BANK CASHIER.

It is assumed, but not decided, that a cashier has authority in virtue of his office to extend the time of payment of a note belonging to the bank, even if sureties are thereby released, where new security is taken.

2. BILLS AND NOTES (§ 491\*)—RENEWAL NOTE—EFFECT ON ORIGINAL NOTE.

Where a new note, payable at a future date, is taken for the same debt evidenced by a past-due note, which is not surrendered, the parties are presumed to intend that action on the old note shall be suspended until the maturity of the new one, in the absence of anything to indicate a contrary contention.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1643-1648; Dec. Dig. § 491.\*]

3. PRINCIPAL AND SURETY (§ 104\*)—RELEASE OF SURETY—EXTENSION OF NOTE.

Where one of the principal stockholders, who is also a director, signs a note with the corporation, given to raise money for its benefit, intending to be bound only as a surety, he is not entitled to the same liberality of treatment that the law accords to volunteer sure-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ties; and where the corporation is granted a valid extension of time, without his knowledge, he is not thereby released from liability, unless he suffers some injury therefrom.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 186-190, 193-195, 197-199, 200; Dec. Dig. § 194.\*]

Appeal from District Court, Johnson County.

Action by First National Bank of Olathe against H. C. Livermore and J. C. Nichols, administrator. Judgment for plaintiff, and defendants appeal. Affirmed.

J. W. Parker, of Olathe, for appellants.  
S. T. Seaton, of Olathe, for appellee.

MASON, J. The Olathe Milling & Elevator Company, a corporation, borrowed \$2,000 of C. L. Hayes for use in its business, and gave him a note therefor, signed by the corporation and by three individuals, who were the principal stockholders, and were also directors of the corporation, but who otherwise received no benefit from the transaction, and who intended to bind themselves as sureties only. The note was purchased by the First National Bank of Olathe, which brought action for a balance due thereon against two of the individual signers, H. C. Livermore and M. G. Miller. It recovered judgment, from which an appeal is taken.

The principal contention in behalf of the defendants is that they were discharged from liability by an extension of time given by the bank to the milling company for a valuable consideration without their consent. After the maturity of the note referred to the milling company executed to the cashier, for the benefit of the bank, a negotiable note for \$12,700 due in 90 days, on account of various items of indebtedness, including the \$2,000. The defendants did not sign this note, and did not consent to it. The old note was not surrendered, and the new note was not entered on the books of the bank, but was placed in an envelope containing notes that had been charged off. As security for the same indebtedness the milling company also executed a mortgage, which was afterwards held void as to creditors.

The defendants maintain that the transaction referred to amounted to a payment of the \$2,000 note. The decision of the trial court implies a finding that the new note was not accepted as payment of the old, and this finding was warranted, if not compelled, by the evidence. The plaintiff challenges the authority of the cashier to bind the bank by the acceptance of the new note. Such authority was not shown, unless it is to be regarded as incidental to the office. It has been held that a cashier has no implied authority to extend the time of payment of a note where the effect would be to release a surety. *Bank v. Wetzel*, 58 W. Va. 1, 50 S. E. 886, 70 L. R. A. 305, 6 Ann. Cas. 48; *Vanderford v. Farmers' Bank*, 105 Me. 164,

66 Atl. 47, 10 L. R. A. (N. S.) 129. The contrary is held in *Wakefield Bank v. Truesdell*, 55 Barb. (N. Y.) 602, cited in 5 Cyc. 473. We shall assume, without deciding, that where, as in this case, additional security was taken, the cashier may in virtue of his office extend the time of payment of a note, even if it results in the release of a surety. Such a transaction would be merely the exchange of one form of security for another.

[2] If there were anything in the conduct of the parties from which an inference might be drawn that they did or did not intend an extension of the time of payment of the original debt, the question would be one of fact, upon which the decision of the trial court would be final. But we think there was no substantial evidence on the subject beyond the bare fact of the making and acceptance of the later note; and, in the absence of anything to indicate the contrary, by the weight of authority the presumption is that action on the first note was to be suspended until the maturity of the second. 7 Cyc. 891, 892; note, 4 Ann. Cas. 884. The defendants were clearly sureties in the sense that, if they had paid the \$2,000 note, they would have been entitled to reimbursement from the corporation. It is agreed that the bank, when it bought the note, knew that the defendants claimed to be sureties, and it must be deemed to have known of their actual relation to the transaction. If the matter were ruled by the present statute relating to negotiable instruments, no extension of time given to the corporation would release the other signers of the note. That statute provides that one who by the terms of an instrument is absolutely required to pay it is "primarily liable." Gen. Stat. 1909, § 5249. It enumerates the methods by which one who is secondarily liable may be released, one of them being by an extension of time to the principal. Gen. Stat. 1909, § 5373. It also enumerates the methods by which the instrument may be discharged, without including any reference to the effect of an extension of time upon any of the parties. The inference is reasonable that co-makers of the note, although in fact sureties, cannot claim a discharge on this ground, and this interpretation is well fortified by the decisions. Note, 10 L. R. A. (N. S.) 129; note, 26 L. R. A. (N. S.) 99; *Lane v. Hyder*, 163 Mo. App. 688, 147 S. W. 514; *Richards v. Bank Co.*, 81 Ohio St. 348, 90 N. E. 1000, 26 L. R. A. (N. S.) 99. This statute, however, has no application to this case, because the note was executed in 1904, and the statute, which was enacted in 1905, includes a section reading: "The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage thereof." Gen. Stat. 1909, § 5252.

[3] The plaintiff contends that the defendants were not released from liability, even if the milling company was given a valid exten-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



sion of time, for the reason that they were not entitled to the privileges of mere volunteer sureties in this respect, because, being themselves the principal stockholders, they had a personal interest in the making of the loan to the corporation. In Seymour D. Thompson's article on Corporations in the *Cyclopedia of Law and Procedure* it is said: "As the promise of a shareholder to pay the debt of a corporation is the promise to pay the debt of another, it entitles the promisor to all the rights and remedies of a surety as to extensions and renewals of credits not authorized by him." 10 Cyc. 651. Only one case is cited in support of the proposition. *Home Nat. Bank v. Estate of Waterman*, 134 Ill. 461, 29 N. E. 503. There the ground of the ruling is stated to be that a corporation is a different person from any of its members. The particular question now suggested was not discussed. In *Pelton v. San Jacinto Lumber Co.*, 113 Cal. 21, at page 24, 25, 45 Pac. 12, at page 13, action was brought upon a note signed by a corporation and indorsed by two stockholders. The indorsers defended on the ground that without their knowledge the note was altered before delivery by the insertion of a provision making it payable in another state. The court said: "That the alteration of the note was material, and such as would discharge sureties, whether indorsers or guarantors, is unquestionable. \* \* \* These propositions, as general rules, are not controverted by counsel for respondent, but they contend that by reason of the circumstances that Caswell and Fuller were stockholders of the corporation defendant, and by virtue of that relation would be indirectly and incidentally benefited by the loan, they are not entitled to the favor accorded by law to uninterested sureties. But to this point they have cited no authority, and I have found none. Conceding that Caswell and Fuller were indirectly benefited, the benefit could have been only in proportion to the stock owned by them at the time of the loan, and to that extent they were made personally liable by force of section 322 of the Civil Code, independently of any contract. But they are not sued on their statutory liability. \* \* \* They are sued on an alleged contract which, according to the findings of fact, they never executed." Under the circumstances stated, the stockholders would not have been liable, even if they had been principals, as no question peculiar to suretyship was involved.

In *Bank v. Prescott*, 60 Kan. 490, at page 497, 57 Pac. 121, at page 123, it was said, referring to a claim that the statutory liability of stockholders for a debt of the corporation had been released by an extension of time given to the company: "We are not satisfied that the stockholders stand in such relation to the corporation as to entitle them to that favor and strict construction of their contracts which is accorded to sureties." In *Richardson v. Draper et al.*,

87 N. Y. 337, the administrator of one of several stockholders who had jointly guaranteed the payment of bonds of the corporation defended an action on the guaranty by invoking the rule which had been thus expressed in *Getty v. Binsse et al.*, 49 N. Y. 385, at page 388 (10 Am. Rep. 379): "It is a well-settled principle that, in case of a joint obligation, if one of the obligors die, his representatives are at law discharged, and the survivor alone can be sued. \* \* \* It seems to be equally well settled that if the joint obligor, so dying, be a surety, not liable for the debt, irrespective of the joint obligation, his estate is absolutely discharged, both at law and in equity; the survivor only being liable. In such case, where the surety owned no debt outside and irrespective of the joint obligation, the contract is the measure and the limit of his obligation. He signs a joint contract and incurs a joint liability, and no other. Dying prior to his comaker, the liability all attaches to the survivor." The rule was conceded to be as so stated, but was held to be inapplicable, because the guarantors, as owners of the stock in the corporation, were interested in the loan made to the corporation. In the opinion it was said: "In guaranteeing the bonds, the obligors did not act as mere sureties; they were seeking a benefit for themselves in promoting an enterprise in which they were largely interested. Whatever would benefit the company would benefit them. They were acting to put profits in their own pockets." *Richardson v. Draper et al.*, 87 N. Y. 337, 347. The case is in point upon the proposition that one who, to facilitate the raising of money by a corporation of which he is a stockholder, guarantees the payment of the loan, is not entitled to that extreme liberality of treatment which is accorded a volunteer surety. The rule by which an extension of time to the principal operates to discharge a surety is almost as technical as that by which the estate of a surety who is one of several joint obligors was held to be relieved of liability by his death. It is true that such extension for the time being prevents the surety from paying the debt, and at once proceeding against the principal, and to that extent affects his legal rights. But, where the rule applies, he is relieved of liability, although he may not suffer the least actual injury. The result is the same even where, as often happens, the extension of time increases the likelihood of payment by the principal. The real basis of the rule is that sureties are favorites of the law, and its application may well be limited to those who assume an obligation for others, having no personal interest in the matter.

In *Guaranty Co. v. Pressed Brick Co.*, 191 U. S. 416, at pages 423, 424, 24 Sup. Ct. 142, at page 143 (48 L. Ed. 242), a surety company bond was given to insure the payment of laborers and materialmen by a contractor en-



gaged in the erection of a public building. Action was brought on the bond on account of the failure of the contractor to pay for some brick furnished him. The surety company defended on the ground that without its consent the brick company had given the contractor an extension of the time of payment, taking his notes due in thirty and sixty days. Against this contention, the argument was advanced that a surety who receives compensation for his risk is not released by an extension of time to his principal, unless he suffers injury therefrom. The proposition was thus stated: "Counsel for the brick company argued with much persuasiveness that this rule of strictissimi juris, though universally accepted is applicable to the undertaking of an ordinary guarantor, who is usually moved to lend his signature by motives of friendship or expectation of reciprocity, and without pecuniary consideration, has no application to the guaranty companies, recently created, which undertake, upon the payment of a stipulated compensation and as a strictly business enterprise, to indemnify or insure the obligee in the bond against any failure of the obligor to perform his contract." The court refused to express any opinion on this question. The surety company was held liable upon the ground that the credit given to the contractor was only such as was customary, and could fairly have been anticipated at the time the bond was given. In the opinion however it was said: "The rule strictissimi juris is a stringent one, and is liable at times to work a practical injustice. It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation, which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor." 191 U. S. 426, 24 Sup. Ct. 144, 48 L. Ed. 242.

In *United States v. United States Fidelity & G. Co.* (C. C.) 178 Fed. 721, a number of federal cases were reviewed, and a conclusion was reached which is fairly indicated by a headnote in these words: "The rule of strictissimi juris, ordinarily applied in relief of an individual voluntary surety, is inapplicable to relieve a paid surety on a contractor's bond because of an extension of time to the principal; but such surety must show, in addition, actual injury." Section 2. Substantially this view has been taken by the Circuit Courts of Appeals for the Third and Fourth Circuits. *United States Fidelity & Guaranty Co. v. United States*, 178 Fed. 692, 102 C. C. A. 192; *Atlantic Trust & Deposit Co. v. Town of Laurinburg*, 163 Fed. 690, 90 C. C. A. 274. One who, after having executed a real estate mortgage, conveys the property to a grantee who assumes the payment of a debt, may become entitled to the

same treatment as a volunteer surety, although originally he was the principal. *Stove Works v. Caswell*, 48 Kan. 689, 29 Pac. 1072; *Fisher v. Spillman*, 85 Kan. 552, 118 Pac. 65; note, 4 L. R. A. (N. S.) 666. That situation, however, grows out of the peculiar relationship of the parties. The mortgage is not necessarily affected by the agreement between the mortgagor and the purchaser of the land; but, if he elects to hold the latter personally, he is required to treat his original debtor as a mere surety.

We acquiesce in the view that where a principal stockholder signs a note with the corporation, intending to be bound only as surety, he is not entitled to the same liberality of treatment which the law accords the volunteer surety; that where the corporation is granted an extension of time, for a consideration, the stockholder is not released from liability, although he did not consent thereto, unless it is shown that he suffered some injury therefrom.

The judgment is affirmed All the Justices concurring.

(90 Kan. 490)

#### BAKER v. UNITED IRON WORKS CO.

(Supreme Court of Kansas. July 5, 1913.)

##### (Syllabus by the Court.)

#### 1. MASTER AND SERVANT (§ 209\*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

A laborer in a foundry was required to assist in carrying a crucible of molten brass weighing 275 pounds by means of a bail holding the crucible by a ring around it from which handles projected. The crucible was new and larger than those ordinarily used. Because of this fact none of the bails on hand were large enough, and the foreman took one to the blacksmith shop in the foundry and gave orders to stretch it in a hurry, which was done by heating and hammering the ring. The hot metal was then carried to the mold by the reconstructed bail, and in pouring it into the mold the handle upon which the plaintiff was lifting broke at its connection with the ring, spilling the metal upon him. It is held that the doctrine of assumption of risk has no application to the facts of this case.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 552, 553; Dec. Dig. § 209.\*]

#### 2. MASTER AND SERVANT (§§ 107, 125\*)—DEFECTIVE APPLIANCES—NOTICE.

The employer who manufactures or alters an appliance is chargeable with knowledge of any defects which ordinary care in the process would have disclosed. Beyond this, if an appliance as ordinarily used is liable, if defective, to injure the employé, a duty of reasonable inspection is cast upon the employer, and he is chargeable with notice of such defects as the inspection would have revealed.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 199-202, 212, 243-251, 254, 255; Dec. Dig. §§ 107, 125.\*]

#### 3. MASTER AND SERVANT (§ 124\*)—DEFECTIVE APPLIANCE—DUTY TO INSPECT.

This duty of inspection is a continuing one and arises from the primary obligation to exercise ordinary diligence to provide safe instru-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 133 P.—47



mentalities. Whenever an inspection is fairly incidental to such diligence, it must be made.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. § 124.\*]

Appeal from District Court, Montgomery County.

Action by Charles R. Baker, a minor, etc., against the United Iron Works Company. From judgment for plaintiff, defendant appeals. Affirmed.

W. E. Ziegler, of Coffeyville, for appellant. Stanford & Stanford, of Independence, for appellee.

**BENSON, J.** This is an appeal from a judgment awarding damages for personal injuries.

[1] While the plaintiff was assisting in carrying a crucible containing molten brass from a furnace in the defendant's foundry, a handle of the brail or shank, by means of which the crucible was carried, broke, whereby a part of the molten mass was spilled upon his leg and into his shoe, causing painful and serious injuries, for which damages are sought.

The brail is an iron ring with handles on opposite sides. When the metal is sufficiently heated, the crucible is taken from the furnace and placed within the ring, which is then lifted until it binds about the crucible just below the center, where it is larger than at the bottom or top. Two men at each handle of the brail then carry it to the mold.

The crucible used at the time of the injury was a new one larger than those ordinarily used at the foundry, and there was no brail in the establishment large enough in circumference to carry it. The foreman selected a brail and took it to the blacksmith shop of the foundry and gave orders to stretch it in a hurry to the required size. It was so stretched by heating and hammering and was then immediately placed upon the floor and the crucible containing about 275 pounds of metal was then drawn from the furnace with tongs and placed within it. The plaintiff and another laborer were directed to take hold of the handle on the side in front (as it was then carried). This handle was a straight rod projecting from the ring of the brail. The foreman and another employé took hold of the other handle, which was T shaped, so made to facilitate turning the crucible to pour the metal. The crucible was then lifted by these carriers who proceeded with it about six feet to a mold, when in raising it for pouring the handle on which the plaintiff was lifting broke off at its connection with the ring, causing the metal to spill and flow upon him. The brail had been used without accident before this alteration but only for carrying smaller crucibles with lighter loads.

Errors are assigned upon the denial of a

motion for judgment on the findings and upon the refusal of a new trial. The findings relied upon in support of the motion were that the crucible and shank or brail were such as are ordinarily used in similar plants, and that the plaintiff knew the way and manner in which the metal was carried in the crucible and emptied into the molds at the defendant's foundry.

The findings referred to necessarily related to the carriage of metals previously in other and smaller crucibles with brails adapted to the size of the crucibles. The injury was not caused by the way in which the work was done but by the use of a defective instrument. It does not appear that a brail adapted to a smaller vessel had ever before been enlarged as this was in order to carry a larger one. Therefore it is not true, as the defendant argues, that the instrument was one in ordinary use. It was not the duty of the laborer, when directed to take the handle and lift, to stop and examine the tool. The fallacy of such a claim is shown in the opinion in *Railway Co. v. Quinlan*, 77 Kan. 126, 128, 93 Pac. 632. The principle is further illustrated in *Allison v. Stivers*, 81 Kan. 713, 106 Pac. 996; *Griffin v. Brick Co.*, 84 Kan. 347, 114 Pac. 217, 40 L. R. A. (N. S.) 1088; *Steck v. Railway Co.*, 87 Kan. 431, 124 Pac. 169; and *Murphy v. Edgar*, 83 Kan. 627, 112 Pac. 109. The doctrine of assumption of risk has no room for application here.

[2] Whether the brail was made at the foundry or purchased of a manufacturer does not appear, but it was altered by the defendant at its own shop, and the situation is analogous to a case where the employer is the manufacturer. It is said to be well settled that the employer who furnishes an instrumentality made by him to his employé is chargeable with such knowledge of defects as ordinary care in the manufacture would have disclosed. 3 *Labatt's Master and Servant* (2d Ed.) § 1054.

In *Atchison, T. & S. R. Co. v. Carey*, 58 Kan. 815, reported in 49 Pac. 662, where it appears that the machinery of an engine had broken, causing injuries to the foreman, it was said in the opinion: "The broken parts had been constructed in the company's own shops, by its own employés and the defects in question must have been obvious to those engaged in the work. In such cases the master is, without doubt, liable for resulting injuries."

Where a carpenter was required to use a scaffold instead of a ladder, which he had selected, it was said: "He did not select or use the scaffold relying upon the care and prudence of the brick masons in building it. The master selected it and ordered it to be used just as he might have purchased another ladder, brought it upon the scene, and ordered the appellee to substitute it for the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



one he was using when the foreman appeared. In such a case the duty would rest upon the master to supply a ladder which was reasonably safe, and he would be bound to know whether it was reasonably safe before ordering an employé, ignorant of its condition, to climb upon it. The discharge of this duty would not depend upon who constructed the ladder. Whether made by a manufacturer of ladders, by an ordinary carpenter, or by brick masons or their helpers, the master's duty would be the same. So here. \* \* \* It is immaterial that the scaffold was built by the brick masons, and immaterial that the master did not superintend its erection. He imposed it upon the appellee and was obliged to know whether it was reasonably fit for service." *Allison v. Stivers*, 81 Kan. 713, 106 Pac. 906.

For the purposes of this decision it is sufficient to say that the employer who manufactures or alters an appliance is chargeable with knowledge of any defects which ordinary care in the process would have disclosed. Beyond this, if an appliance as ordinarily used is liable, if defective, to injure the employé, a duty of reasonable inspection is cast upon the employer, and he is chargeable with notice of such defects as the inspection would have revealed.

"The rule as to the measure of the employer's duty is also stated by saying that if, by the use of ordinary care in testing the strength of machinery placed in the hands of an employé with which to labor, its weakness and dangerous character for the work to be done could have been ascertained, the employer will be chargeable with notice of any defect in the machinery and liable for any injury resulting to such employé from such defect." 4 *Thomp. Neg.* § 3769.

[3] This duty of inspection is a continuing one and arises from the primary obligation to exercise ordinary diligence to provide safe instrumentalities. Whenever an inspection is fairly incidental to such diligence, it must be made, *Atchison, T. & S. F. R. Co. v. Holt*, 29 Kan. 149; *Mo. Pac. Ry. v. Dwyer*, 36 Kan. 58, 12 Pac. 352.

In *K. C. & P. R. Co. v. Ryan*, 52 Kan. 637, 35 Pac. 292, it appeared that a lifting jack had been sent to the company's shops for repairs. It afterwards broke, injuring an employé. The court said: "Now, if in repairing the worn or broken cogs of the jack it was, or ought to have been, the practice at the shops, before the jack was sent out again for use, to examine and inspect all parts to ascertain if any other defects existed therein, and any reasonable examination or inspection at the shops would have disclosed the defective weld of the foot, then the company would be negligent in furnishing from its own shops a defective jack for use, even if the defect in the jack was not visible, or even if after such repairs a man of ordinary skill, prudence, and diligence would not, by any

usual and ordinary inspection, have discovered the defect before the jack broke."

Ordinary care as here used means reasonable care in view of the exigencies of the services and the dangers to be apprehended. Greater care should be used with respect to an appliance for carrying molten metal by laborers than for the carriage of an equal weight of solid or cold substance. Precautions required by ordinary care in one case might not be necessary in the other. The true test is that of reasonable prudence in the particular service.

Applying these fundamental principles to the question here presented, the evidence is amply sufficient to support the verdict. An appliance intended for a smaller receptacle was hastily altered and forthwith, with no inspection except to look at it, was used to carry a molten mass likely to cause serious if not fatal injuries to the carriers if the appliance was insufficient for the purpose. Simple tests of its strength would have revealed its weakness. Even if more elaborate tests were necessary, the incidental expense ought not to outweigh safety of life and limb.

No one testified to the precise cause of the separation of the handle from the ring with which it was connected. The ring was in evidence showing a dent at the point of former connection. It appears that the defendant after the casualty had put the handle upon another brail and it was not produced at the trial. The cause of the break was a question for the jury, but it was not difficult to find. In its original condition the instrument had been used without accident for several years. The jury were warranted in finding that in the process of heating, stretching, and hammering the ring, the weld or connection, however made, had been weakened. Necessarily the ring of the brail was weakened by drawing out the iron to a smaller diameter. From this fact and the appearance of the part offered in evidence it was for the jury to determine the cause of the break.

A multitude of cases where the principles involved in this controversy have been applied are cited in the works of Thompson and Labatt above referred to. Other cases are referred to in extended notes in 41 L. R. A. 70, and 28 L. R. A. (N. S.) 1215.

A Minnesota decision upon facts quite similar to those presented in this appeal is fairly illustrative of the principles involved here. A laborer engaged in bridge work was standing upon a plank on a scaffold above a river turning a jackscrew. For this work he was furnished a crowbar which had been injured by heating in a fire and pouring water upon it. In attempting to turn the screw with this crowbar it broke causing the laborer to fall backwards and upon the ice below, thereby injuring him. After referring to evidence tending to show that the effect of the heat and water would be to weaken the bar, the court said: "It would seem to us quite prob-



able, even from common knowledge applied to the facts, that such a result would follow, and the jury might be justified in the conclusion that the crowbar was defective after the fire, even if of good quality when furnished. This evidence, taken in connection with the effect of the application of the slight force shown to have been applied in attempting to move the screw by it when it broke, might well furnish grounds to support the conclusion that a reasonable inspection would have discovered its condition." *Miller v. Great Northern Ry. Co.*, 85 Minn. 272, 88 N. W. 758.

The judgment is affirmed. All the Justices concurring.

(90 Kan. 408)

**WUNSCH v. WUNSCH et al.**

(Supreme Court of Kansas. July 5, 1913.)

Appeal from District Court, Shawnee County. Action by Henry Wunsch against Gustava Wunsch and others. Judgment for defendants, and plaintiff appeals. Affirmed.

E. R. Simon and J. A. McClure, both of Topeka, for appellant. W. I. Jamison and W. R. Hazen, both of Topeka, for appellees.

**PER CURIAM.** The appellant and the appellee are, and were during all the times referred to, husband and wife. For many years prior and subsequent to the purchase of the shares of stock in question the appellant was in the employ of the Atchison, Topeka & Santa Fé Railway Company, and received his monthly salary in a check about the 15th of each month. The appellee did the household work, received from her husband his pay check, and purchased the household supplies. It appears that for some years prior to the purchase of the shares of stock in question the appellant had purchased and made monthly payments upon a like number of shares in the same building and loan association, the matured par value of which was likewise \$1,000. About July 16, 1901, the appellant suggested to appellee that they could save more money by buying five more shares, and directed her to do so, which she did from the proceeds of his check, taking out the shares in her own name. There was some conflict in the testimony as to what was said about taking out the latter five shares, but there is evidence that appellant said: "We could spare it; that we had the other debts on the property paid. You take out the five shares for you." Also that appellee got \$280 from her father's estate and \$300 from her godfather; that the \$280 and about \$100 of the \$300 received from her godfather was used in paying debts and living expenses of the family; also that appellant said to appellee, referring to this, "I will pay it back."

Later there was some trouble between the parties, and talk of a divorce. A daughter testified that the appellant said the mother would have the \$1,000, and he would have the rest of the property; also that he was paying \$5 per month in the Shawnee Building & Loan Association for her; that he was paying this money in the building and loan association to cover money she had gotten at the time; that he referred to money the mother had received from the old country, which had gone to pay some of appellant's debts or debts on the house. There is also evidence that, shortly after appellee took out the shares of stock in her own name, appellant demanded of her possession of the certificates, and that she surrendered them

to him on his saying that, if she did not do so, he would stop the payment.

The appellant in argument urges that the case is to be settled upon the principles of a gift *inter vivos*, and that there is no evidence that it was a completed gift at any time, but at most only a promise to give the shares of stock when the payments were completed. The court, however, evidently considered the evidence in regard to the payment by him of indebtedness to her, and of an equitable division, in part, of their property; that the appellant had directed appellee to take out five shares for herself, and she did so; that the appellant had several thousand dollars worth of property, accumulated by their joint efforts, held in his own name at the time of the bringing of this suit; and decided that under all the circumstances of the case, and in equity, the appellee was entitled to the shares of stock, and rendered judgment accordingly.

The judgment is amply sustained by the evidence, and is affirmed.

(55 Colo. 111)

**HEGINBOTHAM v. WEBSTER et al.**

(Supreme Court of Colorado. July 7, 1913.)

**1. APPEAL AND ERROR (§ 1082\*)—REVIEW—QUESTIONS CONSIDERED.**

Questions not brought to the attention of the Court of Appeals, either by way of argument or otherwise, should not be considered by this court on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1133-1136, 4270, 4281-4284, 4289-4292; Dec. Dig. § 1082.\*]

**2. APPEAL AND ERROR (§ 1082\*)—BRIEFS—MOTION TO STRIKE—GROUNDS.**

The question whether appellant has attempted by argument or otherwise to raise questions in the Supreme Court which were not presented in the Court of Appeals, cannot be raised by motion to strike the brief or additional abstract, since it can only be determined by consideration of the case upon its merits, as presented to the Court of Appeals; the proper way being to call the attention of this court in the brief in answer to the alleged errors assigned and argued by appellant to the fact that plaintiff in error is attempting to have the case decided here upon some point to which the attention of the Court of Appeals was not directed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1133-1136, 4270, 4281-4284, 4289-4294; Dec. Dig. § 1082.\*]

En Banc. Error to Court of Appeals.

Action between W. E. Heginbotham and B. N. Webster and N. McPherrin. From the judgment in the Court of Appeals, Heginbotham brings error. On motion by defendants in error to strike brief and additional abstract. Denied.

Munson & Munson, of Sterling, for plaintiff in error. Allen & Webster, of Denver, for defendants in error.

**GABBERT, J.** Plaintiff in error, being dissatisfied with the judgment of the Court of Appeals, has brought the case here for review. In this court he has filed an additional abstract of record and brief in support of the errors assigned to the judgment rendered by the Court of Appeals. The defendants in error have filed a motion to strike

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



this abstract and brief, based upon the ground that thereby questions are sought to be presented to this court which were not urged in the Court of Appeals.

[1] We may concede the general rule to be that questions not brought to the attention of the Court of Appeals, either by way of argument or otherwise, should not be considered by this court when a case is brought here from that tribunal.

[2] But a motion to strike a brief or an abstract filed by a plaintiff in error is not the proper way to raise that question. Whether or not plaintiff in error has attempted in either or both of the ways indicated to raise new questions here can only be determined by a consideration of the case upon its merits as presented to the Court of Appeals. The proper way, therefore, for defendants in error to present the question which they have attempted to raise and have determined by their motion to strike is to call the attention of this court in their brief in answer to the alleged errors assigned and argued by plaintiff in error to the fact, if it be a fact, that plaintiff in error is attempting to have the case decided here upon some point to which the attention of the Court of Appeals was not directed.

The motion to strike is denied.

HILL, J., not participating.

(55 Colo. 120)

DENNISS v. PEOPLE

(Supreme Court of Colorado. July 7, 1913.)

1. CRIMINAL LAW (§ 1091\*)—APPEAL—QUESTIONS PRESENTED FOR REVIEW—INSTRUCTIONS—BILL OF EXCEPTIONS.

In order to review instructions given or refused in criminal cases, the instructions themselves, and the exceptions relating thereto, must be embodied in the bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2815, 2816, 2818, 2819; Dec. Dig. § 1091.\*]

2. CRIMINAL LAW (§ 1056\*)—APPEAL—QUESTIONS PRESENTED FOR REVIEW—INSTRUCTIONS—EXCEPTIONS.

Laws 1911, p. 9, is largely a re-enactment of the sections of the Civil Code relating to appeals and writs of error, the last section expressly repealing 23 sections of the Code, all of which are substantially re-enacted or amended. Section 6 of the act repeals all statutes regulating appeals to the Supreme Court in all "actions, suits, and proceedings, both civil and criminal," but nowhere else are the words "both civil and criminal" used to qualify "actions, suits, and proceedings," and there was no law providing for appeals to the Supreme Court in criminal cases. Section 9 of the act provides that no writ of error shall operate as a supersedeas, unless so ordered by the Supreme Court, but Rev. St. 1908, § 1895, giving one sentenced to death a supersedeas as a matter of right, was not expressly repealed. The act provides for bonds on supersedeas to money judgments and judgments not for money, but not to judgments for fine or imprisonment. Section 3 of the act provides that no exceptions need be taken to the giving or refusing of instructions, but they shall be taken to be a part of the record without a

bill of exceptions. *Held* that, without specifically stating it, the whole act purports to be an amendment of the Civil Code relating to the review of civil actions, and section 3 thereof does not apply to a review of a criminal prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2668, 2670; Dec. Dig. § 1056.\*]

En Banc. Error to Weld County Court; G. H. Bradfield, Judge.

R. S. Dennis was convicted of keeping a disorderly house, and he brings error. Affirmed.

James W. Gault, of Greeley, for plaintiff in error. Fred Farrar, Atty. Gen., Frank C. West, Asst. Atty. Gen., Benjamin Griffith, Atty. Gen., and Charles O'Connor, Asst. Atty. Gen., for the People.

MUSSER, C. J. The plaintiff in error was found guilty of unlawfully keeping a common, ill-governed, and disorderly house, to the encouragement of idleness, gaming, drinking, and other misbehavior. It is contended that the evidence was insufficient to warrant the conviction. The evidence in this behalf is so strong that we do not think it necessary to discuss it.

[1] All of the other errors assigned relate to instructions given and instructions asked by the defendant and refused by the court. Neither the instructions given nor those refused, nor the exceptions to the giving or refusal thereof, are contained in the bill of exceptions. Unless some recent statute has changed the settled practice in this state, it is the law that, in order to review instructions given or refused in criminal cases, such instructions themselves, and the exceptions saved relating thereto, must be embodied in the bill of exceptions; and, if they are not contained in that bill, errors assigned as to the giving or refusing of instructions will not be considered. *Packer v. People*, 26 Colo. 306, 57 Pac. 1087; *Bergdahl v. People*, 27 Colo. 302, 61 Pac. 228; *Weaver v. People*, 47 Colo. 617, 108 Pac. 331.

[2] There is found in the Session Laws of 1911, beginning on page 9, an act in relation to appeals and writs of error. If this act relates to criminal cases, section 3 thereof, which is almost identical with section 421, Rev. Code, may have modified the rule above stated. If it was the intention of the General Assembly that this act should apply to criminal cases, the language thereof is, perhaps, broad enough to include such. There are, however, many reasons appearing that go to show that this act was intended to apply only to civil actions, suits and proceedings, except possibly section 6 thereof. The act contains many sections, and is largely a rescript of sections of the Civil Code. It plainly deals with matters dealt with in that Code, and in the exact language with the exception of certain changes made here and there in some particulars. The author

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



must have had the Civil Code before him, or else possessed a remarkable memory of its language and provisions when the bill was prepared, and the object must have been to amend the Code in particulars as shown in the act. The last section specifically repeals 23 sections of the Civil Code, and these sections, though numbered differently, are substantially re-enacted, except where an amendment was desired. While the section repeals all acts or parts of acts inconsistent with the act, it does not specifically repeal any section of the Criminal Code, which it would repeal if so intended. Section 8 of the act is the only section that specifically indicates that that section was intended to cover criminal cases. Part of that section is as follows: "All statutes granting and regulating appeals from district, county and juvenile courts to the Supreme Court, in all actions, suits and proceedings, both civil and criminal, are hereby repealed." The words "actions, suits and proceedings" are used in other places in the act, but this is the only instance where they are followed by the words "both civil and criminal." If the other sections of the act were intended to apply to criminal cases, why do not the words "both civil and criminal" follow the words "actions, suits and proceedings" in other places? The use of the words "both civil and criminal" in this one section in the act conveys the idea that the words "actions, suits and proceedings" used in other parts of the act shall not include both civil and criminal. There was no law providing for appeals in criminal cases. The only method for reviewing such cases was by writ of error.

Section 9 of the act provides that: "No writ of error shall operate as a supersedeas unless the Supreme Court (or if application therefor be made in vacation, some justice of the Supreme Court), after inspecting the record in the cause, shall order such writ of error to be made a supersedeas, nor until the party applying for such writ shall, by himself, his agent or attorney of record, enter into bond with sufficient surety, to be approved by the clerk of the Supreme Court, and file the same in the office of said clerk within the time limited by the court." Then follow provisions with respect to bonds. Under this section, mostly a rescript, so far as quoted, of the same matter in the Civil Code, a supersedeas, as heretofore in civil actions, is not a matter of right in any case. If this applies to criminal cases, section 1995, Revised Statutes, has been repealed. That section provides the manner in which a defendant under sentence of death may have, as a matter of right, a supersedeas to stay the execution of sentence. There is no indication in the act under consideration that the General Assembly ever intended to take away from a defendant, under sentence of

death, the absolute right to have that sentence superseded until the judgment could be reviewed. It seems to us that if such was intended, specific language would have been used to manifest the intention. The act is silent as to admitting defendants to bail or fixing the time for carrying out a sentence of death. It is silent as to all matters which, from their nature, must be provided for differently in criminal than in civil cases, and which are proper to be considered and provided for in a statute regulating writs of error in criminal cases. It speaks only of judgments for money, and judgments not for the payment of money, and contains provisions for bonds in case such judgments are superseded, and is silent about judgments imposing fines or imprisonment.

The foregoing considerations, and many others that might be mentioned, make it appear plain that it was the intention to gather in one body, as much as possible, the provisions of the Civil Code relating to the review of civil causes, amend them where amendment seemed desirable, and to make the writ of error the sole method of review. The whole act purports to be an amendment to the Civil Code without specifically saying so; and, while criminal cases may be included within some of the words of the act they are not included within the plain purport and intent thereof. The rule well established in this state that requires instructions and exceptions thereto in criminal cases to be made a part of the record by bill of exceptions was not affected by the act of 1911, and consideration of the errors assigned is precluded. The judgment is therefore affirmed.

Judgment affirmed.

GABBERT, WHITE, and HILL, JJ., not participating.

(55 Colo. 133)

**WILLIAMS v. ROCKY MOUNTAIN  
FUEL CO.**

(Supreme Court of Colorado. July 7, 1913.)

**1. PLEADING (§ 343\*)—JUDGMENT—MOTION FOR JUDGMENT.**

A motion for judgment on the pleadings cannot be sustained, unless the court can determine from the pleadings the rights of the parties to the subject-matter in controversy, and pronounce a judgment with respect thereto, which will be final between them.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1048-1051; Dec. Dig. § 343.\*]

**2. PLEADING (§ 345\*)—JUDGMENT ON PLEADINGS—SUIT TO ANNUL TAX DEEDS—LIMITATIONS.**

Where, in a suit to annul tax deeds, issued and delivered more than five years before the commencement of the suit, the pleadings of neither party show whether the deeds are void on their face or not, defendant is not entitled to judgment adjudging him to be the owner of the premises, on the theory that the five-year statute of limitations (Mills' Ann. St. § 3904)

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



bars the action, since the statute does not apply to deeds void on their face.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1055-1059; Dec. Dig. § 345.\*]

### 3. PLEADING (§ 345\*) — ANNULING TAX DEEDS—PLEADINGS—DEFECTS.

The defect in the pleadings of plaintiff suing after 5 years to annul tax deeds, arising from the failure to show that the deeds are void on their face, and so not within the five-year statute of limitations (Mills' Ann. St. § 3904) can only be taken advantage of by demurrer, and cannot be raised by motion by defendant for judgment on the pleadings.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1055-1059; Dec. Dig. § 345.\*]

Appeal from District Court, Las Animas County; Henry Hunter, Judge.

Action by Frederick A. A. Williams against the Rocky Mountain Fuel Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Chas. F. Carnine and W. B. Morgan, both of Denver, and Herman A. Schmidt, of Trinidad, for appellant. Edmund J. Churchill, of Denver, and Northcutt & McHendrie, of Trinidad, for appellee.

**GABBERT, J.** The appellant, in an action brought by him against the appellee, commenced March 11, 1909, filed an amended complaint setting up two causes of action. The first was in ejectment to recover possession of certain real estate and damages; the second to annul certain tax deeds on the property involved. The third paragraph in the second cause of action is as follows: "That the defendant unlawfully claims to hold the said real property by reason of certain pretended treasurer's deeds, issued to it by the treasurer of said county of Las Animas March 31, 1903, and filed for record in said county March 12, 1904; and that said deeds are void and of no effect, for the reasons hereinafter set forth." Facts were then alleged upon which the plaintiff relied to establish that these deeds were invalid. The deeds were not incorporated in this cause of action; neither were any facts alleged from which it could be inferred that they were invalid upon their face.

For answer to the first cause of action, defendant pleaded that on March 31, 1903, it obtained tax deeds to the premises in dispute, under which it at once entered into, and thereafter continuously remained in, possession. It also alleged facts from which it appears that the tax sales, upon which these deeds were based, were regular. The deeds are not set out in this defense; neither are any facts alleged from which it could be said that an inspection would show that they are valid upon their face. As a defense to the second cause of action, defendant pleaded, first, that one of its sources of title to the property involved is the tax deeds mentioned in the complaint, which it alleges were delivered March 31, 1903, upon which date it took

possession of the premises, and denies that these deeds, or either of them, are invalid for the reasons set out in plaintiff's complaint, or any other; and second, that plaintiff did not institute his action within five years from the time the same accrued.

For reply to the defense to the first cause of action, plaintiff admitted that the tax deeds were issued and delivered; alleged that they were not recorded until March 12, 1904, and that they were void for the reasons set forth in his amended complaint. For reply to the second defense of the second cause of action, plaintiff denied that the deeds issued March 31, 1903, were delivered on that date, and avers that defendant did not enter into possession of the premises prior to January 31, 1908. The reply to the second defense was a general denial.

On these pleadings the defendant moved for judgment, on the ground shown by the record, that "the pleadings in said cause, taken all together, disclose that no cause of action exists upon behalf of the plaintiff against this defendant." The motion was sustained, and judgment rendered to the effect that plaintiff has no interest in the property in controversy, and that defendant is the owner and entitled to the possession thereof.

The second cause of action is for the annulment of the tax deeds involved. It is not alleged in support of this cause of action that plaintiff is in possession of the premises, and by his reply to the defense, interposed by the defendant, it is admitted that it is in possession of them. It may be doubtful, under such a state of facts, whether plaintiff could maintain his second cause of action. *Munson v. Marks*, 52 Colo. 553, 124 Pac. 187. But waiving this, and treating the case presented by the pleadings as a whole, as one by plaintiff to recover possession of lands, the vital question is whether the facts established by the pleadings entitled the defendant to the judgment rendered. The facts, which it can be said are thus definitely established, are that defendant is in possession of the premises in dispute, under tax deeds executed and delivered March 31, 1903; plaintiff's action was commenced March 11, 1909. Did these facts, when considered in connection with other issues made by the pleadings, entitle the defendant to a judgment adjudging it the owner and entitled to the possession of the premises?

The ground upon which the motion for judgment was based, according to the contention of counsel for defendant in their brief, is that the pleadings disclosed the tax deeds had been executed and delivered more than five years prior to the time plaintiff commenced his action, and as it did not appear that they were void upon their face, they were unassailable by virtue of section 3904, Mills' Statutes, which provides, in substance, that an action for the recovery of land sold

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



for taxes shall not lie, unless action shall be brought within five years after the execution and delivery of the tax deed.

[1] In order to sustain the judgment rendered, it must appear from the facts established by the pleadings that the court, on the law applicable thereto, was right in determining that the defendant was the owner and entitled to the possession of the premises, by virtue of the tax deeds under which it claimed these rights. In other words, that on these facts the court could determine the rights of the parties to the subject-matter of controversy, and pronounce a judgment with respect thereto, which was final between them. *Mills v. Hart*, 24 Colo. 505, 52 Pac. 680, 65 Am. St. Rep. 241.

[2, 3] The defendant based its right to the premises upon tax deeds. Plaintiff claimed that these deeds were invalid, and pleaded the facts upon which he predicated this claim. The facts upon which this claim is based were put in issue by the answer of the defendant. It appears from the pleadings that these deeds were executed and delivered more than five years before plaintiff commenced his action, but the statute invoked by defendant does not apply to tax deeds, void upon their face. *Sayre v. Sage*, 47 Colo. 559, 108 Pac. 160, and authorities there cited. It does not appear from the pleadings of either party, whether the deeds are, or are not, invalid upon their face; hence, with the validity of the tax deeds in issue, and conceding, but not deciding, that the limitation imposed by the statute begins to run from the date a tax deed is executed and delivered, it is apparent, from the facts admitted by the pleadings, that defendant did not thereby establish a right to the premises under the tax deeds upon which it relied, for the reason that the applicability of the statute depended upon whether they were, or were not, invalid upon their face. True, plaintiff failed to allege facts from which it appears that the deeds were void upon their face. This omission, however, was nothing more than a failure to state a cause of action, or by way of reply plead facts, which would avoid the bar of the statute; but this did not entitle the defendant to a judgment, declaring it to be the owner of the premises. This defect in his pleadings could not be raised by a motion for judgment on the pleadings, but could only be taken advantage of by demurrer, and that, in effect, was the attack made upon the pleadings of plaintiff. *Richards v. Stewart*, 53 Colo. 205, 124 Pac. 740; *Roberts v. Colorado Springs and I. Ry. Co.*, 45 Colo. 188, 101 Pac. 59.

In brief, our conclusion is that, with the validity of the tax deeds in issue, and as it did not affirmatively appear from the pleadings that they were unassailable because of the bar of the statute invoked, the defend-

ant was not entitled to the judgment rendered.

Counsel for plaintiff, however, contend that the limitation imposed by the statute does not begin to run until after a tax deed is recorded. We do not believe it is necessary to determine that question at this time. The question presented by the motion for judgment is not the sufficiency of the pleadings to state a cause of action or defense, but whether, on the admitted facts, that motion was properly sustained. Aside from this, plaintiff contends that the tax deeds are void upon their face. By pleading the facts upon which this contention is based, the question of whether the statute began to run from the date of the execution and delivery of the deeds, or from the date they were filed for record, will be eliminated.

The judgment of the district court is reversed, and the cause remanded, with instructions to overrule the motion for judgment on the pleadings, and for such further proceedings as will be in harmony with the views expressed in this opinion. On request the parties should be permitted to amend their pleadings as they may be advised. From the record before us, it would seem that the action is one in ejectment, and hence the pleadings should be framed accordingly. In amending, the parties should endeavor, by apt averments of facts, to have them clearly present the issues upon which their rights to the subject of controversy must be determined.

Judgment reversed, and cause remanded, with directions.

MUSSER, C. J., and BAILEY, J., concur.

(55 Colo. 125)

#### JOHNSON et al. v. LENNOX.

(Supreme Court of Colorado. July 7, 1913.)

##### 1. VENDOR AND PURCHASER (§ 13\*)—VALIDITY OF CONTRACT—CONSIDERATION.

A written contract for the sale of land, signed by both parties, and containing a promise to sell on the one hand, and a promise to buy on the other, is mutual, and based upon sufficient consideration.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 14; Dec. Dig. § 13.\*]

##### 2. FRAUDS, STATUTE OF (§ 143\*) — PERSONS TO WHOM STATUTE IS AVAILABLE—AUTHORITY OF AGENT—SALE OF REAL PROPERTY.

In an action by a purchaser of land from an agent against a purchaser from the owner, the defendant had a right to rely upon the insufficiency of the written authority of the agent to make the contract of sale, even though the unexpressed intention of the principal was to give the agent authority, and the defendant had knowledge of the sale by the agent.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 344-350; Dec. Dig. § 143.\*]

##### 3. FRAUDS, STATUTE OF (§ 116\*) — SALE OF LAND—SUFFICIENCY OF WRITING—WRITTEN AUTHORITY TO BIND PRINCIPAL.

The authority of an agent to execute a contract for the sale of real estate must be con-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ferred in writing, and must give him specific authority, either to conduct the general business of the principal, or to execute a binding contract containing terms and conditions which are in the contract he did execute.

[Ed. Note.—For other cases, see *Frauds, Statute of, Cent. Dig. §§ 251-260; Dec. Dig. § 116.\**]

**4. FRAUDS, STATUTE OF (§ 158\*)—BURDEN OF PROOF — AUTHORITY OF AGENT TO SIGN CONTRACT.**

The burden is upon one suing upon such contract to prove that the agent had authority to execute it.

[Ed. Note.—For other cases, see *Frauds, Statute of, Cent. Dig. §§ 373-376; Dec. Dig. § 158.\**]

**5. PRINCIPAL AND AGENT (§ 147\*)—DUTY TO ASCERTAIN AUTHORITY—PURCHASER.**

A person dealing with an agent for the sale of land is bound at his peril to learn the extent of the agent's authority.

[Ed. Note.—For other cases, see *Principal and Agent, Cent. Dig. §§ 528-533; Dec. Dig. § 147.\**]

**6. FRAUDS, STATUTE OF (§ 116\*) — CONTRACT FOR THE SALE OF LAND — AUTHORITY OF AGENT.**

A letter by the owner of land to his brother-in-law, asking about the chances to sell the property for more than the mortgage against it, offering to deed it to the brother-in-law if he would take care of the mortgage, stating that the owner would do almost anything to prevent a foreclosure, and asking the brother-in-law to see what he could do, conferred upon the brother-in-law no authority to enter into a binding written contract for the sale of the land.

[Ed. Note.—For other cases, see *Frauds, Statute of, Cent. Dig. §§ 251-260; Dec. Dig. § 116.\**]

In Division. Error to District Court, El Paso County; J. W. Sheafor, Judge.

Action by William Lennox against Mary Ellen M. Johnson and another, for specific performance. Judgment for plaintiff, and defendants bring error. Reversed.

Kinney, Kinsley & Schreiber, of Colorado Springs, for plaintiffs in error. Chinn & Stickler and Dudley & Hufferd, all of Colorado Springs, for defendant in error.

**SCOTT, J.** In April, 1908, the defendant Fred W. Chase was the owner of certain lots and buildings in the city of Colorado Springs, El Paso county. There was at the time a mortgage on the premises in the sum of \$5,000, and upon which there were certain defaulted interest payments, and foreclosure was threatened. Chase was at the time residing in Seattle, Wash., and had so resided for two or three years prior. Martin Drake, who acted for Chase in the matter, was his brother-in-law, and resided at Colorado Springs. On the 29th day of November, 1907, Chase wrote Drake a letter upon which the latter assumed to act, in the matter of a negotiation for the sale of the property. This letter is as follows: "Seattle, 11-29-09. Martin Drake, Colo. City, Colo. Dear Martin: I am strictly up against it as far as the mortgage on that Colorado Springs property

is concerned. I have got myself so tied up here on property that I haven't a dollar, and until times pick up a little it will be impossible to see a thing. Do you suppose there would be a chance to sell the property so that I could get a little money out of it; or if you are so situated that you could take care of it for me I will deed the property to you and that would give you a chance to sell it and I will divide any money with you that you can get over the mortgage and interest, or I will take it off your hands just as soon as I can dispose of some of my property here. In fact I am willing to do almost anything rather than have them foreclose. I inclose their letter and statement. See what you can do and oblige. It has been a long time since I have heard from any of you; hope you are all well; love to all. I will write you again very soon and give you the news. This is a business letter. Now see what you can do. Bennett has not sent me a statement for six months and I have a credit there for rent. Yours very truly, Fred W. Chase." Drake immediately set about to find a purchaser for the premises. Among others with whom he endeavored to effect a sale was the defendant Mary Ellen M. Johnson, acting through her son and authorized agent.

On the 16th day of April, 1908, Drake closed a deal with the defendant in error William Lennox. This was in the form of a written proposition and acceptance as follows:

"Mr. Martin Drake, Colo. Springs, Colo. Dear Sir: Pursuant to our conversation of this morning, I hereby offer, for immediate acceptance, the sum of \$3,700 net to me for the N. ½ of lot No. 1, block 201, Colorado Springs Company's addition No. 1, situate on the corner of Yampa and Nevada avenues, this city. The above offer is made with the understanding that you furnish abstract showing perfect title, subject to my approval. Yours very truly, Wm. Lennox.

"Accepted. Fred W. Chase, by Martin Drake, Agent."

Before closing with Lennox, Drake had some negotiation with Johnson, son and agent of defendant, and endeavored to find him before closing with Lennox, but failed to see him, and later in the day accepted the proposition of Lennox, and afterward and at about 1 o'clock in the afternoon of the same day, Drake told Johnson that he had sold the property to Lennox. The proposition and acceptance was filed for record with the county clerk and recorder.

On the same day that Drake accepted the offer from Lennox, the defendant Johnson telegraphed Chase as follows: "Colo. Springs, Colo, Apr. 16-08. Fred W. Chase, 201 Pacific Block, Seattle. I will pay you twelve hundred fifty dollars for equity and also pay interest and taxes north half lot one block two

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



hundred one wait for letter. Mary E. Johnson." On April 17, 1908, Drake telegraphed Chase: "Fred W. Chase, 1707 38th Ave., Seattle, Wash. Have sold your corner deal with no one have written. Martin Drake." On April 17th Chase wired Drake, "Do nothing about property, wait for letter explaining." Chase then executed a deed for the premises to the defendant Johnson and forwarded it to a bank in Colorado Springs to be delivered upon the payment of the sum offered for his equity. The deed was delivered to the defendant Johnson, who entered into possession of the premises, and made valuable improvements thereon. Prior to the delivery of the deed to Johnson, Lennox tendered to Drake the agreed purchase price of \$6,700.

This suit was instituted by Lennox to compel specific performance. The trial court found in favor of Lennox and decreed a deed from Johnson to Lennox. Under supplemental pleadings and pending the litigation, the court appointed a referee to make an accounting as to the receipts and expenditures upon the part of Johnson, subsequent to her purchase. Upon this report the court made his findings and entered an order accordingly, but no error is assigned as to the correctness of this.

The contentions of the plaintiff in error are that the judgment of the court is erroneous, because (a) the alleged contract is not a contract, but an option; (b) Drake had not sufficient authority in writing from Chase to enter into a contract to sell in his behalf; (c) the alleged contract is without consideration; (d) the alleged contract lacks mutuality.

[1] The contract was signed by both parties, and it is therefore mutual in that it is an express agreement to sell upon the one part and to purchase on the other. There was likewise sufficient consideration. *Hoagland v. Murray*, 53 Colo. 50, 123 Pac. 664.

[2] The sole question in this case turns upon the point as to whether or not Drake had sufficient authority to enter into the contract of sale in behalf of Chase. The letter from Chase to Drake must be considered as the sole evidence of authority from Chase to Drake. The testimony indicates that Chase intended thereby to confer such authority. But the defendant had a right to rely on the instrument purporting to confer authority, and cannot be bound by the unexpressed intention of the parties thereto, even though both Drake and Chase may have treated this correspondence as constituting authority to Drake to contract a sale of the premises, and though Johnson had actual knowledge of the contract between Drake and Lennox before telegraphing her proposition to purchase.

[3] The statute in such case, and the decisions of the courts relating to the form and sufficiency of authority of agents, must be controlling, as against third parties. It is the rule of law that the authority of an agent

conferring power to execute an executory contract for the sale of real estate must be in writing, and that the agent must be given therein specific authority to do, either the general business of his principal, or the particular thing which he assumed to do.

[4] Also that the burden is put on the plaintiff who sues upon a contract thus executed to show that the person who signed the contract as agent was authorized, not only to negotiate the sale, but also to conclude in writing a binding contract within the terms, conditions, and limitations expressed in the contract sued on.

[5] Such an agent must strictly pursue his authority, and any person dealing with him is bound at his peril to learn the extent of that authority. *Malone v. McCullough*, 15 Colo. 460, 24 Pac. 1040. A careful analysis of Chase's letter to Drake discloses no such specific or general authority as the law requires in such case.

[6] The only expressions in the letter relied on which may be urged in support of the contention of defendant in error are: "Do you suppose there would be chance to sell the property so that I could get a little money out of it?" "If you are so situated that you could take care of it for me I will deed the property to you," and in which case he would agree to divide the receipts over the mortgage, or take the property off Drake's hands as soon as he can dispose of other property. "I am willing to do almost anything rather than have them foreclose"; "see what you can do," and "now see what you can do." The letter discloses that Chase was in great financial distress, and that there was strong anxiety upon his part to sell the property, but by no express language does it confer authority to Drake to execute a contract of sale, and the right to exercise such authority cannot rest upon inference.

We think the true test in this case is whether, if Lennox had refused to purchase, Chase could have maintained an action against Lennox for specific performance. We think not, for Lennox could have urged that neither price nor terms were suggested in the letter, and nothing is expressly left to the judgment of Drake as to these or other matters. The authority is to "see what you can do," not to "do as you see fit."

It is urged by counsel that we should construe the language of the letter in view of the circumstances in which Chase was then placed, and financial conditions existing at the time, and cite *Lyon v. Pollock*, 99 U. S. 668, 25 L. Ed. 285, and *Smith v. Allen*, 86 Mo. 178, in support of this view. In the former case the property owner had given a general power of attorney to his agent to sell his property, both real and personal. The agent and the property were at San Antonio, Tex. It was during the War of the Rebellion, and the owner by reason of his sentiments felt obliged to remain away from



that locality, and thus gave his partner power of attorney to care for and dispose of all his property. This attorney transferred his own business to one Paschall, to whom he likewise transferred charge of the property to the owner, Lyon, who wrote the agent, Paschall, "I wish you would manage as you would with your own," with the information that he, Lyon, could not go to San Antonio. He was a fugitive from the state. Lyon paid no taxes nor looked after his property in any way from 1865 to 1873. The agent, Paschall, continued to act as had Bennett, and with the knowledge of Lyon, which the court construed to be in effect a ratification of the agent's acts. The case of *Smith v. Allen*, 86 Mo. 178, lends color to the contention of defendant in error, but the letter in that case contained the expressions "I will leave the sale of the lots pretty much with you," and "I think I am willing to have you make out a deed and I will perfect it." But this case appears to be in conflict with the great weight of authority. In a note to the case of *Weatherhead v. Ettinger*, 17 L. R. A. (N. S.) 210, the editor has collated the authorities on the subject, and which seem to overwhelmingly support the conclusion we have reached.

The case of *Winch v. Edmunds*, 34 Colo. 359, 83 Pac. 632, sustained the authority of the agent, but under what appears to be a clear line of distinction from other cases in this court, and from the authorities last cited, and wherein the court said: "In this respect the contract is clearly distinguishable from the contract under consideration in *Smith v. Bateman*, 8 Colo. App. 336 [46 Pac. 213]; *Id.*, 25 Colo. 241 [53 Pac. 457], and for that reason those cases and the authorities there cited are not in point. Appellant also insists that authority to a real estate broker to sell real estate is only authority \* \* \* to execute a contract binding on the principal. Undoubtedly this is the rule as applied to real estate brokers. The facts in this case, however, as shown by the evidence and found by the trial court, constituted Henderson the general agent of appellant for the sale and disposal of all his real estate at Sterling. The evidence upon this point is clear and convincing. At the trial numerous letters were introduced, written by appellant to Henderson, in which he commended him for the manner in which he was handling his business, urged him to sell and dispose of all his property at Sterling, as he did not intend to return there, and authorized him to act as he thought best. It abundantly appears from the evidence in the record that Henderson was more than a mere broker to find a purchaser; that he was a general agent authorized by appellant in writing to make the contract which is relied upon in this case."

In the case at bar the purchaser had not entered into possession of the premises, and had incurred no expense, and it would seem that if he has a right of action at all, it would be one in damage, and not specific performance.

The judgment is reversed.

GABBERT and GARRIGUES, JJ., concur.

(55 Colo. 182)

HENRY v. MONTEZUMA WATER & LAND CO. et al.

(Supreme Court of Colorado. July 7, 1913.)

1. CONTRACTS (§ 179\*)—PARTIES—CONSENT OF STOCKHOLDERS—EFFECT.

The owners of bonds and stock of a corporation, who indorsed their approval on a contract made by the corporation for the employment of an agent to sell corporate property, are not thereby parties to the contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 777, 778; Dec. Dig. § 179.\*]

2. PLEADING (§ 417\*)—RULING ON DEMURRER—WAIVER.

The error, if any, committed by the sustaining of a demurrer to the original complaint is waived by plaintiff filing an amended and supplemental complaint.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1401, 1402; Dec. Dig. § 417.\*]

3. APPEAL AND ERROR (§ 518\*)—RECORD—STRIKING PLEADINGS FROM FILES—BILL OF EXCEPTIONS.

A pleading stricken on motion from the files is a part of the record, and must be incorporated by the clerk in the transcript on appeal, and need not be preserved by a bill of exceptions to authorize a review on writ of error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2342-2355; Dec. Dig. § 518.\*]

4. PLEADING (§ 279\*)—COMPLAINT—SUPPLEMENTAL COMPLAINT—RIGHT TO FILE.

A plaintiff may in a proper case file a supplemental complaint at any time, setting up material facts which have occurred since the action was instituted, provided the rights of defendant are properly safeguarded.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 836-841; Dec. Dig. § 279.\*]

5. PLEADING (§ 279\*)—COMPLAINT—SUPPLEMENTAL COMPLAINT—RIGHT TO FILE.

Where the original complaint, in an action by an employé of a corporation to sell its property, alleged that the employé had procured a purchaser ready, able, and willing to purchase, a supplemental pleading, alleging that since the beginning of the action the corporation had sold the property to the same purchaser on substantially the same terms, was only evidentiary, supporting the original complaint, and was unnecessary.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 836-841; Dec. Dig. § 279.\*]

6. PLEADING (§ 279\*)—COMPLAINT—SUPPLEMENTAL COMPLAINT—RIGHT TO FILE.

Supplemental matters, unnecessary to be alleged because adding nothing to the original complaint, cannot be made the basis of a supplemental complaint.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 836-841; Dec. Dig. § 279.\*]

Error to District Court, City and County of Denver; George W. Allen, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Action by T. C. Henry against the Montezuma Water & Land Company and others. There was a judgment for defendants, and plaintiff brings error. Affirmed.

John R. Smith, of Denver, for plaintiff in error. John M. Waldron and R. D. Thompson, both of Denver, for defendants in error.

GARRIGUES, J. 1. March 2, 1907, T. C. Henry began suit against the Montezuma Water & Land Company, the Denver National Bank, the Colorado State Bank of Durango, and John V. Farwell of Chicago. The original complaint contained first, second, and third causes of action, which were counts or duplicate statements of the same transaction, and upon which there could be but one recovery. The defendant, the Montezuma Water & Land Company, hereinafter for convenience called the ditch company, owned an irrigation system in the Montezuma valley, which was in use, but not completed. All the stocks and bonds of this company were owned by the other defendants. February 20, 1905, the written contract of employment set out in the complaint as the basis of the action, was executed between the defendant ditch company and plaintiff, Henry, by which the latter was employed for one year upon a salary of \$100 a month, to work for the ditch company in promoting and effecting a sale of the ditch to the Montezuma Valley Irrigation District for not less than \$250,000 in cash, or in securities which all the stockholders and bondholders of the ditch company would approve and accept in payment for the property. In the event he sold the ditch within a year, upon these conditions, he was to receive in addition to his salary a further contingent compensation or bonus of 25 per cent. of the cash or bonds or securities which the defendants accepted in payment for the property; and in the event he failed to sell the property within a year, his salary was to be in full compensation of all his services.

[1] The contract expressly provided that it should end in one year, unless sooner terminated by a sale of the property. The other defendants were not made parties to the contract. It bears, however, the following indorsement: "This contract approved by the Denver National Bank of Denver, by J. A. Thatcher, President. Colorado State Bank of Durango, by B. N. Freeman, President. John V. Farwell, by C. F. Harding, Attorney, Owners of all Bonds and Stocks of the Montezuma Water & Land Company." The approval of all the stockholders was necessary before the ditch company could sell the ditch; but this did not make them parties to the contract. It showed the consent of the stockholders and bondholders that the property of the corporation might be sold.

The original complaint was held bad on demurrer, and June 3, 1907, plaintiff filed an amended and supplemental complaint unit-

ing the first and second counts, with no material change, and adding an allegation that since the commencement of the action on March 2, 1907, defendants sold the canal to the Irrigation District through the Empire Construction Company, on terms substantially the same as the alleged sales effected by him to the district, in May and December, 1905. The second count, like the third in the original complaint, asked for \$62,500, as the reasonable worth of plaintiff's services for the work and labor performed by him for defendants at their request, in selling the irrigating system. On motion the amended and supplemental complaint was stricken from the files upon the ground that it was a repetition of the former pleading, to which a demurrer had theretofore been sustained.

[2] 2. By filing an amended and supplemental complaint after the demurrer had been sustained to the original, plaintiff waived any error committed by the court in that ruling. *Anthony v. Slayden*, 27 Colo. 144, 60 Pac. 826; *Enright v. Midland Co.*, 33 Colo. 341, 80 Pac. 1041.

[3] 3. It is contended by defendants in error that to review the court's action in striking the amended and supplemental complaint from the files the pleading stricken must be incorporated in the bill of exceptions. Striking a pleading from the files on motion is a fiction, not a fact. The instrument is still a part of the files, although for the purpose of pleading it is treated as excluded therefrom. For the purpose of reviewing the court's action in striking it, it is still a part of the record, and should be incorporated by the clerk in the transcript, and need not be preserved by a bill of exceptions.

[4-6] 4. It is next contended that an amended complaint, where the original is held bad on demurrer, must be confined to the facts as they existed when the original was filed, and if no right of action then existed, one cannot be created by stating in an amended complaint facts that have arisen since the commencement of the suit. Numerous authorities are cited which support this contention; but this pleading purports to be a supplemental as well as an amended complaint, and we believe a plaintiff has a right, in a proper case, to file a supplemental complaint at any time, setting up material facts which have occurred since the action was instituted; the rights of the defendant being properly safeguarded. In this case, however, it was unnecessary to plead the supplemental facts for the reason in the original complaint it is alleged that plaintiff procured a purchaser ready, able, and willing to buy the property. The supplemental allegation that defendants since the beginning of the suit had sold the property to the same purchaser procured by him, on substantially the same terms which he had negotiated, was evidence supporting the averment that he had procured a purchaser ready, able, and willing to



buy. Supplemental matters unnecessary to be alleged, because they add nothing to the original complaint, cannot be made the basis of a supplemental pleading. We are of the opinion, therefore, that the motion to strike in this case was properly sustained. *Enright v. Midland Co.*, supra; *Rittmaster v. Richner*, 14 Colo. App. 361, 60 Pac. 189; *Columbia Co. v. Clause*, 13 Wyo. 166, 78 Pac. 708; *Waukon v. Strouse*, 74 Iowa, 548, 88 N. W. 408.

5. This is unquestionably the law, though it may be a somewhat technical manner of disposing of the case. As plaintiff in error has devoted his entire argument to the question of the sufficiency of the complaint, and as defendants have done practically the same, and say in their brief they "dispute the right of the plaintiff to a reversal of said judgment: First, because plaintiff's record does not entitle him to raise the question suggested by his assignments of error; second, if plaintiff's record shall be held sufficient to bring before this court the plaintiff's pleadings, said pleadings must be held not to constitute a cause of action entitling plaintiff to said commission sued for by him"—we have carefully read and considered the pleadings. It is unnecessary to quote from or set out the facts pleaded in detail. It is our conclusion that neither the original, nor the amended and supplemental, complaint state a cause of action, and accordingly the judgment of the lower court is affirmed.

Affirmed.

MUSSER, C. J., and WHITE, J., concur.

(55 Colo. 138)

LARIMER COUNTY CANAL NO. 2 IRRIGATING CO. v. PLEASANT VALLEY & LAKE CANAL CO. et al.

(Supreme Court of Colorado. July 7, 1918.)

1. JUDGMENT (§ 720\*) — CONCLUSIVENESS — ADJUDICATION OF WATER RIGHTS.

Defendant under a general adjudication decree in 1882 was decreed priorities for irrigation purposes as of June, 1861, June, 1864, and July, 1872, amounting to a total of 57 cubic feet, but though at the time of the decree it had completed an extension 10 miles in length, increasing its cultivated land from 600 to 6,000 acres, it used but 20 cubic feet before 1882 and did not irrigate the entire tract until 1892, and remained in possession till a suit against it for injunction brought in 1909. Plaintiff was a party to such general adjudication and was decreed a priority of 175 cubic feet per second as of April, 1873, and thereafter fully used its appropriation until 1892, when defendant's appropriation deprived it of water during the latter part of the season. In such adjudication plaintiff made no objection to the claims of the defendant established by the decree, and such claims were not shown to have been abandoned after the decree, held, in an action to enjoin defendant's appropriation of the amounts decreed to him, that such decree as between the parties was res adjudicata.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1251; Dec. Dig. § 720.\*]

2. JUDGMENT (§ 479\*)—ADJUDICATION OF PRIORITIES—COLLATERAL ATTACK.

An adjudication of priorities to the use of water for irrigation purposes cannot be attacked in a collateral proceeding.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 913-915; Dec. Dig. § 479.\*]

3. JUDGMENT (§ 386\*)—ADJUDICATION OF PRIORITIES—OPENING DECREE.

The decree in a proceeding to adjudicate priorities to the use of water for irrigation purposes cannot, in the absence of fraud, be reopened by a party thereto after the lapse of the statutory period provided.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 735-744; Dec. Dig. § 386.\*]

In Division. Error to District Court, Larimer County; James E. Garrigues, Judge.

Action for injunction by the Larimer County Canal No. 2 Irrigating Company against the Pleasant Valley & Lake Canal Company, a corporation, and John L. Armstrong, Water Commissioner of Water District No. 3 of the State of Colorado. Judgment for defendants, and plaintiff brings error. Affirmed.

Rhodes, Temple & Foster, of Ft. Collins, for plaintiff in error. Geo. Clammer, of Ft. Collins, for defendants in error.

SCOTT, J. This case was disposed of by the district court by sustaining a general demurrer to the complaint, and the only question involved is as to whether or not the complaint states facts sufficient to constitute a cause of action against the defendants. It is alleged in the complaint that by virtue of a certain general adjudication decree entered in the district court of Larimer county on the 11th day of April, 1882, there was decreed to the plaintiff, as a part of said decree, priority No. 56 for irrigation purposes, amounting to 10,500 cubic feet of water per minute (175 cubic feet per second), of date of April 1, 1873. The ditch was to be 11 miles in length with its headgate on the south side of the Cache la Poudre river. It is then alleged that the construction of plaintiff's ditch was commenced on the 1st of April, 1873, and completed in the spring of 1874, and thereupon it began the immediate use of the appropriated water; that for a period of 20 years after the completion of its ditch, and for more than 10 years after the date of said decree, plaintiff and its stockholders enjoyed during the entire irrigation season of each year, its said appropriation from the Cache la Poudre river through its ditch and without interruption, and there was during said period and at all times a plentiful supply of water in the river to supply plaintiff's appropriation to the end to each irrigation season; that beginning with the year 1892 plaintiff and its stockholders have been deprived of water for irrigation during the latter part of each season by the alleged wrongful conduct of the defendant. It is then said that the defendant the Pleasant

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Valley & Lake Canal Company "is the owner of a ditch with headgate on the south side of the Cache la Poudre river about one mile below the canon of the river and above the headgate of plaintiff's ditch; that the defendant company's ditch extends in a south and easterly direction for a distance of  $3\frac{1}{2}$  miles, through what is known as Pleasant valley, where said ditch reaches what is known as Bingham Hill; that the said defendant company was a party to the said general adjudication decree of April 11, 1882, and there was decreed to said company priority No. 4 by construction, 10.9 cubic feet per second of time, of date of September 1, 1861, priority No. 11, 29.63 cubic feet per second of time, of date of June 10, 1864, priority No. 48 of 16.5 cubic feet per second of time, of date of July 19, 1872, and priority No. 83 of 80.83 cubic feet per second of time, of date of August 18, 1879; that in the year 1873, when plaintiff began the construction of its ditch, and in the year 1874, when it finished the same and began the beneficial use of water therefrom, and for a period of more than eight years after plaintiff had constructed its ditch and began the use of its appropriation, the ditch of defendant the Pleasant Valley & Lake Canal Company terminated at said Bingham Hill, and its entire length covered not to exceed 1,000 acres of land, of which not to exceed 600 acres were under actual cultivation, and that the amount of water required and used for said land so cultivated did not exceed 20 cubic feet per second; that in the year 1879, five years after the plaintiff had made its full, actual, and complete appropriation and use of the water subsequently decreed to it, the Pleasant Valley & Lake Canal Company commenced the construction of an extension and enlargement of its said ditch and constructed the same along the east side of Bingham Hill, and around the north point of said Bingham Hill and thence in a southerly direction, making its extension a total length of about 10 miles, and brought under said ditch and extension over 6,000 acres of new land which had never been cultivated or irrigated; that said extension and enlargement was not completed until 1882, and the lands lying under the extension were not irrigated to any extent until after said date; that said defendant company has gradually brought under cultivation since the year 1882 said lands so that by the year 1892 the total amount of land so cultivated under said extension amounted to 6,000 acres, none of which lands were ever cultivated until after plaintiff had cultivated some 7,000 acres of land under its ditch for a period of from 8 to 10 years and had fully used its appropriation and applied the same during all such times to a beneficial use; that since the year 1892 the said defendant the Pleasant Valley & Lake Canal Company had taken from the Cache la Poudre river water that belonged to this plaintiff and that should flow past the headgate of defend-

ant company down to plaintiff's headgate and be diverted therein for the purpose of supplying its complete appropriation made in manner as aforesaid and conveyed such water through defendant company's canal to and upon the lands lying under said extension, although this plaintiff and its stockholders had made full appropriation of such water by actual use and application to a beneficial purpose so early as the year 1874, and had their lands under cultivation, and had actually used such water thereon for a period of 10 years before any water was used under said extension of the defendant the Pleasant Valley & Lake Canal Company's ditch. It is further alleged that the defendant John L. Armstrong, as water commissioner, wrongfully permitted the Pleasant Valley & Lake Canal Company to take from the Cache la Poudre river through its canal about 40 cubic feet of water per second to be used under the said extension, all of which water belongs to the plaintiff. That all of this has been against the protest of plaintiff and contrary to its repeated and constant demand upon the water commissioner that it be allowed to have furnished to its ditch the water which it claims under its appropriation. But that the defendant water commissioner has at the request of the defendant company closed the headgates of the plaintiff and deprived it of its appropriation of water which it so alleges it was entitled. The prayer was for injunctive relief.

It will be thus seen that the complaint alleges, in substance, that at the time of the completion of defendant's ditch, and for more than eight years thereafter, it terminated at Bingham Hill, and under which not more than 600 acres were under actual cultivation, and which did not require more than 20 cubic feet of water per second of time for its necessary use, and that this was all that was used by the defendant up to the year 1882, at the time of the completion of defendant's extension. Also that the 6,000 acres of land under the extension was not all brought under cultivation until 1892, at which time the plaintiff began to lose the use of water under its appropriation after the 30th day of June of each year. The water in dispute is that contained in the priorities under the decree No. 4, with 16.9 cubic feet of water per second of time, of date of June 10, 1861; priority No. 11, 23.63 cubic feet of water per second of time, dated June 10, 1864; and priority No. 49 of 16.6 cubic feet per second of time, of date of July 9, 1872—containing a total of 57.03 cubic feet, all of which priorities are of date and right prior and superior to the appropriation of the plaintiff. The contention of the plaintiff in error is therefore that the defendant in error may only use such of this water as was applied to a beneficial use at the time and date of the decree of April 11, 1882; and that the amount of the unused and unappropriated water was 37



cubic feet per second of time, which the plaintiff claims the right to use under its appropriation as a junior appropriator, because the same was not used nor applied until 1882, and after the completion of the extension, when the water was wrongfully applied to the lands under the extension, commencing the use thereof in 1882, and continued and extended the application and use until 1892, when water was applied to the full 6,000 acres thereunder. The complaint also alleges that the defendant did not begin to apply this water to use under its extension until 1882, but whether or not this was prior or subsequent to the decree of April 11th of that year does not appear, although water was not used on the entire tract under the extension until 1892 or for 10 years thereafter. It appears then at the date of the decree the entire extension had been completed. But water was not used or applied to the lands under a large portion of it for many years thereafter.

[1] It is the contention of the defendant that by the decree its rights to the use of the water under the extension stands adjudicated and therefore may not be considered in this proceeding. On the other hand, plaintiff contends that it is beyond the power of the court by that decree and at that time to grant the defendant the priorities for which it so contends.

It appears from the complaint also that the defendant has remained in the constant and uninterrupted use of the water in dispute from a time beginning with 1882 up to the filing of the complaint in 1909, or for a period of 27 years. But the complaint alleges that this has been over the repeated and insistent protest of the defendant.

Briefly, the defendant from its three priorities of 1861, 1864, and 1872 neither used nor applied more than 20 cubic feet of water of the total amount claimed and decreed until it turned water into its extension in 1882 and but for the decree would be entitled to no more than the 20 cubic feet of water so used and applied as against the plaintiff as a junior appropriator. The question of abandonment by the plaintiff since the rendition of the decree is not alleged in the complaint.

Counsel for plaintiff in error cites *Mercer Ditch Co. v. Armstrong*, 21 Colo. 357, 40 Pac. 989, as supporting its contention in this case, but that case was likewise cited and relied on in *Ditch Co. v. Ditch Co.*, 22 Colo. 115, 43 Pac. 540, where the court said: "Counsel for appellants, however, misconceive the effect of the decision in that case if they deem it as authority in their favor. There the appropriator, who relied upon the provisions of the decree for the full quantity of water awarded him, abandoned a part of the same and had never made any use thereof for a long period of time after the decree was rendered, which quantity of water thereby abandoned by him was subsequently appropriated by others. As

against these subsequent appropriators, it was held that the decree offered no protection to the prior appropriator as to entire quantity of water awarded, when, after the rendition of the decree, the claimant abandoned his rights to a portion thereof. In the case at bar the question of the waste of water is not properly before us, nor is there in the pleadings any claim that the water right has been abandoned by defendants. \* \* \* Hence the doctrine of abandonment cannot be invoked. \* \* \* Very different was that case from the case at bar, wherein it expressly appears from the allegations of the complaint that the defendants have continuously used the quantity of water given to them by the decree ever since its rendition and up to the time of the beginning of the present action, \* \* \* The amount of water, however, to which the defendants were entitled was expressly adjudicated, according to the allegations of the plea of *res adjudicata* interposed here, by the district court of Boulder county in proceedings wherein these parties were duly represented. For that reason the plaintiffs are now estopped to allege to the contrary, as well as estopped to repudiate the decree whose benefits they have retained and long enjoyed."

It is not alleged and it is scarcely possible that the defendant's extension of 10 miles in length, and occupying three years in construction, and its claim to the use and application of water thereunder, was not duly considered and determined by the court at the time of the rendition of the decree. The complaint alleges that the plaintiff was a party to that proceeding. It would seem clear that, if plaintiff had objection to the claim of the defendant established by the decree, the proper time and place for its consideration was in that proceeding. So far as the complaint alleges, no objection was made, and we must therefore assume that the plaintiff acquiesced in the decree, which granted to the defendant the very things of which plaintiff now complains.

Under the adjudication statutes, the priorities between ditch companies and other owners of irrigation ditches, and also all other questions of law and right growing out of or involved or carried thereunder are adjudicated. *Combs v. Farmers' Highline Ditch Co.*, 38 Colo. 420, 88 Pac. 396.

[2, 3] It has been repeatedly held by this court that a proceeding to adjudicate priorities to the use of water for irrigation purposes cannot be attacked in a collateral proceeding after the statutory time for reformation or review in the court of original jurisdiction has expired and the time for appeal has elapsed. Also that a decree in such case cannot, in the absence of fraud, be reopened by a party thereto after the lapse of the statutory period provided.

The complaint in this case recites an adjudication of the very matter of which it



complains and which must therefore be held to be res adjudicata.

The judgment is affirmed.

MUSSER, C. J., and GABBERT, J., concur.

(55 Colo. 258)

**PHILLIPS COUNTY COURT v. PEOPLE  
ex rel. CHICAGO, B. & Q. R. CO.**

(Supreme Court of Colorado. June 2, 1913.  
Rehearing Denied July 7, 1913.)

**1. CERTIORARI (§ 64\*)—NATURE OF PROCEEDING—SCOPE OF INQUIRY.**

Where the record of an inferior tribunal is certified in response to a writ of certiorari, the power of the reviewing court is limited to the ascertainment from the record alone whether the inferior tribunal regularly pursued its authority, and it must pronounce judgment accordingly as provided by Code Civ. Proc. § 337.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 174, 175, 183, 184; Dec. Dig. § 64.\*]

**2. CERTIORARI (§ 64\*)—FINDINGS—CONCLUSIVENESS.**

A finding and declaration of a court in denying a motion for new trial that the court was regularly in session for the trial of jury cases when the action was tried and judgment rendered, that a jury regularly impaneled was in attendance, and that counsel for defendant had actual notice that the court would be and was in session, but came not, was necessarily conclusive on a reviewing court in a proceeding to review an order denying defendant's motion to set aside the judgment against it.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 174, 175, 183, 184; Dec. Dig. § 64.\*]

**3. TRIAL (§ 9\*)—SETTING CASES FOR TRIAL—NECESSITY.**

In the absence of statute or rule of court, there is no necessity that causes be previously set down for trial at a particular date and that the parties be notified thereof.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 21-26; Dec. Dig. § 9.\*]

**4. JUDGMENT (§ 138\*)—DEFAULT AT TRIAL—RELIEF.**

Courts have inherent power to dispose of causes in due order which are brought before them, and, if the parties or their counsel neglect to attend, they cannot be relieved from the consequences of such neglect.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 249-251, 254; Dec. Dig. § 138.\*]

**5. JUDGMENT (§ 109\*)—DEFAULT—TIME OF TRIAL.**

On March 15, 1910, the defendant filed a general demurrer, which on the same day was heard in open court and overruled and defendant given 24 hours from 2 p. m. of that day in which to plead. Plaintiff's witnesses were subpoenaed for the next day, and defendant filed an answer in the nature of a general denial within the time allowed, and on March 16, 1910, at 3 p. m., the case was called for trial, tried in defendant's absence, and judgment rendered for plaintiff. Held that, the case not having been tried until the issues were made up, there was no invasion of defendant's rights, even though plaintiff had subpoenaed his witnesses for March 16th before the answer was filed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 160, 162, 179; Dec. Dig. § 109.\*]

**6. CERTIORARI (§ 1\*)—REVIEW—SCOPE.**

Mere irregularities cannot be reviewed on certiorari.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 1; Dec. Dig. § 1.\*]

**7. JUDGMENT (§ 139\*)—VACATION—DISCRETION.**

Defendant having filed a demurrer by mail, it was taken up on the day it was filed, heard in open court, and overruled, and defendant given 24 hours from 2 p. m. of that day in which to plead. Defendant was notified of the action of the court by telegram and within the time allowed filed an answer in the nature of a general denial, and on the next day at 3 p. m. the case was called for trial, tried in defendant's absence, and judgment rendered against defendant. Held, that the refusal of the court to set aside the judgment was not an abuse of discretion, especially in the absence of an affidavit of merits.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 265-268; Dec. Dig. § 139.\*]

**8. JUDGMENT (§ 158\*)—VACATION—AFFIDAVIT OF MERITS—FILING—TIME.**

It was not an abuse of the trial court's discretion to refuse to permit defendant to file an affidavit of merits in support of a motion to set aside a judgment when no offer to file it was made until the hearing of the motion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 311; Dec. Dig. § 158.\*]

**9. JUDGMENT (§ 160\*)—VACATION—AFFIDAVIT OF MERITS—REQUISITES.**

An affidavit of merits in support of a motion to vacate a judgment, merely alleging that defendant has a meritorious defense, is insufficient.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 314-316; Dec. Dig. § 160.\*]

Error to District Court, Phillips County; H. P. Burke, Judge.

Writ of review by the People, on relation of the Chicago, Burlington & Quincy Railroad Company, to review a judgment of the County Court of Phillips County in favor of J. W. Webermeier against relator. From a judgment of the district court annulling the judgment of the county court, the latter brings error. Reversed.

C. D. Walrod, of Holyoke, and E. T. Wells, of Denver, for plaintiff in error. E. E. Whitted and Robert H. Widdicombe, both of Denver, for defendant in error.

WHITE, J. In a certiorari proceeding the district court annulled a judgment of the county court of Phillips county, rendered in favor of J. W. Webermeier against the Chicago, Burlington & Quincy Railroad Company for damages sustained by reason of fire set out by the defendant in the operation of its railroad. The cause is brought here for review. It is contended that district courts have no jurisdiction to issue the writ to review proceedings of county courts in cases of this character; but, if such jurisdiction does exist, petitioner, nevertheless, had a plain, speedy, and adequate remedy at law, and that the county court in no wise exceeded its jurisdiction or abused its discretion in the premises. We shall not determine whether the writ of certiorari properly



issued in this case, as the judgment of the district court must be reversed and that of the county court affirmed, even though we should assume jurisdiction in the former court to issue the writ.

[1] It is elementary that when a writ of this character is granted upon a proper petition, and the inferior tribunal certifies its record in response thereto, the limit of the power of the reviewing court is to ascertain from that record alone whether the inferior tribunal regularly pursued its authority, and thereupon pronounce judgment accordingly. Section 337, Code Civil Procd. 1908; County Court v. Eagle Rock Co., 50 Colo. 365, 115 Pac. 706; Morefield v. Koehn, 53 Colo. 367, 127 Pac. 234. Instead of confining itself to such limitations, the district court apparently determined the controversy from the allegations in the petition and an affidavit contradicting the certified record.

The certified record shows, and it is conceded, that the county court had jurisdiction of the subject-matter of the litigation and of the parties thereto. The suit was commenced October 19, 1909. November 6th thereafter defendant interposed a motion to make the complaint more specific. This motion was overruled on March 14, 1910, at the regular January term of court, and defendant given four days in which to plead. On March 15, 1910, the defendant filed a general demurrer transmitting the same by mail; thereafter, on the same day, the demurrer was heard in open court, overruled, and defendant given 24 hours from 2 p. m. of that day in which to plead. By telegram the defendant was apprised of the action of the court in the premises. Within the time so allowed the defendant filed an answer in the nature of a general denial, transmitting the same by mail. Thereafter, on March 16, 1910, at 3 p. m., the case was called for trial and heard before a jury, resulting in a verdict and judgment for plaintiff; the record reciting, *inter alia*, that the cause had been entered upon the calendar and came on regularly for trial, the plaintiff appearing in person and by counsel, and, the defendant failing to appear and make further defense, the case was regularly called and, at the request of the plaintiff, brought to a hearing. On April 20, 1910, at the ensuing term of court, the defendant, under section 81, Code of Civil Procedure, R. S. 1908, filed a motion to vacate the judgment upon the grounds that it had been entered prematurely, in vacation, and without notice or knowledge upon the part of defendant. The motion was supported by the affidavit of one of the counsel for defendant. Counter affidavits were filed, a hearing had, and the motion determined adversely to defendant. The court in its findings and judgment thereon stating, *inter alia*, that "this court was regularly in session for the trial of jury cases on March 15 and 16, 1910, and at the time the decree complained of was rendered; that a jury regu-

larly impaneled was in attendance upon the session of said court; that counsel for defendant had actual notice that said court would be and was in session," etc.

[2] The finding and declaration of the county court entered at the time of the trial, and in disposing of the motion for a new trial, are necessarily conclusive upon reviewing courts in proceedings of this character. Such courts cannot disregard the unequivocal statements of the record. The claim that the cause was tried without having been previously set down for trial, and without knowledge upon the part of defendant that it would be tried, are equally without merit. It must be presumed that actions pending, in which the issues are made, will be tried when reached.

[3] Unless required by statute or a rule of court, there is no necessity that causes be previously set down for trial at a particular date and the parties notified thereof. We have no such statute, and the record before us fails to disclose the existence of a rule of court to that effect, and none will be presumed. *Cochrane v. Parker*, 12 Colo. App. 169, 171, 54 Pac. 1027; *Davis v. Peck*, 12 Colo. App. 259, 55 Pac. 192; *Welch v. Jepson*, 13 Colo. App. 520, 522, 58 Pac. 789; *Union Brew. Co. v. Cooper*, 15 Colo. App. 65, 67, 60 Pac. 946.

[4] It is elementary that courts have inherent power to dispose of causes in due order which are brought before them. If parties or their counsel neglect to attend the courts and give proper attention to their cases, we cannot relieve them of the consequences of their neglect. *Clifford v. Mason*, 6 Colo. 603.

[5] In the memorandum of proceedings in the county court, it appears that prior to the filing of the answer subpoenas were issued for certain witnesses and the "case set for trial March 16, 1910, at 2:15 p. m.," and it is contended that this shows that plaintiff caused the case to be set for trial before the issues were made. This may all be true and still in no sense constitute an invasion of defendant's substantial rights. The cause was not tried until the issues were made, and the witnesses could have properly testified whether subpoenaed or not.

[6] Moreover, mere irregularities are not reviewed by means of the writ of certiorari.

[7] But it is claimed that the action of the county court, in its refusal to set aside the judgment against the defendant, was a most flagrant abuse of discretion warranting the decree and judgment of the district court. We are not impressed with this contention. When we bear in mind the proceedings in this case admittedly known by defendant, it would seem that proper respect for the court and defendant's own interests would have prompted the latter to actually appear and give proper attention to its case. The very fact that defendant was required to plead further within 24 hours after demurrer over-



ruled should have been sufficient to cause a prudent and cautious person to personally appear in court and protect his interests. Instead defendant prepared a general denial of plaintiff's cause of action, transmitted it to the court by mail, and gave the matter no further attention until it was called upon to respond to the judgment under an execution duly issued thereon.

[8] Moreover, the motion for a new trial was not supported by an affidavit showing a meritorious defense to the action. The record discloses that the motion was filed April 20, 1910, supported by an affidavit setting forth only the alleged irregularities and want of notice upon the part of defendant. Thereafter, upon hearing, the plaintiff questioned the sufficiency of this affidavit because it failed to show a meritorious defense. Thereupon the defendant presented an additional affidavit by one of its counsel, whereby it sought to supply the omission of the former affidavit in that respect. The court sustained an objection interposed by plaintiff and refused to file the affidavit for the reason that it was presented "too late and out of time." Doubtless the court, in its discretion, might have properly received the additional affidavit, but it was clearly not an abuse of discretion to reject it.

[9] But, be that as it may, the offered affidavit of merits was insufficient, as it stated no facts constituting the supposed defense. The mere allegation that defendant has a meritorious defense is insufficient. *Union Brewing Co. v. Cooper*, supra.

The judgment of the district court is reversed, and the cause remanded, with instructions to affirm the judgment of the county court.

Reversed and remanded, with instructions.

MUSSER, C. J., and BAILEY, J., concur.

(55 Colo. 112)

#### MOFFITT v. CITY OF PUEBLO.

(Supreme Court of Colorado. July 7, 1913.)

#### 1. MUNICIPAL CORPORATIONS (§ 111\*)—ORDINANCES—VALIDITY.

An ordinance authorized by specific and definite legislative act will be upheld unless it conflicts with the state or federal Constitutions, while an ordinance which the municipality assumes to pass by virtue of its incidental powers or under a general grant of authority will be declared invalid unless it be reasonable, fair, and impartial, and not arbitrary or oppressive.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 245-256; Dec. Dig. § 111.\*]

#### 2. LICENSES (§ 7\*)—OCCUPATION TAX—REASONABLENESS.

An ordinance making it unlawful to sell or offer to sell as incidental to or as a part of the mode of carrying on business any goods or merchandise from any car, warehouse, or other place not kept or directly under the seller's control without paying a license fee of \$200 per month, or \$25 per day for a period of less than a month, not applying to peddlers or to

transient merchants, was an exercise of the police power subject to the rule of reasonableness.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 7-15, 19; Dec. Dig. § 7.\*]

#### 3. LICENSES (§ 7\*)—OCCUPATION TAX—PRESUMPTIONS—REASONABLENESS.

An occupation tax imposed under the police power will be presumed to be reasonable unless the contrary appears on the face of the ordinance imposing it or is established by proper evidence.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 7-15, 19; Dec. Dig. § 7.\*]

#### 4. LICENSES (§ 7\*)—REASONABLENESS OF OCCUPATION TAX.

A license fee of \$200 per month, or \$25 per day for a period of less than a month, required to be paid by persons who, as incident to or as a part of their business, sell any goods from any car, warehouse, etc., not kept or directly under their control, absolutely prohibitive of such sales, was, as to a sales manager taking orders for pianos, excessive, exorbitant, and unreasonable.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 7-15, 19; Dec. Dig. § 7.\*]

#### 5. CONSTITUTIONAL LAW (§ 230\*)—LICENSES (§ 7\*)—REGULATIONS—DISCRIMINATION.

Although a license or occupation tax is valid if uniform as to all persons engaged in the particular business or occupation if classified according to natural lines of distinction, yet an ordinance providing that no person should, as incident to or as part of his mode of business, sell any goods from any place not kept or directly under his control without a license was discriminatory as between those engaged in the same line of business, and in case of a nonresident sales manager as between residents of the city and nonresidents.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 687; Dec. Dig. § 230.\* *Licenses*, Cent. Dig. §§ 7-15, 19; Dec. Dig. § 7.\*]

#### 6. LICENSES (§ 7\*)—POLICE POWER—OCCUPATION TAX—REASONABLENESS OF AMOUNT.

Where the amount of an occupation tax imposed in the exercise of the police power is substantially in excess of the reasonable expense of issuing a license and of regulating such occupation or is virtually prohibitory, the ordinance is void.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 7-15, 19; Dec. Dig. § 7.\*]

#### 7. CONSTITUTIONAL LAW (§ 238\*) — POLICE POWERS—OCCUPATION TAX.

It is the natural and constitutional right of every citizen to engage in any lawful business he may choose, subject only to such reasonable regulation as may apply alike to all persons engaged in the same kind of business.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 688-690, 695, 706-708; Dec. Dig. § 238.\*]

En Banc. Error to Pueblo County Court: Frank G. Mirlick, Judge.

W. Spencer Moffitt was convicted of the violation of an ordinance, and he brings error. Reversed.

Willis Stidger, of Denver, for plaintiff in error. A. W. Arrington, of Pueblo, for defendant in error.

SCOTT, J. The plaintiff in error was convicted in the municipal court of the city of Pueblo for a violation of ordinance No. 847

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



of that city. Upon appeal to the county court of Pueblo, such conviction was sustained. The only question before us is the validity of the ordinance. This question was raised by demurrer to the complaint and by objection to the introduction of the ordinance in evidence. The grounds of such objection being that the city was without power to enact such an ordinance; that it is in violation of the state and federal Constitutions; and that it is not a valid exercise of the police power and is unreasonable, discriminatory, and void.

Section 1 of the ordinance provided: "It shall be unlawful for any person or persons, copartnership or corporation to sell or offer to sell as incident to or as a part of their mode of carrying on business, any goods, wares and merchandise or other chattels from any car, warehouse, private house or houses, or any other place or places not kept or directly under his or their control without being duly licensed as herein provided for: Provided that this section of the ordinance shall not apply to peddlers or to licenses of others included within the provisions of ordinance No. 781, passed June 7th, 1909, providing a license tax upon transient merchants." The ordinance provided for a license fee of \$200 per month or \$25 per day for a period of less than a month.

Ordinance No. 781, to which section 1 of the ordinance complained of refers, in so far as it is important to consider, is as follows: "That any person or persons, copartnership or corporation who shall keep a store, booth, stand, room or other place and shall vend, offer or expose for sale or retail any goods, wares or merchandise within the city of Pueblo, without being first duly authorized by a license from the city of Pueblo, as hereinafter provided, shall be fined upon conviction in any sum not less than ten dollars, nor more than three hundred dollars, for each offense: Provided, that this ordinance shall not be construed to apply to the sale of goods, wares and merchandise by merchants who pay an annual city tax upon such goods, wares and merchandise assessed according to the revenue laws of this state, nor to the traveling agents who sell samples to regular merchants doing business in the said city of Pueblo, nor to the sale of goods for charitable and nonprofitable purposes."

The testimony going to the violation of the ordinance is that the plaintiff sells or takes orders for pianos; that he acts in this capacity as the agent of the Robert D. Sharp Music Company; that he sold one piano to one Cantrell in the city of Pueblo in October, 1911, and exchanged this for another in December of the same year. The first piano was examined in a private house. Nothing is said in this respect as to the other one. Moffitt also sold a piano to Mrs. Herman Schluse. He told her this one was in a rooming house. Moffitt's testimony, which is not in conflict

with that of other witnesses, is as follows: "As sales manager I had and have in the city of Pueblo taken orders for pianos to be shipped and that have been shipped directly from the factories to the homes where the pianos have been sold prior to their shipment. At times some of these pianos are left in the cars for a day or so before delivery to the purchaser. They have been kept in warehouses or private houses before being delivered. Sometimes before and sometimes after the contract was signed with the purchaser." Then what the plaintiff did in alleged violation of the ordinance was to solicit and make sales of pianos as the agent of the Sharp Company of Denver. Neither the agent nor the company kept or maintained a place of business in Pueblo.

The authority of the city in the matter of license or occupation tax is found in section 6550, Rev. Stat. 1908: "Third. To license, regulate and tax, subject to any law of the state now in force or hereafter to be enacted, any or all lawful occupations, business places, amusements or places of amusements." This is a general grant of authority, and it is not contended that the ordinance is authorized by any specific or definite legislative authority.

[1] In *Phillips v. City of Denver*, 19 Colo. 179, 34 Pac. 902, 41 Am. St. Rep. 230, Mr. Justice Elliott stated the rule in such case to be: "In determining whether a municipal ordinance is valid, the following distinction is to be observed: An ordinance expressly authorized by specific and definite legislative authority will be upheld unless it conflicts with the Constitution of the state or nation, while an ordinance which the municipality assumes to pass by virtue of its incidental powers, or under a general grant of authority, will be declared invalid, unless it be reasonable, fair, and impartial, and not arbitrary or oppressive." In that case the charter provision considered, in so far as it may affect the case at bar, is very similar to the general statute, and it was contended there as here that the power of the council was absolute, even to the extent of the prohibition of the particular business, but upon that point the court said: "In our opinion the charter provisions, above quoted, will not bear the construction contended for. The power conferred is not sufficiently specific or definite to warrant such unrestrained municipal legislation affecting private property. The grant of power to regulate lawful occupations and business places is certainly not an express grant of power to locate or prescribe the limits of carrying on lawful occupations upon private premises. The grant of power to regulate and prevent the carrying on of business dangerous or detrimental to public health, and to declare, prevent, or abate nuisances, is not to be construed as vesting the city council with authority to prohibit, at their discretion, the existence of



well-constructed, well-regulated, and well-conducted livery stables; neither does the 'general welfare' clause, adopted after the passage of the ordinance in question, confer full and specific power upon the city council for that purpose. The ordinance in question must therefore be subjected to the test of reasonableness; and the particular provision under consideration cannot stand, in any event, unless its adoption was a reasonable exercise of the incidental or general grants of power contained in the charter. Whether the city government can be vested with such authority as is contended for need not now be considered." The doctrine of that case was quoted with approval in the case of *Denver v. Rogers*, 46 Colo. 479, 104 Pac. 1042, 25 L. R. A. (N. S.) 247. Construing a charter provision under which the city council assumed to act in that case, and where the same contention was made as to absolute power in the council, without regard to reasonableness as it is in this case, the court said: "These provisions are not susceptible of such construction. To so determine would be equivalent to declaring the legislative or municipal fiat absolute and supreme, even though out of harmony and in clear conflict with the provisions of both national and state Constitutions. Such holding would place it within the power of the municipal legislature to strike down and annihilate any business, however harmless and inoffensive in fact, which, for any reason, it might desire to put under the ban. The effect would be to say that, no matter how extreme, unreasonable, or invidious the law passed upon a given subject might be, still, under the powers granted, the action of the council is final and the door to judicial inquiry and examination securely closed."

[2] It may be regarded as settled, then, in this jurisdiction, that ordinances of this character and under the statute are an exercise of the police power and as determined by this court, subject to the rule of reasonableness.

[3,4] The testimony of witnesses for the defendant is that the license fee provided by the ordinance is absolutely prohibitive. There is no testimony to the contrary. It is very clear upon the face of the ordinance that the license fee was intended to prohibit. The very amount of the license fee, \$25 per day, \$200 per month, or \$2,400 per year, is sufficient to make it manifestly appear, when considered in connection with the character of the business of the accused, as excessive, exorbitant, and unreasonable.

It is the accepted rule of law that an occupation tax imposed under the police power will be presumed to be reasonable unless the contrary appears on the face of the act or ordinance imposing it or is established by proper evidence. That the ordinance in question is unreasonable and prohibitive appears upon its face and is established by proper and uncontradicted evidence.

[5] The ordinance likewise discriminates between those engaged in the same line of business and between residents of the city of Pueblo and nonresidents.

It is not required that the license tax shall be upon every business or avocation and is valid if uniform as to all persons engaged in the particular business or avocation, and if the persons engaged therein are classified according to natural and well-recognized lines of distinction, yet the constitutional requirement of uniformity is violated by a tax which does not fall alike on all persons engaged in the particular business or avocation taxed. 25 Enc. 606; *Ames v. People*, 25 Colo. 508, 55 Pac. 725.

The ordinance provides that no person shall sell, or offer to sell as incident to or as a part of their mode of carrying on business, any goods, wares, and merchandise or other chattels from any car, warehouse, private house, or any other place not kept or directly under his control without a license. Thus, if A. keeps or controls a warehouse, he may sell without a license tax; if B. occupies only space in a warehouse, he must pay the license tax. If A. owns or controls a private house, he may freely sell; while if B. rents or is permitted to use a room in such house wherein he makes a sale, he must pay \$200 per month or \$25 per day. This is so manifestly in violation of the inherent and constitutional rights of the citizen as to require no argument.

By what right may a city council say whether or not a person may only transact his business in a building owned or controlled by himself? By what right may it say that the owner or controller of a building may sell his wares therefrom without burden, and at the same time impose an unconscionable and prohibitive tax upon the person who may not be able to either own or control an entire building, if he sell the very same kind of an article or is engaged in the same kind of business? This is the plain language of the ordinance, and for this reason also the ordinance is indefensible and cannot be sustained. If it be the purpose of the ordinance to tax nonresidents of the state and so discriminate in favor of residents, then it is in violation of the provisions of the federal Constitution that "citizens of each state shall be entitled to all privileges and immunities of citizens of the several states." 25 Cyc. 610. While it is not clear from the record yet it appears that Moffitt was a resident of Colorado, possibly of Pueblo, and if so the discrimination is more repugnant. But the fee fixed in the ordinance is of itself so unreasonable and unjust as to make the ordinance invalid. The business of selling pianos is a legitimate one and not in itself tending to injuriously affect the public welfare.

[6] The ordinance does not purport to be other than an occupation tax, and it is well settled that, whenever it is manifest that the amount of such tax imposed in the exercise



of police power is substantially in excess of the reasonable expense of issuing a license and of regulating the occupation to which it pertains or is virtually prohibitory, the ordinance imposing the tax is void. 25 Cyc. 610.

[7]. It is the natural and constitutional right of every citizen to engage in any lawful business he may choose, subject only to such reasonable regulation as may apply alike to all persons engaged in the same kind of business, and an ordinance or statute that unduly discriminates or prohibits a citizen from the exercise of such right because he may not be a taxpayer or own or control a building for the purpose is void. The equal right to honestly earn a livelihood is first and paramount and cannot be denied by statute. As supporting our conclusions, see *Smith v. Farr*, 46 Colo. 379, 104 Pac. 401; *Leonard v. Reed*, 46 Colo. 311, 104 Pac. 410, 133 Am. St. Rep. 77; *Wilcox v. People*, 46 Colo. 382, 104 Pac. 408.

For these reasons we must hold the ordinance to be unfair, unreasonable, discriminatory, and prohibitive, and therefore in violation of the Constitution and void.

The judgment is reversed.

(55 Colo. 236)

WILEY v. McDOWELL

(Supreme Court of Colorado. June 2, 1913.)

1. ELECTIONS (§ 180\*)—BALLOTS—INTENTION OF VOTERS.

The intention of the voter must be ascertained according to the statutory rules prescribing the manner in which voters may mark ballots for the candidates intended to be voted for.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. §§ 151-155, 157; Dec. Dig. § 180.\*]

2. ELECTIONS (§ 180\*)—BALLOTS—INTENTION OF VOTERS—EVIDENCE.

Under Rev. St. 1908, § 2236, authorizing any voter desiring to vote a straight ticket to write within the blank space thereinbefore provided for the name of the party, ballots containing complete Democratic, Republican, and Progressive tickets and containing Roosevelt and Bull Moose tickets with no candidates for county officers cannot be counted for the county Republican and Progressive candidates when merely marked in the space by the words "Bull Moose" or "Roosevelt"; the Progressive party indorsing the Republican party candidates for county officers.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. §§ 151-155, 157; Dec. Dig. § 180.\*]

3. ELECTIONS (§ 201\*)—CONTESTS—COUNTING OF BALLOTS—BURDEN OF PROOF.

One instituting an election contest has the burden of proving that the ballots have not been tampered with before the court may order a recount of the ballots.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 286; Dec. Dig. § 291.\*]

In Banc. Error to Gunnison County Court; George Hetherington, Judge.

Election contest by Elmer Wiley against E. H. McDowell. There was a judgment for the

latter, and the former brings error. Reversed and remanded, with instructions.

Sapp & Nash and J. M. McDougal, all of Gunnison, for plaintiff in error. E. M. Nourse and Crump & Allen, all of Gunnison, for defendant in error.

HILL, J. At the last general election the parties to this action were rival candidates for the office of county commissioner for Gunnison county. The plaintiff in error was the candidate upon the Democratic ticket. The defendant in error was the candidate upon the Republican and Progressive tickets. The canvassing board found that the defendant in error had received the highest number of votes, and issued to him the certificate of election. The plaintiff in error instituted this contest, alleging that a certain number of ballots sufficient to change the result (giving the number, precincts, etc., in detail) in which the voter wrote either the word "Roosevelt" or "Bull Moose" in the space intended to be filled out in order to vote a straight party ticket, and in which no cross or other mark was made opposite the name of the defendant in error, were counted and returned for the defendant in error; that the defendant in error was not upon the Bull Moose or Roosevelt tickets; that neither of said parties placed in nomination, or had, any candidates in Gunnison county for the office of county commissioner. These facts were established. The court in its findings so declared, but was of opinion, although the defendant in error was not upon the Bull Moose or Roosevelt tickets, but was only upon the Republican and Progressive tickets, that these ballots should be counted for him and he so ordered, making his findings and reasons therefor, as follows: "That, considering the form of the ballots and the general and prevalent opinion among electors that the Progressive, Bull Moose, and Roosevelt parties and tickets were identical, it therefore was clearly the intention of the electors voting the straight Bull Moose and Roosevelt tickets to vote the Progressive county ticket, unless otherwise marked, and, said ballots not being so marked, it was clearly the intention of the 14 voters casting them to have intended to vote for contestee, and therefore said 14 Bull Moose and Roosevelt ballots should be counted for said contestee McDowell, giving him a majority of eight votes." In this respect the trial court was in error.

[1, 2] Elections are regulated by statutes. General Section 2236, Revised Statutes, 1908, in part reads: "Any voter desiring to vote a straight ticket may write within the blank space above provided for, the name of the party whose ticket he may wish to vote, and any ballot so cast shall be counted for all the nominees upon said ticket, except when the voter has marked opposite the name or names of any individual candidate of some

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



other party, which individual marks opposite such individual candidate shall count for them, and shall not be counted for the candidates for the same office upon the ticket whose party name the voter has so filled in the blank at the head of the ticket." In *Nicholls v. Barrick*, 27 Colo. at page 442, 62 Pac. at page 205, this court said: "The intention of the voter, as expressed upon the face of his ballot, has always been regarded as the cardinal principle controlling the count. Under a system providing for balloting like the Australian, it is necessary that certain rules be prescribed to prevent confusion and secure uniformity. By this means the intention of the voter is to be ascertained." These principles have repeatedly been recognized and followed in this jurisdiction. *Young v. Simpson*, 21 Colo. 460, 42 Pac. 666, 52 Am. St. Rep. 254; *Heiskell v. Landrum*, 23 Colo. 65, 46 Pac. 120; *Rhode v. Steinmetz*, 25 Colo. 308, 55 Pac. 814. It appears to be the universal rule in all states which have adopted the so-called Australian system, as said by the Supreme Court of Iowa in *Whittam v. Zahorik*, 91 Iowa, 23, 59 N. W. 57, 51 Am. St. Rep. 317, whether a ballot should be counted does not depend solely upon the power to ascertain and declare the choice of the voter, but also upon the expression of that choice in the manner provided by the statute. To put it in another way, as was said in *Vallier v. Brakke*, 7 S. D. at page 354, 64 N. W. at page 184: "The statute having prescribed the manner in which the elector may designate by marks upon his ballot the candidate for whom he intends to vote, and declared the effect of such marks, neither the judges of election nor the courts are authorized to go beyond those marks in order to ascertain the voter's intention." It was alleged, and sought to be shown that the Progressive, Bull Moose, and Roosevelt tickets were the same and represented the same party, and that the candidates on each of said tickets for state officers were the same persons, and a vote cast for any one was a vote for the same party as either of the others; that the words "Progressive," "Bull Moose," and "Roosevelt" each meant and were understood by the voters to mean the same party; that while in Gunnison county the Progressive was the only one which filed a separate and distinct petition indorsing the Republican county ticket and candidates, thereby placing in nomination as their candidates the same as those already upon the Republican ticket, that it was the same in fact as if separate petitions had been secured and filed representing each of said names, for which reason that the electors who wrote either the word "Roosevelt" or "Bull Moose" in the space in the ballot to be filled out in order to vote a straight ticket intended thereby to vote for the county candidates on the Republican and Progressive tickets, and did so vote. We cannot accept this conclusion. In *McCrary on*

*Elections* (3d Ed.) § 507, it is said: "While it is true that evidence aliunde may be received to explain an imperfect or ambiguous ballot, it does not by any means follow that such evidence may be received to give to a ballot a meaning or effect hostile to what it expresses on its face. The intention of the voter cannot be proven to contradict the ballot, or when it is opposed to the paper ballot which he has deposited in the ballot box." In *People v. Seaman*, 5 Denio (N. Y.), at page 412, in commenting upon this subject, the court said: "The intention of the elector cannot be thus inquired into when it is opposed or hostile to the paper ballot which he has deposited in the ballot box. We might with the same propriety permit it to be proved that he intended to vote for one man when his ballot was cast for another; a species of proof not to be tolerated."

To adopt the theory of the defendant in error would be to hold that, although an elector had properly voted a particular ticket in the manner and form provided for by statute, he intended thereby, not only to do that, but also to vote for a candidate whose name was not upon that ticket, but which was upon another ticket, for the reason that he understood that the three tickets and parties were one and the same. This would be to ignore the provisions of the statute in their requirements as to how an elector shall vote in order to have his ticket counted, and also to say regardless of all such requirements that in a contest an elector or others would be permitted to say that they presumed certain people were upon certain tickets when they were not, and that on account of such presumptions their ballots should be counted for them for the reason that they intended to vote for them, even though they did not. The fallacy of this argument and the danger which it might lead to is apparent from this record. The only witnesses called to prove that the voters in Gunnison county understood and believed that the Progressive, Bull Moose, and Roosevelt tickets were one and the same, and that it was not necessary to place county candidates upon but one of these tickets in order to have them cover all three, were a Mr. Whipp and a Dr. Sanford. Their testimony was substantially as follows: Mr. Whipp was asked: "Q. I will ask you to state if it was generally known throughout the length and breadth of the state of Colorado that they were identical, through your reading of newspapers and other discussions publicly made in regard to these parties. A. If there was any distinction, I never discovered it." The witness also said that he was a Republican judge in precinct No. 1 and acted as a Progressive; that they had some straight ballots in that precinct marked "Roosevelt" or "Bull Moose," but that they did not count them for the Progressive county ticket. Dr. Sanford was asked, "Q. I will ask you to state to the



court if you know what relation the organization or party, so-called Bull Moose and Roosevelt parties, bore to the Progressive party—what relation did they bear to each other? A. They were identical, sir. Q. I will ask you to state whether it was a matter of general knowledge and generally known to the people throughout this county and state that persons voting for the Bull Moose or what is known or called the Bull Moose or Roosevelt parties thereby voted for the candidates of the Progressive party? A. As secretary of the Progressive party formation in Gunnison county I sent out literature all over of every sort concerning it to inform people as to that very question, and I tried to reach everybody with it, and from that I should judge that most everybody did know that they were identical in their formation. Not having had a sufficient number to insert the three names in this county by petition, we contented ourselves with one, Progressive, and we had such a short time to do it or we would have certainly made petitions for the other two names as well as the Progressive. Q. I will ask you whether or not it was not generally known and accepted and a matter of general knowledge that they were identical, these parties, throughout the county of Gunnison? A. Yes, sir." Upon cross-examination the witness admitted that there was no county Bull Moose or Roosevelt ticket; also, that he sent out literature advising the members of the Progressive party, or rather the three parties, to vote the Progressive ticket and not to vote the Bull Moose or the Roosevelt ticket. It will thus be observed that preceding the time of the election Dr. Sanford was advising his people to vote the Progressive ticket, and not the Roosevelt or Bull Moose ticket. The reason was that they had no county Bull Moose or Roosevelt ticket, and hence that, if they did not vote this ticket alone, they would not be voting for anybody upon the county ticket. This was correct. While Mr. Whipp says he understood that they were one and the same, yet as a sworn judge of election he did not thus count them, but, as he states, counted the tickets the way they read; that is, where an elector had voted a Roosevelt or Bull Moose ticket, his vote was not counted for the county candidates for the reason that these parties had no candidates upon the ticket for county offices. It will be observed that his understanding as a sworn judge of election was not in harmony with his understanding as a witness which, if relevant, might have had a tendency to sustain this contention. The ballots disclose that the defendant in error was only upon the Republican and Progressive tickets. Any elector by glancing at the names could have readily ascertained this fact, so that the claim that the intention of an elector who voted the Bull Moose or Roosevelt ticket was to vote for the defendant in error is not only

in conflict with the provisions of the statute, but is a contention which cannot be gathered from the ballot, nor otherwise than from the individual statement of each voter, which, to sustain it, would have to be that he intended to do what he in no manner made an effort to do. This would be violative of every legal test as well as in conflict with all precedent.

[3] By assignment of cross-errors the defendant in error contends that the court erred in opening any of the ballot boxes and ordering a recount of the votes. It being charged in the answer that the boxes had been tampered with, and had not been preserved by the county clerk in the manner provided by law, the contestor assumed the burden of proving that they had not been tampered with or molested, and that they were in the same condition as when received by the clerk. The court found that the ballot boxes had not been tampered with or molested in an illegal manner, or that the ballots therein or any of them had been substituted or altered, and ordered a recount of the ballots in certain precincts. Under the issues as made by the pleadings the contestor was entitled to a recount of these ballots as a matter of course. *Clanton v. Ryan*, 14 Colo. 419, 24 Pac. 258; *Kindel v. Le Bert*, 23 Colo. 385, 48 Pac. 641, 58 Am. St. Rep. 234.

Counsel have cited many authorities concerning the manner in which these boxes should be preserved while in the custody of the clerk. It is unnecessary to review them in detail, but is sufficient to say that there is evidence to the effect that the statutes in this respect were substantially complied with, with probably the exception of Pitkin precinct No. 7, where, after the ballots were counted by the judges of election, it appears that they were not put back into the official ballot box, but were placed in a pasteboard box and with the pollbook tied up, and thus returned to the county clerk with the official box, where, at the time of the canvass, this paper box was opened by the clerk and the poll book removed therefrom and the box with the ballots therein was again closed, and tied with a string. The condition of this box becomes immaterial, for the reason that the plaintiff in error lost two votes by the recount of this precinct, so that his total from it given him at the trial was two less than had been awarded him by the judges of election. It is also proper to note that the evidence is practically conclusive of the fact that the ruling of the trial court was correct in holding that these ballots had not been tampered with. The vote was close. The contention hinged around a few certain ballots in which had been written the word "Roosevelt" or "Bull Moose." There was no contention concerning crosses being added or erased, or that the ballots had been otherwise disfigured as in *Rhode v. Steinmetz*, 25 Colo. 308, 55 Pac. 814, nor that the words



'Bull Moose' or 'Roosevelt' had in any manner been substituted for any other name. The evidence discloses that there was no intentional fraud upon the part of any one, but that the real contention was the manner in which these Roosevelt and Bull Moose ballots should be counted.

For the reasons stated, the judgment is reversed and the cause remanded, with instructions to enter a decree in harmony with the prayer of the plaintiff in error.

Reversed.

(24 Colo. App. 397)

**BAUM et al. v. CONCORD LAND & IMPROVEMENT CO.**

(Court of Appeals of Colorado. July 14, 1913.)

**1. SALES (§ 7\*)—SPECIFIC PERFORMANCE (§ 73\*)—SCOPE OF REMEDY—NATURE OF CONTRACT.**

Defendant alone signed an instrument describing certain real property; reciting that the title stood in its name; specifying the lowest price per acre; terms of sale; the lowest amount that would be accepted to bind the bargain; and that defendant agreed to furnish an abstract and make a warranty deed to plaintiffs, or to whom they might direct. The contract also declared that defendant placed the land in plaintiffs' hands to negotiate a sale so as to net defendant the price stated, for which defendant agreed to allow all above such net price as a commission when a sale was effected, the property to be left in plaintiffs' hands and the contract to remain in full force until plaintiffs should receive notice that the property was withdrawn from the market, and that on receipt of such notice the contract to become null and void, and both parties released; plaintiffs pledging themselves to use their best efforts to dispose of the land. *Held*, that the contract was more in the nature of an employment of plaintiffs as brokers, and was not one for the sale of land such as would sustain a suit for specific performance.

Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 16, 17; Dec. Dig. § 7.\* Specific Performance, Cent. Dig. §§ 206-208; Dec. Dig. § 73.\*]

**2. SPECIFIC PERFORMANCE (§ 49\*)—CONTRACT—CONSIDERATION.**

A contract for the sale of land, in order to sustain a bill for specific performance, must be based on a consideration.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 140-151; Dec. Dig. § 49.\*]

**3. SPECIFIC PERFORMANCE (§ 121\*)—CONTRACT FOR SALE OF LAND—ACCEPTANCE OF OPTION.**

In an action for specific performance of an alleged contract for the sale of land, based on an option, evidence *held* insufficient to show an acceptance of the option, either in its original condition, or as modified before it was withdrawn, as provided therein.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387-395; Dec. Dig. § 121.\*]

Appeal from District Court, Conejos County; Charles C. Holbrook, Judge.

Suit by Charles C. Baum and others against the Concord Land & Improvement Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Corlett & Corlett, of Monte Vista, for appellants. Jesse Stephenson, of Monte Vista, for appellee.

MORGAN, J. This is an appeal from a judgment against the plaintiffs, in an action for the specific performance of a contract. The judgment should be affirmed.

[1] The plaintiffs sued for the specific performance of a contract made in September, 1909, in substance, as follows: Monte Vista, Colorado, — 19 —. Section 17, Tp. 38, R. 9, Conejos county. Title stands in name of Concord Land & Improvement Company. Number of acres, 640. Lowest net price, \$25 (per acre). Terms of sale, one-half cash, balance one to two years. Lowest amount to bind the bargain, \$500. That defendant agrees to furnish abstract and make a warranty deed to plaintiffs or to whom they may direct; that defendant places the land in plaintiffs' hands, they to negotiate a sale so as to net defendant the price stated above, for which defendant agrees to allow all above said net price as a commission when a sale is effected; property to be left in plaintiffs' hands and contract to remain in full force until plaintiffs should receive notice that the property is withdrawn from the market, and upon receipt of such notice by plaintiffs, the contract to become null and void and both parties released from further obligations. Plaintiffs pledge themselves to use their best efforts, at their own expense, to dispose of the land. Signed by defendant only. The complaint also contains allegations of a subsequent parol modification, hereinafter referred to.

This contract is more in the nature of an employment of the plaintiffs, as agents, to sell the land for a commission than a contract for the sale thereof. There is nothing in the contract that would tend to make it a contract of sale, except that defendant agrees to make a warranty deed to plaintiffs, or to whom they may direct. This provision is in harmony with a contract of employment, and does not convert it into a contract for the sale of land, and the alleged modifications do not materially assist in such conversion.

It is not such a contract for the sale of land as would admit of a suit for specific performance thereof. "The specific performance of a contract is its actual execution according to its stipulations and terms, and is contrasted with damages or compensation for the nonexecution of the contract. Such actual execution is enforced, under the equitable jurisdiction vested in the courts, by directing the party in default to do the very thing which he contracts to do." Fry on Specific Performance, § 3. Courts of equity have been slow to enforce specific performance, in face of the right to sue at common law for damages for the breach of a contract.

This contract is without date or consider-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ation, uncertain and indefinite as to the purchaser, and as to the time and security of the balance of the purchase price; the plaintiffs do not agree to buy, and the defendant does not specifically agree to sell; the names, the price, and terms upon which the plaintiffs might sell it, as agents of the defendant, alone are given, with the possible susceptible interpretation that plaintiffs could accept the proposal therein contained, and buy it themselves.

Waterman on Specific Performance of Contracts says, in section 152:

"Considerations as to the certainty of a contract sought to be enforced arise in a suit for specific performance, which do not present themselves in an action at law for damages occasioned by a breach."

"Sec. 157. If the language of the contract is contradictory, or there are two different agreements in relation to the same subject-matter, specific performance will in general be refused."

"Sec. 186. Contracts which are voluntary, or where there is no consideration on the part of him who seeks performance, will not be specifically enforced, although under seal, whether the contract be in the form of an agreement, a covenant, or a settlement."

[2] It has been held by our Supreme Court that a contract of this character must be based upon a consideration before an action can be maintained thereupon for a specific performance thereof. *Rude v. Levy*, 43 Colo. 482, 487, 96 Pac. 560, 127 Am. St. Rep. 123, 24 L. R. A. (N. S.) 91; *Winter v. Goebner*, 2 Colo. App. 259, 261, 30 Pac. 51.

In *Rude v. Levy*, supra, the court said: "The writing upon which this action for specific performance is based was not signed by plaintiff, and did not at its execution possess the elements of a binding contract. It was, on the contrary, as named by the parties themselves, a mere 'option to purchase.' According to its terms there was nothing obligatory upon plaintiff unless, at a future time, he elected to accept and perform. And even after such election, the only penalty for nonperformance would be a forfeiture of the money, if any, previously paid. Moreover, there was practically no consideration for the option. The recital of \$1 as paid is the usual provision inserted in such instruments as a matter of form, and even if this sum were actually advanced, it would be merely nominal. It would not, alone, constitute the 'proper' or 'fair' consideration usually considered essential to a suit for specific performance." Also *Pomeroy on Specific Performance*, § 57, p. 79.

[3] Assuming, but not admitting, that this brings this contract within that species referred to by Mr. Pomeroy, supra, in the following excerpt from section 169, p. 235: "Among the examples of this species are those contracts by which the party, upon whom alone an obligation arising from the

express stipulations rests, covenants or promises to do or to forbear from some specified act upon the request of the other, and those by which the party making an offer covenants or promises to do or to omit some act upon the assent or acceptance of the person to whom the offer is addressed, and those in which the party confers an *option* upon the other"—nevertheless the assent or acceptance in this case was not an assent to, or an acceptance of, the terms of the contract as originally written, or the alleged modification.

Plaintiff sent a telegram to defendant, and a letter confirming it, accepting the offer contained in the contract as modified. The telegram was as follows: "Your terms on trade of section seventeen accepted. Send abstracts." The letter, confirming the telegram, says: "We wired you yesterday that 'your terms on trade of section seventeen accepted. Send abstracts.' We understand your terms to be that we are to take the entire section seventeen at \$27 per acre, net to you; that you will accept the 172 acres of Arkansas timber land at \$30 per acre, providing the abstracts are satisfactory and that we are to pay you \$5,000 cash at the time of transfer in addition to the timber land. \* \* \* In making this trade on section seventeen, we are compelled to take the northwest quarter ourselves and take our chances on selling it a little later on." This telegram and letter show no acceptance of the terms of the contract sued upon, as modified, or otherwise. The trade for Arkansas land and the prices named are entirely foreign to any of the terms of the contract alleged. This correspondence further shows that plaintiffs were not then acting under any such contract as the one alleged, but upon some kind of negotiations subsequent thereto.

The evidence of plaintiffs, however, discloses that Mr. Godfrey, representing defendant, came out to Monte Vista pursuant to the telegram and letter, but refused to take the Arkansas land in trade, because of a defect in the title, and thereupon plaintiffs both testify to negotiations with Godfrey, to the effect that plaintiffs would buy all of said section 17 themselves, except what they had succeeded in selling to some Nebraska parties, and pay one-fourth cash and balance in four equal payments in one, two, three, and four years. This was foreign to any contract made prior to that time, and plaintiffs do not testify that such negotiations were made as a modification of any prior contract, although the contract described in the complaint was made a month before that time. Mr. Baum does testify as follows: "We said to Mr. Godfrey we were willing to complete this deal along the lines of the contract; that as he had agreed, with the exceptions that we should pay him more money than what the option called for in the beginning, provided that he would accept these mortgages back from these other parties in Nebraska to



whom we had already sold certain parts of this land and received the money and had it deposited in the bank at Tecumseh, Neb., to which he agreed. \* \* \* We told Mr. Godfrey we would make these payments in one, two, three, and four years, and he agreed to it. I told Mr. Godfrey (defendant's representative) that we had sold these parcels of this section 17, and it was necessary to continue with it to complete this deal we were making on the entire section. I showed him the contract—Mr. Godfrey said that he would write a contract of sale covering this section 17 under the terms of the contract, \$24—and accordingly he offered to close this deal on the lines of the contract, \$24, and accordingly I was surprised that he went away without writing the contract which he had agreed to write. After he knew of the sale of the three 80's he agreed to write a contract for section 17, all of it at \$24 an acre, \$25, they would allow us \$1 an acre commission and all over that we received. The terms was to have been one-fourth and the balance in one, two, three and four years." Mr. Dowdell, the other plaintiff, testifies: "In order to clear up the title to section 17, or timber land in Arkansas, Mr. Godfrey agreed to accept a note without interest. After that contract was written I submitted it to Mr. Godfrey—Mr. Godfrey proposed that we take section 17 at \$24 per acre, 25 per cent. cash, 25 per cent. in one year, 25 per cent. in two years, three years and four years. We told him we would accept it; it was perfectly acceptable to Mr. Godfrey, and he further said that he would have a contract written. The next day he did not have it written, claiming that Mr. Stephenson was busy. I did not see anything more of him until Sunday when he was about to take the train leaving Monte Vista. Mr. Baum and I urged him to prepare the contract on section 17 at \$24 an acre; 25 per cent. cash and the balance in four equal payments at 6 per cent., which he said he would do as quick as he got home, but he never done it. \* \* \* We exhibited contracts to Mr. Godfrey that we had made with the Nebraska people and explained to him the dates of the payments and about the money advanced in the bank, and he accepted the \$1,100 that was deposited there, and it was satisfactory to him." These negotiations were in the latter part of November, 1909. Soon thereafter plaintiffs sent to defendant a contract, purporting to comprise these negotiations with Godfrey, which required defendant to accept a mortgage on only a part of the land for the balance of the purchase price; and Mr. Dowdell testified that this was according to the negotiations aforesaid. Defendant refused to sign it, and on December 27, 1909, notified plaintiffs that the land was withdrawn from the market.

Plaintiffs rely upon these negotiations with Mr. Godfrey as the basis for the modifications of the original contract alleged in the

complaint. These negotiations were in the nature of a new agreement, on the part of plaintiffs, to buy part of the land themselves, and sell the rest of it to Nebraska parties. Anyway the negotiations resulted in nothing more than Mr. Godfrey's agreeing to draw up a written contract concerning the deal, which he did not do, together with defendant's later refusal to sign one prepared by plaintiffs; and the contract prepared by plaintiffs and sent to defendant was not according to the modifications alleged. Plaintiffs afterwards, however, in January, 1910, did go to Indiana and tender to defendant one-fourth of the full price of the entire section 17, together with notes and mortgages for the balance, according to the modifications of the contract as alleged in the complaint; but this was rejected, and it was made after the land was withdrawn from the market, and, furthermore, not in accordance with any subsequent modifications, nor with any agreement established by the testimony.

It is firmly settled law that assent and acceptance, in instances such as this, must not vary or depart from the terms of the option, either in words or effect, nor amount to a substitute or counter proposition. "In these cases there is no assent, and no contract. The respondent is at liberty to accept wholly, or to reject wholly, but one of these things he must do; for if he answers, not rejecting, but proposing to accept under some modifications, this is a rejection of the offer. The party making the offer may renew it; but the party receiving it cannot reply, accepting with modifications, and when these are rejected, again reply, accepting generally, and upon this acceptance claim the right of holding the other party to his first offer." 1 Parsons on Contracts, p. 516, \*p. 477 (9th Ed.). This rule is distinctly affirmed and illustrated in *Salomon v. Webster*, 4 Colo. 353; *Davis v. Thomas*, 28 Colo. 303, 64 Pac. 187; *Talcott v. Mastin*, 20 Colo. App. 458, 79 Pac. 973.

If the last acceptance and tender made by plaintiffs had been in exact accordance with the terms of the alleged contract and modification, it comes precisely within the acceptance defined in the foregoing quotation from Parsons, supra, because it was made after propositions and counter propositions had been made with no result, and then came as a general acceptance of the modified contract sued upon, after the property had been withdrawn from the market as provided in the original contract. "In order that an acceptance may be operative, it must be plain, unequivocal, unconditional, and without variance of any sort between it and the proposal, and it must be communicated to the other party, and that without unreasonable delay." Fry on Specific Performance, § 284. The same author, in section 289, says the introduction of a term in the acceptance which is not in the proposal is a variance which prevents their constituting a contract.



The original contract without modification was without consideration, and the modification alleged was never proved, because the acceptance first made was not in conformity with the modification alleged, and the acceptance and tender last made was not pursuant to any completed agreement, was rejected, and came after the property was withdrawn from the market, as provided in the contract, whereby both parties were released from further obligations by the terms thereof.

Judgment affirmed.

(24 Colo. App. 209)

**WILMORE v. KALBERER.**

(Court of Appeals of Colorado. May 12, 1913.)

**1. LANDLORD AND TENANT (§ 44\*)—LEASES—CONSTRUCTION.**

The provision of a farm lease that the lessee shall feed "all teams" at his expense is not affected by the provision that the lessor shall furnish "three horses," though there were and remained on the premises six horses of the lessor.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 108-110, 732; Dec. Dig. § 44.\*]

**2. APPEAL AND ERROR (§ 1050\*)—PREJUDICIAL ERROR—IRRELEVANT EVIDENCE.**

Admitting evidence that defendant placed a team of horses in plaintiff's possession to sell, and that he sold them, but did not account for the proceeds, having nothing to do with the matters as to which defendant counterclaimed, was prejudicial, as tending to impress the jury that plaintiff was dishonest and had wronged defendant.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1048, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

Error to District Court, City and County of Denver; Harry C. Riddle, Judge.

Action by Charles T. Wilmore against J. Jacob Kalberer. Judgment for defendant; plaintiff brings error. Reversed and remanded.

Thomas B. Stuart and Charles A. Murray, both of Denver, for plaintiff in error. R. D. Rees and Allen & Webster, all of Denver, for defendant in error.

**HURLBUT, J.** Action in the Denver district court by plaintiff (plaintiff in error) against defendant to recover judgment for moneys laid out and expended for defendant, and for the value of goods, wares, and merchandise received by him for plaintiff. Defendant pleaded a counterclaim and recovered judgment thereon, from which this appeal is prosecuted.

The pleadings show that defendant was in possession of certain farm premises described in the complaint, under a written lease from plaintiff, for one year, beginning December 1, 1905. The lease contains many covenants and agreements, some of which are as follows: "And lessee shall pay as rent one-half (½) of all hay, grain and other produce

raised on said ranch, shall do all necessary work to raise and harvest said crops, and furnish all tools, seed and machinery to do the work; and keep the small ditches in order, feed all teams at his own expense, and not use the said Wilmore's horses for any other purpose than actual work on the ranch. The hay shall be divided in the stack; the grain shall be divided as soon as it is threshed; and all grain belonging to the party of the first part shall be put in the granary or loaded on the car, and the party of the first part shall pay for the loading of his half; the apples to be sold by the party of the second part and the money be equally divided, and all other produce or income from said ranch shall be equally divided. Settlements shall be made in dividing all moneys immediately at the time the same is paid for. The party of the first part shall furnish three (3) horses, all the tools, machinery, wagons and harness now on the place; pay for seventy (70) inches of water; pay one-half (½) the threshing bill and furnish one-half (½) of the seed and one-half (½) of the boxes or barrels for the apples, it being understood that nothing shall be sold off from the place before division without the mutual consent of the parties hereto, and settlements shall be made in dividing all money immediately at the time the same is paid for any hay, grain or produce when the same is sold off from the place, it being understood that the said Wilmore shall at all times have general supervision of the place as to the course to be pursued in general."

Defendant's answer contained a counterclaim to the effect that plaintiff was indebted to him in the sum of \$30.80 for the care and keep of a mare named "Maud" from March 1 to June 10, and from September 1 to October 17, 1906, at a reasonable charge, as claimed, of 40 cents a day, for the sum of \$220 for moneys expended in hiring a team to work on the ranch, made necessary by plaintiff's failure to furnish him with three horses to do such work, also for several small sums aggregating \$9.53, making a total counterclaim of \$289.13.

Defendant's evidence shows that he had been in possession of the ranch from December 1, 1904, to December 1, 1905, under a written lease substantially identical with the one now before us; that two horses, called "Bob" and "Barney," and the mare "Maud," were on the ranch at the time both leases were signed, and remained there throughout 1904, 1905, and 1906, except as to "Barney," who died in 1906; that Wilmore had four other horses on the place besides "Bob" and "Maud" during 1906, up to June 10th, at which time one team was taken away to haul lumber and never returned, leaving on the ranch two good horses that could work, besides "Bob" and "Maud"; that "Bob" and "Maud" worked there during the summer of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes



1905, and some of the time during 1906; that for 110 days in 1906 defendant hired a team to work on the ranch, and paid therefor \$220, or \$1 per day per horse.

[1] The direct and cross-examination of defendant conclusively shows, by his admissions, that he owed plaintiff \$161.21, which he sought to overcome by his counterclaim, and also that plaintiff furnished two serviceable horses during the term of the lease; hence, under defendant's own showing, plaintiff could not have been in default as to the third horse for more than \$110 for the 110 days. The remaining \$110 of the \$220, subtracted from the counterclaim of \$289.13, would leave it \$179.13. This computation is based entirely upon defendant's evidence, ignoring that of plaintiff altogether, which shows an indebtedness from defendant to him of approximately \$305. The item of \$59.60 for feeding "Maud" is included in the counterclaim of \$179.13. Under the terms of the lease defendant was precluded from asserting this item as a claim against plaintiff. The lease reads that the lessee (defendant) shall "feed all teams at his own expense." There is no ambiguity about this provision. The animal "Maud" had been used on the ranch as a farm and team horse during the entire term of the first lease, and was there at the time the present lease went into effect. It must have been within the contemplation of the parties that she would remain there for the full term of the new lease and be used as a team horse; hence defendant contracted to feed her at his own expense. To hold otherwise would violate the rule that the terms and conditions of a written contract cannot be varied by parol. This covenant is not affected by another clause of the lease, viz., "The party of the first part shall furnish three (3) horses, all the tools, machinery, wagons and harness now on the place," for whether the phrase "shall furnish three horses" refers to horses then on the place, or to any three horses plaintiff might choose to place thereon, is immaterial, as defendant contracted to feed all teams at his own expense. In the light of the evidence there can be no doubt that defendant realized he was obligated by the contract to feed all team horses on the place at the time the lease took effect. It is undisputed that from the time the lease began until June 10, 1906, plaintiff had on the ranch six horses, including "Bob" and "Maud," but no claim is made by defendant for feeding any of these animals except "Maud." Aside from what has just been said on this point, we think the weight and force of the evidence is with plaintiff. It is undisputed that defendant worked "Bob" and "Maud," with other horses of plaintiff throughout the season of 1905; but he testifies that those two animals became worthless and of no use as farm horses during the year 1906. The witness Williamson testified that he was employed by defendant

in harvesting grain during August, 1906; that four horses belonging to plaintiff, viz., "Bob," "Maud," "Fanny," and "Nellie," were on the ranch at that time; that he mowed and hauled hay with "Maud," and ran the mowing machine with her and a mate, and worked both horses under instructions from defendant; that "Maud" was used for hard work on the farm while he was there; and that the only trouble with her was a swollen leg. Asmussen, defendant's witness, testified that he did not think her leg was any worse in 1906 than it had been in 1905. Defendant's witnesses Webster and Dibble testified that there was nothing the matter with the animal except a stiff leg, and that she was in fair condition, was not dead lame, but just limped, and that she was a good mare. Now the witnesses Sharp and Park, called by plaintiff, testified that they used "Maud" in 1907 for plowing and general farming purposes, and she did such work satisfactorily and fairly well. It seems strange that she should render fair services as a farm horse in 1905 and 1907, but be incapacitated for any kind of farm work during the year 1906. Defendant does not deny that the witness Williamson worked "Maud" on the ranch in 1906, as stated, but says he did not do so at defendant's direction. Williamson was in defendant's employ at this time, and it is to be presumed that he was performing services for defendant and no one else. If he had been working the animal against defendant's desire, the latter would have stopped him from so doing. The evidence fairly shows that both "Bob" and "Maud" did considerable work upon and around the ranch in 1906, and were included in the six horses of plaintiff on the ranch when the lease went into effect. Under these circumstances defendant was not authorized to charge plaintiff for the care and keep of "Maud." Assuming the truth of defendant's statement that the animal was perfectly worthless as a farm horse during 1906, then he should have refused to use her for any purpose. It is stated in the answer that "at the instance and request of plaintiff" defendant kept and fed a certain horse, etc. Defendant was on the stand as a witness, but gave no testimony supporting this allegation. The item of \$59.60 should have been deducted from defendant's counterclaim of \$179.13. This would leave the counterclaim \$119.53, which, subtracted from the admitted amount due plaintiff, \$161.21, shows an indebtedness of \$41.68 against defendant.

[2] We think another error occurred during the course of the trial which is fatal to the judgment, viz.: Considerable testimony was permitted to go to the jury, under strenuous objections of plaintiff, concerning the alleged sale of a certain team by plaintiff. Defendant claimed this team belonged to him, and that he placed it in the possession of plaintiff to make a sale thereof for defend-



ant's benefit. The evidence so admitted on the part of defendant tended to show that plaintiff undertook to, and did, sell the team, but never accounted to the jury therefor. This evidence was highly prejudicial to plaintiff, and it is reasonable to presume had considerable bearing on the minds of the jury upon the rights of the parties. From such inadmissible testimony the jury might have been justified in presuming that plaintiff had wronged defendant out of this team. It is true that plaintiff denied the evidence of defendant in this respect after the court had permitted it to go to the jury, but as the jury apparently supported defendant in every issue, it is not unreasonable to suppose that they may have considered this team transaction as an aggravation of defendant's wrongs, and so entertained a doubt as to plaintiff's honesty and integrity. This testimony was in no sense admissible. There was no suggestion in defendant's pleadings that he had any claim whatever against plaintiff for moneys received by him from the sale of defendant's horses. Not a word can be found in the pleadings tendering such issue. The testimony concerning the transaction was in no way material to any other issue in the case. Its admission tended to no purpose but to prejudice the jury against plaintiff. It is suggested by counsel, however, that the testimony was material in some way as affecting the final settlement and accounting between the parties for matters arising out of the lease of the year 1905. We fail to discover its materiality. Both parties admit that the accounting for the year 1905, which showed a balance due from defendant to plaintiff of \$68.79, was correct. There is no pleading by defendant suggesting that any mistake was made by the parties in making this settlement, nor that defendant desired a readjustment of such settlement on the ground of fraud or mistake. The court would not permit any testimony showing the value of this team. This ruling was right, but it did not remove from the minds of the jurors the unfavorable impression against plaintiff which they might have possessed as to his want of honesty in selling defendant's team without accounting to him for the proceeds. It really left them at liberty, if possessed of such impression, to guess at the value of the team and charge it against plaintiff in their deliberations. We think the admission of testimony concerning the alleged sale of defendant's team was error, and that it affirmatively appears from the record to have been highly prejudicial to plaintiff's rights. *Denver, S. P. & P. R. Co. v. Wilson et al.*, 12 Colo. 20, 20 Pac. 340; *City of Pueblo v. Griffin*, 10 Colo. 366, 15 Pac. 616; *Denver Tramway Co. v. Reid*, 22 Colo. 349, 45 Pac. 378; *Smuggler Union M. Co. v. Broderick*, 25 Colo. 16, 53 Pac. 169, 71 Am. St. Rep. 106; *Loloff v. Sterling*, 31 Colo. 102, 71 Pac. 1113.

Other errors are discussed in the briefs, which we do not deem necessary to notice in this opinion, owing to the conclusions we have already expressed.

We have not attempted to construe that clause in the lease, above quoted, relating to the furnishing of three horses, tools, etc. Even if that construction of the clause contended for by defendant be adopted, it would not change the result we have reached.

Both parties to this appeal appear to be men of modest means, and it is to be regretted on their account, as well as that of the state, that this matter could not have been settled after the trial below. The voluminous record and printed matter indicates an expense to both of many times the amount involved.

Upon a consideration of the entire record, we think the verdict was so manifestly against the weight of evidence as to show that it resulted from prejudice or a misunderstanding of the force and effect of evidence and the rules of law applicable thereto, and that the court erred in its rulings respecting those matters to which we have referred.

Reversed and remanded.

(24 Colo. App. 367)

# SCHON v. CROUCH & CASE.

(Court of Appeals of Colorado. June 10, 1913.  
Rehearing Denied July 14, 1913.)

## 1. MONEY RECEIVED (§ 6\*)—RIGHT OF ACTION.

Plaintiff by agreement in December, 1908, purchased from defendant a stock of meats and groceries and a safe for \$697.27, and agreed to rent the building and fixtures for one year at \$55 per month, \$25 of which amount was payable by defendant as ground rent, and was to pay one-half of the first year's rent, \$330, in advance, a total of \$1,037.27, of which \$700 was paid; the next month, plaintiff having an option to buy the building at the end of six months or a year's lease, bought it and paid defendant an amount which included the balance due to defendant on the first agreement, and assumed all future liability for rent, and, on discovering that upon the second settlement he had overlooked the payment of \$330 for advanced rent, plaintiff brought an action to recover that amount as money had and received. *Held*, that as a recovery would permit plaintiff to retain the property of defendant on payment of a sum which defendant would not willingly have accepted, and would amount to the making of a new contract for the parties, plaintiff could not recover.

[Ed. Note.—For other cases, see *Money Received*, Cent. Dig. §§ 15, 21-27; Dec. Dig. § 6.\*]

## 2. PAYMENT (§ 85\*)—RECOVERY OF PAYMENT—MISTAKE.

Nor on such facts could plaintiff recover as for money paid by mistake.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 272-281; Dec. Dig. § 85.\*]

## 3. SALES (§ 124\*)—RESCISSI0N—PLACING OTHER PARTY IN STATU QUO.

A party to a contract cannot maintain an action for its rescission where he has sold the stock of goods which he purchased, and there-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



fore could not tender it back and place the defendant in statu quo.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 303-312; Dec. Dig. § 124.\*]

Morgan, J., dissenting.

Error to District Court, Pueblo County; J. E. Rizer, Judge.

Action by Crouch & Case, a copartnership, composed of Sterling P. Crouch and Osmund Case, against Sam L. Schon. Judgment for plaintiffs, and defendant brings error. Reversed with direction to enter judgment for defendant.

McCorkle & McCorkle and James A. Park, all of Pueblo, for plaintiff in error. Adams & Gast, of Pueblo, for defendants in error.

CUNNINGHAM, P. J. On July 10, 1909, defendants in error, Crouch & Case, filed their complaint in the district court to recover from the plaintiff in error, Schon, the sum of \$330. The complaint contained two causes of action, both being based upon the same transaction. The first cause of action was for money had and received; the second for money paid by mistake. The facts involved present for our consideration a somewhat unusual case. Stated as briefly as may be, they are substantially as follows: (We shall, for convenience, treat Crouch as the sole plaintiff, and from time to time will allow his name to stand for the partnership, while the plaintiff in error, Schon, will be referred to hereinafter as the defendant.)

On or about the 21st day of December, 1908, the defendant owned a building in the city of Pueblo, which was situated upon land belonging to a third person; defendant paying rent for the lot on which his building stood. This building he occupied as a butcher shop and grocery store; he owning the fixtures therein. At about the time last aforesaid Crouch, representing the partnership of Crouch & Case, entered into an agreement with Schon, by the terms of which the former purchased from the latter the stock of meats and groceries and a safe, agreeing to pay therefor the sum of \$697.27, the value of the safe being \$40. As a part of the same agreement it was provided that Crouch should rent the building and fixtures from Schon for one year, paying therefor \$55 per month, \$25 of this sum being for ground rent which Schon was obligated to pay the owner of the lot. One-half of the first year's rent, or \$330, Crouch was to pay in advance. It will thus be seen that under the first agreement (there was a second agreement, to which we shall presently refer) Crouch was obligated to pay Schon, in cash for the stock of goods, \$657.27, for the safe \$40, for the half year's rent, cash in advance, \$330, or a total of \$1,037.27. On or about the 1st day of January, Crouch entered into possession of the stock of goods, at which time he paid

\$600 to Schon, which was in addition to \$100 paid at the time the agreement was entered into, leaving a balance due to Schon of \$327.27. It was further agreed between the parties that Crouch might buy the building at the end of six months, or at the end of the year's lease. It is not quite clear which of the two dates for the exercise of the option was intended, and no writing was entered into at the time or afterwards which embraced any of the conditions or provisions of the first agreement. There arose some slight difference between the parties at the time Crouch took possession of the store, which prevented the execution of a written agreement. On or about January 21, 1909, some three weeks after the plaintiffs had taken possession of the store, Crouch took up with Schon the matter of buying the building then without further delay. It will be well to quote from the abstract literally what occurred between the parties at this time.

Schon testified on this point as follows: "He (Crouch) came down and he says, 'Wouldn't you just as well sell this building now as to wait,' and I says, 'Yes; I will sell it now.' He says, 'What do you want for it.' I said, '\$350,' and he said if he could buy it he could turn it quicker. I says, 'You can have it; all you have got to give me is \$350 and pay the taxes and some insurance policies.' And we made out how much was coming to me, and he fussed around about \$25 ground rent. I says, 'You give me that money, and you can have it. If you don't, leave it alone.' And he agreed to give me all the money I asked, and gave it to me, and I was satisfied. He paid me at that time \$863.77. That is the amount I demanded he should pay. I would not take five cents less either. He did not have to buy the building. I did not push the building on him. He came to me and said he wanted to buy it. I told him he could have it for \$350, and if he gave me \$350 he could have the building. The \$863.77 was made up of merchandise, fixtures, and the store building." Schon testified further: "I required them to pay me all that they had agreed to pay me theretofore, and \$350 in addition for my building. That is what we agreed to. I would not sign any paper before that. I asked \$350 besides what they owed me, and I told them I would not sign any papers unless they paid it. He (Crouch) came and wanted me to sign the papers, and I would not unless he gave me \$350 in addition to what they owed me." There was no attempt on the part of Crouch to contradict this testimony. On the contrary, Crouch himself, while on the stand, testified: "At the time I paid Mr. Schon the check for \$863.77 he said he would not take less than \$863.77 to settle up with us. I don't know as he said that amount several times. We had argument over the taxes, but not over the total amount." There were but three witnesses

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



called in the case, and as we read the record, only the testimony of Crouch and Schon is really of much importance. Singular to relate, there is no substantial conflict in their testimony.

The second and last agreement took place in a law office, and at that time and place Crouch gave a check to Schon for \$863.77. This sum was made up by adding to the \$350, at which Schon had priced the building, \$161.50, the amount Crouch agreed to pay for the fixtures, one month's ground rent, \$25, and \$327.27, the balance due to Schon from Crouch on the first agreement which involved the purchase of the groceries and safe, and the payment of six months' rent in advance. As a part of the second agreement the lease of the lot was transferred by Schon to Crouch, the latter binding himself to pay the rent as it fell due to the owner of the lot, and thereby Crouch became the sole owner of the building, store fixtures, and the leasehold, in all respects the same as Schon owned them before any negotiations had been entered into between the parties; the transfer of the lease having been made with the consent of the owner of the land.

At the time of the last agreement, when the parties were in the law office, in order to arrive at the exact balance due Schon from Crouch by virtue of the first agreement, Crouch telephoned to his partner, and Schon telephoned to his wife, each apparently in the presence and hearing of the other. Each received the same information, viz., that there was a balance of \$327.27 due to Schon on the first contract. Crouch testified as follows: "I paid the \$863.77 at the law office of McCorkle. At that time an itemized statement of the amount due Mr. Schon was made up. I presume the amounts were dictated by me." The "itemized statement of the amount due Schon" evidently referred to the items which aggregated the \$863.77, for which Crouch gave his check, and included the \$327.27, the balance due on the first agreement. According to Crouch's testimony, some time in July, about six months after the second and last transaction, in going over their papers he and his partner, Case, discovered that they had paid Schon too much money; that inasmuch as they purchased the building some three weeks after they had taken possession of it, they ought, he contends, to have received credit on the purchase price of the building for the \$330 which they had paid as six months' advance rent on the building and ground. At this point it will be remembered that by the terms of the second agreement Crouch assumed all responsibility for the payment of the ground rent from and after the date of the agreement, and released Schon therefrom. Upon making this discovery Crouch consulted an attorney, made a demand upon Schon for the return of the \$330, and, meeting with no encouragement, instituted this suit against Schon.

The case was tried to the court, by agreement, without a jury. The trial judge rendered judgment in favor of the plaintiff for \$300, deducting \$30 from his demand, apparently for one month's rent of the building; the plaintiffs having occupied the same for three weeks of that month while the building remained the property of Schon. From this judgment the defendant brings the case here for review by writ of error.

[1, 2] As we read the record, there is no evidence whatever that Schon received a dollar more at the time of the last settlement than he was demanding. He was under no obligation to dispose of the building at that time. There is not a word of evidence to support the theory that there was any mistake whatever on the part of Schon. There is no evidence in the record of any mistake on the part of Crouch at the time of this agreement, save and except his own statements to that effect. But, granting that he did overlook the fact that he paid \$330 to Schon for advance rent, and that if he had bethought himself of this matter he would not have purchased the building at all unless he had received credit for that amount, it by no means follows that he (Crouch) can maintain an action either for money had and received, or money paid through mutual mistake. To permit him to do so would result, in this case, in allowing him to retain the property of Schon and pay for it a sum of money which Schon would not willingly have accepted. In other words, it amounts to the court making a contract between the parties to which one of them would never have voluntarily assented. The hardship to Crouch of requiring him to pay \$350 for a building on which he had paid the rent for six months in advance can only be relieved, if at all, by a rescission of the contract into which he inadvertently entered, through no apparent persuasion or deception on the part of Schon. The parties were dealing at arm's length; Schon had a right at any time before six months or one year, as the case may be, to place whatever value he pleased upon his building. Crouch might pay this price or wait until the option period had expired and take the building at \$350, the price stipulated in the original option agreement. He himself testified, when on the stand, that when he approached Schon with a view of buying the building, the latter told him that "he would not take less than \$863.77 to settle up with us." Not one word appears to have been said by either party about the refunding of any rent that had been paid in advance. Crouch did not rely on Schon for his information as to the balance due the latter upon the first agreement, but telephoned to his partner, who kept their books, and received the information in this manner.

Counsel for Crouch vigorously argues the foolishness of Crouch's conduct, if we assume that he voluntarily and knowingly agreed to



pay \$330 by way of advance rent on a building which he was buying and paying for and acquiring title to. This absurdity on the part of Crouch is more apparent than real. In fact, it is no more absurd than his first agreement whereby he obligated himself to pay \$30 a month rent for 12 months, or a total of \$360, on a building that could have been bought for \$350. If the option period of the original agreement expired in six months, as Crouch testifies, then all that can be said of Crouch's conduct in agreeing to pay \$350 for the building some five months before the option period expired is that he advanced \$350 five months before the time when he was obligated to pay it in order to secure title thereto. This conduct on his part is not extraordinary, in view of the fact that as a part of this second agreement, whereby this sum was so advanced, he acquired the fixtures of the store at a price satisfactory to him, which fixtures Schon had not obligated himself in the option to sell, and managed to acquire the transfer of the lease from Schon to himself, with the consent of the owner of the property, and this lease the record shows the owner had reserved the right to cancel on 60 days' notice to Schon. Presumably Crouch had, in the five weeks that intervened between the making of the first and the second contracts, had an opportunity to test to his satisfaction the profitableness of the business which he had purchased. Furthermore, Schon testified, and this testimony, like all the rest that he gave, was not contradicted, that Crouch gave at the time of the second contract, as one of his reasons for desiring to purchase the building then, that "If he could buy it he could turn it quicker," indicating that he had in mind a sale.

But it requires no speculative argument to disclose the inherent error in the judgment of the trial court which required Schon to return the plaintiff's money, which he had obtained from the plaintiff through no fraud or deceit, but as the result of a contract which he, Schon, thoroughly understood, and at the same time permitting the plaintiff to

retain the property of Schon, when there is nothing in the record to indicate that he, Schon, would have parted with his property for any less sum than that which he received for it. Indeed, the probabilities are all against the assumption that Schon would have consented, had Crouch made such a demand, to credit the advance rent which he had received for the building on the purchase price thereof.

Leaving out of the question the fixtures, which it may be assumed Crouch took over at a fair valuation, since he makes no complaint on that score, we have this situation: Schon had rented his building for one year at \$30 per month; he had in his pocket, in the form of advance rent, \$180, which had been paid to him on the building. It seems quite improbable that in order to persuade Crouch to pay to him \$350, five months in advance of the time when, if the latter saw fit to exercise the option of purchase contained in the original agreement, he would naturally expect to receive it, he, Schon, would take from his pocket this \$180 and pay it over to Crouch as a bonus. If Schon drove a sharp bargain with Crouch, it was at the time of the first transaction, when he induced him to pay \$30 a month rent on a building worth \$350, and not at the time of the second, when at most he induced Crouch to pay \$350 for his building, which he, Crouch, appeared to want, five months in advance of the option period. But no complaint is made by Crouch of the first transaction or its terms.

[3] Inasmuch as it seems improbable, if not impossible, for Crouch at this time to maintain an action for the rescission of the contract, for the reason that he has probably sold the stock of goods which he purchased, and therefore could not tender that back, and place the defendant in statu quo, the judgment of the trial court will be reversed, with directions to enter judgment for the defendant.

Reversed, with directions.

MORGAN, J., dissents.



(65 Or. 402)

**SILLIMAN v. SILLIMAN.**

(Supreme Court of Oregon. July 29, 1913.)

**1. DIVORCE (§ 252\*)—ALIMONY—STATUTE.**

Where plaintiff was granted a divorce from her husband, she was entitled under L. O. L. § 511, to have incorporated into the decree a provision granting her a one-third interest in the land which was found to be owned by the husband.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 713-715; Dec. Dig. § 252.\*]

**2. DIVORCE (§ 254\*)—ALIMONY—MODIFYING DECREE.**

An amendment of a divorce decree so as to give plaintiff one-third of her husband's realty, but not allowing \$1,000 cash alimony and \$150 suit money given in the original decree, was beyond the jurisdiction of the court when made after the term at which the decree was entered.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 718-721; Dec. Dig. § 254.\*]

**3. JUDGMENT (§ 299\*)—AMENDMENT—AUTHORITY OF COURT.**

The court may make changes in a judgment any time during the term it was entered, but after the term it is beyond its power to make any substantial change, except to correct clerical errors or to make the judgment conform to the actual decision.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 583-586; Dec. Dig. § 299.\*]

Department 1. Appeal from Circuit Court, Hood River County; W. L. Bradshaw, Judge.

Action by Annie L. Silliman against Lawrence Silliman. From a decree modifying the original decree for plaintiff, plaintiff appeals. Reversed.

This was a suit for a divorce brought by the plaintiff against the defendant. A divorce was granted to the plaintiff on March 22, 1912, and by this decree the court awarded to the plaintiff alimony amounting to \$1,000 and expense money amounting to \$150, besides costs and disbursements amounting to \$233.30.

The plaintiff's complaint alleged, that the defendant owned in fee-simple certain real property in Hood River county containing 9½ acres. In the findings of fact the trial court found that the defendant owned said real property but failed to decree one-third thereof to the plaintiff. The court gave her the \$1,000 alimony and the \$150 expense money in lieu of the one-third interest in the defendant's land.

On June 22, 1913, three months after the decree of divorce was entered, and after the adjournment of the term of the court at which said decree of divorce was rendered, the plaintiff filed a motion in the court below, asking that court so to amend said decree of divorce as to grant the plaintiff, in fee simple, an undivided one-third part of the real property of the defendant, referred to in the complaint and in the findings of fact. Said motion was heard by the court below and decided on July 18, 1912, and on that day the court made and entered an amended decree of divorce and

by such amended decree granted to the plaintiff an undivided one-third of said real property, and at the same time so amended said decree as not to allow the plaintiff said \$1,000 alimony, or any part thereof, or said sum of \$150 or any part thereof, as expense money.

In the conclusions of law filed by the court in said suit on March 22, 1912, the court below did not find that the plaintiff was entitled to any part of said real property. The record fails to show that the defendant made any motion to have the original decree modified, so as not to allow the plaintiff any alimony or expense money.

The terms of the circuit court of Hood River county, as fixed by the laws of 1911 (page 213), began on the second Monday in January, first Monday in April, July, and October, annually. The original decree was entered before the beginning of the April term, and the motion for the amendment of the decree was filed after the April term, and the amended decree was granted and entered during the July term, 1912. The plaintiff has appealed from that part of the amended decree of divorce which so modified the original decree that the plaintiff was not entitled to any part of said alimony of \$1,000 or any part of said \$150 allowed in the original decree as "suit money."

E. H. Hartwig, of Hood River, and S. H. Haines, of Portland, for appellant. A. J. Derby, of Hood River, and Bennett & Sinnott, of The Dalles, for respondent.

RAMSEY, J. (after stating the facts as above). [1] The plaintiff was entitled to a decree for an undivided one-third of the defendant's real property referred to in the complaint and in the findings of fact. Section 511, L. O. L.; Wetmore v. Wetmore, 5 Or. 469; Rees v. Rees, 7 Or. 47; Houston v. Timmerman, 17 Or. 506, 21 Pac. 1037, 4 L. R. A. 716, 11 Am. St. Rep. 848. When the original decree was entered, a provision granting her said one-third interest in the defendant's land should have been incorporated into the decree. The trial court's conclusions of law failed to find that she was entitled to any part of the land. In the amended decree the court stated that she was given \$1,000 alimony and \$150 as "suit money" in lieu of the one-third of the land, but the original decree is silent on that point.

[2] The plaintiff brought this appeal and asks that said portion of the amended decree which so modifies the original decree as not to allow the plaintiff any alimony or any "suit money" be reversed, and claims that the court below erred in so modifying said decree.

Section 514, L. O. L., authorizes the court, at any time after entering a decree of di-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



voice, to change or set aside any portion of the decree that provides for the care and custody of minor children or for their education or nurture or for the maintenance of either party. This power may be exercised at any time after a decree of divorce is granted on the motion of either party. But this section requires a motion to be filed, asking the court to make the change desired. There seems to have been no motion filed in this case by the defendant asking to have the decree modified so as not to allow the alimony, etc. But counsel for the defendant contends that as the court below allowed alimony and the "suit money" in lieu of the one-third interest in the defendant's realty, as the amended decree states, it was the duty of the court, when changing the original decree so as to grant the plaintiff one-third of the defendant's land, so to modify the original decree as not to allow the plaintiff any alimony or any "suit money." This position might be true, if the court had had jurisdiction to make the change in the decree in relation to the one-third interest in the land, but the court was without jurisdiction to change its decree in any respect.

The original decree was made and entered on March 22, 1912. Another regular term of that court began on the first Monday in April, 1912, and the motion asking for the change in the decree was not filed until June 22, 1912, and the amended decree was not entered until July 18, 1912. Another regular term of that court began on the first Monday in July, 1912. It will be observed that the original decree was made during the January term, and that the motion for a change in the decree was not made or filed at that term nor until after the April term had probably closed. The records show also that the original decree was, when entered, in all respects what the court intended it to be. This motion was not based on any error of the clerk in entering the decree or to make the decree to be entered to conform to the decree actually made by the court. The object of the motion was to have a new paragraph added to the decree, granting to the plaintiff one-third of the defendant's real property, which the court, when the original decree was entered, did not intend to grant. That the court did not intend to grant the plaintiff any interest in the defendant's land, when the original decree was rendered, is shown by the conclusions of law then filed and by a recital of the amended decree.

[3] The law is settled that a court may make changes in a judgment or a decree at any time during the term at which it was entered. 1 Black on Judgment (2d Ed.) § 153. It is equally well settled that, after the expiration of the term of court at which a judgment or a decree was rendered, it is not within the power of the court to amend it in any matter of substance or by adding a new clause affecting the rights of the

parties. 1 Black on Judgment (2d Ed.) § 153; Grover v. Hawthorne, 62 Or. 69, 75, 121 Pac. 804; Farmers' Loan Co. v. O. P. R. R., 28 Or. 66, 40 Pac. 1089; Lombard v. Wade, 37 Or. 432, 61 Pac. 856; 23 Cyc. pp. 861, 862. But it is within the power of the court, after the adjournment of the term, to correct clerical errors or misprisions of the clerk in entering a judgment or a decree so as to make the judgment or the decree entered conform to the judgment or the decree actually rendered. Under this power to make corrections, however, the power of the court is limited to including in the reformed judgment or decree provisions that were included in the judgment or decree actually rendered, but omitted from the entry by misprision of the clerk. 1 Black on Judgments, §§ 156, 157. Mr. Black, in section 156, supra, says: "Hence, if anything has been omitted from the judgment which is necessarily or properly a part of it, and which was intended and understood to be a part of it, but failed to be incorporated in it through the negligence or inadvertence of the court or the clerk, then the omission may be supplied by an amendment after the term. If, on the other hand, the proposed addition is a mere afterthought and formed no part of the judgment originally intended and pronounced, it cannot be brought in by way of amendment."

The amendment of the decree in this case, so as to grant the plaintiff part of the defendant's land, was an afterthought, and the court was without jurisdiction to allow it, after the adjournment of the term, and hence the court could not, as an incident to that amendment, amend the decree so as to allow the plaintiff no alimony or "suit money"; the defendant not having presented any motion or petition for such modification. We do not find it necessary, however, to decide whether, if the court had had jurisdiction to amend the decree, so as to allow the plaintiff part of defendant's land, it could, as an incident to that amendment, have amended the decree also so as not to allow the plaintiff alimony or "suit money," without a motion asking for such modification. But the change in the decree, so as to grant the plaintiff part of the defendant's land, having been made without jurisdiction, the other change could not be made *as an incident* to that modification even if it could have been so made, if the change as to the land had been legally granted.

We find that the attempted amendment of the original decree, so as not to allow the plaintiff the \$1,000 as alimony or \$150 as "suit money," was made without jurisdiction, and that it is void. The amended decree, so far as it changed the original decree, so as not to allow the plaintiff said alimony and said "suit money," is reversed and set aside. We do not reverse that part of the amended decree which attempts to allow



one-third of the defendant's land to the plaintiff for the reason that the defendant has not appealed therefrom. The decree of this court reverses that part of said amended decree in regard to alimony and "suit money" without affirming any part of said amended decree, as the whole amended decree was rendered without jurisdiction or authority. Neither party will recover costs or disbursements in this court.

McBRIDE, C. J., and MOORE and BURNETT, JJ., concur.

(66 Or. 38)

**ASHLEY & RUMMELIN v. HIMMELFARB.**

(Supreme Court of Oregon. July 15, 1913.)

**1. BILLS AND NOTES (§ 408\*)—PRESENTATION AND PROTEST.**

Protest can only be made in the case of a negotiable instrument which has been duly presented and payment refused.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1019-1021, 1113-1128; Dec. Dig. § 408.\*]

**2. BILLS AND NOTES (§ 408\*)—PRESENTATION AND PROTEST—NECESSITY OF PROTEST.**

Where defendant's liability to plaintiff grew out of his indorsement of a draft and his request to plaintiff to pay the amount of it to a person supposed to be but who was not the payee, and not by reason of the dishonor of the draft by the drawer to whom it was not presented for payment, protest was not required.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1019-1021, 1113-1128; Dec. Dig. § 408.\*]

**3. WITNESSES (§ 286\*)—EXAMINATION—RIGHT TO CROSS-EXAMINE.**

A party has the right to cross-examine his adversary's witnesses and rebut anything not before brought out.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 907-912, 914-920, 922; Dec. Dig. § 286.\*]

**4. APPEAL AND ERROR (§ 1048\*)—HARMLESS ERROR—EXAMINATION OF WITNESSES.**

Under Const. art. 7, § 3, as amended (see Laws 1911, p. 7), providing that, if the Supreme Court on consideration of all the matters submitted shall be of the opinion that the judgment excepted to was such as should have been rendered in the case, it shall be affirmed, the court, where it is satisfied from all the evidence that neither cross-examination of plaintiff nor the rebuttal of the evidence of a witness for plaintiff could have changed the result so that the judgment was such as should have been rendered notwithstanding any errors at the trial, the judgment will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.\*]

Department 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Ashley & Rummelin against M. S. Himmelfarb. Judgment for plaintiff, and defendant appeals. Affirmed.

The action was to recover upon a promissory note. The answer denies the allegations of the complaint and affirmatively alleges facts seeking to show that defendant

took one Dow to plaintiff's bank to have a draft, in the sum of \$845, cashed; said draft being drawn on the Everett Bank of Everett, Pa. Also that plaintiff did not know Dow, and had defendant indorse the draft; and, when the draft was returned unpaid because Dow was not the payee thereon, the plaintiff induced defendant to sign the note sued on for the amount advanced by plaintiff for the draft; defendant contending that he did not know the effect of his indorsement, nor that the paper he signed later was a note. The reply denies the new matter in the answer. The court directed a verdict for the plaintiff for the amount of the note.

Maurice Seitz, of Portland (Seitz & Seitz, of Portland, on the brief), for appellant. W. S. Hufford, of Portland, for respondeent.

EAKIN, J. (after stating the facts as above). [1] It is first contended that defendant was not liable on his indorsement of the draft because it was not protested for nonpayment. This objection is without merit as protest can be made only in the case of a negotiable instrument which has been duly presented and payments refused.

[2] There is nothing in the record to show the form of the draft or whether it is negotiable; but in no event was protest required in the case of this draft because it was not duly presented for payment, and a refusal to pay it was not a dishonor thereof, as it was not presented by the payee nor his indorsee. Defendant's liability to plaintiff grew out of his indorsement of the draft to the plaintiff and his request to plaintiff to pay the amount of it to Dow, and not by reason of the dishonor of the draft by the drawer, nor did it depend upon presentment and protest thereof.

The only other assignments of error relate to the refusal of the court to permit cross-examination of the witness Ashley, called by plaintiff in rebuttal, and to permit defendant to rebut the evidence of witness Constable, called by plaintiff at the commencement of his case, but confessedly evidence in rebuttal, and in directing a verdict. No offer was made showing what he expected to bring out by the cross-examination of Ashley or by the rebuttal of the evidence of the witness Constable. Constable, who wanted to get away at once, was the first witness called by the plaintiff with defendant's consent; the testimony being introduced only as rebuttal. Defendant testified that he took Dow, who was seeking to cash the draft, to Ashley, cashier of the plaintiff, and asked him to cash the draft for Dow; that Mr. Ashley, after some questioning as to Dow's identity, asked defendant how long he had known him, and defendant answered nearly two years, but that he did not know his name until he saw the draft; and that Ashley asked defendant to sign the draft with Dow, which he did.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



He says in his answer that, two or three days after the draft was cashed by plaintiff, defendant found out that Dow had been known by the name of Morgan, and he notified Ashley of that fact; and that when he signed the note he was greatly excited, indicating that he realized his liability in the matter. Ashley was recalled in rebuttal and cross-examined at some length by defendant's counsel, when the court adjourned for the day. In the morning, on reconvening, the judge announced that he had made up his mind that there was no case to be submitted to the jury, and that he would direct a verdict for plaintiff. Defendant stated that he desired to finish his cross-examination of Ashley. The court replied: "I don't think you are entitled to that; you have made out your case and rested; and if there was anything you wanted to ask him you should have called him." And the same ruling was made to the rebuttal of the evidence of the witness Constable, who was called before defendant was on the stand. Thus it appears that the court was of the opinion that neither the cross-examination of Ashley nor the rebuttal of the evidence of Constable could add to the merits of the defense or weaken the plaintiff's case on the proof.

[3, 4] Although a party has a right to cross-examine the adversary's witnesses and rebut anything not before brought out, yet in this case we are satisfied, after reading the evidence, which is all before us, that such examination could not have changed the result. It is provided by section 3, art. 7, of the Constitution, as amended (see Laws 1911, p. 7): "If the Supreme Court shall be of the opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed." And we are of the opinion that the verdict and judgment were such as should have been rendered in the case, notwithstanding any errors that may have been committed at the trial.

The judgment is affirmed.

McBRIDE, C. J., and BEAN and McNARY, JJ., concur.

(66 Or. 208)

GIBBONS v. HOOD RIVER IRR.  
DIST. et al.

(Supreme Court of Oregon. July 29, 1913.)

1. CONSTITUTIONAL LAW (§ 137\*) — WATERS AND WATER COURSES (§ 216\*)—OBLIGATION OF CONTRACTS—IMPAIRMENT.

L. O. L. §§ 6167-6217, provides for the government and organization of irrigation districts, including the assessment and collection of taxes sufficient to discharge the obligations of the district, and made payable on November 1st of each year, and made delinquent on the last Monday in December. Under this law bonds were issued by the irrigation district with interest coupons payable, as required by section 6182, January 1st and July 1st. Laws 1913, p.

382, amends several sections of chapter 7, among others section 6192, and provides that, after the board has completed the equalization of the assessment, it shall certify a copy thereof to the county clerk, who shall enter the same upon the assessment roll of the county, and that it shall be collected in the same manner as other taxes, the result of which would be that funds would not be available for January interest on the bonds until April, and for the July interest until November. *Held*, that since the amendment of 1913 would impair the irrigation company's contract with the bondholders, it cannot apply to the bonds and other obligations existing at the time of its enactment; and hence a peremptory writ of mandamus will issue to compel the officers of the irrigation district to make the levy and assessment according to the method prescribed prior to the amendment of 1913.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 354; Dec. Dig. § 137; Waters and Water Courses, Cent. Dig. § 306; Dec. Dig. § 216.\*]

2. STATUTES (§ 64\*)—EFFECT OF PARTIAL INVALIDITY.

As Laws 1913, p. 382, so amends L. O. L. c. 7 (sections 6167-6217), as to change the whole method of the assessment and collection of taxes for irrigation districts, and as the efficacy of each section depends, more or less, upon the others, no part of the Laws of 1913 can be given effect without the whole.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 196; Dec. Dig. § 64.\*]

In Banc. Mandamus by J. J. Gibbons against the Hood River Irrigation District and others to compel defendants to levy an assessment according to the method prescribed by chapter 7, L. O. L. Peremptory writ issued.

This cause is presented upon an alternative writ of mandamus, issued out of this court. After reciting the facts, the writ directs that the defendants be commanded to make the assessment and taxation of the lands lying within the defendant irrigation district according to the provisions of chapter 7, tit. 41, L. O. L., being the act of the legislative assembly of 1895, entitled: "To provide for the organization and government of irrigation districts," etc. Laws of 1895, p. 13, as amended by the Laws of 1909, p. 144, and by the Laws of 1911, p. 378. From the writ it appears that the Legislature of 1913 amended certain sections and repealed others of said chapter 7, under which the defendants are threatening to and will act unless otherwise directed by this court. An answer to the writ was filed by the defendants, admitting most of the facts alleged and denying others. However, the denials raise only issues of law as to the application of the amendment of 1913 to the bond issues of the defendant company which were made and issued under said chapter 7 prior to the act of 1913, which amounts to a demurrer to the writ; and the only question for our consideration is whether the later amendment of portions of chapter 7 should govern defendant company and its officers in the assessment, levy, and collection of the taxes to meet its obligations, especially the interest payment upon the said bonds, made due and payable as provided in section 6183 of said

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



chapter 7; the contention of the plaintiff in the writ being that the effect of the amendment of 1913 impairs the obligations of the defendant company under its contract with its bondholders.

George R. Wilbur, of Hood River, for plaintiff. A. J. Derby, of Hood River, for defendants.

EAKIN, J. (after stating the facts as above). [1] The act of 1913 (Laws of 1913, p. 382) amends sections 6170, 6186, 6190, 6191, 6192, 6202, and 6212 of said chapter 7, and repeals sections that are rendered unnecessary or inoperative by the amendment. The amendment of section 6170 only abolishes or eliminates the two offices of assessor and collector, whose duty it is to assess and collect, respectively, the tax for payment of the obligations of the defendant company. The amendment of section 6186 imposes upon the board of directors the duty before devolving upon the assessor, namely, the duty of preparing a budget of the financial needs of the defendant company for the following year, which shall constitute an assessment upon all land in the district, and requires it to apportion the assessment to the land in proportion to the number of acres of irrigable land in the district. It also changes the method of assessing the amount to be raised, namely, prior to the amendment the assessor is required to view and assess upon the lands in the district a charge sufficient to pay all charges and obligations incurred by virtue of any contract in proportion to the benefits derived from the construction of the irrigation project, while the amendment directs the board to assess the amount needed proportionately, according to the acreage of all land that is capable of irrigation; but the propriety of such a change is a legislative question with which we have nothing to do, and, standing alone, these changes have no bearing upon the obligations of the bonds, and the amendments of sections 6190, 6191, relate only to the equalization of the assessment, and by themselves do not affect the obligations of the defendant company. The principal contention of plaintiff is that the amendment of section 6192 impairs the obligation of the contract of defendants' bonds. The original of this section, together with section 6195, related to the tax levy and the collection of it by the collector, the amount being made due and payable on November 1st of each year, and is made delinquent on the last Monday in December. The following sections, which are repealed by the act of 1913, relate to the enforced collection of the assessment by sale of the land, redemption, etc. Therefore, if section 6192 is inoperative as to the defendants' bonds, the repeal of the subsequent sections must also be inoperative. Section 6192, as amended by the act of 1913, provides that after the board

has completed the equalization of the assessment it shall certify a copy of it to the county clerk, who shall enter the same upon the assessment roll of the county, and that it shall be collected and accounted for in the same manner as other taxes. Therefore the funds would not be available for the payment of the January interest on defendants' bonds until after the 1st of April, and the same result would obtain as to the July payment, as the second payment of taxes is not due until October, and would not be available until that time for the July payment of interest, which we see would have the effect to impair the defendant company's contract with the bondholders. Therefore, the amendment cannot apply to obligations existing at the time of the enactment. *Strand v. Griffith*, 63 Wash. 334, 115 Pac. 512.

[2] And as all amendments effected by the act were made with the intention of changing the method of the assessment and collection of the tax, and the efficacy of each section is more or less dependent upon the others, we find that no part of the act of 1913 can be given effect without the whole. The amendment cannot apply to obligations of irrigation districts, organized and bonded under the act of 1895, prior to said amendment, if such obligations would be affected thereby. As all of such bonds are required by section 6182 to be dated January 1st or July 1st, and the interest coupons are due and payable on those dates, respectively, the bondholders are entitled to have these terms of the bonds observed. Therefore the act of 1913 under consideration can have no application to the defendant the Hood River Irrigation District, nor to its method of assessing and collecting its taxes, and plaintiff is entitled to the peremptory writ of mandamus as prayed. It is so ordered.

(66 Or. 353)

#### RICHARDSON v. INVESTMENT CO.

(Supreme Court of Oregon. July 15, 1913.)

#### 1. APPEAL AND ERROR (§ 1010\*)—FINDINGS—REVIEW.

A finding in an action on a contract tried to the court that plaintiff had performed the work in a thorough and workmanlike manner cannot be set aside on appeal unless it affirmatively appeared that there was no evidence to sustain it under Const. art. 7, § 3, providing that the findings of the court on such a trial are tantamount to a verdict, and cannot be disturbed unless the Supreme Court can affirmatively say there is no evidence to sustain it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.\*]

#### 2. CONTRACTS (§ 295\*)—PERFORMANCE—EVIDENCE.

Where plaintiff contracted to lay a cement sidewalk with a 4-inch concrete base and a ¾-inch wearing surface, and the proof showed without dispute that the concrete base was only from 3 to 3½ inches thick, and that the wearing surface was less than ¾ inch, a finding that plaintiff had performed his contract in a thor-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ough and workmanlike manner could not be sustained under L. O. L. §§ 725, 726, providing that evidence shall correspond with the substance of the material allegations, and that each party shall prove his own affirmative allegations.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1353-1356, 1362; Dec. Dig. § 295.\*]

**3. CONTRACTS (§ 346\*)—EXPRESS CONTRACT—ACTION—QUANTUM MERUIT.**

Where plaintiff declared on an express contract and alleged performance, the burden was on him to prove substantial performance, and on failing to do so he could not recover on a quantum meruit.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1714, 1718-1751; Dec. Dig. § 346.\*]

**4. INTEREST (§ 39\*) — JUDGMENT — UNLIQUIDATED DAMAGES.**

L. O. L. § 6028, provides that the rate of interest in the state shall be 6 per cent. per annum on all moneys after the same becomes due on judgment and decrees for the payment of money on moneys received to the use of another and retained beyond a reasonable time without the owner's consent, express or implied, or on money due on the settlement of matured accounts from the day the balance is ascertained, etc. *Held* that, where the plaintiff sued for the balance of the contract price of certain sidewalk construction work, he could not recover interest prior to judgment.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 83-89; Dec. Dig. § 39.\*]

Department 1. Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action by A. R. Richardson against the Investment Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The plaintiff declared on an express contract whereby he was to perform labor and furnish material in building a cement sidewalk at a specified price stated in the complaint. He alleged complete performance of the agreement on his part, and claimed a balance still due and owing to him from the defendant. The answer denied the contract except as stated, and utterly denied the performance of the same by the plaintiff and the balance due as alleged in the complaint. The answer alleged that the contract consisted in the acceptance by the defendant of a written offer made by the plaintiff, of which here follows a copy: "Portland, Oregon, Dec. 23, 1908. Mr. E. Quackenbush, Pres. Investment Co., Portland, Ore.—Dear Sir: I hereby make the following bid for excavation and laying cement sidewalks with corners, on Vancouver avenue (west side) between Killingsworth avenue and Holman street: Per lineal foot of sidewalk, 6 feet wide, 4-inch concrete base with  $\frac{3}{4}$ -inch wearing surface, 65 cents. Curbing at corners to be at the rate of 20 cents per cubic foot. Surface at corners, if wanted, with 4-inch base at angles, 11 cents per square foot. Cement to be used exclusively to be White Bros.' best quality cement, properly mixed and laid in a thorough and workman-

like manner. Yours respectfully, A. R. Richardson." The defendant charged that the plaintiff had failed to comply with the terms of his stipulation, in that the material was not properly mixed; that the sidewalk was not laid in a workmanlike manner; that the foundation is "porous, not of the thickness required, and not solid or sufficiently hard to make a proper foundation for said sidewalk." The plaintiff claims damages for the breach of the contract alleged in the sum of \$1,800. The new matter of the answer was traversed by the reply. The action was heard by the court without a jury, and findings were made substantially according to the allegations of the complaint, followed by a judgment for the plaintiff rendered March 21, 1912, for the full amount claimed by the plaintiff, with interest thereon from July 10, 1911, which last-named date seems to be that on which the findings were filed. The defendant appeals.

John Van Zante, of Portland (A. H. Tanner, of Portland, on the brief), for appellant. E. B. Watson, of Portland (Edward & A. R. Mendenhall, of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). Two questions are presented by the appeal: (1) Was the testimony sufficient to authorize the court to make a finding of fact to the effect that the plaintiff had fully performed the contract declared upon? (2) Was the allowance of interest as stated authorized by law?

[1] Although denied by the pleadings, it was admitted at the trial that the contract was made and the work done upon the written offer and acceptance alleged in the answer. That instrument is silent as to the material to be used except the kind of cement required. There is a marked dispute in the testimony as to whether the work was done in a "thorough and workmanlike manner." Hence, the finding of the circuit court on that point cannot be disturbed; for, under Const. art. 7, § 3, and the precedents established in this state, the findings of the court are tantamount to a verdict, and cannot be disturbed unless this court can affirmatively say there is no evidence to sustain them.

[2] It is specified in the contract, however, that the sidewalk must have a 4-inch concrete base with a  $\frac{3}{4}$ -inch wearing surface. It is admitted in the testimony by the plaintiff himself, and there is no dispute anywhere in the evidence on that point, that the concrete base of the sidewalk in question was only about 3 to 3 $\frac{1}{2}$  inches in thickness, and that the wearing surface was of less thickness than that specified in the bid. It is said that "evidence shall correspond with the substance of the material allegations," and that "each party shall prove his own

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



affirmative allegations." L. O. L. §§ 725, 726.

[3] The plaintiff, having declared upon an express contract and alleged performance thereof, must prove his allegations. This is required by the Code, and accords with the rule as laid down in *Hannan v. Greenfield*, 36 Or. 97, 58 Pac. 888; *Young v. Stickney*, 46 Or. 101, 79 Pac. 845. Having contracted to build a walk with a 4-inch base, and having alleged complete performance of the contract, the plaintiff, if he would recover under such a complaint, must prove that he built a sidewalk with a 4-inch base. Something was said in the testimony about a custom prevailing in Portland to build concrete sidewalks in forms composed of 2 by 4 scantling sized to 2 by 3¾ inches, tamping down the base even below the top so as to receive the surface dressing within the form. Custom, however, cannot be allowed to contradict the plain terms of a contract, though it is sometimes used as a canon of interpretation for provisions otherwise obscure.

The sidewalk may have been a good one. It may be of value to the defendant, and under proper allegations on the quantum meruit the plaintiff might recover the reasonable value of the services performed and materials furnished, as ruled in such cases as *Gove v. Island City M. & M. Co.*, 19 Or. 363, 24 Pac. 521, and authorities there cited. The plaintiff's case, however, is not so laid. A careful reading of the testimony, the whole of which is made part of the bill of exceptions, shows that in the respect mentioned there was no testimony to sustain the finding of the court to the effect that the plaintiff had fully performed his contract.

[4] The court was in error in allowing interest on the plaintiff's demand antecedent to the date of the judgment. As said by Mr. Justice Bean in *Sorenson v. Oregon Power Co.*, 47 Or. 24, 34, 82 Pac. 10, 12: "The court was in error, however, in allowing interest on the verdict from its date to the rendition of judgment. In the absence of a contract to pay interest, the right to exact it must be found in the statute, \* \* \* and the statute makes no provision for interest on unliquidated damages arising out of a tort until made certain by judgment." It is said in section 6028, L. O. L., that: "The rate of interest in this state shall be six per centum per annum, and no more, on all moneys after the same become due; on judgments and decrees for the payment of money; on money received to the use of another and retained beyond a reasonable time without the owner's consent, express or implied, or on money due upon the settlement of matured accounts from the day the balance is ascertained; on money due or to become due where there is a contract to pay interest and no rate specified. \* \* \*" It is thus apparent that the statute allows interest only on certain specified demands. It

is not in any and every case without discrimination where money should be paid by one person to another that interest is allowed against the tardy debtor. The statute prescribes the instances in which interest is allowed in the absence of an agreement to pay it; and, if one would recover interest, he must show that his claim comes within the provisions of the statute. If the Legislature had intended to allow interest on all manner of monetary demands, it would have stopped short, in the section quoted, with the declaration that "the rate of interest in this state shall be six per centum per annum, and no more, on all moneys after the same become due." The specifications in the subsequent clauses of the section operate to exclude all other instances, else their mention were useless. In this case, until judgment was rendered, the conditions of the statute were not fulfilled authorizing the allowance of interest.

The judgment of the circuit court is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

MCBRIDE, C. J., and MOORE and RAMSEY, JJ., concur.

(66 Or. 213)

EQUI et al. v. OLCOTT, Secretary of State. (Supreme Court of Oregon. July 29, 1913.)

1. STATUTES (§ 35½\*)—INITIATIVE—AUTHORITY TO SUBMIT.

Const. art. 4, § 1, after reserving to the people the right of the initiative, provides, among other things, that petitions therefor shall be filed with the Secretary of State, and, in submitting the same to the people, he and all other officers shall be guided by the general laws until legislation shall be specially provided therefor. Act Feb. 28, 1913 (Laws 1913, p. 620), provides for a special election on the first Tuesday after the first Monday in November, at which time measures passed by the Twenty-Seventh Legislative Assembly upon which the referendum may be invoked shall be submitted to the people. *Held*, that as the special act of February 28, 1913, contained no allusion to initiative measures, it does not apply to the initiative, and the Secretary of State is not authorized to submit an initiative measure in the election provided for by that act, but was governed by the general laws, as provided by the Constitution.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 35½.\*]

2. ELECTIONS (§ 29\*)—HOLDING ELECTIONS—AUTHORITY.

Unless there is authority of law for an election it cannot be held.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 19; Dec. Dig. § 29.\*]

3. MANDAMUS (§ 160\*)—WRIT—CONCLUSIONS.

Where mandamus is sought to compel the Secretary of State to file a petition for the initiative, and all that appeared in the writ as to whether the petition complied with the law was, "Which said initiative petition and measure is alleged to be in form in substantial compliance with the provisions of the Constitution and laws of Oregon, governing initiative petitions

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rev'r Indexes



and the filing thereof, and voting on measures included therein," as this was but a conclusion, it was not sufficient to show that the petition was in such form as to require the Secretary of State to file the same.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 326-335; Dec. Dig. § 160.\*]

In Banc. Original petition for mandamus by Marie D. Equi and another against Ben W. Olcott, as Secretary of State, to compel the filing of a petition for the initiative and its submission to the people. Demurrer to alternative writ sustained.

W. S. U'Ren, of Oregon City, for plaintiffs.  
A. M. Crawford, Atty. Gen., for defendant.

**BURNETT, J.** By the act of February 28, 1913 (*Laws* 1913, p. 620), the Legislative Assembly passed a law, providing that: "There shall be held a special election in the several voting precincts of this state on the first Tuesday after the first Monday in November, 1913. All measures passed by the Twenty-Seventh Legislative Assembly of the state of Oregon upon which the referendum may be invoked shall be submitted to the people for their approval or rejection at such special election." The plaintiffs have sued out of this court an original alternative writ of mandamus, requiring the defendant, as Secretary of State, to forthwith receive and file in his office an initiative petition, therein described, for a "Woman Wageworker's Eight-Hour Law," and commanding him to submit the proposed law to the legal voters of the state of Oregon for their approval or rejection at the special election above mentioned, or show cause to the contrary. The defendant has demurred generally to the writ.

Two questions are involved. The principal one pressed upon our attention is whether or not the proposed law shall be submitted to the electorate at the special election mentioned. The other is whether or not the Secretary shall be compelled to file the petition on the showing made in the writ.

Affecting the first question, section 1, article 4, of the Oregon Constitution says that: "The legislative authority of the state shall be vested in a legislative assembly, consisting of a senate and house of representatives, but the people reserve to themselves power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the legislative assembly. \* \* \* The first power reserved by the people is the initiative, and not more than eight per cent. of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon. \* \* \* Petitions and orders for the initiative and for the referendum shall be filed with the Secretary of State,

and, in submitting the same to the people, he and all other officers shall be guided by the general laws and the act submitting this amendment, until legislation shall be especially provided therefor."

Legislation other than the act of February 28, 1913, has been provided by general laws for the guidance of public officers in relation to the initiative process, and these laws have been in operation for a number of years. The act authorizing a special election to be held in November, 1913, mentioned above, does not contain any allusion to initiative measures. It does not purport to repeal or amend any previous legislation on the subject of the initiative. It is manifest that the Secretary of State, as directed by the people in its Constitution already quoted, must be guided by the general laws on the subject involved. In the face of this mandate of the people, that officer cannot find any justification in the special act mentioned authorizing him to submit any initiative measure to the people during the present year. It is well settled that unless there is authority of law for an election it cannot be held. *State ex rel. v. Simon*, 20 Or. 365, 28 Pac. 170; *Andrews v. Nell*, 61 Or. 471, 120 Pac. 883, 123 Pac. 32. Of course under the sanction of the initiative and referendum system the people have a right to legislate independent of the Legislative Assembly, except as they themselves by their own Constitution have set metes and bounds upon this reserved power. The fallacy of the plaintiffs' position lies in the assumption that the fraction of 8 per cent. of the voters said to have signed the initiative petition has the right to order the submission of their measure to the people at large at a special election called under a statute which makes no mention of initiative measures. It would be but a step further for the 8 per cent. minority to assert that it could call an election at such time as it might choose, irrespective of the statutory and constitutional provisions on that subject. Indeed, the people have reserved to themselves the power to make laws independent of the Legislative Assembly; but they have annexed to this reservation of power such directions to their Secretary of State and other officers as will prevent in some measure the too frequent use of the initiative process. In short, as plainly declared by the people in the Constitution "the Secretary of State shall be guided by the general laws" in matters of this kind. He cannot rightfully enlarge the provisions of the special act of February 28, 1913, to include matters not therein specified, and this court has no power to direct him so to do, or to violate the express mandate of the people embodied in the Constitution, requiring him to operate under the general laws.

Upon the second question we note that section 3472 L. O. L., as amended by chapter 359

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



of the Laws of 1913, prescribes many conditions which must be observed in preparing a petition for the initiative. Among the details specified are the following: Every sheet of petitioners' signatures shall be attached to a full and correct copy of the measure so proposed by initiative petition; not more than 20 signatures on one sheet shall be counted; all petitions for the initiative and sheets for signatures shall be printed on a good quality of bond or ledger paper on pages  $8\frac{1}{2}$  inches in width by 13 inches in length, with a margin of  $1\frac{1}{4}$  inches at the top of binding. Whether or not the petition in question complied with these and other specifications of the law does not appear in the writ. All that is said upon that subject is this: "Which said initiative petition and measure is alleged to be in form in substantial compliance with the provisions of the Constitution and laws of Oregon, governing initiative petitions and the filing thereof, and voting on measures included therein." This is a mere conclusion of law and states no fact by which the court can determine whether or not the petition was in such form as to require the Secretary of State to file the same. If the initiative petition did, in fact, comply with the requirements of the law on that subject, was signed by the proper number of legal voters, and the facts were well stated in the writ, we might properly overrule the demurrer so far as to require the defendant to file the petition. But it is clear that in no event can the court rightly compel him to submit the measure to the people at a special election called for an entirely different purpose.

The demurrer must therefore be sustained.

(66 Or. 340)

In re S. MARKS & CO.'S ESTATE.

(Supreme Court of Oregon. Sept. 9, 1913.)

**1. EXECUTORS AND ADMINISTRATORS (§ 35\*)—PARTNERSHIP ADMINISTRATORS—REMOVAL.**

The county court has power to remove a partnership administrator if he neglects to file his semiannual accounts or if there is reasonable ground to believe that his acts have been in violation of his trust.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 227-262; Dec. Dig. § 35.\*]

**2. EXECUTORS AND ADMINISTRATORS (§ 1\*)—SETTLEMENT OF ESTATE—DELAY.**

The purpose of statutory proceedings for the administration of estates is to marshal the assets of the estate in order that the debts may be promptly paid and the remaining assets promptly distributed to those entitled thereto, and county courts should require an expeditious compliance with the statute.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §  $1\frac{1}{2}$ ; Dec. Dig. § 1.\*]

**3. EXECUTORS AND ADMINISTRATORS (§ 93\*)—POWERS—CARRYING ON BUSINESS OF DECEASED.**

Where heirs and devisees desire to continue the business of their ancestor undivided, they should first have the estate closed as provided by law and take over the business individually; it not being the affair of an administrator to continue the business as a part of the administration, and the county court having no power to authorize or permit him to do so.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 407, 408; Dec. Dig. § 93.\*]

**4. EXECUTORS AND ADMINISTRATORS (§ 35\*)—PARTNERSHIP ADMINISTRATORS—REMOVAL.**

A delay of 20 years in the administration of a partnership estate, during which the administrator carried on the business without any order of the county court and against the will and protest of the heirs of the deceased partner, was a sufficient violation of the statute and abuse of trust to authorize his removal by the county court on its own motion.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 227-262; Dec. Dig. § 35.\*]

**5. EXECUTORS AND ADMINISTRATORS (§ 18\*)—PARTNERSHIP ADMINISTRATORS—DISQUALIFICATION.**

A person whose personal interests are so adverse to the interests of an estate and those entitled to its distribution that both cannot be fairly represented by the same person is not a proper person to administer the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 60-70; Dec. Dig. § 18.\*]

**6. EXECUTORS AND ADMINISTRATORS (§ 35\*)—PROBATE COURT—DISCRETION.**

County courts are vested with large discretionary powers over the conduct of executors and administrators, and its discretion will not be interfered with on appeal unless plainly required by some principle of law.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 227-262; Dec. Dig. § 35.\*]

Department 2. Appeal from Circuit Court, Douglas County; John S. Coke, Judge.

Petition for the removal of H. Wollenberg, as administrator de bonis non of the partnership estate of S. Marks & Company. From a decree removing the administrator, he appeals. Affirmed.

This proceeding was commenced in the county court of Douglas county by the petition of Rachel De Bow, Sura Hartbrod, Clara Marks, administratrix of the estate of Adolph C. Marks, deceased, and Meier Marks, as successors to the interest of Zulkind Krotki, an heir of S. Marks, deceased, for the removal of H. Wollenberg as administrator of the above-entitled estate. The dealings of S. Marks and Asher Marks, constituting the firm of S. Marks & Co., involved here, have a very long and complicated history, beginning in 1853. The name of S. Marks, deceased, was originally Samuel Krotki. He came to this country early in the fifties, and engaged in the mercantile business in Roseburg. A little later he took into partner-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ship with him his nephew, Asher Marks, as S. Marks & Co., and that partnership continued until the death of Samuel Marks, which occurred September 20, 1893. On October 9, 1893, after the death of S. Marks, Asher Marks was appointed administrator of the estate of S. Marks, valued at about \$12,000, and of the partnership of S. Marks & Co. His undertaking as such for both estates was in the sum of \$150,000, upon which H. Wollenberg is one of the sureties. On August 31, 1899, Asher Marks died, leaving a will in which Herman Marks, his nephew, is his principal devisee and sole executor thereof. At the time of his death Asher Marks had not fully administered the estate of S. Marks & Co., nor made a final settlement of the estate. On September 29, 1899, after the death of Asher Marks, and upon the joint petition of Herman Marks and H. Wollenberg, the latter was duly appointed by the county court of Douglas county administrator de bonis non of the said partnership of S. Marks & Co. He entered upon the administration of the estate, taking possession of the property, books, and papers thereof, and still is such administrator; said estate being still unsettled. On October 3, 1899, on his own petition, he was appointed administrator of the partnership estate of S. Marks and H. Wollenberg, valued in his petition at \$50,000, and he is still such administrator; the estate remaining unsettled. At the time of the death of Samuel Marks he left surviving him his brothers, Zukkind Krotki and Saul Krotki, and his sister, Myndel Trout; being his only heirs, and all residing in Russia. Zukkind Krotki died October 12, 1894, his heirs surviving him being Rachel De Bow, Sura Hartbrod, Meier Marks, Adolph C. Marks, Asher Marks, and Saul Marks, his children; the last named three being now dead. Plaintiff Clara Marks is the widow of Adolph C. Marks, and the administratrix of his estate. The petitioners in this proceeding ask for the removal of H. Wollenberg as administrator of the estate of S. Marks & Co., and that a new administrator be appointed in his place. The petition for such removal discloses that Asher Marks, as administrator of the estate of S. Marks & Co., was unfaithful to his trust and mismanaged the same, to the great loss of the estate and of the petitioners, reciting that he conspired with H. Wollenberg and Herman Marks to deprive Zukkind Krotki and these petitioners, his children and heirs to his interest in the estate of S. Marks, deceased, of their part thereof, and setting forth many specific wrongful transactions which it is not necessary to state here in detail; that H. Wollenberg, as administrator of the partnership estate of S. Marks & Co., has been unfaithful to his duties and violated his trust as such administrator in the various particulars specified in the petition and in failing to secure a settlement with the estate

of Asher Marks as to his administration of the estate of S. Marks & Co., and by his neglect to settle and close said estates and distribute the same, to the great loss, waste, and depreciation of the estate of S. Marks & Co., and loss to the petitioners; that by reason of his unfriendly relations to petitioners and to their interest, his adverse attitude thereto, and his intentional delays in closing the estate, he is disqualified to act further in the matter. The county court of Douglas county entered a decree removing him as such administrator. The case was appealed to the circuit court, and there affirmed, and Wollenberg appeals to this court.

O. P. Coshow, of Roseburg (Coshow & Rice, of Roseburg, on the brief), for appellant. E. B. Watson, of Portland (E. B. Watson, of Portland, and C. S. Jackson, of Roseburg, on the brief), for respondents.

EAKIN, J. (after stating the facts as above). [1] In the trial of this proceeding in the county court the evidence was taken as fully as it would have been upon an accounting. More than 400 pages of testimony were taken and as great a volume of exhibits were submitted; all being contained in the record here. We do not deem it important to examine this record with great particularity, as the only question for consideration is whether the decision of the county court in removing H. Wollenberg, the administrator de bonis non, should be upheld, without determining the actual conditions of the accounts or the actual relative rights of the parties. As said in Marks v. Coats, 37 Or. 609, 62 Pac. 488, it is sufficient for the purposes of the case that there is reasonable ground to believe that his acts have been in violation of his trust. The statute fully authorizes the county court to remove the administrator if he is negligent with his trust or neglects to file his semi-annual accounts. See sections 1159, 1165, 1282, 1283, and 1293, L. O. L.

[2] It might be apropos to remark here that our statutory proceedings for the administration of estates is for the purpose of marshaling the assets of the decedent's estate that the debts may be promptly paid, and the remaining assets just as promptly distributed to those entitled to them. County courts are sometimes much too lenient in requiring an expeditious compliance with the statute in the administration of estates.

[3] If the heirs and devisees desire to continue the business of the ancestor undivided, they should first have the estate closed, as provided by law, and take over the business individually; but it is not the affair of the administrator to continue the business as a part of the administration, and the county court has no power or authority to authorize or permit him so to do.

[4] It appears that this estate has been in the course of administration for 20 years,



and the writer of this opinion can conceive of no circumstances that would justify such a delay. It was not occasioned by any order of the county court, nor upon any good cause shown, but by usurpation of authority to conduct a business for the heirs against their will and protest. This delay alone is a sufficient violation of the statute and abuse of his trust to authorize the county court to remove him on its own motion.

[8] Furthermore, it appears from the petition and evidence that the personal interests of the administrator are so adverse to the interests of the estate, and of those entitled to its distribution, that both cannot be fairly represented by the same person. The administrator's duties are those of a trustee and he should be such a person as can and will carefully guard the interests of the estate and of the distributees thereof. He should be an indifferent person as between the claimants thereto. See *In re Mill's Estate*, 22 Or. 210, 29 Pac. 443. It is said in *Manser's Estate*, 60 Or. 240, 118 Pac. 1024: "It was impossible for Baker to bring an action against himself to determine his right to the \$4,000, and he cannot be permitted to be the judge of his own title to the property, when other parties assert a claim to it. An executor is a quasi trustee, who should be indifferent between the estate and claimants of the property, except to preserve it for due administration, and when his interest conflicts with such right and duty the county court, in the exercise of a sound discretion, may remove him." In *Re Holladay's Estate*, 18 Or. 168, 22 Pac. 750, it is said: "Under our probate system the duties of an executor or administrator are active, and not passive. He cannot be permitted to neglect to do those things which are plainly required at his hands by law or the order of the court, and, when complaint is made of such neglect, excuse himself by alleging that such delay or omission was for the benefit of the estate. No doubt, in this particular case, the property of the estate did appreciate in value; but that circumstance was accidental. It might have gone the other way, and, if the excuse is good in one instance, it ought to be in the other. Such a theory is at variance with the requirements of our statute \* \* \* and could not receive the sanction of this court."

[9] A cursory examination of the evidence convinces us that Wollenberg's individual interests are antagonistic to the interests of the estate, and that he is not a proper person to administer it. It is said in the last case cited above: "In the very nature of things, county courts are vested with a very large discretionary power over the conduct of executors and administrators." And its exercise will not be interfered with on ap-

peal, unless plainly required by some principle of law.

The decree of the circuit court is affirmed.

BEAN and McNARY, JJ., concur; McBRIDE, C. J., not sitting.

(86 Or. 347)

**In re MARKS & WOLLENBERG'S ESTATE.**

(Supreme Court of Oregon. July 15, 1913.)

**EXECUTORS AND ADMINISTRATORS (§ 35\*)—PARTNERSHIP ADMINISTRATORS—REMOVAL.**

Where an administrator of a partnership estate continued the business for more than six years without responsibility to any one, failed to keep thorough and accurate accounts, lost or destroyed account books, and did not file a full inventory of the partnership property as it existed at the death of the deceased partner, he should be removed.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 227-262; Dec. Dig. § 35.\*]

Department 2. Appeal from Circuit Court, Douglas County; John S. Coke, Judge.

Petition for the removal of H. Wollenberg, as administrator of the partnership estate of Marks & Wollenberg. From a decree removing the administrator, he appeals. Affirmed.

O. P. Coshow, of Roseburg (Coshow & Rice, of Roseburg, on the brief), for appellant. E. B. Watson, of Portland (E. B. Watson and C. S. Jackson, both of Portland, on the brief), for respondents.

EAKIN, J. The issues and history of this estate are much the same as those in the *Estate of S. Marks & Co.*, 133 Pac. 777, just decided. It was tried upon the same evidence in the county court, and the two cases here were argued and submitted together. In addition to the statement in that case, it appears in the estate of S. Marks and H. Wollenberg that administration was not asked for until October 3, 1899. It also appears that H. Wollenberg continued the business as formerly without responsibility to any one for more than six years. The affairs of each partnership were more or less involved in the other. Thorough and accurate accounts were not kept, account books were lost or destroyed, and the administrator in this estate did not file a full inventory of the property of the partnership estate as it existed at the time of the death of S. Marks; and it seems to be very necessary that the settlement of the estate should be placed in the hands of an impartial person.

The opinion in the *Estate of S. Marks & Co.* applies equally to this.

The decree is affirmed.

BEAN and McNARY, JJ., concur; McBRIDE, C. J., not sitting.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



(66 Or. 503)

**BUCHANAN v. LEWIS A. HICKS CO.**

(Supreme Court of Oregon. July 29, 1913.)

**1. MASTER AND SERVANT (§§ 101, 102\*)—SAFE APPLIANCES—DUTY OF MASTER.**

A master must exercise care in furnishing a reasonably safe instrument with which a servant is to perform the work demanded of him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.\*]

**2. MASTER AND SERVANT (§ 286\*)—DEFECTIVE APPLIANCES—NEGLIGENCE—QUESTION FOR JURY.**

In an action for an injury caused by a circular rip saw, held under the evidence, a question for the jury whether the defendant was negligent in failing to provide a guard for the saw.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046, 1060; Dec. Dig. § 286.\*]

**3. PLEADING (§ 376\*) — ISSUES, PROOF, AND VARIANCE—MATTERS TO BE PROVED—ADMISSIONS.**

Where the complaint alleged that defendant was negligent in failing to provide a guard for a saw, and the answer averred that the saw could not be operated with a guard, this was an admission that there was no guard, and dispensed with proof of that fact.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1225-1227; Dec. Dig. § 376.\*]

**4. NEGLIGENCE (§ 56\*)—PROXIMATE CAUSE.**

In an action for a personal injury, the negligence alleged in the complaint must be the proximate cause of the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 69, 70; Dec. Dig. § 56.\*]

**5. NEGLIGENCE (§ 136\*)—INFERENCES FROM EVIDENCE—QUESTION FOR JURY.**

Where there is a question as to which of several causes produced an injury, the issue should be submitted to the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.\*]

**6. EVIDENCE (§ 5\*)—JUDICIAL NOTICE—MATTERS OF COMMON KNOWLEDGE.**

Where the evidence shows that a circular rip saw 14 inches in diameter was so set in a frame that when the operator placed his foot on a lever it raised the edge of the saw above the surface of the table, and was rapidly operated by electricity, no evidence was required to prove that the saw was so dangerous as to require a guard, as this will be assumed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 4; Dec. Dig. § 5.\*]

**7. MASTER AND SERVANT (§ 264\*)—INJURY—LIABILITY—APPLIANCES INHERENTLY DANGEROUS—PLEADING AND PROOF.**

Where a rip saw, 14 inches in diameter, set in a frame and rapidly operated by electricity, was unprotected by a guard, it was unnecessary for an employe, in an action for an injury, to allege and prove that the master knew of the danger incident to working with or about such machinery without having a guard on saw.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.\*]

Department 1. Appeal from Circuit Court, Multnomah County; Robt. G. Morrow, Judge.

Action by Ernest E. Buchanan against Lewis A. Hicks Co. From a judgment in

favor of the plaintiff, defendant appeals. Affirmed.

This is an action by Ernest E. Buchanan against the Lewis A. Hicks Company, a corporation, to recover damages for a personal injury. The complaint charges that the defendant was negligent in failing to place a guard upon a circular rip saw that was operated by electric power, whereby the plaintiff's left thumb was cut and hurt to his damage in the sum of \$4,000. The answer denies the material averments of the complaint, and for separate defenses alleges that the mechanism of the saw was such that it could not be operated with a guard, that the plaintiff was an experienced workman, who knew and appreciated the danger to which he was exposed, and assumed the risk incident thereto, and that the hurt of which he complains resulted from his contributory negligence. A reply having put in issue the allegations of new matter in the answer, the cause was tried, resulting in a verdict and judgment in plaintiff's favor for \$1,500, and the defendant appeals.

Eugene Brookings, of Portland, for appellant. Harry Yanckwich, of Portland (H. J. Parkinson and John A. Jeffrey, both of Portland, on the brief), for respondent.

MOORE, J. (after stating the facts as above). It is contended that errors were committed in refusing to grant a judgment of nonsuit, and in declining to instruct the jury to find a verdict for the defendant when the cause was finally submitted. The testimony shows that the plaintiff is a carpenter 27 years old, and had worked at his trade 12 years. He had been employed by the defendant about 2½ months prior to January 3, 1912, on which day, by direction of the defendant's superintendent, he commenced operating a circular rip saw, but before that time he had never had any experience in that line of work. The saw frame and table were adapted to a combination of instruments by changing which wood could be cut with the grain or across it. The saw designated for the kind of work desired was fastened to a mandrel that was so attached to the frame that the operator, by placing his foot on a lever, brought the edge of the saw above the surface of the table, along which he pushed with his hands the material to be cut. The plaintiff on January 4, 1912, attempting with the rip saw to split a block 2 inches in thickness, 4 in width, and 9 in length, so as to form wedges, his left thumb came in contact with the circular cutting instrument, and a piece of flesh was sliced from that digit.

[1] It is the duty of a master to exercise care in furnishing a reasonably safe instrument with which a servant may perform the work demanded of him. In Geldard v. Marshall, 43 Or. 438, 444, 73 Pac. 330, 331, Mr.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Justice Bean, in discussing the carelessness of the employer to the person engaged to render personal services, says: "There may be, and are, cases in which the master's negligence is clearly inferable, although there is no positive proof thereof. The rule is that if two inferences may be legitimately drawn from the facts in evidence, one favorable and the other unfavorable to the defendant, a question is presented which calls for the opinion of the jury."

[2] In the case at bar the testimony in chief of the defendant's witnesses is to the effect that the saw causing the injury could not have been operated without a guard. E. E. Kain, the defendant's superintendent, on cross-examination, however, said upon oath: "I always make it a custom to put a guard on a saw." C. F. Caulfield, a deputy labor commissioner, who had been engaged in Portland three years in inspecting machinery, testified that he had examined the saw in question, and that it was practicable to have guarded an instrument of that kind. From the testimony of the witness last named it might reasonably have been inferred that the defendant was negligent in failing to place a guard upon the saw, and, this being so, the question was properly presented to the jury, and no error was committed, as alleged.

[3] It is insisted that no testimony was offered tending to support the averment of the complaint that the defendant did not have a guard on the saw, and for that reason errors were committed in denying the motion for a nonsuit and refusing to direct a verdict, as requested. The answer practically admits that no guard was placed on the saw, averring that the instrument could not be operated when so attempted to be protected, and, this being so, no evidence on that branch of the question was required.

[4] It is argued that no testimony was offered tending to show that the failure to place a guard on the saw was the proximate cause of the hurt. In actions to recover damages for a personal injury it is essential to a recovery that the negligence alleged in the complaint should be the proximate cause of the hurt.

[5] Where, however, a question as to which of the several causes produced the injury arises, the issue should be submitted to the jury for their determination. *Elliff v. O. R. & N. Co.*, 53 Or. 66, 76, 99 Pac. 76; *Palmer v. P. Ry. L. & P. Co.*, 56 Or. 262, 268, 108 Pac. 211.

[6] It is contended that no evidence was produced to show that the saw in question when in operation was so dangerous as to require a guard. There are some physical facts so well established that they will be assumed as true; thus where a circular rip-saw 14 inches in diameter set in a frame, so that when the operator placed his foot on a lever, thereby raising the edge of the saw above the surface of the table, and the in-

strumentality was rapidly operated by electricity, the safety of human life and the protection of the limbs of inexperienced laborers engaged about such a machine demand that a guard should be supplied.

[7] The condition of the rip-saw and its mode of operation were such that no evidence was required to prove that the defendant knew of the danger incident to working with or about such machinery without having a guard on the saw. If by the breaking of some part of the instrumentality, which was apparently in perfect condition, and in consequence of a flaw, the plaintiff was injured, it would have been necessary to prove the defendant's knowledge of the imperfection, or that it was negligent in failing to discover the defect. *Geldard v. Marshall*, 43 Or. 438, 73 Pac. 330; *Finn v. W. P. Ry. Co.*, 51 Or. 66, 93 Pac. 690. Such is not the case before us, where the operation of the saw was at all times inherently dangerous when used without a guard. What has just been said in respect to evidence applies also to the complaint, and shows that it was not necessary to allege such scienter.

Complaint is also made because the court refused to instruct the jury as requested by defendant's counsel. An examination of the entire charge as given convinces us that the facts involved were fairly presented to the jury, and that no errors were committed in denying the requests.

From a careful examination of the whole testimony, which is attached to the bill of exceptions, we are unable affirmatively to say there is no evidence to support the verdict. Other errors than those considered are assigned, but, deeming them immaterial, the judgment is affirmed.

McBRIDE, C. J., and BURNETT and RAMSEY, JJ., concur.

(66 Or. 110)

#### ACKLES v. PACIFIC BRIDGE CO.

(Supreme Court of Oregon. July 22, 1913.)

#### MASTER AND SERVANT (§ 317\*)—INDEPENDENT CONTRACTOR—DEFENSES.

While ordinarily a master can defend on the ground that the negligence causing the plaintiff's injury was that of an independent contractor, yet a contractor employed to construct a municipal improvement cannot defeat an action for personal injuries by one who fell through an unguarded hole in the street, on that ground, where the contract referred to an ordinance requiring the contractor to guard all excavations by barriers, notices, and signals.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1254; Dec. Dig. § 817.\*]

Department 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Alice Ackles against the Pacific Bridge Company, a corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.



This is an action to recover damages for personal injuries. The defendant contracted with the city of Portland for the pavement and improvement of a portion of Alberta street in said city. In said contract appeared the following provisions: " \* \* \* Said work to be performed and completed in strict accordance with the provisions and requirements of the charter of said city, ordinances No. 14253, as amended, and No. 21715, and the plans and the specifications of the city engineer, on file in the office of the auditor of the said city, which charter provisions, ordinances, plans, and specifications, are hereby referred to and made a part of this contract. \* \* \* " The ordinance referred to reads as follows: "The contractor shall observe all the ordinances of the city of Portland," etc. "He shall erect and keep erected, by day and night, a fence or proper barrier along the line of the work and across the ends of the same, in order to guard the public effectively from the danger of falling into trenches, or from upsetting their vehicles against earth thrown up during the progress of the work, and he shall post all proper notices and signals to the public of the state of the street while the work is in progress." The contract also contained the following agreement on the part of the Pacific Bridge Company: "Said work shall be performed under the personal supervision of the said contractor, and no part of this contract, nor any interest therein, shall be sublet, assigned, or transferred without the written consent of said city, by its executive board, and no such written consent shall release the contractor from any obligation, either to the said city or the persons employed by any such subcontractor, and all subcontractors shall be construed merely as employees of the said contractor. \* \* \* " The defendant contracted with Jeffery & Buffton to do the work; and such contract seems to have been sufficient in form to have made them independent contractors, unless the agreement with the city precludes such a result. An unguarded hole was left in the street as the work progressed, into which plaintiff fell and sustained injury. The court instructed the jury that the defense offered by defendant, namely, that, if Jeffery & Buffton were independent contractors, they alone were responsible, could not be maintained in this case, and this instruction is assigned as error. The plaintiff had a verdict, and defendant appeals.

Rauch & Senn, of Portland, for appellant. W. A. Williams and Moser & McCue, all of Portland, for respondent.

McBRIDE, C. J. (after stating the facts as above). This appeal presents practically but one proposition: Can the defendant be heard to say that Jeffery & Buffton were independent contractors, and, therefore, the parties

solely responsible for the injury? That such a defense is usually available is shown by a multitude of authorities. *MacDonald v. O'Reilly*, 45 Or. 589, 78 Pac. 753, and cases there cited. But there is an exception to this rule which clearly includes the defendant. It is this: Where a statute or city ordinance requires certain precautions to be taken for the safety of the public in the manner of doing the work, the contractor cannot shift his liability for failure to take these precautions by employing a subcontractor. *Colgrove v. Smith*, 102 Cal. 220, 36 Pac. 411, 27 L. R. A. 590; *Luce v. Holloway*, 156 Cal. 162, 103 Pac. 886; *Storrs v. City of Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *North Chicago St. R. R. Co. v. Dudgeon*, 184 Ill. 477, 56 N. E. 796; *Robbins v. Chicago City*, 4 Wall. 657, 18 L. Ed. 427; *Hawver v. Whalen*, 49 Ohio St. 69, 29 N. E. 1049, 14 L. R. A. 828; *Werthheimer v. Saunders*, 95 Wis. 573, 70 N. W. 824, 37 L. R. A. 146. See, also, notes to the cases last cited. Here the city ordinance required the contractor to guard with proper barriers, by day and night, the excavations made, and to post such notices and signals as would indicate to the public the condition of the street. No fence inclosed the hole into which plaintiff slipped, and no light indicated its existence. Defendant cannot permit its subcontractors to leave a dangerous trap, forbidden by the city ordinances, and in itself constituting a nuisance, and thus escape the liability entailed by the ordinance when it became the principal contractor.

This view renders it unnecessary to consider the other questions so ably presented.

The judgment is affirmed.

BEAN, EAKIN, and McNARY, JJ., concur.

(66 Or. 42)

BROSS v. McNICHOLAS et al.

(Supreme Court of Oregon. July 15, 1913.)

1. PRINCIPAL AND SURETY (§ 113\*)—RIGHTS OF SURETY AS TO CREDITOR.

Where a brick maker had made several different contracts with the same buyer for the sale of bricks, the last of which was assured by a surety bond, the surety company could not require bricks thereafter delivered to be credited by the buyer upon the contract assured by it, unless the bricks delivered were the identical bricks described in that contract.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 235-239; Dec. Dig. § 113.\*]

2. PRINCIPAL AND SURETY (§ 162\*)—REMEDIES OF CREDITOR—QUESTIONS FOR JURY.

Where the evidence was conflicting as to whether they were the identical bricks, the court could not direct a verdict for the surety company on the ground that the contract had been performed.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 442-445; Dec. Dig. § 162.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



### 3. PRINCIPAL AND SURETY (§ 123\*)—LIABILITY OF SURETY—NOTICE OF PRINCIPAL'S DEFAULT.

Where a surety bond required the indemnitee to notify the surety company immediately after the occurrence of an act involving loss should come to his knowledge, all that was required of the indemnitee was that he notify the surety company with due diligence and within a reasonable time.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 304-311; Dec. Dig. § 123.\*]

### 4. PRINCIPAL AND SURETY (§ 162\*)—REMEDIES ON BOND—QUESTIONS FOR JURY.

Where the evidence was conflicting as to whether the notice was given within one day or eight days after knowledge by the indemnitee, it was a question solely for the jury whether it was given within a reasonable time, whichever length of time actually elapsed.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 442-445; Dec. Dig. § 162.\*]

### 5. PRINCIPAL AND SURETY (§ 123\*)—LIABILITY OF SURETY—NATURE.

Since it has become common for corporations to become sureties for an adequate consideration, the strictness of the old rules regarding suretyship has been relaxed, and a surety company must show some injury caused by failure to give notice, as required in the bond, before it can be absolved from its contract.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 304-311; Dec. Dig. § 123.\*]

### 6. PRINCIPAL AND SURETY (§ 157\*)—REMEDIES OF CREDITOR—EVIDENCE.

Where a complaint, upon a bond securing a contract for the sale of bricks, alleged failure to deliver the bricks, the answer affirmatively asserted that the bricks had been furnished according to the contract, and the replication was a general denial of the new matter in the answer, it was proper for the plaintiff, after the defendant had brought out upon cross-examination of him that a quantity of bricks had been delivered, to prove the exact number of bricks delivered and the time and place of their delivery, to show that they were not the bricks sold under the assured contract, since that was not a matter of confession and avoidance.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 427; Dec. Dig. § 157.\*]

### 7. APPEAL AND ERROR (§ 1001\*)—VERDICT OF THE JURY—CONCLUSIVENESS—QUESTIONS OF FACT.

Where a surety bond required the creditor to give notice of breach by the principal in writing to the president of the company at its principal office, and there is sufficient evidence that the notice was given, the determination of the jury on that question is conclusive.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

Department 2. Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action by Albert Bross against Jas. H. McNicholas, the Pacific Surety Company, and another. Judgment for plaintiff, and defendant the Pacific Surety Company appeals. Affirmed.

This action is brought upon a surety bond given to the plaintiff by the defendant Jas. H. McNicholas, doing business under the firm name and style of the National Brick & Clay

Company, as principal, and the Pacific Surety Company, a corporation, as surety. On the 8th day of February, 1911, the defendant Jas. H. McNicholas entered into a contract with plaintiff, whereby McNicholas agreed to sell and deliver to plaintiff, at such points in Portland, Or., as plaintiff might designate from time to time, 500,000 bricks "of the kind and quality usually manufactured by the plants owned by defendant McNicholas," for the price of \$5 per thousand, aggregating the sum of \$2,500, plaintiff paying at the time the purchase price of the bricks. As a part of the contract between plaintiff and defendant McNicholas, the latter agreed to assure the performance of the contract upon his part by supplying plaintiff with a surety bond, and to that end on said day defendant McNicholas and the Pacific Surety Company entered into an undertaking in the sum of \$2,500, binding themselves to deliver the bricks to plaintiff in accordance with the terms of the contract, or in default thereof to pay plaintiff the sum of \$2,500. By the terms of said bond, it is provided among other things: "That said surety shall be immediately notified of any breach of said contract by said principal, or of any act on the part of said principal, or his agent or employes, which may involve a loss for which said surety may be liable hereunder, immediately after the occurrence of such act shall have come to the knowledge of said owner, or his duly authorized representative or representatives who shall have the supervision of the completion of said contract; said notification must be in writing to the president of said surety, at its principal office in San Francisco, California." Plaintiff brings this action upon the undertaking, setting out in his complaint the contract and bond in question, alleging failure of McNicholas to deliver any of the bricks guaranteed by the undertaking, and prays for judgment in the full penal sum provided in the bond. The defendant McNicholas made default. The Pacific Surety Company denied any breach of the bond, and alleged failure on the part of the plaintiff to give immediate notice of the breach of the contract, as provided in the bond, and pleaded delivery by McNicholas to plaintiff of the bricks of the kind and quality contracted for at places designated in Portland. The allegations of affirmative matter in the answer were denied by the respondent. The issues thus made were tried by the court and jury, with the result that a judgment was rendered in favor of the plaintiff for the sum of \$2,500, with interest and costs. From this judgment the defendant the Pacific Surety Company appeals.

Thos. H. Crawford, of La Grande, and Wilbur, Spencer & Dibble, of Portland, for appellant. Rauch & Senn, of Portland, for respondent.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



McNARY J. (after stating the facts as above). The initial error assigned and relied upon by counsel for the defendant the Pacific Surety Company is founded upon the refusal of the court to instruct the jury that, "upon the undisputed facts in evidence in this case, you are directed to return a verdict for the defendant the Pacific Surety Company."

Fully to appreciate the ruling of the court, we deem important a résumé of the testimony, as this assignment of error gives rise to the most vital phase of the case. Prior to March 30, 1911, the defendant McNicholas, doing business as the National Brick & Clay Company, was the owner of several brick-yards in or near the city of Portland, Or. Plaintiff, who is a contractor operating in the city, gave testimony, and in corroboration thereof introduced in evidence two bills of sale, to the effect that he had purchased from McNicholas, at various times between December 29, 1910, and February 8th following, large quantities of bricks, aggregating 750,000, that plaintiff had received on account thereof only 566,744 bricks, and that no delivery had been made under the contract of February 8, 1912, the faithful observance of which was guaranteed by the defendant Surety Company. It is admitted that bricks purchased, as evidenced by the bills of sale, were not delivered until after the execution of the contract and bond under consideration. True, counsel for the defendant Surety Company insist the bricks delivered to plaintiff were in virtue of the contract underwritten by the surety, and, if applied as the wisdom of the law directs, would exculpate the Surety Company from liability.

[1, 2] While the authorities are not in harmonious accord, we think that, as a general proposition, the surety cannot direct the application of payments made by the principal and the creditor, or either of them. However, this rule is applicable solely in those cases where the principal makes the payment from funds which are his own and are free from any equity in favor of the surety to have the money applied in payment of the debt of which the surety is liable, but where the specific money paid, or property delivered to the creditor, is the identical money or property for the payment and delivery of which the debtor and his surety obligated themselves by the contract and undertaking, the surety is not bound by an application of the money or property to some other debt for which the surety is not liable. In such cases the surety is equitably entitled to have the money paid, or the property delivered, applied to the payment of the debt or the liquidation of the contract for which he is liable. *Merchants' Insurance Company v. Herber*, 68 Minn. 420, 71 N. W. 624; *U. S. v. American Bonding & Trust Company*, 89 Fed. 925, 32 C. C. A. 420. Applying this rule to the case at hand, if the bricks de-

livered by defendant McNicholas to plaintiff were the specific bricks described in the contract, the performance of which the Surety Company had guaranteed, no liability would attach to the Pacific Surety Company, as the rule announced would require plaintiff to apply the bricks delivered on the contract guaranteed by the bond. But, on the other hand, if the bricks delivered to the plaintiff by McNicholas were the bricks sold or contracted to be sold to plaintiff prior to the execution of the contract and bond for which the Surety Company was liable, plaintiff had a legal right to place the bricks to the credit of the contract made at a prior time. Under the controversial state of the testimony, the lower court could not direct the jury to return a verdict in favor of the defendant the Pacific Surety Company, and no error can be predicated thereon.

[3, 4] It is claimed that the trial court erred in giving to the jury the following instructions: "I instruct you that the words in said bond in this suit 'shall be immediately notified' mean promptly and without unnecessary delay after knowledge of a breach of the contract had come to the plaintiff, would not be technical knowledge of the plaintiff. Therefore I instruct you, if you find from the evidence in this case that McNicholas breached his contract in this case, and that such breach came to the knowledge of his representative having supervision of the completion of said contract, and that plaintiff thereafter failed to notify the defendant Pacific Surety Company in the manner required in the bond in this action, then plaintiff cannot recover, and your verdict must be for the defendant Pacific Surety Company." Counsel for the Surety Company argue that plaintiff had knowledge of the breach of the contract on March 30, 1911, but he neglected to give notice thereof until April 7, 1911, which delay forecloses plaintiff to recover upon the bond, in view of the provision that the Surety Company should be immediately notified of any breach by the principal. To the contrary, plaintiff's counsel insists the default of the principal was not known until April 7, 1911, and that notice thereof was given on the day following. Again, we are confronted with conflicting testimony. However, be the interim 8 days or 1 day, all the plaintiff was required to do was to notify the Surety Company of the breach of the contract by the principal with due diligence and within a reasonable time after being apprised thereof. Whether that was done was a question solely for the jury to determine. Volume 4, *Cooley's brief on Insurance*, p. 3579; *Fidelity & Deposit Company v. Courtney*, 186 U. S. 342, 22 Sup. Ct. 833, 46 L. Ed. 1193; *Bacigalupi v. Phoenix Building Construction Co.*, 14 Cal. App. 632, 112 Pac. 892; *Dakin v. Queen City Fire Insurance Co.*, 59 Or. 269, 117 Pac. 419; *Donahue v. Insurance Company*, 56 Vt. 374.

[5] The law of suretyship has undergone



a considerable change in late years. The day of personal suretyship is fast slipping away, and in its stead comes the corporate surety for profit. This new condition has brought about a new construction of the law. The rules as applied to the insured have been softened, while the rules applicable to the surety have been drawn more stringently. The reason, therefore, lies in the very nature of the transformation. Formerly a surety was an individual, or collection of individuals, actuated by beneficent motives to carry the burden of suretyship, receiving no profit or benefit, and, in consequence thereof, the law dealt tenderly with him or them. But, in this day and age of corporate sureties, when the burden is lightened by the payment of adequate premiums, and their final liabilities oftentimes secured by counter indemnity, the strictness of the old rule is relaxed, and the modern day surety company must show some injury done before they can be absolved from the contracts which they clamor to execute. *Baglin v. Title, etc., Company* (C. C.) 166 Fed. 356; *U. S. Fidelity & Guaranty Company v. U. S., 178 Fed. 692, 102 C. C. A. 192*; *Guaranty Company v. Press Brick Company, 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242*; *Atlantic Trust Company v. Laurinburg, 163 Fed. 695, 90 C. C. A. 274*. No claim is made by the Surety Company that the delay of which it complains worked to its injury.

[6] The contention is made by counsel for the Indemnity Company, that no issue was tendered by the pleadings of the application of the 500,000 bricks of the kind and quality named to any other contract or debt than the contract secured by the bond in question. By recurring to the complaint, it will be observed that the action is founded upon a breach of contract to supply the bricks therein described. The answer denied the breach, and affirmatively asserted the bricks had been furnished conformably to the terms of the contract. The reply denied generally the assertions made in the answer. Upon cross-examination of plaintiff, by counsel for the Surety Company, testimony was elicited that a quantity of bricks other than those specified in the contract, secured by the indemnity bond, were delivered by McNicholas to plaintiff. This evidence being produced by the perseverance of counsel for the surety, it was proper for plaintiff's counsel to offer proof of the exact number of bricks delivered to plaintiff and the time and place of delivery. The receipt of these bricks was not in the nature of a plea of confession and avoidance, for their delivery was not a part of the contract in controversy, but a matter affecting a transaction had between plaintiff and McNicholas at a prior time.

[7] The position is taken by defendant the Pacific Surety Company that notice of the breach of contract was not given as required by the bond, namely: "That notification

must be given in writing to the president of the company at the principal office in San Francisco, Cal." Assuredly there was ample testimony adduced at the trial tending to show that notice was sent by mail to the president of the company at its head office. Proof was offered that the local agent of the Surety Company was notified, and in turn he notified the principal office of the company. Letters were produced evidencing the fact that officers of the company in San Francisco and counsel for plaintiff had correspondence concerning the contract and the alleged breach thereof. This part of the controversy was presented to the jury, and being an issue of fact, the determination thereof is conclusive on appeal.

We see no error, and the judgment is affirmed.

McBRIDE, C. J., and BEAN and EAKIN, JJ., concur.

(66 Or. 50)

#### KINGSLEY v. UNITED RYS. CO.

(Supreme Court of Oregon. July 15, 1913.)

#### 1. EJECTMENT (§ 9\*)—TITLE TO SUSTAIN ACTION.

Under L. O. L. § 325, permitting one having a legal estate in land and a present right to possession to recover it in an action against a person in actual possession, one who held a bond for the execution of a deed from the legal owner, and was put into possession by such owner, could maintain ejectment against a mere intruder.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-29; Dec. Dig. § 9.\*]

#### 2. PROPERTY (§ 10\*)—POSSESSORY RIGHTS.

Naked possession vests a sufficient property right in the possessor to permit him to hold the land against every one except the true owner; actual occupancy or possession being in the nature of a right or estate.

[Ed. Note.—For other cases, see Property, Dec. Dig. § 10.\*]

#### 3. EJECTMENT (§ 9\*)—TITLE TO SUSTAIN ACTION—POSSESSION.

Bare possession will enable one ousted therefrom to eject a trespasser, or one not having a better title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-29; Dec. Dig. § 9.\*]

#### 4. EJECTMENT (§ 110\*)—INSTRUCTIONS.

An instruction in ejectment that the damages to which plaintiff was entitled was damage to the possession, and not to the fee, the amount of which damage should be determined from all of the evidence, was proper.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 319-326; Dec. Dig. § 110.\*]

#### 5. DAMAGES (§ 91\*)—PUNITIVE DAMAGES.

To authorize an award of punitive damages in a tort action, the injury must have been malicious or willful or wanton in character, or done so recklessly as to imply a disregard of social obligations.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 193-201; Dec. Dig. § 91.\*]

#### 6. EMINENT DOMAIN (§ 304\*)—REMEDY OF OWNER—PUNITIVE DAMAGES.

One who goes without the owner's consent upon another's land and appropriates a



part thereof, and changes its physical features as by making a railroad cut contrary to the owner's wish, may be held liable in punitive damages.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 818; Dec. Dig. § 304.\*]

**7. EMINENT DOMAIN (§ 307\*)—ACTION BY OWNER—SUFFICIENCY OF EVIDENCE—PUNITIVE DAMAGES.**

Evidence in ejectment to recover land appropriated by defendant as a railroad right of way and damages for wrongful taking and withholding held to make the question of exemplary damages in entering one for the jury.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 820-824; Dec. Dig. § 307.\*]

Department 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by E. D. Kingsley against the United Railways Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action of ejectment instituted by plaintiff, E. D. Kingsley, to recover from the defendant United Railways Company, a corporation, possession of a quantity of land, being approximately 28 acres in Multnomah county, Or., and damages for the wrongful taking and withholding of the premises and for the rent, use, and occupation thereof. After alleging the corporate existence of defendant, and that it is engaged in operating an electric railway, plaintiff avers that during the month of April, 1908, A. L. Mills executed and delivered to plaintiff a bond for a deed to the above-described premises, and that simultaneously therewith placed plaintiff in possession of the property, and that he is entitled to the exclusive occupation of the same. Continuing, plaintiff alleges that defendant in the month of April, 1908, without right or title thereto, entered upon the premises and ousted plaintiff therefrom, and does now wrongfully, willfully, and maliciously withhold the possession of said premises from plaintiff; that upon the entrance of said premises defendant made deep cuts therein, likewise high fills, and drove and erected large numbers of piles and builded expensive railroad bridges, tore down the fences, and constructed a right of way for an electric railway across said land, and is now using the same for the purpose of operating its electric railway system and has used a large portion of the land for the purpose of storing a vast quantity of railway equipment to plaintiff's damage in the sum of \$10,000; that the loss incident to the rental value of said premises and the use and occupation thereof during the plaintiff's deprivation has damaged him in the sum of \$2,000; and, finally, that defendant occupied for its right of way a strip of land containing 2.07 acres. Judgment is demanded by plaintiff for the restoration of the whole of said land and for the damages heretofore mentioned.

In due time defendant filed its answer, wherein it denied generally the matters set forth in plaintiff's complaint, and alleged

that in the month of May, 1908, it took possession of the strip of land containing 2.07 acres and constructed an electric railway line thereover in pursuance of a written agreement entered into by plaintiff and defendant, by the terms of which instrument plaintiff donated to defendant a perpetual right of way across said strip of land; that the conditions prescribed in said agreement were faithfully observed, and that the possession of said premises and the construction of said railway line thereover was with the knowledge and consent of plaintiff; that since the summer of 1908 defendant has operated passenger and freight trains across said land, and has since continued to operate its line of railway as a common carrier, in the transaction of state and interstate business; that, if ejected from said premises, it will be compelled to abandon its railway line and the business thereon, with a great detriment to the public interest, and it is therefore an absolute necessity that said line of railway remain continuously in operation and be maintained across the premises of plaintiff, and that the one chosen is the only route across said premises over which defendant can operate its line of railway. The issues were concluded by a reply containing a general denial of the affirmative defense asserted by defendant.

Upon the trial of the case the jury rendered a verdict to the effect that plaintiff was entitled to the possession of the whole of the property described in plaintiff's first pleading, and awarded damages to plaintiff in the sum of \$3,000. Following the entry of the judgment, defendant effected this appeal, assigning numerous errors, the significant ones of which will be considered in the opinion.

Carey & Kerr and Harrison Allen, all of Portland, for appellant. Wilbur & Spencer, of Portland, for respondent.

McNARY, J. (after stating the facts as above). The first and most important question to be determined arises from the contention that plaintiff has not the legal estate and right to possession of the premises as required by law to authorize ejectment. Except as modified by our statute, the common-law principles pertaining to ejectment are applicable. Upon referring to the statute, we note section 325, L. O. L., which reads: "Any person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession with damages for withholding the same, by an action at law. Such action shall be commenced against the person in the actual possession of the property at the time, or if the property be not in the actual possession of any one, then against the person acting as the owner thereof." Obviously this section

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



of the Code is substantially an affirmation of the principles of ejectment as known to the common law. Confessedly, at the time defendant entered upon the land, plaintiff was in possession thereof by direction of the legal owner from whom plaintiff had a contract of purchase, which, omitting the description of the premises therein contained, recites: "Know all men by these presents, that I, Edward D. Kingsley, am held and firmly bound unto A. L. Mills in the sum of thirty thousand dollars to be paid to the said A. L. Mills, his executors, administrators or assigns, for which payment well and truly to be made I bind my heirs, executors and administrators firmly by these presents. Sealed with my seal and dated the 16th day of April, A. D. 1906. \* \* \* The conditions of this obligation are such that if the above-bounden obligator shall, on or before the 16th day of April, A. D. 1911, make, execute and deliver unto the said Edward D. Kingsley, his heirs or assigns, provided that the said Edward D. Kingsley, his heirs or assigns, shall on or before that day have paid unto the said obligator the sum of thirty thousand dollars, gold coin of the United States of America, a good and sufficient deed of all the certain lot, piece or parcel of land situated in the county of Multnomah, and state of Oregon, bounded and to be paid by said Edward D. Kingsley. And shall thereby convey the title of said premises, free and clear of all incumbrances, to the said Edward D. Kingsley, his heirs or assigns, then this obligation shall be void, otherwise to remain in full force and virtue." (Duly witnessed and acknowledged.)

[1] It will be observed by the terms of the contract of sale that plaintiff had an equitable estate in the premises, and, when placed in the possession thereof by the legal owner, was endowed with the legal right to repel an invading attack of a mere intruder, and, possessing such right, he had a sufficient interest or estate in the land to support an action of ejectment.

[2] It is an undisputed rule of law that naked possession vests a sufficient right of property in the person who has such possession as to permit him to hold the land against all the world except the true owner. Consequently actual occupation or possession of real property is in its essential nature of an estate or right therein. *Willson v. Fine* (D. C.) 38 Fed. 789. Even were plaintiff a trespasser relatively to the owner of the legal estate in the premises, he would, while in possession, be owner of the land relatively to the defendant railway corporation.

[3] In this state the rule has become fixed that possession in a sufficient interest in land to enable one ousted therefrom to eject a trespasser or one unable to show a better title. *Gallagher v. Kelliher*, 58 Or. 557, 114 Pac. 943, 115 Pac. 596; *Browning v. Lewis*,

39 Or. 11, 64 Pac. 304; *Sommer v. Compton*, 52 Or. 173, 96 Pac. 124; *O. R. & N. v. Hertzberg*, 26 Or. 216, 37 Pac. 1019. In arriving at the conclusion that section 325, L. O. L., authorizes a vendee under an executory contract of sale of real property to maintain ejectment when dispossessed by a trespasser, we are not forgetful of the numerous cases decided by this court of which *Sayre v. Mohny*, 30 Or. 241, 47 Pac. 197, is an illustration; that at law a bond for a deed conveys no estate whatever, but in equity an equitable estate is created. These cases do not touch the vital point under consideration, but merely consider the correlative rights of the parties to a contract of sale without reference to the legal status of a person dispossessed by an intruder. The defendant asserts that its entry upon the land was made with the consent of plaintiff, and for that account plaintiff is estopped from maintaining ejectment. We are aware that the courts have frequently held that if a landowner knowing that a railroad has entered upon his land and is engaged in constructing its road without having brought proceedings to condemn or without permission, and remains inactive, and permits the company to expend large sums in the construction work, the landowner will be estopped from maintaining ejectment, and will be regarded as having acquiesced in the conduct of the railway company. *Roberts v. Northern Pacific Railroad*, 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873.

The record before us does not lead to the conclusion that plaintiff can be charged with such acts of omission or commission that would preclude him under the rule enunciated. Upon this phase of the case, counsel for defendant rely mainly upon two letters by plaintiff calculated it is claimed to inspire in defendant the belief that plaintiff was satisfied with the entry of defendant and the building of its railway. However, that may be, the testimony received in the trial of the case upon that point was widely conflicting. An inspection of the record discloses there was some evidence introduced at the hearing tending to show that some of the conditions precedent dictated by plaintiff were never observed by defendant and that the entry was without the sanction of law and in subversion of the rights of plaintiff. This being so, the right or the wrong of defendant's conduct was for the jury to determine, and not for an appellate court.

[4] It is urged that the trial court erred in giving the jury the following instructions: "You will remember, gentlemen, that the damages to which plaintiff is entitled is damage to the possession, and not to the fee—it is simply to his possession and what that amounts to you are to determine from all of the testimony in the case." These instructions clearly presented to the minds of the jurors the measure of plaintiff's interest in the premises, and were entirely proper.

Error is predicated upon the court's state-



ment to the jury that damages could be awarded for the withholding of the possession of the whole of the premises described in the complaint, including the right of way, and in the submission of a general verdict embracing the whole tract. The complaint contains the declaration that defendant took possession of the whole tract, and in support thereof some testimony was placed before the jury that defendant in the construction of its line of railway upon the 2.07-acre tract occupied a considerable part of the whole premises. It was the prerogative of the jury to consider the territorial extent of the disselzin as limited by the averments in the pleadings.

Finally, the contention is made that the lower court erred in presenting to the jury the following instructions: "In addition to this, gentlemen, if you should determine that the railroad company has acted high handedly and maliciously, I say if you should determine that, with a total disregard of the rights of the plaintiff in this case, they have taken possession of his property in utter disregard of his social rights as a citizen, and as a man, then in addition to the actual damages he has sustained, you would have a right to assess what are known as punitive or exemplary damages to deter this company, and all other people, from doing acts of this kind in the future. But you must remember, gentlemen, that in no sense can you take up the question of punitive or exemplary damages, unless you should determine that the act of this company was malicious, and was done in total disregard of the social rights of the plaintiff, as a citizen and as a man."

[5] It is the law that in actions ex delicto the jury may, if they are satisfied from the testimony, award what are known in the law as exemplary or punitive damages. To justify such damages, the jury must be satisfied from the testimony that the injury done was malicious or willful and wanton in its character or committed with a bad motive or so recklessly as to imply a disregard of social obligations.

[6] To go unbidden upon another's lands, appropriate a part and change the physical aspects thereof in contravention of the expressed wishes of the owner, constitute acts so violent to wholesome legal restrictions as to come within the rule permitting exemplary damages. Plaintiff gave testimony that he prescribed certain conditions upon which defendant might acquire a part of the land for its purposes, but that, instead of meeting the requirements and while plaintiff was confined by bodily infirmity in a hospital, defendant entered upon the land, and in violation of expressed mandates of plaintiff and without paying for or tendering payment of said right of way constructed a railway line across a part of the premises, to its

great physical damage. In fairness to the defendant we are glad to concede that it offered testimony quite to the contrary, but it is not our office to weigh the testimony between parties, but rather to ascertain if there was any testimony tending to sustain the conclusion of the jury.

[7] Under all the circumstances, we think the court did not err in giving the instruction.

We deem the remaining assignments of error immaterial.

Judgment is affirmed.

McBRIDE, C. J., and BEAN and EAKIN, JJ., concur.

(65 Or. 596)

### EILERS MUSIC HOUSE v. REINE

(Supreme Court of Oregon. July 8, 1913.)

#### 1. PARTNERSHIP (§ 55\*)—EVIDENCE.

Evidence in a suit in equity for an accounting held to show the existence of a partnership in a mercantile business.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 75, 78, 79, 81; Dec. Dig. § 55.\*]

#### 2. PARTNERSHIP (§ 1\*)—NATURE OF RELATION —"PARTNERSHIP."

A "partnership" is an agreement between two or more persons to unite their labor, skill, money, and property, or either, in a lawful business for their mutual benefit.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5191-5202; vol. 8, pp. 7746, 7747.]

#### 3. PARTNERSHIP (§ 70\*)—LIABILITY OF PARTNERS.

In the absence of a contrary agreement, partners are entitled to share equally in profits and losses.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 114; Dec. Dig. § 70.\*]

#### 4. PARTNERSHIP (§ 76\*)—"PARTNER'S INTEREST."

A partner's interest in the firm business consists in the net balance remaining to him after the partnership debts are paid and the equities between the partners have been adjusted.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 116, 124, 148; Dec. Dig. § 76.\*]

#### 5. PARTNERSHIP (§ 264\*)—DISSOLUTION — SALE OF PARTNER'S INTEREST.

A partnership was dissolved by the sale of the interest of one of the partners; the purchaser becoming a tenant in common with the remaining partner.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 608, 614, 617; Dec. Dig. § 264.\*]

#### 6. PARTNERSHIP (§ 298\*)—ACCOUNTING.

The purchaser of a partner's interest in the firm business as a tenant in common with the remaining partner is entitled to have an account taken of the firm business and property and to have the business closed and his interest therein set apart.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 680-686; Dec. Dig. § 298.\*]

Department 1. Appeal from Circuit Court, Linn County; William Galloway, Judge.

Action by the Eilers Music House against

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



M. Reine. From a judgment dismissing the complaint, plaintiff appeals. Reversed and remanded with directions.

This is a suit for an accounting brought by the appellant against the respondent. On July 19, 1911, the appellant commenced action in the circuit court of Marion county, against one U. S. Rider to recover from him the sum of \$710, and interest, on a promissory note. Two days later, a writ of attachment was issued to the sheriff of Linn county, and, by virtue thereof, said sheriff levied upon a stock of goods at Brownsville, Linn county, Or., supposed to belong to U. S. Rider and M. Reine, the defendant in this suit, as partners. Thereafter Eilers Music House obtained a judgment on said note in said action and an order for the sale of attached property. A writ of execution upon said judgment and order of sale was issued out of said circuit court and placed in the hands of the sheriff of Linn county, and, by virtue of said writ, he sold all of the interest of U. S. Rider in said stock of goods to the appellant.

The defendant and respondent refused to recognize the appellant as having any interest in said stock of goods, and refused to account to the appellant for any part thereof, and denied that the appellant had any interest therein.

This suit was tried by the court below, and that court rendered a decree holding that U. S. Rider had no interest in said stock of goods, and that Reine and Rider were not partners in said stock of goods, and dismissed the appellant's complaint, and awarded costs against the appellant. The plaintiff appealed and assigned as error the dismissing of plaintiff's complaint and the refusing of the court below to require the defendant to account, and holding that the appellant was not the owner of any interest in said stock of goods, etc.

Smith & Shields, of Salem, and Amor A. Tussing, of Brownsville, for appellant. Weatherford & Weatherford, of Albany, and G. E. Unruh, of Salem, for respondent.

RAMSEY, J. (after stating the facts as above). [1] This is a suit in equity for an accounting, and the question for decision is whether the respondent, M. Reine, and U. S. Rider were partners, and, as such partners, owned the stock of goods at Brownsville, Linn county, in the latter part of July, 1911, when the supposed interest of said U. S. Rider therein was attached. The appellant obtained a judgment against said U. S. Rider in the circuit court of Marion county for \$710, and interest and costs.

After the action to recover said judgment was commenced, a writ of attachment was issued and levied on the supposed interest of said Rider in said stock of goods. After the judgment and an order to sell all attached property were entered, a writ of execution

was issued out of said court, and, by virtue thereof, the rights and interests of said Rider in said stock of goods were sold to the appellant by the sheriff of Linn county. After the sale, the respondent refused to recognize any rights or equities of the appellant in said stock of goods, and refused to account to the appellant, and denied that said U. S. Rider was a partner of his or had any rights or interest in said stock of goods. The questions involved are principally matters of fact.

We have read and examined the evidence taken in this case. The appellant M. Reine and U. S. Rider were witnesses, and swore they were not partners, and that Rider had no interest in the business, and that he had never paid anything into the business.

It is admitted that Rider lived at Salem and was an employé in the post office there. Reine lived at Brownsville and carried on the business. Rider's wife was a clerk in the store at Brownsville a portion of the time, and her evidence tends to support the evidence of Reine and Rider. The evidence shows that the store was opened in December, 1910, and that it was attached in the latter part of July, 1911. If the evidence of Reine and Rider is to be taken as true there was no partnership, and Rider had no interest in the stock of goods or in the business. It is admitted by Reine and Rider that they are friends and that there were negotiations between them concerning the forming of a partnership, but they deny that any was formed.

The material testimony for the defendant and respondent was the evidence of the defendant and Rider and Mrs. Rider. There were some other witnesses in his behalf, but their evidence was not important.

The evidence for the plaintiff, as to the existence of the partnership, consists largely of admissions and statements and acts of the defendant and Rider, tending to prove the existence of a partnership. The defendant admitted, in his evidence, that the store business at Brownsville was conducted from some time in December, 1910, until the store was attached in July, 1911, in the name of Reine & Rider; that during this time the name was painted on the window of the store as Reine & Rider; that the books were kept in the name of the firm; that their letter heads were under the firm name, with the name of U. S. Rider printed at the upper right-hand corner and the name of the defendant, M. Reine, printed at the upper left-hand corner of the letter heads; that they used pads in making sales and that the firm name was stamped on these pads with a rubber stamp; that this rubber stamp, containing the firm name, was obtained at Salem by Rider and sent to the defendant for use; that the business of the store was advertised in a Brownsville paper in the name of the firm; that they made deposits of money in a local bank in the firm name; that checks to pay for



goods bought were signed in the firm name; that Reine was ill in May, 1911, and sent for Rider, and in his presence made a will, and that this will was dated May 21, 1911, and contains clauses, of which the following is a copy, to wit:

"In the event of my death, I hereby appoint my partner and friend U. S. Rider executor not only of the estate of the partnership of Reine & Rider, of Brownsville, Oregon, but I do hereby appoint him also executor of my general estate. \* \* \*

"In the event of my death, I desire my executor to pay as early as practicable any indebtedness owing by said partnership of Reine & Rider. And I hereby give and bequeath unto my friend U. S. Rider all my interest in said partnership remaining after payment of any such indebtedness."

Mr. Tussing, a lawyer who wrote the will for Mr. Reine, at the same time wrote also a memorandum of contract which was signed by both Reine and Rider, showing Mr. Rider's interest in the store, and this contract, according to the evidence of Mr. Tussing, purported to show a partnership between Reine and Rider in the grocery store. It was written to show Mr. Rider's interest in the store and thereby to prevent Reine's relatives making trouble for Rider regarding the store, in case Reine should die, he being then ill and expecting to die. A copy of this contract was offered in evidence, but it was objected to, and, as its admissibility is doubtful, we will not consider it, but will consider the evidence of this witness that was not objected to.

The respondent admits that he had printed on a curtain in the picture-show at Brownsville an advertisement of the store in the firm name. Reine leased a room for the store, and this lease was made to the firm, and he told the lessor that Rider was his partner; and, when Reine was assessed, he had the store assessed to Reine & Rider and swore to the property statement before the assessor.

We have referred to enough of the evidence to show the relation between Reine and Rider as to this stock of goods and the business carried on by Rider. The business was carried on *as a partnership* in every respect. The partners by their words and actions declared it to be a partnership, and we believe and find that it was a partnership at all times from the date of the opening of the store in December, 1910, until the partnership was dissolved by the sale of the interest of U. S. Rider in the stock and business to the plaintiff and appellant upon the writ of execution issued out of the circuit court of Marion county. Said sale was made on November 28, 1911. We find that said sale was valid and conveyed to the appellant all the rights and equities which said U. S. Rider had in said stock of goods and business at the time the same was levied upon

by the attachment, and that the appellant still owns said interest and equities.

[2] A partnership is an agreement entered into between two or more persons to unite their labor, skill, money, and property, or either or all of them, in a lawful business for mutual account. *Willis v. Crawford*, 38 Or. 525, 63 Pac. 985, 64 Pac. 866, 53 L. R. A. 904; *Story on Partnership* (5th Ed.) § 2: 30 Cyc. 352, 353. The latter authority on page 353 says: "Our law has always treated the partnership relation as founded in voluntary contract. It does not surprise parties into a partnership against their will, although it does not require an express agreement between them, nor is it bound by their statements of intention in associating themselves together for business transactions. It will regard their conduct rather than their language in determining whether their voluntary associating in a business enterprise amounts to a partnership or not."

In this case, these parties kept their business accounts as a partnership, placed the firm sign on their front window and kept it there, opened and carried on an account with the bank as a firm, bought and paid for their goods as a firm, advertised their business in the local paper as a partnership, had their firm name on their letter heads, had a rubber stamp containing the firm name and stamped it on statements of sales, gave the assessor a sworn statement of the property in the store as firm property; they had the firm advertisement painted on a curtain for exhibition at the picture-show, and the respondent made his will in the presence of Rider, and, in this will, called Rider his partner and the store partnership property, and bequeathed his interest in the store to Rider as partnership property, etc. So far as the evidence shows, they did not deny the partnership until Rider's interest in the store was attached. When persons by their words and acts thus proclaim themselves to the world as partners, they should be held to be partners. We believe that it is conclusively shown that they were partners and we so find.

Subsection 29 of section 790, L. O. L., declares it to be a presumption of law, "that persons *acting* as copartners have entered into a contract of copartnership."

[3] In the absence of any agreement to the contrary, the partners are to share equally in the profits and losses of the partnership business. *Griggs v. Clark*, 23 Cal. 427; *Story on Partnership* (5th Ed.) § 24; 1 *Lindley on Partnership* (2d Am. Ed.) pp. 348, 349; *Roach et al. v. Perry*, 16 Ill. 37; *Hutchinson v. Dubois*, 45 Mich. 143, 7 N. W. 714; *Gius v. Coffinberry*, 39 Or. 414, 65 Pac. 358; 22 Am. & Eng. Ency. of Law (2d Ed.) p. 101.

[4] The interest which each member of a firm has in the partnership stock and business consists in the net balance remaining to him after all the partnership debts have



been paid and the equities between each partner and his copartners have been adjusted. 22 Am. & Eng. Ency. Law (2d Ed.) p. 98; Bank v. Carrollton R. R., 11 Wall. 624, 20 L. Ed. 82; Trowbridge v. Cross, 117 Ill. 109, 7 N. E. 347; Sindelare v. Walker, 187 Ill. 43, 27 N. E. 59, 31 Am. St. Rep. 353.

[5] By the sale of the interest of U. S. Rider in the partnership property to the appellant the partnership was dissolved, and the appellant became a tenant in common with the respondent. Marx v. Goodnough, 16 Or. 31, 16 Pac. 918.

[6] The appellant as a tenant in common with the respondent is entitled to have an account taken of the property and business of the late partnership of Reine & Rider, and to have the business closed up and to obtain his proper part thereof. Cogswell v. Wilson, 17 Or. 31, 21 Pac. 388; Shirley v. Goodnough, 15 Or. 642, 16 Pac. 871.

The court below erred in finding that there was no partnership between Reine and Rider and in dismissing the appellant's complaint, etc.

The decree of the court below is reversed, and this cause is remanded to the court below with directions to enter a decree reversing the former decree herein, and thereafter to proceed in accordance with this opinion to take an account of the late partnership business of Reine & Rider, and to adjust and settle the business between the appellant and respondent growing out of said partnership business and property.

MCBRIDE, C. J., and MOORE and BURNETT, JJ., concur.

(66 Or. 59)

# GRAY et al. v. BEARD.

(Supreme Court of Oregon. July 15, 1913.)

## 1. TRUSTS (§ 61\*)—CONVEYANCE BY CESTUI TO TRUSTEE—EFFECT—TERMINATION OF TRUST.

Where decedent conveyed certain property to defendant in trust, so that the property might not stand of record in decedent's name, and had defendant execute a return deed, which was not recorded, the fact that decedent thereafter executed another deed to defendant for the same property, and dated the same back solely for the purpose of lodging in defendant a complete record title, did not terminate the trust, nor relieve defendant of his obligations as trustee with reference to the property.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 83-87; Dec. Dig. § 61.\*]

## 2. DEEDS (§ 108\*)—CONSTRUCTION—ANTEDATING.

Where parties deliberately antedate a deed, or otherwise manifest an intention that it shall speak from its date, the courts will give effect to their intention.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 294-308; Dec. Dig. § 108.\*]

## 3. TRUSTS (§ 9\*)—CONVEYANCE OF REAL PROPERTY—ENFORCEMENT—CREDITORS.

Where decedent executed deeds to certain land to defendant in trust for himself, without

any intent to escape any just obligation, and there was no creditor or just claimant whose rights or interests would be prejudiced, the trust would be enforced.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 6, 7; Dec. Dig. § 9.\*]

## 4. TRUSTS (§ 63½\*)—PART PERFORMANCE.

Where defendant received property in question in trust for decedent, with other parcels of real estate which had been sold and conveyed by defendant at decedent's dictation, and the proceeds had been turned over to the latter, thereby executing the trust in part, a resulting trust was established which was not within the statute of frauds.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 93; Dec. Dig. § 63½.\*]

## 5. TRUSTS (§ 44\*)—CREATION—EVIDENCE—CONDUCT OF PARTIES.

Continued exercise of acts of dominion over real property by a cestui que trust, with notice to the trustee and without protest from him, is sufficient to establish the existence of the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 66-68; Dec. Dig. § 44.\*]

## 6. TRUSTS (§ 69\*)—RESULTING TRUST—CONVEYANCE WITHOUT CONSIDERATION.

A resulting trust may arise where a conveyance is made without consideration and it appears from the circumstances that the grantee was not intended to take beneficially.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 69.\*]

## 7. TRUSTS (§ 42\*)—EXPRESS TRUST—EVIDENCE—DECLARATIONS—CIRCUMSTANCES.

An express trust may be proved, not only by express declarations, but also by circumstances from which its existence may be inferred, for which purpose evidence of acts and declarations of the parties, oral or written, as well as the surrounding circumstances, is admissible.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 61; Dec. Dig. § 42.\*]

## 8. TRUSTS (§ 86\*)—RESULTING TRUST—DENIAL—BURDEN OF PROOF.

Where defendant relies on a voluntary conveyance from a near relative as absolute, and a prima facie case of trust is established against him, and the attendant facts and circumstances and the means of disclosure and explanation are peculiarly within the defendant's cognizance, the burden is on him to show an entire good faith in the transaction, and to prove his title.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 128; Dec. Dig. § 86.\*]

Department 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Suit by Mary B. Gray and another against A. Edgar Beard, to establish title in plaintiffs to an undivided two-fifths interest in real property. From a decree in favor of plaintiffs, defendant appeals. Affirmed.

R. A. Leiter, of Portland (Griffith, Leiter & Allen and I. N. Smith, all of Portland, on the brief), for appellant. Wallace McCamant, of Portland (Snow & McCamant, of Portland, on the brief), for respondents.

BEAN, J. S. M. Beard died testate on January 8, 1910, leaving as residuary legatees, Elizabeth Beard, a sister-in-law, and the mother of the other residuary legatees, viz., Mary B. Gray and S. Roscoe Beard,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



plaintiffs, and A. Edgar Beard, defendant; also Carrie E. Cadwell (née Carrie E. Beard). Plaintiffs claim that defendant, A. Edgar Beard, held the property in trust for his uncle, S. M. Beard, deceased. Defendant claims to own the property individually. The suit involves lot 2 B, and the east 37½ feet of lot 3, all in block I of Tabor Heights addition to the city of Portland, and 41.12 acres in sections 9 and 10, township 1, south of range 2, east of the Willamette Meridian, known as the Kelly Butte property.

S. M. Beard, deceased for several years, was president of a bank at Vancouver, Wash., prior to 1906, at which time he sold his interest in the same. He was a thrifty, painstaking business man, and in one of his letters he stated that he lived on less than \$25 per month. He was not considered an immoral man, but the evidence indicates that he was unable to discriminate between a worthy and a designing woman. His first wife died, leaving no children. He was married the second time on August 18, 1898, and divorced in January, 1899. In August, 1904, he was married the third time, and divorced in February, 1905. A fourth marriage took place in February, 1909, with a following divorce in May, 1909. It is claimed by plaintiffs that, by reason of his several marriages and divorces, and the fear that some woman might endeavor to obtain a large part of his property, it was his practice to keep much of his property standing on the records in the names of several different persons, who held the same in trust for him.

In December, 1901, S. M. Beard organized the Beard Fruit Company, for the purpose of holding title to his valuable properties in Clarke county, Wash. A. Edgar Beard was a nephew of the decedent. The record shows that his uncle had implicit confidence in him. On the 22d of July, 1897, S. M. Beard was the owner of a one-half interest in lots 3 and 2 B, in block I of Tabor Heights, and also of certain lots and blocks in the Eden tract. On that date he executed a deed to this property in favor of the defendant, which was placed of record. The property in Eden was subsequently sold, A. Edgar Beard executing the deeds therefor, and S. M. Beard receiving the proceeds of the property. In 1902, at the instance of S. M. Beard, there was a partition of the Tabor Heights property, the decedent securing title in the name of A. Edgar Beard to lot 2 B, and the east 37½ feet of lot 3, in block I, and W. L. Kauffman, the owner of the other half interest, receiving the remainder of the property. The taxes on the Tabor Heights property continued to be paid by S. M. Beard as long as he lived. In recognition of the trust in favor of S. M. Beard in the Tabor Heights and Eden property, A. Edgar Beard, on the — day of —, 1897, executed a deed thereof to S. M. Beard. This deed was acknowledged on the 19th day of March, 1898, and about the year 1899 was given by S. M. Beard to

Mrs. Gray for safe-keeping. After the death of S. M. Beard, when the defendant for the first time asserted title to the Tabor Heights property, this deed was placed of record. In June, 1903, as contended by the plaintiffs, the decedent had specific reasons for fearing blackmail. On the 22d of June, 1903, as it is claimed by A. Edgar Beard, S. M. Beard was in need of money, and he loaned him \$5,000, exacting as security 10 shares of stock in the Beard Fruit Company standing in the name of S. M. Beard. The defendant contends that on the following day S. M. Beard presented him with the Kelly Butte property described in the complaint. It is conceded by defendant that no consideration was paid for such conveyance executed on June 23, 1903. The fact that the deed was executed and delivered was admitted by the pleadings. This Kelly Butte property had been purchased in 1890 by a syndicate consisting of S. M. Beard and several United States army officers for the sum of \$30,400. On the 23d of June, 1904, there was a mortgage on the property for \$6,250. This mortgage had been originally \$25,000. It had been whittled down from time to time, and payments continued to be made by S. M. Beard until the balance of \$5,451.70 was paid in full on the 8th day of February, 1906. When the property was purchased by the syndicate, the title was taken in the name of S. M. Beard, and he executed the note and mortgage for \$25,000 to Mr. McDaniel. The syndicate of army officers failed to make their share of the payments for the property, with the exception of S. McConihe. On the 10th day of October, 1902, a settlement was had between S. M. Beard and Col. McConihe, by which S. M. Beard retained 101.12 acres of the property as his own, which he valued at that time at \$22,793.78. On the 12th of August, 1904, it appears that the decedent valued this property at \$14,028.10. The decedent carried this property through all the hard times of 1903, paid all the taxes thereon, which was quite a burden, and cared for the same. It was his custom at the first of each year to make out an inventory of his property, showing its valuation, together with his liabilities. Five of these inventories are in evidence, bearing dates from January 1, 1893, to January 1, 1910. The last inventory shows the property in dispute listed as S. M. Beard's, as follows:

	Selling.	Conserv-
		ative.
62½x160 feet, lot Tabor Heights....	\$ 2,500	\$2,000
41.12 acres Kelly Butte.....	16,000	8,000

It is signed by S. M. Beard. The inventories of January 18, 1909, and of January 1, 1910, mention the property of Mary B. Gray separately from that of S. M. Beard, minutely describing the same. The latter inventory directs where the abstracts of title to different parcels of property, and other valuable papers, may be found in the bank and elsewhere. The decedent had heart trouble, and



this last inventory clearly appears to be for the information of those who might transact the business of his estate after his death. These several inventories which appear in the handwriting of the decedent were made with much care, and the earlier ones include as liabilities the amount owing for the property in question. It is inconceivable why a man in his condition of life, who had executed a will in favor of his relatives, and apparently did not expect to enjoy his property for a very long time, should make out a false inventory. The last inventory shows the amount of \$137,051, as a conservative value of his property, with liabilities amounting to \$1,600, being one note and street improvements.

[1] When S. M. Beard took title to the property belonging to the syndicate, he signed declarations of trust, which were given to the several individuals, in which it was declared that they might be transferred by indorsement. These, with the assignments and releases thereof, were all carefully collected from the different members of the syndicate, or other transferees. At the time they were placed of record, in 1904, Mr. Dabney, as attorney for S. M. Beard, had him execute a deed to A. Edgar Beard of the same property he had conveyed as trustee on June 23, 1903, and dated the deed back to the last-named date. This was done in order to straighten the title, which had, prior to the settlement with the other members of the syndicate, been held by S. M. Beard as trustee. It is contended by defendant's counsel that this individual deed of S. M. Beard confirmed the title in A. Edgar Beard and terminated the trust, if any. A conveyance from cestui que trust to trustee, if executed solely for the purpose of lodging with the trustee a complete record title, will not terminate the trust or relieve the trustee of his obligations. *Jenkins v. Eldredge*, 13 Fed. Cas. 462, 493; *Broder v. Conklin*, 77 Cal. 330, 19 Pac. 513.

[2] And where the parties deliberately ante-date a deed, or otherwise manifest an intention that it shall speak from its date, the courts will give effect to their intention. *Cummings v. Newell*, 86 Minn. 130, 90 N. W. 311.

It appears that S. M. Beard also executed a declaration of trust to A. Edgar Beard for his interest in the Eden property, and that he usually kept some memorandum of real property held in trust by himself and others. However, he appeared to rely upon an unrecorded certificate as much as upon a duly recorded conveyance of real estate.

The plaintiffs allege in their complaint, and the lower court found, that a deed had been executed by A. Edgar Beard in favor of S. M. Beard, which recognized S. M. Beard's equitable title to the Kelly Butte property. S. M. Beard wrote to A. Edgar Beard under date of November 23, 1903, transmitting a

deed for execution by the latter. No answer to this letter was found among the papers of the decedent, nor was the deed itself found. When S. M. Beard died the defendant took possession of a number of the decedent's papers, and a few weeks later took possession of the remainder, with the exception of a few which Mrs. Gray had had for several years. These papers were kept by the defendant until January, 1911, the possession of which was secured through proceedings in the county court by the efforts of S. Roscoe Beard, executor, and Mary B. Gray, then executrix of S. M. Beard's estate. S. M. Beard continued to exercise dominion over the Kelly Butte property after the deed of June 23, 1903, up to the time of his death. During that time A. Edgar Beard never asserted ownership over the property. A portion of the land was platted as the Multnomah Berry Ranch by S. M. Beard, and several lots were sold subsequently to June 23, 1903. The money arising from these sales was paid to S. M. Beard, and the prices for which the property was sold were fixed by him. Interest on the mortgage held by Mr. McDaniel was also paid by S. M. Beard, as well as the principal. For this purpose he borrowed money on his own note. It is in evidence that A. Edgar Beard stated to H. G. Patterson and O. L. Price that he had no interest in the property, but that S. M. Beard was the owner thereof. It is shown that A. Edgar Beard was familiar with the inventories of 1908 and 1909, including the property in question, and showing that S. M. Beard owned the same, and that he made no protest nor claim of ownership to the land.

Subsequent to the death of S. M. Beard, and while the defendant was executor of the decedent's estate, he placed of record a mortgage for \$5,000 on the Kelly Butte property in favor of one S. H. Bell. This mortgage was not given for any consideration. A release of the same was executed by Mr. Bell in favor of the defendant. This the latter, up to the time of the trial, had not placed of record. The defendant states in his cross-examination upon this subject: "I put the mortgage on record so that you could not get it and tie it up." It appears that S. M. Beard at different times owned real property, the title to which was held in the name of the Beard Fruit Company, Mary B. Gray, A. Edgar Beard, and others.

[3] While the decedent was in active business he held property in trust for several other persons, and it does not seem strange that he should convey his own property to his relatives in trust. Whether or not his fears of being overreached by some woman were well founded does not change the situation. It does not appear that S. M. Beard executed the deed of July 22, 1897, or the deed of June 23, 1903, for the purpose of escaping any just obligation. There was no creditor or just claimant whose rights or in-



terests could be prejudiced in the matter. *Rivera v. White*, 94 Tex. 538, 63 S. W. 125; *Odell v. Moss*, 137 Cal. 542, 70 Pac. 547.

We have read the evidence carefully, and have examined the several exhibits contained in the record. This is a family affair, and an extended recitation or discussion of the testimony would be of no advantage to any one. Suffice it to say that the proofs are convincing, and clearly preponderate in favor of the plaintiffs.

[4] It is contended by counsel for the defendant that there is no evidence to sustain the allegation in the complaint of an express trust, because an express trust must be shown by a writing. The defendant, A. Edgar Beard, received the property in question in trust for S. M. Beard, together with other parcels of real estate which had been sold and conveyed by A. Edgar Beard at the dictation of S. M. Beard, and the proceeds thereof turned over to the latter, thereby executing the trust in part. A fiduciary relation is therefore shown to have existed between the defendant and the decedent.

[5] There was no open breach of the trust until after the death of S. M. Beard. The partial performance of the trust takes the same out the statute of frauds. Continued exercise of acts of dominion over real property by the cestui que trust, with notice to the trustee, as was given to A. Edgar Beard, and without protest from him, established the existence of the trust. *Kollock v. Bennett*, 53 Or. 395, 401, 100 Pac. 940, 133 Am. St. Rep. 840; *Greenley v. Shelmidine*, 83 App. Div. 559, 82 N. Y. Supp. 176; *Bork v. Martin*, 132 N. Y. 280, 30 N. E. 584, 28 Am. St. Rep. 570; *Broder v. Conklin*, 77 Cal. 330, 19 Pac. 513.

[6] It is a salutary maxim that the statute against frauds cannot be used as a cover for fraud. The complaint also sets forth in detail circumstances which show that there was no gift intended, but that, on the contrary, a trust arose in favor of the grantor on the execution of these deeds. A resulting trust may arise where a conveyance is made without any consideration, and it appears from the circumstances that the grantee was not intended to take beneficially. *Bispham*, Prin. Eq. § 79; *Bennett v. Hutson*, 33 Ark. 762; *Gay v. Hunt*, 5 N. C. 141, 3 Am. Dec. 681; *Williams v. Williams*, 108 Iowa, 91, 78 N. W. 792; *Lingenfelter v. Ritchey*, 58 Pa. 485, 98 Am. Dec. 308.

The rule is stated in 39 Cyc. 60, as follows: "Although real or personal property is transferred by a conveyance absolute in form, the transfer may be held to have been made in trust and the grantee to be a trustee, where the prior or contemporaneous acts, declarations, and agreements of the parties evidence an intent and understanding that the grantee was to take and hold the property for a trust purpose (citing *Coffin v. Argo*, 134 Ill. 276 [24 N. E. 1068]; *Van Patten v. Camp-*

*bell*, 59 N. J. Eq. 653 [49 Atl. 1070]; *Bridenbecker v. Lowell*, 32 Barb. [N. Y.] 9; *Hunter v. Hunter*, 17 Barb. [N. Y.] 25; *Hurley v. Walter*, 129 Wis. 508 [109 N. W. 558]). It is not permissible, however, for one who has made an absolute conveyance of property to fasten a trust thereon by his own subsequent acts and declarations alone, although such subsequent acts and declarations are sometimes considered in connection with prior and contemporaneous ones in determining whether or not a trust exists, and there is no objection to the grantee subsequently declaring that he holds in trust. Within the meaning of the rules just stated, the facts and circumstances surrounding many absolute conveyances have been held insufficient to disclose a trust."

[7] The general rule is that an express trust may be proved, not only by express declarations, but also by circumstances from which its existence may be inferred, and to this end evidence of the acts and declarations, either oral or written, of the parties, as well as the surrounding circumstances, may be admitted and considered. 39 Cyc. 80; *Kendrick v. Ray*, 173 Mass. 305, 53 N. E. 823, 73 Am. St. Rep. 289; *Barker v. Smith*, 92 Mich. 336, 52 N. W. 723; *Starbuck v. Farmers' L. & T. Co.*, 28 App. Div. 272, 51 N. Y. Supp. 58; *Drew v. Corliss*, 65 Vt. 650, 27 Atl. 613.

At the time S. M. Beard executed the deed of July 22, 1897, to the Eden and Tabor Heights property he prepared and forwarded to A. Edgar Beard an exact duplicate of that deed, except that the day and month were left blank, and the names of the grantor and grantee were reversed. This deed, however, was not acknowledged by A. Edgar Beard until the 19th day of March, 1898, and is the one referred to as having been recorded after the death of S. M. Beard. This deed defendant claims was executed as a mortgage and left with his father, so that in case of defendant's death it would secure the payment of the sum of \$1,000 to S. M. Beard. This is not, however, substantiated by the evidence. The manner in which S. M. Beard carried on his business, and all the facts and circumstances of the case, indicate very strongly that at the time he executed the deed of the Kelly Butte property to A. Edgar Beard on June 23, 1903, he required and obtained a reconveyance from A. Edgar Beard to himself, but never recorded the same. The circuit court so found.

[8] Where the defendant relies upon a voluntary conveyance from a near relative, such as a confiding uncle, and a prima facie case is made out against him, showing that the property conveyed is held by him in trust, and the attendant facts and circumstances and the means of disclosure and explanation are peculiarly within the defendant's cognizance, it devolves upon him to show an entire good faith in the transaction, and prove his



title. This the defendant has failed to do. *Schwartz v. Gerhardt*, 44 Or. 425, 432, 75 Pac. 698; *Mendenhall v. Elwert*, 36 Or. 375, 384, 52 Pac. 22, 59 Pac. 805; *Garnier v. Wheeler*, 40 Or. 198, 201, 66 Pac. 812; *Goodale v. Wheeler*, 41 Or. 190, 197, 68 Pac. 753; *Livesley v. Helise*, 48 Or. 147, 152, 85 Pac. 509.

The findings of the trial court were, in substance, correct. It follows that the decree of the lower court should be affirmed, and it is so ordered.

MCBRIDE, C. J., and EAKIN and McNARY, JJ., concur.

(66 Or. 526)

### BEARD v. BEARD.

(Supreme Court of Oregon. July 15, 1918.)

#### 1. APPEAL AND ERROR (§ 1011\*)—VERDICT—REVIEW.

Under Const. art. 7, § 3, as amended (see Laws 1911, p. 7), providing that no fact tried by a jury shall be otherwise re-examined in any court unless the court can affirmatively say there is no evidence to support the verdict, a verdict based on conflicting evidence cannot be set aside on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

#### 2. WITNESSES (§ 159\*)—TRANSACTION WITH PERSON SINCE DECEASED.

Where, in an action by an executor to recover certain stock certificates, plaintiff claimed that the stock had been assigned to defendant as part of decedent's general scheme to place his property in the names of other persons, and that defendant was not the real owner thereof, evidence of a conversation between decedent and defendant at the time certain money was deposited by defendant to the credit of a third person, and that such deposit was made to cover up a transaction of decedent, was admissible under L. O. L. § 725, providing that it is within the discretion of the court to permit inquiry into a collateral fact, directly connected with the transaction in dispute and essential to its proper determination, or when it affects the credibility of a witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 629, 664, 666-669, 671-682; Dec. Dig. § 159.\*]

#### 3. WITNESSES (§ 176\*) — TRANSACTION WITH PERSON SINCE DECEASED.

Where an executor, suing to recover certain stock, claimed that it had been assigned to defendant, pursuant to a general scheme of decedent to place his property in the name of other persons, while defendant claimed he had taken the stock in payment of a \$5,000 loan to testator, and defendant's deposition had been taken before trial, declarations by testator, showing a reason for placing the shares in the names of others, and an inventory in his handwriting in which the corporation's property was listed as his own, with a valuation thereof, was admissible under L. O. L. § 732, subd. 2, providing that when a party to an action by or against an executor appears as a witness in his own behalf, or offers evidence of statements made by decedent against his own interest, statements of decedent concerning the same matter in his favor may be also admitted.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 714, 716, 717, 719; Dec. Dig. § 176.\*]

#### 4. APPEAL AND ERROR (§ 1047\*)—HARMLESS ERROR—RECEPTION OF EVIDENCE—EVIDENCE IN CHIEF PROPER IN REBUTTAL.

The admission of testimony in chief, which is properly admissible in rebuttal, is a mere matter of order of proof, so that failure to follow the rule is at most a harmless irregularity, and not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4132, 4133, 4146-4152; Dec. Dig. § 1047.\*]

#### 5. DISCOVERY (§ 31\*) — PARTIES — EXAMINATION BEFORE TRIAL — DEPOSITION OF DEFENDANT.

L. O. L. § 837, providing for the examination of an adverse party before trial by its express terms, authorizes the taking of the testimony of an adverse party by deposition at any time after service of the summons or the appearance of the defendant.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 45; Dec. Dig. § 31.\*]

Department 2. Appeal from Circuit Court,

Multnomah County; J. P. Kavanaugh, Judge.

Action by S. Roscoe Beard, as executor of S. M. Beard, deceased, against A. Edgar Beard. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action to recover the possession of a certificate for 10 shares of stock in the Beard Fruit Company. It is alleged in the complaint that plaintiff, S. Roscoe Beard, was appointed as executor under the last will and testament of S. M. Beard, deceased, and that he duly qualified as such; that his coexecutors were removed by order of the county court for Multnomah county, and that plaintiff thereupon became the sole executor of the estate; that as such executor plaintiff is the owner of and entitled to the immediate and exclusive possession of a certain certificate of stock issued by the Beard Fruit Company to S. M. Beard, deceased; that such certificate is within Multnomah county, Or., in the possession, custody, and control of the defendant; that plaintiff demanded possession of the certificate from defendant, who failed and neglected to deliver the same.

Concerning plaintiff's ownership and right of possession of the certificate, an affirmative defense is set up to the following effect: That on June 22, 1903, defendant loaned S. M. Beard \$5,000, taking from him a promissory note for that amount, bearing the same date, due on or before two years after date, with interest at 8 per cent.; that as collateral security for such note, S. M. Beard pledged the certificate of stock in question with the defendant; that during the latter part of 1906, the note for \$5,000 being wholly unpaid, it was agreed between the defendant and S. M. Beard that the latter should assign and deliver the certificate of stock to the defendant in payment of the note and the amount due thereon, and that the defendant should surrender such promissory note; that pursuant to said agreement the certificate for said stock was indorsed by S. M. Beard and delivered to the defendant in payment



of the promissory note, and the defendant surrendered and delivered such note to S. M. Beard; that by reason of this transaction the defendant became and now is the owner of the certificate of stock, and in the sole and exclusive possession of the same. The allegations contained in the affirmative defense of defendant's answer were denied by the plaintiff's reply. The cause was tried before a jury, and a verdict returned in favor of the plaintiff, finding him to be the owner and entitled to the possession of the certificate of stock. Defendant appeals from the judgment entered upon such verdict.

The plaintiff's ownership and right of possession depend entirely upon the ownership and right of possession of S. M. Beard at the time of his death, January 8, 1910. Upon the trial the plaintiff introduced evidence to the following effect: The Beard Fruit Company was organized under the laws of Washington by S. M. Beard, Mary E. Beard, and the defendant, A. Edgar Beard. It was capitalized for \$10,000, and its authorized stock divided into 100 shares, 10 of which were issued to S. M. Beard, 40 in the name of defendant, and 50 in the name of Mary E. Beard. Various fruit lands owned by S. M. Beard were conveyed to the corporation, and constituted the wealth of the company. Mrs. Mary B. Gray (née Beard) testified that upon her return from California in September, 1902, all three certificates of stock were handed to her by S. M. Beard, to be kept for him until he should ask for them. This incident occurred in the bank at Vancouver. The three certificates were kept by her in an envelope marked "Beard Fruit Company" in her uncle's handwriting. Subsequent to that time she had possession of the certificates continuously until 1904, when defendant took them to Baker City. In the fall of 1905 she went to Baker, and upon her return in February, 1906, she brought back the certificates, and kept them in her possession until January, 1909. One evening at her home the defendant took the certificates, stating that he would place them in a vault where they would be safer than in her frame house. They remained in his possession until after the death of S. M. Beard.

Mrs. Gray's testimony in regard to the possession of the certificates was corroborated in the main by that of her husband, W. L. Gray, and by the written and oral statements of S. M. Beard, deceased. The certificate of stock in suit was issued originally to S. M. Beard. It is admitted that the plaintiff is the executor of the estate of S. M. Beard, deceased. Mrs. Gray's testimony was contradicted by Mrs. A. Edgar Beard, who states that she saw the certificates in the defendant's safe deposit box in June, 1908; by Charles L. Boss, who states that he saw one of the certificates in the defendant's possession at the office of Moline-Bain Company in 1902; by Mrs. Carrie E. Cadwell, one of the

sisters; and by the defendant in every material particular.

R. A. Leiter, of Portland (Griffith, Leiter & Allen and F. J. Lonergan, all of Portland, on the brief), for appellant. Wallace McCamant, of Portland (Snow & McCamant, of Portland, on the brief), for respondent.

BEAN, J. (after stating the facts as above). The defendant contends that the court erred: (1) In overruling the motion for a judgment of nonsuit, made by the defendant at the close of plaintiff's evidence; and (2) in overruling the motion for a directed verdict in favor of the defendant, made at the close of all the evidence. These assignments may be considered together.

[1] We take up the final consideration of this case after the suit of Mary B. Gray and S. Roscoe Beard v. A. Edgar Beard, 133 Pac. 791. The history of the relations of the parties is contained in the opinion in the latter case to which reference may be made, and which need not be repeated here. The jury came to the same conclusion in the case at bar as we did in the equity suit, and upon much the same facts. There was a direct conflict in the evidence. Section 3, art. 7, of the Constitution, as amended (see Laws 1911, p. 7), provides that no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict. However, we cannot so declare in this case. There was no error in submitting the cause to the jury.

It was the plaintiff's theory of the case, and the evidence tended to show, that in 1893 S. M. Beard, fearing that his property would be wrongfully taken from him, carefully planned and executed a transfer of the 10 shares of stock to the defendant in such a manner as to thoroughly conceal the true nature of the transaction; that in carrying out the plan, on June 15, 1903, he borrowed \$5,000 from the Commercial Bank of Vancouver, giving his note therefor; that on June 22, 1903, a note for \$5,000 in favor of defendant was signed by him, and purported to be secured by the 10 shares of capital stock of the Beard Fruit Company; that this note was never delivered, but that soon after its execution it was turned over by S. M. Beard to his niece, Mary B. Gray, in whom he had implicit confidence, who retained it until she produced it at the trial of this case; that to make the transaction more plausible, certificates of deposit were turned over by the defendant to the decedent, and the money used to pay the note of June 15, 1903. In this connection it is claimed by the plaintiff that on June 22, 1903, \$3,000 of the \$5,000 was deposited by A. Edgar Beard to the credit of W. L. Gray, Mrs. Gray's husband, during his absence; that upon Gray's return to the city he was apprised of what had been done, and told that it was to cover up some trans-



action of S. M. Beard. It appeared from a conversation between S. M. Beard and A. Edgar Beard at the time, as testified to by W. L. Gray, that the money belonged to S. M. Beard. The defendant objected and excepted to the introduction of evidence in regard to this transaction, and requested the court to instruct the jury to disregard it, which request was refused. The defendant assigns the admission and consideration of the same as errors.

[2] The particular transaction in regard to the 10 shares of stock in question appears to have been a part of a general scheme of decedent to place this property in the name of other parties. The evidence relates to the very \$5,000 matter by which the defendant claims ownership to the stock, and we think it is germane to the issues. The jury was entitled to the whole history of the deal under proper instructions. There was no error in admitting the evidence complained of. Section 725, L. O. L., provides that it is within the discretion of the court to permit inquiry into a collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness. It should be stated that it does not appear and is not claimed that S. M. Beard, deceased, transferred any of his property for the purpose of defeating any just claim against him.

[3] The defendant objected and saved exceptions to the evidence of the declarations of S. M. Beard, tending to show a reason for placing the shares of stock in the names of other persons, and also to the introduction of an inventory in the handwriting of S. M. Beard, in which the Beard Fruit Company property was listed as S. M. Beard's property, with the valuation thereof. This evidence was admissible under section 732, L. O. L., subd. 2, providing that when a party to an action, suit, or proceeding, by or against an executor or administrator, appears as a witness in his own behalf, or offers evidence of statements made by deceased against the interest of the deceased, statements of the deceased concerning the same subject-matter in his own favor may also be proven. See *Jones v. Hill*, 62 Or. 53, 124 Pac. 206.

[4] This evidence, taken in connection with the other testimony and circumstances of the case, was material. It is objected that the same was introduced by the plaintiff as a part of his case in chief, before the defendant appeared as a witness. The deposition of the defendant had been taken in the case, and it was evidently understood that he would take the witness stand in his own behalf, which he did. The admission of testimony in chief, which is properly admissible in rebuttal, is a matter of the order of proof. At most it was a harmless irregularity, and

does not call for a reversal of the judgment. *Cashman v. Harrison*, 90 Cal. 297, 27 Pac. 283; *Nuckolls v. College of Physicians & Surgeons*, etc., 7 Cal. App. 233, 94 Pac. 81.

[5] The defendant complains because the plaintiff took the deposition of the defendant before the time of trial. Section 837, L. O. L., authorizes the testimony of the adverse party to be taken by deposition at any time after the service of the summons or the appearance of defendant. *Wheeler v. Burckhardt*, 34 Or. 504, 56 Pac. 644.

We find no prejudicial error in the record. The judgment of the lower court is therefore affirmed.

McBRIDE, C. J., and EAKIN and McNARY, JJ., concur.

(66 Or. 512)

### BEARD v. BEARD.

(Supreme Court of Oregon. July 15, 1913.)

#### 1. CORPORATIONS (§ 665\*)—FOREIGN CORPORATIONS—INTERNAL AFFAIRS—JURISDICTION.

The rule that courts decline jurisdiction of controversies relating to the management of the internal affairs of a foreign corporation is not strictly a question of jurisdiction, but of discretion in the exercise of jurisdiction, since except in cases involving the exercise of visitatorial powers, the rule rests more on grounds of public policy and expediency than on jurisdictional grounds.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2571, 2573, 2595-2600; Dec. Dig. § 665.\*]

#### 2. CORPORATIONS (§ 665\*)—FOREIGN CORPORATIONS—INTERNAL AFFAIRS—RECOVERY OF PROPERTY.

Where a suit was brought by the secretary of a foreign corporation on its behalf, to require a resident of Oregon to deliver property in his possession to plaintiff as his successor in office, and all the parties interested were residents of Oregon, so that the court's authority could be exercised on the person of the defendant, the court would take jurisdiction, and determine the controversy without remanding the plaintiff to a foreign jurisdiction, in which it was shown that service of process could not be had.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2571, 2573, 2595-2600; Dec. Dig. § 665.\*]

#### 3. CORPORATIONS (§ 665\*)—FOREIGN CORPORATIONS—REGULATION—VISITORIAL POWERS—DEFENSES.

The rule which restricts interference by a court in the internal affairs of a foreign corporation is for the protection of the corporation, and is not available as a defense to a suit at the instance of the corporation, or on its behalf.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2571, 2573, 2595-2600; Dec. Dig. § 665.\*]

#### 4. QUO WARRANTO (§ 20\*)—CORPORATIONS—RIGHT TO OFFICE.

The remedy to determine the right to an office in a private corporation is by an action in the nature of quo warranto.

[Ed. Note.—For other cases, see *Quo Warranto*, Cent. Dig. § 21; Dec. Dig. § 20; *Corporations*, Cent. Dig. § 1222.]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



7. MANDAMUS (§ 129\*)—CORPORATE OFFICERS—INDICIA OF OFFICE.

An officer whose term of office has expired cannot defeat his successor's right to mandamus for possession of the indicia of the office and the property of the corporation, by raising the question of the validity of his successor's title.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 264; Dec. Dig. § 129.\*]

6. CORPORATIONS (§ 665\*)—OFFICERS—ELECTION—RIGHTS OF SUCCESSOR.

Until the election of an incoming secretary of a corporation has been declared void by a court of the state of the corporation's domicile, the election will be held valid, and the officer's rights thereunder protected by the courts of Oregon.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2571, 2573, 2595-2600; Dec. Dig. § 665.\*]

7. MANDAMUS (§ 129\*) — CORPORATE BOOKS AND RECORDS—DELIVERY TO OFFICER ELECT.

Mandamus is available to compel the outgoing secretary of a foreign corporation to deliver the corporation's books, records, and personal property to the secretary elect.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 264; Dec. Dig. § 129.\*]

8. MANDAMUS (§ 3\*)—OTHER REMEDY—FOREIGN CORPORATIONS—BOOKS AND PAPERS—REPLEVIN.

Replevin, being a local action which lies only for the possession of goods situated within the county in which the venue is laid, and requiring great particularity of description, did not furnish an adequate remedy by which an incoming secretary of a foreign corporation might recover from his predecessor the books, papers, and personal property belonging to the office, so as to prevent the obtaining of such relief by mandamus.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 8, 10, 11, 16-34; Dec. Dig. § 3.\*]

9. MANDAMUS (§ 1\*)—NATURE OF PROCEEDING—ACTION AT LAW.

A mandamus proceeding is an action at law.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 1-3; Dec. Dig. § 1.\*]

10. MANDAMUS (§ 187\*)—FINDINGS—REVIEW.

Findings of a trial court in a mandamus proceeding have the force and effect of a verdict, and should not be set aside on appeal, where there is any evidence to sustain them.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 427-437; Dec. Dig. § 187.\*]

Department 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by S. Roscoe Beard, as Secretary of the Beard Fruit Company, against A. Edgar Beard. Judgment for plaintiff, and defendant appeals. Affirmed.

This is a mandamus proceeding commenced July 19, 1912, to compel the defendant to deliver to the plaintiff, as secretary of the Beard Fruit Company, certain books, papers, and promissory notes. The writ sets forth, in substance, as follows: The Beard Fruit Company is a foreign corporation, organized under the laws of the state of Washington, and the plaintiff is and has been since July 9, 1912, the duly qualified and acting secretary of the corporation, and entitled to the books and choses in action of the company,

some of which are without the state of Oregon, and all under the control of the defendant. The defendant resides in Multnomah county, Or., and cannot be served personally in the state of Washington. For a long time prior to July 9, 1912, the defendant was secretary of the Beard Fruit Company, and had and claimed the records and papers as such secretary. Plaintiff demanded the possession of the same, but the defendant did not comply therewith. The latter demurred to the writ for want of jurisdiction and sufficient facts. The circuit court overruled the demurrer. The defendant answered, denying all the allegations of the writ, except that the company is a Washington corporation, and that the defendant resides in Oregon, and was secretary prior to July 9, 1912. The first defense alleges in effect that the defendant is and has been since November 17, 1901, secretary of the corporation, and sets forth in detail facts from which the defendant claims that the election of the plaintiff as secretary was illegal. The second defense shows that the books and papers are in the possession of Gilbert Daniels, the resident trustee of the company at Vancouver, Wash. The third defense alleges in effect that there is controversy existing among the stockholders as to the ownership of the shares of stock in the corporation; that this proceeding is a plan to obtain control of the corporation illegally, in furtherance of a conspiracy; that the title of the plaintiff to the office has not been adjudicated, and that the court has no jurisdiction over the subject-matter, or over the defendant; that the proceeding relates entirely to the management of the internal affairs of a foreign corporation. Plaintiff filed a reply putting in issue the material allegations of the answer. Upon the trial the circuit court made findings in favor of the plaintiff. The defendant requested certain findings of facts, which were refused and exceptions duly saved. Judgment was entered making the writ peremptory, and the defendant appeals.

R. A. Leiter, of Portland (Griffith, Leiter & Allen, of Portland, on the brief), for appellant. Wallace McCamant, of Portland (Snow & McCamant, of Portland, on the brief), for respondent.

BEAN, J. (after stating the facts as above). The first point urged by the defendant's counsel is raised by the demurrer and by the third separate answer, to wit, that it is not within the judicial province of a court of this state to supervise the internal affairs of a corporation of the state of Washington. The Beard Fruit Company was organized under the laws of the state of Washington by S. M. Beard, now deceased, who was the equitable owner of nearly all the assets of the corporation. In 1906 he moved from Vancouver, Wash., to Portland, Or. Until

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



July 6, 1912, all the stockholders of the company resided at the latter place. At that time a share of stock was assigned to E. S. Blesecker, of Vancouver, as trustee. The by-laws of the Beard Fruit Company were amended July 13, 1909, so that they required four directors. It was also necessary, under the Washington laws, that there should be a Washington stockholder, who should also be a member of the board of directors. One share of the stock was therefore assigned to each of the following: Captain Griffith, E. S. Blesecker, and W. L. Gray, who executed certificates of trust therefor to Mary B. Gray. They were chosen directors. The authorized capital stock of the company was 100 shares. At the time of the organization 50 shares of the stock were issued to Mary E. Beard, whose present name is Mary B. Gray, 40 shares to A. Edgar Beard, and 10 to S. M. Beard. The latter died January 8, 1910. The ownership of the 10 shares is in litigation; the defendant claiming them as his own, and the plaintiff claiming that they belong to the estate of S. M. Beard. These shares were involved in an action for the possession thereof, in which an opinion has just been rendered by this court, to wit, in the case of S. Roscoe Beard, as Executor of the Estate of S. M. Beard, deceased, v. A. Edgar Beard, 133 Pac. 795. The estate of S. M. Beard is being administered in the probate court of Multnomah county, Or. S. Roscoe Beard is the sole executor. The devisees under S. M. Beard's will are S. Roscoe Beard, Mary B. Gray, A. Edgar Beard, and Carrie Ella Cadwell, who are brothers and sisters, and were the nephews and nieces of S. M. Beard, deceased, and Susan Beard, the mother of the four devisees just mentioned, and a sister-in-law of the deceased. These parties, by the will, were each given a one-fifth interest in the estate for the payment of certain small legacies.

[1] The doctrine that courts decline jurisdiction of controversies relating to the management of the internal affairs of a foreign corporation is not strictly a question of jurisdiction, but rather of discretion in the exercise of jurisdiction. Except in cases involving the exercise of visitatorial powers, the rule rests more upon grounds of public policy and expediency than upon jurisdictional grounds, and more upon a want of power to enforce a decree than upon jurisdiction to make it.

[2] Where the relief sought amounts to requiring a resident of the state, who has been an officer in the corporation, to deliver property to his successor in office, who has been duly elected, in order that the property may be cared for and protected, and where all the parties interested are residents of this state, and where the authority of the court is to be exercised upon the person of the defendant, and the action is brought in behalf of the corporation, the court should exercise

the power of determining the controversy without remanding the suit to a foreign jurisdiction in which it is shown that services of process cannot be had upon the defendant. *Babcock v. Farwell*, 245 Ill. 14, 91 N. E. 683, 137 Am. St. Rep. 284, 19 Ann. Cas. 74; *Edwards v. Schillinger*, 245 Ill. 231, 91 N. E. 1048, 33 L. R. A. (N. S.) 895, 137 Am. St. Rep. 308; *Ernst v. Rutherford, etc.*, 38 App. Div. 388, 56 N. Y. Supp. 403, 405; *Richardson v. Clinton Wall, etc., Co.*, 181 Mass. 580, 64 N. E. 400; *Beale on Foreign Corporations*, §§ 300-312.

This is not an action where it is claimed that an officer of a corporation has offended solely against the majesty of the state of Washington. It appears from the pleadings and all the evidence that the action is brought to protect the rights of stockholders and citizens of this state to the property in the corporation. No good reason appears why they are not entitled to receive full relief in our courts, in so far as such relief can be accomplished by acting directly on the person of the defendant. Should there be a question as to the enforcement of the judgment, we should be inclined to apply the suggestion made in the case of *Kalyton v. Kalyton*, 45 Or. 116, 131, 74 Pac. 491, 78 Pac. 332, and declare the law irrespective of consequences that may result therefrom.

[3] Courts will not exercise visitatorial powers over foreign corporations or interfere with the management of their strictly internal affairs. The difficulty is in drawing the line of demarcation between matters which do, and others which do not, pertain to the management of the internal affairs of the corporation. *Guliford v. Western Union Telegraph Co.*, 59 Minn. 332, 61 N. W. 324, 50 Am. St. Rep. 407. The purpose of the rule which restricts interference by a court in the internal affairs of a foreign corporation is the protection of the foreign corporation. The defense therefore is available only to the corporation; it cannot be maintained as against the corporation in a proceeding brought on its behalf and at its instance. *Babcock v. Farwell*, 245 Ill. 14, 91 N. E. 683, 137 Am. St. Rep. 284, 19 Ann. Cas. 74; *Ernst v. Elmira Co.*, 24 Misc. Rep. 583, 54 N. Y. Supp. 116.

[4] In the case at bar this court is not called upon to finally determine the validity of the election of the secretary of the corporation, nor to consider that question only in so far as the present necessities may require, but to find who has prima facie title to the office of secretary and entitled to the present possession of the property of the corporation, and grant relief accordingly, leaving the contest, if any there be, as to the election, to be determined in a proper proceeding. In this state such contest would be in an action in the nature of quo warranto.

[5, 6] An officer whose term of office has



expired cannot defeat his successor's right to a writ of mandamus for possession of the indicia of the office and the property of the corporation by raising a question as to the validity of the latter's title. *Stevens v. Carter*, 27 Or. 553, 561, 40 Pac. 1074, 31 L. R. A. 342. In this case the plaintiff instituted a proceeding in mandamus to obtain possession of the office to which she had been prima facie elected. The question was raised under the Constitution, as it then existed, as to the right of the plaintiff to hold the office. The court declined to pass upon that question, and sustained the writ. In a proceeding properly raising that question, it was determined that, under the Constitution, before the amendments which have since been made, the plaintiff, being a woman, was not authorized to hold the office in question. *State ex rel. v. Stevens*, 29 Or. 464, 473, 44 Pac. 898. Until the election of the secretary of the Beard Fruit Company is declared to be void by the court of the state of Washington, we shall hold it to be valid, and protect the rights thereunder. See *State ex rel. Ryan v. Cronan*, 23 Nev. 437, 49 Pac. 41; *Cruse v. State ex rel.*, 52 Neb. 831, 73 N. W. 212; *State ex rel. v. Kipp*, 10 S. D. 495, 74 N. W. 440; *Ernst v. Rutherford, etc., Co.*, 38 App. Div. 388, 56 N. Y. Supp. 403, 405.

[7] It is contended by the defendant that the plaintiff has a plain, speedy, and adequate remedy at law by an action for possession of the personal property. High, Extraordinary Remedies, § 306, states: "And the rule is well established, both upon principle and authority, that mandamus will lie to compel the surrender and delivery of corporate books and records to the officers properly entitled thereto. And where the term of office has expired, either by removal, or by lapse of time, and the officer refuses to surrender the corporate records and documents to his successor duly elected and entitled to their custody and control, mandamus will go to compel the delivery." See, also, *Cook on Corporations*, § 515.

[8] It is apparent that an action of replevin would not be an adequate remedy, for the reason that only a portion of the property is situate in one jurisdiction. In order to adjust the property rights pertaining to S. M. Beard's estate, the parties have already prosecuted an action at law. *S. Roscoe Beard, as Executor, v. A. Edgar Beard*, 133 Pac. 795, and a suit in equity, *Mary B. Gray and S. Roscoe Beard v. A. Edgar Beard*, 133 Pac. 791, opinions in which have been lately rendered. A portion of the property involved in those cases was held by the Beard Fruit Company. Replevin is a local action, and lies only for the possession of the goods situate in the county in which venue is laid. *Kirk v. Matlock*, 12 Or. 319, 7 Pac. 322; *Prescott v. Helmer*, 13 Or. 200, 9 Pac. 403; *Moorhouse v. Donaca*, 14 Or. 430, 13 Pac.

112; *Byers v. Ferguson*, 41 Or. 77, 79, 63 Pac. 1067, 68 Pac. 5. In a replevin action it is necessary to describe the personality with greater particularity of description than is required in a proceeding in mandamus, trover, or trespass. 34 Cyc. 1471; *Foredice v. Rinehart*, 11 Or. 208, 209, 8 Pac. 285; *Fox v. Tift*, 57 Or. 268, 271, 111 Pac. 51, Ann. Cas. 1912D, 845.

[9, 10] The circuit court found that at a meeting of the stockholders of the Beard Fruit Company, held on the 9th day of July, 1912, Mary B. Gray, W. L. Gray, J. H. Griffiths, and E. S. Biesecker were duly elected trustees of said corporation for the year beginning July 9, 1912; that at said meeting, Mary B. Gray rightfully voted 47 shares of stock of the corporation; that S. Roscoe Beard, as executor of the estate of S. M. Beard, deceased, rightfully voted 10 shares of stock of the corporation, and that W. L. Gray, J. H. Griffiths, and E. S. Biesecker rightfully voted one share each of the stock of the corporation; that after their election the trustees duly qualified by taking the trustees' oath prescribed by the state of Washington. We think there was sufficient evidence to support the finding. A proceeding in mandamus is an action at law. In *re Vinton*, 132 Pac. 1165, decided June 24, 1913. The findings of the lower court have the force and effect of a verdict, and should not be set aside where there is evidence to sustain them. *Giaconi v. Astoria*, 60 Or. 12, 23, 113 Pac. 855, 118 Pac. 180; *Aerne v. Gostlow*, 60 Or. 113, 119, 118 Pac. 277; *Van De Wiele v. Garbade*, 60 Or. 585, 120 Pac. 752.

Finding no error, the judgment of the lower court will be affirmed.

MCBRIDE, C. J., and EAKIN and McNARY, JJ., concur.

(66 Or. 377)

#### FRANCK v. BLAZIER.

(Supreme Court of Oregon. July 22, 1913.)

#### 1. APPEAL AND ERROR (§ 1010\*)—FINDINGS—CONCLUSIVENESS.

If there is any competent evidence to support fact findings in an action at law tried to the court, they will not be disturbed by the Supreme Court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.\*]

#### 2. BROKERS (§ 31\*)—INDIVIDUAL INTEREST—GOOD FAITH.

An agent employed to sell cannot ordinarily become interested in the purchase without the knowledge and consent of his principal, but he may openly and fairly buy the property at the price fixed by the principal if the latter has full knowledge of his action.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 24; Dec. Dig. § 31.\*]

#### 3. BROKERS (§ 82\*)—ALLEGATIONS—AFFIRMATIVE DEFENSES.

In order for defendant, in an action for a broker's commissions for selling property, to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



rely on the illegality of the contract because the broker secretly became a purchaser, such fact must be pleaded.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 101-103; Dec. Dig. § 82.\*]

**4. BROKERS (§ 67\*) — COMMISSIONS — ACTING FOR BOTH PARTIES.**

A broker may act for both parties in the sale of property, and receive commissions from both, if he does so with their knowledge.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 52-54; Dec. Dig. § 67.\*]

Department 2. Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Action by L. S. Franck against J. E. Blazier. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action for a broker's commission, tried before the court without the intervention of a jury. The court found in favor of plaintiff and entered judgment accordingly, from which defendant appeals. Plaintiff in his complaint alleges the contract and the consummation thereof. Defendant alleges that plaintiff is not entitled to recover any compensation for any service performed by him for defendant under and by virtue of the contracts between them, for the reason that, unknown to defendant and without his consent, plaintiff had a secret agreement with some or all of the members of the syndicate mentioned in his complaint, whereby he was to receive a portion of the profit or compensation of the transactions, thus rendering void all contracts between plaintiff and defendant. During the month of December, 1910, defendant employed plaintiff to procure a loan for him of \$500,000, on a logging railroad known as the "Cape Horn Railroad," situated in Skamania county, Wash. It was agreed between defendant and plaintiff that if plaintiff was successful in procuring this loan, defendant would pay him a commission of \$10,000. Plaintiff proceeded from Portland to Detroit and other financial centers, and, after encountering difficulties, notified defendant that he was unable to procure the loan. Defendant then requested plaintiff to endeavor to sell the railroad, and fixed the price at \$275,000, and defendant agreed to pay plaintiff a commission of \$10,000 in the event of his being successful. Plaintiff organized a syndicate to purchase the railroad, and brought certain members of the syndicate and the defendant together, and as a result of their negotiations the defendant's railroad was sold. A new corporation was organized, known as the Washington-Northern Railroad Company, to which all the rights and interests of the Cape Horn Railroad were transferred, the defendant receiving his price, \$225,000 in cash and \$50,000 in bonds. The Washington-Northern Railroad Company issued bonds in the sum of \$1,000,000, secured by a mortgage upon all its property. The Oregon-Washington Timber Company, being the corporation that

owned the timber, issued two series of bonds, one in the sum of \$600,000, and one in the sum of \$400,000, secured by first and second mortgages upon its property, and sold the \$600,000 of its first mortgage bonds for the sum of \$540,000 to the syndicate organized by the plaintiff, and as a bonus for the taking of all of those bonds the syndicate was given all of the shares of the capital stock of the Washington-Northern Railroad Company. The syndicate borrowed the money from the Mississippi Valley Trust Company, of St. Louis, and pledged the bonds and stock as collateral security for said loan. Defendant claims that, unknown to him, plaintiff entered into an agreement with Mr. Noble, whereby it was agreed that he and Noble would pool the commission that Noble was to receive from the sale of the bonds with the commission that plaintiff was to receive from defendant and divide the same.

J. F. Reilly, Ralph E. Moody, and W. C. Healion, all of Portland, for appellant. Hugh Montgomery and Platt & Platt, all of Portland, for respondent.

BEAN, J. (after stating the facts as above). It is plaintiff's contention that he informed defendant fully in regard to the complicated deal and that all he did was for the best interests of defendant, and necessary to consummate the transaction and obtain the money required by the defendant; that it was an honest arrangement. It is stipulated that, in order to enhance the security of the bond issue, the Oregon-Washington Timber Company, in which the defendant held shares of stock, entered into a contract on June 9, 1910, with the Washington-Northern Railroad Company and the Mississippi Valley Trust Company. It appears that in organizing the new railroad company plaintiff took one share of stock and became a director, as he states, at the instance of defendant, Blazier, and the attorneys attending to the affair. The question as to whether or not defendant had full knowledge from the plaintiff, Franck, in regard to the latter's interest in the matter negotiated was an issue upon the trial. The circuit court found in favor of the plaintiff, in effect, that it was a fair transaction, and that plaintiff performed all of his obligations, and caused the sale to be consummated. Defendant excepted to the findings made, and requested the court to make certain findings in favor of defendant, in substance, the reverse, for the reason that the evidence showed that plaintiff by becoming a member of the syndicate which took over the old railroad, without defendant's knowledge, rendered the contract for a commission void.

[1] In an action at law, tried by the court without the intervention of a jury, upon an appeal to this court, we can only examine the testimony to ascertain whether or not there is any competent evidence to support

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
133 P.—51



the findings. If there is such evidence, the findings of fact, which are of the same force as a verdict (L. O. L. § 159), should not be disturbed. *Sun Dial Ranch v. May Land Co.*, 61 Or. 205, 119 Pac. 758; *Brown & Co. v. Sharkey*, 58 Or. 480, 115 Pac. 156. Plaintiff and defendant both testified, giving their versions of the matter, which conflict as to the conclusions and understandings. It appears that, in order to interest the parties and make the deal, it was necessary for the defendant and others to guarantee a certain amount of timber to be transported over the railroad at fixed prices. Mr. Franck was in control of some timber belonging to certain heirs. When it was concluded to abandon the attempt to obtain a loan and sell the railroad, Blazier, on January 15, 1910, wired Franck from Portland, Ore., as follows: "Will sell road for two hundred seventy five thousand cash. J. E. Blazier." Franck then wired Blazier from Detroit, Mich., on January 17, 1910, the following: "Plan is \* \* \* party to put in eighteen thousand dollars per mile for fifteen miles of new road \* \* \* will be under my control which will insure you fair treatment. Will you contract to furnish forty million and Wiest twenty after first year must guarantee eighty million Lead-better and me to furnish balance. \* \* \* [Signed] L. S. Franck." Also, on same date Blazier received the following telegram from Franck: "On this plan you will have to allow me the ten thousand dollars commission as agreed on other, only want this understood as I must take care of party here to get this through. L. S. Franck." Blazier answered thus: "Will allow you ten thousand have your people got to come out and investigate before closing deal, if so must be at once have Omaha deal on. J. E. Blazier." Several other communications passed between them. The lengthy correspondence between plaintiff and defendant during the progress of the negotiations is contained in the record. Franck and the party with whom he was negotiating then came to Portland, Ore., and the deal was closed with defendant. From the statement in the message to Blazier, above quoted, to the effect that the railroad, as proposed to be extended, would be under the control of Franck, thus insuring fair treatment of defendant, who was interested in obtaining a means for the shipment of his logs, and the proposition of plaintiff and another to furnish the balance of the timber required to be secured for hauling over the road, and the information to the defendant that Franck had "to take care of party," as well as from plaintiff's evidence, the court, acting as a trier of facts, might reasonably conclude that defendant knew that plaintiff was, according to the plan proposed, to be interested in the railroad and the operation thereof, and that plaintiff was dealing with different persons in order to obtain their aid in selling the railroad, reorganizing and securing a sufficient amount of traffic to make

the bonds of the road valuable, as an inducement for the payment of the money to defendant. Indeed it is difficult to conjecture how the correspondence referred to could be construed otherwise than that it was intended plaintiff was to be interested in the purchase and future management of the properties sold, and that defendant desired and consented to a culmination of the deal with that understanding. Unless Franck was to have an interest in the property sold, we fail to see how it could be expected that it would be under his control. Whether or not the venture was profitable would not change the contract if defendant understood the details and consented thereto.

[2] It is a salutary rule that, in order to insure good faith and loyalty, an agent employed to sell cannot generally make himself a purchaser, or become interested in the purchase, without the full knowledge and consent of his principal. 31 Cyc. 1437, 1438; *Mechem on Agency*, § 643; *Hammond v. Bookwalter*, 12 Ind. App. 177, 39 N. E. 872, 873; *Porter v. Woodruff*, 36 N. J. Eq. 174. Where the agent openly and fairly buys the property, or is interested as one of the purchasers, at a price fixed by the principal, with full and complete knowledge that the agent is one of the purchasers, according to the weight of reason and authority the transaction is valid. 31 Cyc. 1439; *Jameson v. Coldwell*, 23 Or. 144, 31 Pac. 279; *Mechem on Agency*, § 644.

[3] It appears that Franck negotiated mainly with one Noble, who was to sell the bonds of the Wash. & N. R. R., and defendant complains that plaintiff agreed with Noble to pool commissions; Noble and another to have two-thirds of plaintiff's commission, and plaintiff to have one-third of the commission on the sale of the bonds, if any were sold after the organization of the new company. Plaintiff explains that this was necessary to make the trade, and was what he referred to when he stated in his message to defendant that he had to take care of a party, and exacted the \$10,000 as commission, and that defendant was informed in regard thereto. This matter is not pleaded in the answer, and is mentioned only incidentally in plaintiff's testimony. The illegality or secrecy of a contract must be specially pleaded to be available as a defense. Evidence of such matter is not admissible unless so pleaded. *Buchtel v. Evans*, 21 Or. 315, 28 Pac. 67; *Thorne v. Barth* (Sup.) 114 N. Y. Supp. 900.

[4] Franck had a right to act with both parties in the deal and receive commission from both, provided the business was open, fair, and honest, and each party knew of the employment by the other. *Jameson v. Coldwell*, 23 Or. 144, 31 Pac. 279; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *McLure v. Luke*, 154 Fed. 647, 84 C. C. A. 1, 24 L. R. A. (N. S.) 659.

It was plaintiff's contention upon the trial, and there was evidence to fairly support the theory, that defendant was fully informed



in regard to the facts, and consented to the termination of the deal with an understanding of the true conditions. The trial judge saw and heard the witnesses, and was in a better position to pass upon the conflicting claims than is this court, and the finding should not be disturbed on account of a conflict in the evidence. Article 7, § 3, as amended (see Laws 1911, p. 7).

The judgment of the lower court will be affirmed.

McBRIDE, C. J., and EAKIN and McNARY, JJ., concur.

(65 Or. 606)

#### YUEN SUEY v. FLESHMAN.

(Supreme Court of Oregon. July 8, 1913.)

#### 1. DAMAGES (§ 76\*)—PENALTY OR LIQUIDATED DAMAGES—"PENALTY."

A penalty is an agreement to pay a greater sum to secure the payment of a less sum, subject to avoidance by the payment of the less sum before a contingency agreed upon happens.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 154, 155; Dec. Dig. § 76.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5272-5276; vol. 8, p. 7750.]

#### 2. DAMAGES (§ 81\*)—PENALTY OR LIQUIDATED DAMAGES—LEASES.

A lease provided that the lessee should deposit with a bank \$5,000, to be held for payment to lessor, as security for the rent and the performance of the conditions of the lease during the term; the said sums to be credited on rent during the last period of occupancy which it would cover if all the terms were properly fulfilled, and that, if any installment of rent should be in arrears for 10 days, or if lessee should neglect to perform any of the conditions of the lease, lessor might immediately notify lessee of his election to declare the conditions broken, and to cancel the lease, and should have the right to draw upon the fund to make good any arrears of rent due, and any damage caused by lessee's failure to perform such conditions, provided that, if the lease be declared forfeited for nonpayment of rent, the \$5,000 should become the property of the lessor. *Held*, that the \$5,000 deposit was a penalty, and not liquidated damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 177; Dec. Dig. § 81.\*]

#### 3. LANDLORD AND TENANT (§ 190\*)—TERMINATION OF TENANCY.

The election of the lessor to terminate the lease for nonpayment of rent, and the ejection of lessee in an action, terminated the tenancy so as to release lessee from liability for rent not due when he was ousted.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 765-769; Dec. Dig. § 190.\*]

#### 4. JUDGMENT (§ 713\*)—RES JUDICATA.

A lessor should have pleaded his right to attorney's fees expended in an action of ejectment against a tenant so as to recover them in that action, and, not having done so, cannot recover them in a subsequent action against him by the lessee to recover the balance of a deposit made by the lessee to secure rent.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1234-1237, 1239, 1241, 1247; Dec. Dig. § 713.\*]

#### 5. EJECTMENT (§ 132\*)—ACTIONS—DAMAGES.

Plaintiff in ejectment is entitled to recover all damages which he may have suffered, which fairly result from the wrong complained of.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 444-447, 449-452; Dec. Dig. § 132.\*]

#### 6. JUDGMENT (§ 713\*)—RES JUDICATA.

A judgment on the merits is a bar to a subsequent action between the same parties upon the same claim as to every question which was, or which might have been, litigated therein.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1234-1237, 1239, 1241, 1247; Dec. Dig. § 713.\*]

Department 1. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Yuen Suey against A. Fleshman. From a judgment for plaintiff, defendant appeals. Affirmed.

This action was begun by the plaintiff against the defendant to recover \$2,732.30 for money had and received. Judgment for the full amount was rendered in the court below for the plaintiff.

The facts are stated in the opinion of the court.

Bernstein & Cohen, of Portland, for appellant. Wm. Reid and Martin Watrous, both of Portland, for respondent.

RAMSEY, J. This is an action to recover \$2,732.30 and interest, based on the following facts:

On the 29th day of April, 1908, the appellant and respondent entered into a contract of lease, whereby the appellant demised to the respondent a three-story brick building which he erected for the respondent on lots 1 and 4, in block 38, of Couch's addition to the city of Portland. The lease was made for a term of 20 years. The building was intended to be used by Chinese tenants. The respondent took possession of the building on May 1, 1908. He covenanted to pay a monthly rental of \$775 in advance on the first day of each calendar month.

The following is a copy of the material part of said lease: "All of said monthly payments to be paid in advance on the 1st day of each month, and the lessee agrees to deposit with the United States National Bank, upon the signing of this agreement, the sum of five thousand dollars (\$5,000) in United States gold coin, or in approved certificates of deposit, to be held by said bank pending the completion of said building, and when said building is completed, and possession thereof is delivered to the lessee as herein provided, the said bank shall pay and deliver over said sum of money to the lessor as security for the rent hereunder, and for the performance of each and every one of the obligations of the lease hereunder, and for the faithful performance of all the requirements upon the lessee under this lease during its entire term, the said sum to be credited



as rent paid for the last period of occupancy under this lease, which said amount of five thousand dollars (\$5,000) will cover, if all the terms hereof are properly fulfilled. And if, at any time during the term of this lease, after such deposit of five thousand dollars (\$5,000), any installment of rent herein stipulated shall at any time be in arrears for the term of ten (10) days, from and after the 1st day of the calendar month for which the same shall be due, or if the lessee does or shall fail or neglect to perform or observe any or either of the covenants, conditions, or agreements herein contained, which on his part are to be kept, performed, or observed, then and in either of the said cases the lessor, or his agent, or those claiming under him, may immediately, or at any time thereafter, and while such neglect or default continues, and without prejudice to any other rights or remedies available to the lessor at law, or in equity, or otherwise, notify the lessee that he, the lessor, elects to declare the covenants, conditions and agreements of the lease herein broken, and this instrument and the lease hereby granted canceled, determined, and forfeited, and thereupon said lease shall forthwith be determined and at an end, and, in that event and at any time thereafter, the lessor shall have the right to draw upon said fund to make good any arrears whatsoever of rent due hereunder, and also any and all loss, damage, injury, expense, or liability, caused by reason of any failure on the part of the lessee to perform on his part any of the conditions, covenants, and agreements herein contained. Provided, however, that in case this lease should be declared forfeited for nonpayment of rent under the conditions thereof, then the said five thousand dollars (\$5,000) is to be forfeited, and become the property of the lessor."

The respondent paid the rents under said lease until April 1, 1909, but failed to pay the rents for the months of April and May, 1909. The appellant elected, under the terms of the lease, to terminate the lease for nonpayment of rent, and he at once began against the appellant and some of his tenants an action of ejectment to recover possession of said building and damages for its withholding. He recovered possession of the building and \$4,050 damages and \$46.30 costs.

While said action of ejectment was pending, the appellant caused a receiver to be appointed, who took possession of the building and collected the rents. The receiver turned over, after deducting \$250 for his services and attorney fees, the money by him collected which was credited on the said judgment for damages, leaving unpaid thereon, after making said credit, the sum of \$2,267.30. Of the \$5,000 belonging to the respondent, which the appellant held as security under the terms of said lease, he applied \$2,267.30 thereof in payment of the said balance due on said judgment for damages,

leaving still in his hands \$2,732.30 of the said deposit of \$5,000. This action was brought to recover said balance of \$2,732.30.

The appellant, by his answer, claims that the deposit left by the respondent with him, as security that the respondent would perform the conditions of said lease on his part, was forfeited to him and became his property, as liquidated damages for the nonperformance of the conditions of said lease by the respondent. He claims that the court should hold that said deposit should be treated as liquidated damages, and not as a penalty, for the special reason that the damages that might accrue for a breach of the conditions of said lease by the respondent were uncertain and difficult to prove, owing to the fact that the leased building was built for Chinese tenants, and not for white tenants, etc.

The appellant claims, by his answer, also, that he expended for attorney fees in said action of ejectment the sum of \$500, which he claims should be allowed him in this suit, as a counterclaim. He claims, also, \$2,000 as damages, which he asserts he sustained by having to repair the building by reason of injuries to it, caused by the respondent and his tenants. This suit was tried by the court below without a jury, and its findings of fact stand as the verdict of a jury.

By the terms of the lease, the respondent, as lessee, agreed to pay in advance on the first day of each calendar month \$775 as rent of said premises, and he deposited with the appellant as lessor \$5,000, to secure the payment of said rent and the performance of every other covenant and condition of said lease on his part. The lease shows that the intention in making this deposit was to secure the performance of the lessee's covenants. The lease provides that if the lessee should fail, for the period of 10 days, after an installment of rent should become due, to pay it, the lessor should have the power, at his election, to declare the covenants and conditions of the lease broken, and the lease canceled, terminated, and forfeited. In case of the termination of the lease, at the election of the lessor, that instrument gave him power to "draw upon" said deposit of \$5,000, to make good arrears of rent and any costs, damages, injuries, expense, or liability, caused by reason of any failure of the lessee to perform any of the conditions, covenants, and agreements contained in said lease on his part.

The lease contains this further provision: "Provided, however, that in case this lease should be declared forfeited for nonpayment of rent, under the conditions thereof, then the said five thousand dollars (\$5,000) is to be forfeited and become the property of the lessor." The respondent paid the rent until April 1, 1909. On that day the rent for the month of April became due, and, under the terms of the lease, on the 11th day of April the lessor had power to terminate the lease for nonpayment of rent, and, by the terms of



the provision quoted, *supra*, the whole of the \$5,000 deposited would be forfeited and become the property of the appellant. In other words, for the failure to pay \$775 for 10 days after it became due, the appellant had the power, by the terms of the lease, to declare the whole of the \$5,000 deposit his property.

By the terms of the lease, the appellant had the right to pay any rent that was past due out of the \$5,000 deposited in his hands, but instead of drawing on this fund for \$1,550, due as rent for the months of April and May, when he terminated the lease, as he had a right to do, he began an action of ejectment to recover the possession of the property, had a receiver appointed to take possession of the leased property, and then claimed the \$5,000 deposit to have been forfeited to him as his property for nonpayment of rent.

He now asks this court to hold that the \$5,000 should be considered as liquidated damages, and not as a penalty to secure the performance of the covenants of the lease on the part of the respondent. The language of the lease shows that the intention of the parties, in providing for the deposit, was to secure the performance of the covenants on the part of the respondent. The appellant was authorized to terminate the lease for a failure of the respondent to perform *any* of the covenants thereof on his part, but, by the terms of the lease, the \$5,000 deposit was to be forfeited to the appellant *only* in case the lease should be terminated for *nonpayment of rent*. This indicates that the forfeiture clause was placed in the lease to secure the payment of the rent.

By the terms of the lease, the appellant had power to terminate the lease for the nonpayment of one month's rent, and to have forfeited to him, for such nonpayment, \$5,000, or a sum more than six times as great as the amount of rent due for one month.

[1] A penalty is an agreement to pay a greater sum to secure the payment of a less sum. It is conditional and can be avoided by the payment of the less sum, before the contingency agreed upon shall happen. In 19 Am. & Eng. Ency. Law (2d Ed.) pp. 395, 396, a penalty is thus defined: "A penalty, in contradistinction to liquidated damages, is a sum inserted in a contract, not as the measure of compensation for its breach, but rather as a punishment for default, or by way of security for the actual damages which may be sustained by reason of nonperformance." Chief Justice Marshall, in *Taylor v. Sandiford*, 7 Wheat. 16, 5 L. Ed. 384, says: "In general, a sum of money, in gross, to be paid for the nonperformance of an agreement is considered as a penalty, the legal operation of which is to cover the damages which the party, in whose favor the stipulation is made, may have sustained from the breach of the contract by the opposite party."

[2] The provision of the contract of lease

under consideration comes within these definitions of a penalty, rather than of liquidated damages. When a sum of money is deposited with the lessor by the lessee, as security for the faithful payment of rent, the making of repairs, and the like, with the condition that it may be applied to the payment of rent in default, and with the agreement that, if the lessee makes default in the payment of rent, and the lease is terminated by the lessor for such a default, the money so deposited should be forfeited and become the property of the lessor, such agreement creates a penalty, and is not a stipulation for liquidated damages. *Chaude v. Shephard*, 122 N. Y. 397, 25 N. E. 358; *Caesar v. Robinson*, 174 N. Y. 492, 67 N. E. 58; *Cunningham v. Stockton*, 81 Kan. 780, 106 Pac. 1057, 19 Ann. Cas. 212; *Carson v. Arvantes*, 10 Colo. App. 382, 50 Pac. 1080; *Hecklau v. Hauser*, 71 N. J. Law, 478, 59 Atl. 18.

In *Caesar v. Robinson*, *supra*, the facts were briefly as follows: "The lessors erected for the lessees a three-story brick building for stores, a dance hall, lodge and meeting rooms. The lessees leased it for 10 years at an annual rate of \$3,300, to be paid in monthly payments of \$275 each, to be due on the 1st day of each calendar month. The lessees deposited with the lessors \$1,000, as security for the faithful performance of the lease on their part, and the lease expressly stipulated that, in case of any breach thereof by the lessees, the \$1,000 should be retained by the lessors as liquidated damages for such a breach." The court of appeals held that, under the facts of that case, the \$1,000 deposited should be regarded as security for the performance of the lease, and not as liquidated damages.

In this case, we hold that the \$5,000, deposited by the respondent, should be regarded as a penalty to secure the performance of the conditions of the lease on the part of the lessee, and *not* as liquidated damages.

[3] In this case, the appellant elected to terminate the lease for nonpayment of rent, and ejected the respondent by an action at law. This effectually terminated the tenancy, and exonerated the lessee from all liability for rent not due at the time of such ouster. The respondent was not liable for any injuries to the premises occurring after he was ejected therefrom. The court below found, as a fact, that there was no evidence of any damage to the premises, prior to the time the respondent was ejected therefrom, and the respondent was not liable for injuries to the premises while they were in the possession of the receiver.

It is very doubtful whether the appellant was entitled to recover from the respondent the amount of attorney's fees which he expended in the action brought to eject the respondent from the demised premises, as the following authorities will show: *Howell v. Scoggins*, 48 Cal. 355; *Day v. Woodworth*,



13 How. 371, 14 L. Ed. 181; *Barnard v. Poor*, 21 Pick. (Mass.) 382; *Falk v. Waterman*, 49 Cal. 355; *Clark v. Wolfe*, 115 Ga. 323, 41 S. E. 581; *Knefel v. Ahrens*, 57 Ill. App. 568; *Dorris v. Miller*, 105 Iowa, 564, 75 N. W. 482; *Henry v. Davis*, 123 Mass. 345; *Gates v. Toledo*, 57 Ohio St. 110, 48 N. E. 500; *Olds v. Carey*, 13 Or. 366, 10 Pac. 786; 1 *Sedgwick on Damages* (9th Ed.) §§ 229-233.

Sections 561 and 562, L. O. L., allow the prevailing party to recover from the losing party, in most cases, a small attorney fee as part of the cost of the action. And it is doubtful whether anything beyond this can be recovered as counsel fees in the absence of an agreement therefor, except in certain cases that need not be particularly referred to in this opinion. However, we do not find it necessary to decide this point in this case.

[4] If the appellant was entitled to recover from the respondent his expenses for attorney fees in the ejectment case referred to, supra, he should have pleaded them in the action of ejectment and recovered them there.

[5] In an action of ejectment the plaintiff is entitled to recover *all* damages which he may have suffered, fairly resulting from the wrong complained of, if properly pleaded. *Trotter v. Stayton*, 45 Or. 305, 77 Pac. 395. In *Trotter v. Stayton*, supra, Justice Bean, says: "The statute combines these two actions [ejectment and for mesne profits]; but there is no reason why plaintiff may not plead and give in evidence an action to recover real property under the statute any damages he may have suffered, fairly resulting from his having been wrongfully kept out of the possession." If the plaintiff is entitled to recover expenses of counsel fees incurred in an ejectment action, he can, and should, recover them in the action of ejectment.

[6] A judgment or a decree upon the merits is a bar to a subsequent action or suit between the same parties, upon the same claim as to every matter that was, or *might have been*, litigated. *Ruckman v. Union R. R. Co.*, 45 Or. 578, 78 Pac. 748, 69 L. R. A. 480; *White v. Ladd*, 41 Or. 324, 68 Pac. 739, 93 Am. St. Rep. 732; *Belle v. Brown*, 37 Or. 588, 61 Pac. 1024; *Morrell v. Morrell*, 20 Or. 96, 25 Pac. 362, 11 L. R. A. 155, 23 Am. St. Rep. 95. These decisions have settled the rule in this state that a judgment is a bar not only as to all matters which appear to have been actually determined, but, also, as to all matters that could properly have been litigated in the action in which it was rendered.

The respondent, by his reply, pleaded the judgment in the ejectment action as a bar to that part of the appellant's answer which sets up his counterclaim for \$500 attorney fees, expended by him in the ejectment action. The court below properly sustained the plea in bar, and found in favor of the respondent, and gave him judgment for the

sum of \$2,732.30, and costs and disbursements.

We find no error in the proceedings of the court below, and the judgment appealed from is affirmed.

McBRIDE, C. J., and MOORE and BURNETT, JJ., concur.

(66 Or. 70)

STATE ex rel. BEEMAN v. KELSEY et al.  
(Supreme Court of Oregon. July 15, 1913.)

1. MUNICIPAL CORPORATIONS (§ 105\*)—RESOLUTION—ENACTING CLAUSE.

A resolution of a city containing an enacting clause, "Resolved that the people of the city of Gold Hill," etc., sufficiently complied with a charter provision that the enacting clause of every ordinance or resolution shall be, "The people of the city of Gold Hill do ordain or resolve," etc.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 223, 224; Dec. Dig. § 105.\*]

2. MUNICIPAL CORPORATIONS (§ 85\*)—CHARTER—COUNCIL AUTHORITY—MODE OF EXERCISE.

Where a city charter delegates the decision of a matter to councilmen and does not express the mode to be pursued, the determination may be evidenced by resolution and need not be manifested by ordinance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 188; Dec. Dig. § 85.\*]

3. MUNICIPAL CORPORATIONS (§ 85\*) — MUNICIPAL LEGISLATION — MANNER OF EXERCISE — INITIATIVE AND REFERENDUM POWERS.

Where a city charter was silent with respect to the matter of municipal legislation, the manner of exercising the initiative and referendum powers when not violative of the state Constitution could as well be prescribed by resolution as by ordinance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 188; Dec. Dig. § 85.\*]

4. MUNICIPAL CORPORATIONS (§ 120\*) — CITY COUNCIL — LEGISLATIVE POWER — RESOLUTION OR ORDINANCE.

An enactment of a city council that a special election of the legal voters should be called to be held Monday, November 20, 1911, to submit a proposed new charter to the people for their adoption or rejection by first publishing the proposed charter in two issues of the *Gold Hill News* on the 11th and the 18th of November, 1911, was in substance and effect an ordinance or regulation, and its validity was not affected by the fact that it was called a "resolution."

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 274-280; Dec. Dig. § 120.\*]

5. MUNICIPAL CORPORATIONS (§ 116\*) — ORDINANCES—IMPLIED REPEAL.

A resolution of a city council that a special election of the legal voters should be and was called to be held November 20, 1911, to submit a proposed new charter to the people of Gold Hill for their adoption or rejection by first publishing the proposed new charter in two issues of the *Gold Hill News* on the 11th and 18th of November 1911, constituted an implied repeal of a prior ordinance declaring that not less than 10 days before a regular or special election at which any proposed charter amendment might be submitted to the people the re-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



order should cause to be printed in a newspaper of general circulation a full and correct copy of the text of such measures with the number and form in which the title thereof should be printed on the official ballot and should cause similar copies to be posted in three public places in the town for not less than 10 days immediately prior to the election.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 268-271; Dec. Dig. § 116.\*]

**6. MUNICIPAL CORPORATIONS (§ 48\*)—CHARTER ELECTION—NOTICE—PUBLICATION.**

Where a public notice of submission of a proposed new charter to the voters of a city pursuant to a resolution informed them of the time, place, and object of the election and gave them nine days notice thereof, it was sufficient.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 127, 128, 130-133; Dec. Dig. § 48.\*]

**7. MUNICIPAL CORPORATIONS (§ 48\*)—CHARTER ELECTION—NOTICE—PUBLICATION—TIME.**

The council of a city as its governing legislative body has authority to prescribe the number of days' notice of a special election for the adoption of a new charter so long as the notice prescribed is reasonable.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 127, 128, 130-133; Dec. Dig. § 48.\*]

**8. MUNICIPAL CORPORATIONS (§ 48\*)—CHARTER—SUBMISSION TO VOTERS—BALLOT TITLE.**

Where the ballot title of a new charter submitted at a special election was printed in bold type, "For the proposed new charter," and "Against the proposed new charter," it was not material that such title did not comply strictly with the prior ordinance providing for the submission of charter amendments and that the numbers used on the ballot were not in compliance with such ordinance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 127, 128, 130-133; Dec. Dig. § 48.\*]

**9. MUNICIPAL CORPORATIONS (§ 48\*)—NEW CHARTER—LIMITATION OF INDEBTEDNESS—LEGAL VOTERS.**

Initiative power having been reserved to the "legal voters" of every municipality by Const. art. 4, § 1a, a new charter properly provided that an election to authorize an increase of indebtedness should be by the "legal voters" instead of "property owners," as provided by the prior charter.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 127, 128, 130-133; Dec. Dig. § 48.\*]

Burnett, J., dissenting.

Department 1. Appeal from Circuit Court, Jackson County; F. M. Calkins, Judge.

Action by the State, on relation of Josiah H. Beeman, against R. C. Kelsey and others to determine defendants' right to act as officers of the City of Gold Hill. Judgment for plaintiff, and defendants appeal. Reversed.

This is an action by the state of Oregon, on the relation of Josiah Beeman, against R. C. Kelsey, John Palmer, Joseph Dietrich, W. R. Walker, Frank Wilmarth, and George Landis to determine the right of each to act as an officer in the city of Gold Hill, a municipal corporation, which town was incorporated by

an act of the Legislature. Laws Or. 1895, p. 248. The charter was amended April 13, 1907, under an exercise of the initiative power reserved to the people of municipalities by the organic law. Const. Oregon, art. 4, §§ 1, 1a. By this amendment the name of the municipality was changed to that of the city of Gold Hill and power was vested in a board of five councilmen to be elected annually on the first Monday in April and who were to hold office until their successors were regularly elected and duly qualified. It was the duty of the board to select a member thereof as president, who thereupon became ex officio mayor.

At a regular election held April 3, 1911, Josiah H. Beeman, L. R. Cardwell, Walter Dungey, Samuel Hodges, and Henry Miller were chosen councilmen, and, each having duly qualified, Beeman was elected president of the board. The members thereof on August 7, 1911, enacted ordinance No. 64 which by its terms went into immediate effect and prescribed the manner of exercising the initiative and referendum powers reserved to the people. The ordinance was patterned largely after the provisions of chapter 226, Laws of Oregon 1907, and authorized the boards to propose amendments to the charter by ordinance, resolution, or initiative petition. Section 6 of this enactment provided that, when any proposal to amend the charter was made, the recorder should cause to be printed official ballots, consecutively numbering the measures to be voted upon in the order of their filing, giving to the first expression of an affirmative choice the number "400" in numerals and to the negative "401." Section 9 thereof declared that, not less than 10 days before any regular or special election at which any proposed charter amendment was to be submitted to the people, the recorder should cause to be printed in a newspaper of general circulation in Gold Hill "a full and correct copy of the title and text of such measures so submitted with the number and form in which the ballot title thereof would be printed on the official ballot, and the recorder shall also cause similar copies to be posted in three public places in said town for a period of not less than 10 days immediately prior to such election."

The board, desiring to amend the charter, appointed for that purpose a commission, and a proposed new charter, having been submitted, was approved by the board by resolution adopted October 10, 1911, but, a typographical error having occurred in printing the organic act, such resolution was revoked on the 24th of that month. Another resolution was adopted October 30, 1911, expressing a purpose to submit the proposed charter to the legal voters for adoption or rejection. A citizens' committee having suggested certain changes in the proposed charter, which alterations were approved by the commission,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the board on November 6, 1911, adopted a further resolution directing the recorder to incorporate in the new organic act the modifications so recommended. The declaration further provided as follows: "Therefore be it resolved by the city council that a special election of the legal voters shall be and is hereby called to be held Monday, November 20, 1911, for the purpose of submitting a proposed new charter to the people of Gold Hill for their adoption or rejection, by first publishing the proposed new charter in two issues of the Gold Hill News of the 11th and the 18th of November, 1911." An emergency was declared to exist and that the resolution should be in full force and effect after its approval by the mayor, which officer immediately appended thereto his signature. The charter as changed was then ratified by the council, and the recorder was directed to give notice as indicated, which command was obeyed. A ballot title was also prepared, to which the numeral "10" was fixed to indicate an affirmative vote and "11" a negative. The proposed charter was also published in the Gold Hill News in its issues of November 11 and 18, 1911, but no copies were posted as required by ordinance No. 64. The special election was held at the time and place designated, when were cast 86 votes for the measure and 15 against it. The returns of the election were canvassed and the mayor on November 27, 1911, issued a proclamation declaring the new charter to be in force. Pursuant to its provisions an election was held in the city the first Monday in April, 1912, when were declared to be elected as councilmen all the defendants hereinbefore named except Kelsey, who was thereafter selected president of the board and ex officio mayor, and each having taken an oath of office entered upon the discharge of the duties thereof.

The plaintiffs on September 18, 1912, asserting that in consequence of the failure to give the required notice the proposed new charter had not been legally enacted and that he and his associates, who were elected April 3, 1911, and constituted the board of councilmen, instituted this action. The case, being at issue, was tried, and from a stipulation of the evidence by the parties the court made findings of fact in conformity therewith and in substance as hereinbefore set forth. Based on the conclusions of law deducible from the findings of fact, a judgment of ouster was rendered against each of the defendants and they appeal.

Porter J. Neff, of Medford (Neff & Mealey, of Medford, on the brief), for appellants. A. E. Reames, of Medford, for respondent.

MOORE, J. (after stating the facts as above). It will be remembered that ordinance No. 64, prescribing the manner of exercising the initiative power in the city of Gold Hill, required the recorder at every

election to cause to be printed in consecutive order on the official ballot the title of all measures to be voted upon, the affirmative of the first measure to be designated by the number "400" and the negative by "401"; that, not less than 10 days before any regular or special election at which any proposed charter amendment was to be submitted to the people, that officer was, by the enactment referred to, commanded to cause to be printed in some newspaper a full and correct copy of the title and text of the measure, and also to cause copies of the proposed charter to be posted, for the same length of time, in three public places in Gold Hill. It will also be recalled that the numbers placed on the official ballot were "10" and "11"; that notice of the election was published on November 11 and 18, 1911, and as the vote was taken on the 20th of that month only nine days' notice was given; and that copies of the proposed charter were never posted.

It is maintained by defendant's counsel that the resolution of November 6, 1911, pursuant to which the notices referred to were given, was adopted and approved with all the formalities required for the enactment of an ordinance; that it had enacting and emergency clauses and was approved by the mayor; that it was in substance an ordinance, though denominated a resolution, and to the extent specified it impliedly amended ordinance No. 64, and, such being the case, an error was committed in rendering the judgment herein.

An examination of the provisions of the charter of the city of Gold Hill, as amended April 13, 1907, and which were in force November 6, 1911, when the resolution of the latter date was adopted, shows that the authority of the councilmen to enact ordinances or resolutions was general and granted as follows: "The board shall have power to pass all resolutions and ordinances necessary to enable it to carry out the provisions of this charter." Section 16. "The enacting clause of every ordinance or resolution shall be 'The people of the city of Gold Hill do ordain or resolve,' and every ordinance and resolution to be valid must receive the affirmative vote of three members of the board of councilmen, the president being allowed to vote on all questions, and when the roll is called the name and vote of each member must be entered in the journal." Section 17. These are the only provisions found in the charter adverted to relating to matters inherently legislative in character. The only provisions in the charter respecting notice applies to the general election to be held annually on the first Monday in April and are as follows: "The board of councilmen shall at their meeting on the first Monday in March of each year order the recorder to post three conspicuous notices in three conspicuous places in said city calling for a



primary election by the people to be held at least eighteen days prior to the date of the following election. \* \* \* At the time of posting the notices aforesaid the recorder shall also post notices in three conspicuous places in said city announcing that there will be an annual election held at the place therein designated. \* \* \* Section 7.

[1] The enacting clause of the resolution of November 6, 1911, is as follows: "Resolved that the people of the city of Gold Hill," etc. It will be noticed that the clause does not exactly coincide with the form prescribed, but there is no difference in the meaning of the terms employed. The court's finding is to the effect that at the meeting of November 6, 1911, all the members of the board of councilmen were present and that the resolution was passed unanimously. An emergency was declared in the resolution to exist in consequence of the necessity of securing an adequate supply of water, and that the legislation would be in full force and effect after its approval by the mayor, which sanction was given by that officer.

It does not appear from the record before us that any rules of order had been adopted by the board of councilmen respecting the manner of entering upon the journal the mode pursued in the enactment of legislative matters. The court found, however, that, when the amendments proposed by the citizens' committee had been approved and incorporated in the charter, the act was read there several times and ratified by the board. It is not shown that an ordinance or a resolution was required to be published before it could go into effect.

[2] Where a municipal charter permits the decision of a matter to councilmen and does not express the mode to be pursued, the determination may be evidenced by a resolution and need not be manifested by an ordinance. *Dillon, Mun. Corp.* (5th Ed.) § 572; *Clinton v. Portland*, 26 Or. 410, 38 Pac. 407.

[3] The charter being silent with respect to the matter of municipal legislation, the manner of exercising the initiative and referendum powers, when not violative of the state Constitution, could as well have been prescribed by a resolution as by an ordinance. *McQuillin, Mun. Ordinances*, § 2, note 8.

[4] The resolution of November 6, 1911, was in substance and effect an ordinance or regulation, and the name given to it by the councilmen was immaterial and did not render the enactment void. *Dillon, Mun. Corp.* (5th Ed.) § 571; *Municipality No. 1 v. Cutting*, 4 La. Ann. 335.

[5] Though repeals by implication are not favored, the resolution in question impliedly

changed as much of the ordinance as was in conflict therewith.

[6] The notice published, pursuant to the resolution, informed the legal voters of Gold Hill of the time, place, and object of the special election which prerequisites are essential in elections of that kind, and in these particulars the notice was sufficient.

[7] By requiring the notice to be published on the 11th and 18th of November, 1911, when the election was to be held on the 20th of that month, the board knew that only nine days' possible publication could be given, but such legislative body had as much authority to prescribe that number of days in the resolution as they had to designate a different number in the ordinance. The notice required should be reasonable and that given answered such precept.

[8] The resolution made no reference to the number to be placed on the official ballot, while the ordinance particularly specified the numerals to be used. The ballot title employed did not comply therewith, but this failure evidently did not mislead any voter for the phrases, "For the proposed new charter," and "Against the proposed new charter," were printed in bold type, calling particular attention to the choice to be expressed by the elector, regardless of the number employed, and this was sufficient. *Kiernan v. Portland*, 57 Or. 454, 462, 111 Pac. 379, 112 Pac. 402, 37 L. R. A. (N. S.) 339.

[9] The charter of April 13, 1907, limited the amount of indebtedness that might be incurred by the board of councilmen to \$1,500. By calling an election of the "property owners" of the city to vote thereon, a greater indebtedness might be sanctioned, provided that all sums in excess of \$1,500 per annum should be evidenced by municipal bonds. The charter adopted November 20, 1911, changed the phrase "property owners" to "legal voters of the city" who could in the same manner authorize the issuance of municipal bonds in the sum of \$25,000. As the initiative power is reserved "to the legal voters of every municipality" as to all municipal legislation of every character in or for their respective municipalities (Const. Or. art. 4, § 1a), the alteration in the new charter recognized the right of franchise of every voter unfettered by a property qualification.

Believing that the amended charter was enacted pursuant to proper and adequate notice, the judgment is reversed, and one will be entered dismissing the action.

McBRIDE, C. J., and RAMSEY, J., concur. BURNETT, J., dissents.



(66 Or. 317)

**CRANE et al. v. OREGON R. & NAVIGATION CO.**

(Supreme Court of Oregon. July 1, 1913.)

**1. PRINCIPAL AND AGENT (§ 43\*)—POWER OF ATTORNEY—REVOCATION.**

A power of attorney is revoked by the death of the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 67-71; Dec. Dig. § 43.\*]

**2. APPEAL AND ERROR (§ 1138\*)—AFFIRMANCE—MOOT CASE.**

In ejectment by tenants in common, who perfected an appeal, the sale by part of the tenants of their share of the premises to the defendant's successor in interest will not necessitate an affirmance on the theory that the case has become a moot one, because, under L. O. L. § 336, a tenant in common may maintain ejectment against his cotenant in possession, and it will be presumed that defendant's successor in interest claimed the premises in severalty as did the defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4456-4461; Dec. Dig. § 1138.\*]

**3. TENANCY IN COMMON (§ 38\*)—RIGHTS OF TENANT IN COMMON.**

Under L. O. L. § 336, providing that a tenant in common of real property may sue his cotenant, where his right to possession is denied expressly or by implication, a tenant in common may maintain ejectment against his cotenant in possession where the cotenant claims the entire tract in severalty.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 100-104, 107-118; Dec. Dig. § 38.\*]

**4. APPEAL AND ERROR (§ 803\*)—DISMISSAL—EFFECT.**

Under L. O. L. § 549, providing that any party to a judgment or decree may appeal therefrom, the dismissal of defendant's appeal will not necessitate a dismissal of plaintiff's cross-appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3169-3173; Dec. Dig. § 803.\*]

**5. APPEAL AND ERROR (§ 629\*)—BILL OF EXCEPTIONS—TIME OF FILING.**

When plaintiff's bill of exceptions was settled and allowed in October, the trial judge certified that it was agreed that the original bill, instead of a transcript, might be sent up. The bill reached the Supreme Court in May, but, being sent without an order of court, no file mark was placed thereon. *Held*, that as permission to file would have been granted if leave had been asked, or a rule would have been issued on the clerk of the trial court directing him to send up the bill, the bill of exceptions may subsequently be filed as on the date it was received.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2765; Dec. Dig. § 629.\*]

**6. EJECTMENT (§ 135\*)—DAMAGES—EVIDENCE.**

In ejectment, where mesne profits were claimed under L. O. L. § 325, evidence that the property could have been profitably used if a warehouse had been built thereon is properly excluded; it appearing that there was no warehouse thereon, for the damages recoverable must be determined according to the use for which the property is adapted, and, in the absence of a warehouse, it is not adaptable to that use.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 459, 460; Dec. Dig. § 135.\*]

**7. TRIAL (§ 309\*)—VIEW BY JURY—EFFECT OF VIEW.**

In ejectment, where mesne profits were claimed, and the jury were allowed to view the premises in accordance with L. O. L. § 133, they cannot compute the damages in accordance with information acquired in viewing them, for that information can only be used to properly understand and correctly apply the evidence adduced for their consideration.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 738; Dec. Dig. § 309.\*]

**8. EJECTMENT (§ 127\*)—ACTIONS FOR MESNE PROFITS—SUBJECTS OF RECOVERY.**

Under L. O. L. § 325, providing for an action at law for recovery of possession with damages for withholding the same, plaintiff in ejectment may not only recover mesne profits, but additional damages for injury to his freehold.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 438-443, 453; Dec. Dig. § 127.\*]

**9. MUNICIPAL CORPORATIONS (§ 324\*)—PUBLIC IMPROVEMENTS—ORDERS OPENING STREETS—COLLATERAL ATTACK.**

Where printed notice was given of a proposed change in a street purporting to be such information as the charter of the city required, and an appeal was given by the charter for the correction of material errors, the proceedings are not open to collateral attack.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 847-849; Dec. Dig. § 324.\*]

**10. EVIDENCE (§ 60\*)—PRESUMPTIONS.**

Under the presumption enunciated by L. O. L. § 799, subsec. 34, that the law has been obeyed, it will not be presumed that the defendant in ejectment stored its property upon that portion of the land condemned for a street, and thus maintained a nuisance.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 81; Dec. Dig. § 60.\*]

**11. EJECTMENT (§ 138\*)—MESNE PROFITS—JUDGMENT—EVIDENCE—SUFFICIENCY.**

Even though the jury may in some instances determine the value of the premises withheld, without evidence of purely pecuniary injury, no judgment for mesne profits is warranted, when no testimony was offered as to the length of time the premises were used by the defendant, and as to the portion of the premises so used.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 465; Dec. Dig. § 138.\*]

**12. EMINENT DOMAIN (§ 74\*)—"JUST COMPENSATION."**

The just compensation required by Const. art. 1, § 18, before private property may be taken for public purposes, is such an award as may be agreed upon by a court of competent jurisdiction or a jury of appraisers appointed by law for that purpose.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 188-197; Dec. Dig. § 74.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3897-3902.]

**13. EMINENT DOMAIN (§ 75\*)—COMPENSATION—PAYMENT OF COMPENSATION.**

The awarding of a corporate warrant for property taken for a public use is a sufficient compliance with Const. art. 1, § 18, requiring the payment of just compensation before property can be taken for public use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 198, 199; Dec. Dig. § 75.\*]

Burnett, J., dissenting.

Appeal from Circuit Court, Union County; J. W. Knowles, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Action by Susan Crane and others against the Oregon Railroad & Navigation Company. From the judgment, defendant appeals, and plaintiffs cross-appeal. Affirmed.

This is an action to recover the possession of real property and damages for withholding the same. The facts are that George Crane died in the year 1901, and left surviving Susan Crane, his widow, and Alonzo, Alfred W., and Christopher Crane, his sons, the plaintiffs herein. Prior to his death George Crane had been the owner in fee of all of lots 2, 3, 4, and 5, in block 12, in Riverside addition to the city of La Grande, Or., except a small triangular piece taken from the southwest corner of lot 5 by the right of way of the railroad of the defendant, the Oregon Railroad & Navigation Company. Harding street joins these lots on the north, Second street on the west, the defendant's right of way on the southwest, an alley on the south, and lot 1 in that block on the east. The real property in question was assessed for the year 1895 "to George Crane and to all other owners known and unknown." The taxes levied on the premises not having been paid, the land was sold for the delinquency to Union county, which municipality thereafter assigned the certificate of sale to the defendant, to whom the sheriff of that county on December 3, 1900, executed a tax deed. The common council of the city of La Grande, attempting to exercise the power conferred by the municipal charter, adopted a resolution November 19, 1900, "proposing to change Second street so as to include all of lot 5 and the west 18 feet of lot 4 of the block mentioned. Such prescribed proceedings were had that ultimately appraisers were appointed who determined the amount of damages the supposed owners affected thereby would sustain by reason of the contemplated change, city warrants were drawn in payment thereof, and on April 26, 1901, an ordinance was enacted approving all the measures taken to condemn the land and in effect declaring Second street as changed a public highway. Harrison avenue, a proposed street, undertaken to be extended southwesterly, immediately east and parallel with the defendant's right of way, was laid upon the greater part of lot 5, about half of lot 4, and a small part of lot 3. The attempt to establish such avenue was annulled, however, by a judgment of the circuit court for that county. Second street was also extended southwesterly across the railroad, and thereafter the defendant made quite a fill of cinders, gravel, etc., over and upon the lots in question placing thereon side tracks, and storing upon the property ties and other material to be used in construction and repair work. The complaint herein alleges that the defendant is a corporation engaged in operating a railway from Portland to Huntington, in Oregon, which line passes through La Grande; that the plaintiffs as tenants in common are the

owners in fee of the lots referred to; that on January 2, 1901, the defendant unlawfully took possession of the premises, hauled thereon sand and cinders, covering the land to a depth of about six feet to plaintiffs' damage in the sum of \$1,000, and also built over and upon the property a line of railway which it illegally operated to plaintiffs' damage in the sum of \$500 per annum for six years immediately preceding the commencement of this action. Judgment was demanded for the recovery of the possession of the lots, for \$1,000 damages thereto, and for \$5,000 as the reasonable rental value thereon. The answer denied the material averments of the complaint alleged that in the year 1895 George Crane was the owner of the lots in controversy, and set forth the proceedings undertaken to assess the premises, to levy a tax thereon, and to sell the land as hereinbefore stated.

For another defense it is averred that ever since December 3, 1900, the defendant under color of title and claim of ownership had been in the open, notorious, continuous, and hostile possession of all of lots 2 and 3 and the east 40 feet of lot 4 in the block mentioned, asserting a right thereto adverse to the plaintiffs and to all other persons. For a further answer the proceedings undertaken by the common council to change Second street are set forth in detail, and it is averred that no appeal has been taken from the judgment of condemnation therein whereby the proposed relocation of that street had become final. For an additional answer and a partial defense, it is alleged that no part of Harrison avenue is owned by either of the plaintiffs.

A reply having put in issue the averments of new matter in the answer, the cause was tried resulting in a judgment, awarding plaintiffs the possession of lots 2 and 3 and the east 40 feet of lot 4 in block 12, giving them damages in the sum of \$1, but determining that they were not entitled to the possession of lot 5 or the west 18 feet of lot 4 in that block, which latter tract of land had been appropriated as a public highway. From this judgment both parties appealed. The defendant, however, failed to file in this court an abstract or brief, and for that reason its appeal was dismissed.

T. H. Crawford, of La Grande (A. C. Spencer and C. E. Cochran, both of Portland, on the brief), for appellant and cross-respondent. Turner Oliver, of La Grande, for respondents and cross-appellants.

MOORE, J. (after stating the facts as above). [1] A motion to dismiss the plaintiffs' appeal has been interposed on the ground that since the judgment was rendered the controversy involved in the action has been settled by the parties. It appears from affidavits and other writings submitted with the motion and supplemental thereto that



the plaintiffs Alonzo Crane and his brother, Alfred, on November 27, 1908, executed to their mother, the plaintiff Susan Crane, a power of attorney, authorizing her to sell any of their real property in Oregon and to execute to the purchaser the necessary deeds therefor. This power of attorney was duly recorded December 6, 1908, in Union county, Or., and does not appear to have been revoked. The plaintiff Alfred W. Crane died after the judgment herein was rendered, and left surviving a minor son Alfred and a widow, who reside in the state of Washington. The death of this plaintiff necessarily annulled the agency created by the power of attorney as far as it related to him.

[2] After the judgment was rendered, the plaintiff Susan Crane on September 24, 1912, for herself and as attorney in fact for Alonzo Crane, entered into a written agreement with the Oregon-Washington Railroad & Navigation Company, a corporation, which has succeeded to the property, rights, and franchises of the defendant, whereby, in consideration of \$300 then paid, she stipulated to release to such successor her right of dower and also to convey to it an undivided one-third, being Alonzo Crane's interest, in and to the south 25 feet of lots 2 and 3 and to the east 40 feet of lot 4, together with all of lot 5 and the west 18 feet of lot 4 in block 12, agreeing, also, that the purchaser should remain in possession of the real property to be conveyed. The further sum of \$700 was to be paid upon the execution of good and sufficient deeds to such successors by the other tenants in common of their respective interests, or that sum would be paid into the court for them if the title to the premises was required to be secured by condemnation. Pursuant to this writing, an action to appropriate the real property was instituted in the circuit court of the state of Oregon for Union county against the other tenants in common who had not joined in the contract to obtain their title to the premises last hereinbefore described. This agreement did not pretend to divest Christopher Crane or Alfred Crane, Jr., of his undivided one-third interest in the land described in the written agreement. No judgment in the condemnation action has become final so as to bar the defendants therein of their respective estates, thereby terminating their interests in the premises as in the case of *Moores v. Moores*, 36 Or. 261, 59 Pac. 327. How can it be said, then, that the defendant's successor in interest by securing a contract stipulating for an assignment of Mrs. Crane's dower right and covenanting for a conveyance of Alonzo Crane's undivided one-third estate in fee in the premises described in the agreement concluded the controversy as to the remaining cotenants? It may be assumed that, after obtaining this agreement, the railroad company acquiesced in the court's determination as thus modified and abandoned its attempt

to review the judgment herein, for which reason its appeal was dismissed. As to Christopher Crane and his nephew, Alfred, though the defendant's successor in interest has in effect become a tenant in common with them as to a part of the premises, it is practically insisting upon an ouster against them as to all the land described in the agreement consummated with Mrs. Crane.

[3] An action in ejectment by a tenant in common against a cotenant is maintainable where it appears that the plaintiff is entitled to the demanded premises, and that his right thereto is denied by the defendant, or that the latter has done some act equivalent to such denial. L. O. L. § 336. *Grant v. Pad-dock*, 30 Or. 312, 47 Pac. 712. "The question as to whether a given state of facts as between cotenants," says a text-writer, "constitutes an ouster, arises \* \* \* where the defendant claims that his possession has been so inconsistent with plaintiff's rights as to grow into a perfect title in severalty by virtue of the Statute of Limitations." *Freeman, Coten. & Par.* (2d Ed.) § 291. It will be remembered that the answer alleges that by such means the defendant secured a right to all the lots in question in severalty. It is not to be supposed that because such party has been succeeded by another corporation that the latter is not safely guarding the rights, property, and franchises intrusted to it, and, this being so, it is necessarily asserting the same claims its predecessor put forth. This motion is without merit.

[4] Another motion to dismiss the plaintiffs' appeal is based upon the ground that the dismissal of the defendant's appeal necessarily affirmed the judgment, and also terminated the plaintiffs' right to prosecute their cross-appeal. A statute prescribing who may review the ultimate determination of a trial court contains in part the following declaration: "Any party to a judgment or decree other than a judgment or decree given by confession, or for want of an answer, may appeal therefrom." L. O. L. § 549. From this enactment it will be seen that there may be as many separate appeals from a judgment or decree rendered or given upon contested issues of fact as there are different active parties to the suit or action. Each separate appeal from a judgment in a law action is necessarily distinct, and must be complete within itself.

[5] In the case at bar plaintiffs' counsel in due time served and filed a notice of appeal and undertaking therefor and within the period limited filed with our clerk certified copies of such notice, of the undertaking, and of the judgment rendered, thereby conferring upon this court jurisdiction of the cause. The plaintiffs' bill of exceptions was settled and allowed October 26, 1912, the trial judge certifying that it was agreed by the attorneys for the respective parties that the original bill of exceptions, instead



of a transcript thereof, might be sent up to this court. Such bill reached our clerk May 25, 1913; but, as it was sent without an order of court, no filing mark was placed thereon. If proper application had been made a rule would have been issued on the clerk of the trial court directing him to send up the bill, or if leave had been asked to file it when received permission would have been granted. Since orders of that kind might have been made in the first instance, the bill of exceptions will be filed as of the date it was received.

The defendant's counsel call attention to cases holding that the dismissal of a main appeal affirms a judgment, and also concludes cross-appeals. The cases of *Crawford's Adm'r v. Bashford*, 16 B. Mon. (Ky.) 3, and *Hammond v. Conyers*, 118 Ga. 539, 45 S. E. 417, illustrate this principle. In those cases, however, the conclusions reached were predicated upon a construction of statutes differing from ours with respect to appeals. If the dismissal of a first appeal terminated a cross-appeal, it would necessarily follow that the party first appealing, after perfecting his appeal, could by refusing to do some act required to secure a transfer of the case or by failing to comply with a rule of this court respecting the mode of procedure, prevent his adversary, who had taken a cross-appeal, from obtaining a review of a judgment. The statement of such possible consequences shows the absurdity of the doctrine contended for. Though a first appeal may be dismissed, a cross-appeal will be retained, and the judgment reviewed with respect to the errors assigned by the appellant, who takes a subsequent appeal, and properly brings his case up for consideration. The motions to dismiss the plaintiffs' appeal are therefore denied.

Considering the case on its merits, the bill of exceptions shows that, when the cause was submitted, the court, over exceptions, refused to give any of the instructions requested by plaintiffs' counsel, and directed the jury to find in accordance with the judgment hereinbefore referred to, thereby holding in effect that the assessment of the lots to "all other persons known and unknown" was void, defeating the tax sale (*Lewis v. Blackburn*, 42 Or. 114, 69 Pac. 1024), and that the defendant's assertion of an adverse title had not been substantiated.

[6] C. T. Darley, a civil engineer, testified that he had measured the fill made by the defendant upon the demanded lots in order to place its railroad tracks thereon, finding that 3,000 cubic yards of earth had been left upon the plaintiffs' property, and that it would cost 35 cents per cubic yard to remove such material, so as to prepare the ground for a building. This was then directed as follows: "State whether or not a side track could be built upon the main line of the Oregon Railroad & Navigation Compa-

ny along the property in question, so that trains could start with the same power as in daily use along the main track." The purpose of this inquiry was to show that the lots were adapted to the possible or probable uses of a warehouse and came within the provisions of the statute, permitting the owner of contiguous real property to build a warehouse thereon, and to compel a railroad company to lay down a track from its line to the premises with the necessary connections and switches, as required by law. L. O. L. § 6902. An objection to the inquiry was sustained, an exception allowed, and it is insisted that an error was thereby committed.

The real purpose of the question evidently was to show that the lots bordered or were near the defendant's right of way, and that the real property could be profitably used if a warehouse were built thereon. It is believed that the exception referred to may be properly considered in connection with the following alleged error: Though the demanded lots are uninclosed, vacant, and unimproved, excepting the fill referred to, the plaintiffs' counsel undertook to establish by several witnesses that the real property was adapted to warehouse purposes, and as such the defendant by withholding the possession of the land was liable for the annual value of the use of the premises for a storehouse for six years immediately preceding the commencement of this action. Objections to such offers of proof having been sustained, exceptions were allowed, and it is insisted that errors were thereby committed. Our statute enlarging the common-law remedy permits a plaintiff in an action in ejectment to recover damages for withholding the possession of real property. L. O. L. § 325. In referring to such modified redress, an author observes: "This remedy is termed an action for mesne profits, or an action of trespass for mesne profits." *Tyler, Eject.* 838. In actions to recover such profits, it is often said by text-writers and by judges of courts of last resort that the owner of land who has been ousted from its possession is entitled to the annual avails of the property for the use to which it is adapted. The word "adapted," as thus employed, evidently means the use to which the owner of the premises had appropriated them before the ouster, or the use to which the land could probably have been put in its then condition. Thus in *McMahan v. Bowe*, 114 Mass. 140, 19 Am. Rep. 321, it was determined that the damages which a demandant in a writ of entry might recover were not to be computed upon the value of the claimed land for a specific purpose for which he might have used the premises had he not been dispossessed. In *Horton v. Cooley*, 135 Mass. 589, which was an action to recover the value of the use of real property, it appeared that the defendant had used for storage a building equipped with water power and fitted with a machine shop,



and it was ruled that he was liable for the use of the building as a machine shop, and not merely as a storeroom. So, too, in *Morris v. Tinker*, 60 Ga. 466, which was an action in ejectment, the defendant having occupied a mill site upon which a steam saw-mill had been erected, the rent of the mill and site was held to be the measure of damages recoverable. In that case Mr. Justice Bleckley says: "Whatever would be rent as between landlord and tenant is mesne profits as between the parties in ejectment. \* \* \*

With reference to rent or mesne profits, the whole is to be taken as realty, and a suit for the profits of the land applies to the land in its actual condition." To the same effect is the case of *Rafferty v. Davis*, 54 Or. 77, 102 Pac. 305. In the case at bar there was no warehouse on the land. Hence the value of the use of the real property for warehouse purposes was immaterial, and no errors were committed in refusing to receive testimony on this subject.

[7] Pursuant to the authority granted by statute (L. O. L. § 133), the jury prior to the giving of any evidence were by order of the court conducted in a body in the custody of a proper officer to the locus in quo in order to view the premises. The jury must have seen where the fill was made by the defendant and the land upon which it built its railroad, and though there is a conflict of judicial utterance upon this subject, the rule appearing to have been adopted in this state and in our opinion supported by the better reasoning is that the information thus acquired, independent of any evidence, is of no value in determining the issues involved. *State v. Ah Lee*, 8 Or. 237. Illustrating the principle thus seemingly upheld, it was determined that, where by direction of the court a view of real property was had by the jury, they could not take into consideration the result of their examination in determining the character of the premises, but were required to render their verdict on the testimony of witnesses given before them at the trial, and to use their inspection of the land as a means to enable them properly to understand and correctly to apply the evidence adduced for their consideration. *Wright v. Carpenter*, 49 Cal. 608; *Close v. Samm*, 27 Iowa, 503.

[8] As to the question of damages for making the fill upon the lots and building and operating thereon a railroad track, a statute like ours, prescribing that a recovery of mesne profits may be joined with an action for the possession of real property (L. O. L. § 325), authorizes a plaintiff in ejectment, where an injury to his estate in the demanded premises has been caused by a defendant, to augment his damages beyond the measure of rent to such an extent as will reimburse him. *Sedgwick*, Dam. (9th Ed.) § 910; *Tyler*, Eject. p. 848.

[9] It will be remembered that the wit-

ness Darley testified that the defendant placed on the plaintiffs' lots 3,000 cubic yards of earth, to remove which, in order to erect a building on the premises, would cost 35 cents per cubic yard. As a part of the realty involved is lot 5 and the west 18 feet of lot 4, upon which lots Second street was attempted to be located, if the fill were made upon such street as altered and the railroad built and operated thereon, the plaintiffs are remediless in this collateral action, unless the proceedings undertaken by the common council of La Grande to re-establish the highway were void. Objections were made and exceptions taken by plaintiffs' counsel to the introduction in evidence of copies of such proceedings, and an instruction requested by plaintiffs' counsel upon the subject was refused. Looking at copies of the proceedings referred to, it is manifest that a printed notice was given of the proposed change in the street purporting to be such information as the charter of La Grande required, thereby calling into existence the power of the common council, and authorizing that inferior tribunal to proceed in the matter. It also appears that a right of appeal was given from the determination of the council for the correction of material errors, thus rendering the proceedings invulnerable against collateral attack. *Elliott, Roads & Streets* (2d Ed.) § 320; *Lewis*, *Eminent Domain* (3d Ed.) § 865; *Bewley v. Graves*, 17 Or. 274, 20 Pac. 322; *Sweek v. Jorgensen*, 83 Or. 270, 54 Pac. 156.

[10, 11] Whether or not any part of the fill made by the defendant was placed upon lots 2 and 3 and the east 40 feet of lot 4 or that the railroad track was built and operated on such premises, the possession of which the plaintiffs were found to be entitled to, it is impossible to determine from an inspection of the record before us, and, such being the case, we are unable to say that error was committed in not directing a greater sum to be awarded as damages. *J. B. Eddy* testified that from June 1, 1901, to January 1, 1912, he had been employed by the defendant as its tax and right of way agent, and that the property in question had been used in connection with the railroad yard for the purpose of storing ties and timber. This constitutes the entire testimony to be found in the bill of exceptions relating to the use of the property, except the offer to prove a use for warehouse purposes. No attempt was made to ascertain the length of time these lots were used by the defendant nor what the reasonable value of such use was for storage purposes. Invoking the presumption that the law has been obeyed (L. O. L. § 799, subsec. 34), the defendant did not commit a nuisance by storing railroad material upon that part of the lots included within Second street as altered, and hence the ties and timber must have been piled upon lots 2, 3, and the east 40 feet of lot 4. It was incumbent upon the



plaintiffs to produce the best proof possible in support of the averments of their complaint; and, where as in the case at bar the amount of damages is capable of being established, proof thereof must be offered, and, if no evidence be given upon that subject, the recovery is necessarily limited to a nominal sum only. Sedgwick, Dam. (9th Ed.) § 171. This author at section 171a of the edition noted states that in some instances value may be found by a jury without evidence in cases of purely pecuniary injury. Assuming without deciding that the legal principle last referred to is applicable herein, the jury could not determine the value of the use of the lots not occupied by Second street, when no testimony was offered as to the length of time for which the premises were used by the defendant; and, such being the case, no error was committed in directing a verdict for nominal damages on this branch of the case.

[12, 13] It is maintained that since only \$25 was awarded to the plaintiffs by the common council as damages for the condemnation of Second street and as a city warrant was issued for the sum which when discounted would equal the amount of the award, but which order for the payment of money was never delivered or tendered, the amount thus determined upon was not just compensation within the meaning of article 1, § 18, of our Constitution; that the sum so ascertained should have been paid in money and placed upon deposit, instead of being manifested by a city warrant, and that permitting such warrant to be offered in evidence, errors were committed.

Just compensation means such an award as may be agreed upon by a court of competent jurisdiction; a jury or appraisers appointed by law for that purpose. The sum determined upon herein having been fixed by appraisers legally appointed, the award constituted just compensation. While there is some conflict of authority as to the method of paying the award, when land has been condemned by a municipality, it has been held in this state that a corporate warrant is sufficient for that purpose. Baker County v. Benson, 40 Or. 207, 66 Pac. 815.

Other alleged errors are assigned; but, believing that a fair trial has been had, it follows that the judgment should be affirmed, and it is so ordered.

BURNETT, J. (dissenting). I am unable to concur in the opinion of Mr. Justice MOORE in this case on the point that the circuit court was right in directing the jury to find only the nominal damage of \$1 in favor of the plaintiffs on account of defendant's having withheld the realty in question.

The reasonable value of the use of the premises is predicated upon two elements, viz., the nature and situation of the property as one, and the length of time it was occu-

pled as the other. Abundant testimony appears in the record that the lots are situated in the flourishing city of La Grande adjacent to an interstate railway in the immediate neighborhood of its freight and passenger depots. These circumstances of themselves suggest rental value to any ordinary juror. He does not need, and it is not indispensable that he should have, some one sworn to testify that in the opinion of the witness the use of the premises is worth any definite sum of money. But, if such an estimate in dollars and cents were necessary, it was supplied by the testimony of Mr. Bushnell. When asked, "Now what in your opinion, are these lots reasonably worth per year as a rental for any purpose for which they are adapted?" he said, "I should think about five hundred dollars, something like that." Other testimony might be mentioned, but enough has been indicated to take the question to the jury on that point.

There is no issue about the defendant having been in possession of the property for some years next prior to the commencement of the action. The plaintiffs allege that defendant has been in possession ever since January 2, 1901, while the defendant itself says that it has been occupying the premises in dispute ever since December 3, 1900. Its own witness, J. B. Eddy, its tax and right of way agent from June 1, 1901, to January 1, 1912, testified that the defendant used the property in question in connection with its yard in La Grande for the purpose of storing ties and timber.

Length of time of occupancy for more than the statutory six years of withholding for which damages may be recovered is an admitted fact, not requiring testimony to prove it. Its situation in a trade center adjacent to a great railway and its depots is a circumstance appealing strongly to practical jurors on the question of rental value, and this indirect evidence is reinforced by the opinion of the witness Bushnell that its use is reasonably worth five hundred dollars a year. The defendant's own witness completes the case for plaintiffs when he tells that the defendant used the property for the purpose of storing ties and timber thereon.

Without descanting upon the weight of the testimony, it was clearly sufficient as a matter of law to require the trial court to submit to the jury the question of damages for withholding the property.

(66 Or. 80)

HARADON v. COFFEY, County Clerk.

(Supreme Court of Oregon. July 15, 1913.)

CLERKS OF COURTS (§ 32\*)—FEES—PAYMENT.

L. O. L. § 1114, requires the clerk of Multnomah county to collect in advance \$10 on account of fees from parties instituting civil suits to be held by him until earned or returned to the parties. Section 1125 allows an



additional fee of \$1 as a law library fee. Sections 3106 and 3107 require the clerk to collect specified fees in advance and keep account thereof and each month to pay to the county treasurer, out of the money in his hands, all fees earned, and on determination of the case to refund any balance to the parties. Section 3026 makes it his duty to keep all property belonging to his office and deliver it to the person entitled thereto. Defendant clerk taking office January 5, 1913, received \$38,888, being only about 71 per cent. of the fees received by his predecessor, part of which had been deposited in a bank which had become insolvent, and thereafter plaintiff, who on commencement of his suit July 30, 1912, had deposited \$11 as fees in advance, as required by the statute, tendered an order of the court to defendant who refused to file it without payment of fees. *Held* that, as defendant should be held not accountable for the money which never came into his hands as fees in actions pending before he took office, and without collecting fees when the papers were filed would become liable for the balance of fees not received by him, and as the sums collectible were small though vexatious, mandamus would not lie.

[Ed. Note.—For other cases, see *Clerks of Courts*, Cent. Dig. §§ 36, 37; Dec. Dig. § 32.\*] Ramsey, J., dissenting.

Department 1. Appeal from Circuit Court, Multnomah County; R. G. Morrow, W. N. Gatens, Geo. N. Davis, J. P. Kavanaugh, and H. E. McGinn, Judges.

Mandamus by A. M. Haradon against John B. Coffey, as County Clerk of Multnomah County, Or. Demurrer to return to alternative writ overruled. Writ quashed, and proceeding dismissed, and plaintiff appeals. Affirmed.

This is a special proceeding to compel the performance of an act which it is asserted the law specially enjoins as a duty resulting from an office. The complaint charges in effect that on January 5, 1913, the defendant, John B. Coffey, became, ever since has been, and now is the duly elected, legally qualified, and acting county clerk of Multnomah county; that as such officer he has custody of all papers in actions, suits, and proceedings instituted in the circuit court of the state of Oregon for that county, and it is his duty to receive and file all papers in such causes that are properly indorsed and tendered to him for that purpose, for which the prescribed fees have been paid; that on July 30, 1912, A. M. Haradon, the plaintiff herein, commenced in such court an action against the Queen Insurance Company of America, a corporation, and then deposited with the county clerk of such county, as required by law, the sum of \$11 to defray the expenses of filing papers, etc., in such cause; that plaintiff has complied with all the requirements of law respecting the filing of papers in that action, and there remains under the control of the defendant \$8.10 that has not been applied in payment of filing fees in such case; that on April 8, 1913, plaintiff tendered a duly issued and properly indorsed order of the court, relating to such action, to the defendant whose duty it was

to file the same, but without any reason therefor he refused to accept or file the written direction; that at the time of such tender there was in his possession more than sufficient funds to pay all filing fees; and that plaintiff has not plain, speedy, or adequate remedy in the ordinary course of law. The prayer is that a writ of mandamus may be issued commanding the filing of such paper.

An alternative writ having been issued, the return thereto states, in substance, that on January 5, 1913, when the defendant entered upon a discharge of the duties of his office, the books thereof showed that his immediate predecessor therein had received from parties litigant \$54,410.98, but that of that sum there was delivered only \$38,888.56 to the defendant, who immediately deposited the same in a bank in Portland to his credit to be held for the benefit of persons entitled thereto; that such predecessor asserts that of the money so received by him, on account of fees, he deposited \$15,522.43 in a bank which became insolvent, and that sum cannot be collected except by due course of settlement; that since the failure of that bank such predecessor had made to some of the parties litigant payments but the amount thereof or the persons receiving the same are unknown to the defendant, who for that reason, and until the ownership of the money so received by him is established, has declined to file any paper in causes pending prior to assuming his official duties, unless the fees are paid at the time; and that, by the provisions of the statute regulating the matter, the defendant is compelled to pay to the treasurer of Multnomah county on the fourth of each month the sum of ten cents for each paper filed during the preceding month, and by reason of such requirement it is impossible for him to comply therewith in respect to fees in pending actions, suits, or proceedings instituted prior to January 5, 1913, without collecting such fees when the paper is filed, unless he becomes personally liable for the failure of his predecessor to pay over all money that he received on account of fees.

A demurrer to the return, based on the ground that it did not state facts sufficient to constitute a defense, having been overruled, and the plaintiff declining further to plead, the writ was quashed and the proceeding dismissed, from which judgment he appeals.

C. L. Whealdon and Ralph R. Duniway, both of Portland, for appellant. Jay Bowerman, of Portland (Fulton & Bowerman, of Portland, on the brief), for respondent.

MOORE, J. (after stating the facts as above). The county clerk of any county containing more than 50,000 inhabitants, which limitation applies to Multnomah county, is required to collect in advance from the par-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.



ty instituting any civil suit, action, or proceeding the sum of \$10 on account of fees. If before the termination of the cause the money thus paid has been earned by the county, a further deposit is demanded, which sums are to be held by the clerk until earned by the county or returned to the parties. L. O. L. § 1114. An additional sum of \$1 must be collected in that county as law library fees. Id. § 1125. A schedule of fees is prescribed, and the county clerk is required to collect in advance, for the benefit of the county, the sum so ordained for the performance of his official duties in the causes specified. Id. § 3106. He is also commanded to enter in the register, under the date of performance, the charge for such service rendered, and also to note all sums of money paid or advanced on account of fees. On the fourth of each month he is required to ascertain from the register the amount earned by the county during the preceding month and immediately to pay to the county treasurer from the sum so deposited all fees that have been earned. When a case is dismissed or otherwise finally determined, the clerk must refund to the party, depositing any fees on account, the remainder of the money which he had advanced, after the payment of all fees charged against him. Id. § 3107.

If the provisions of the statute referred to are strictly to be enforced in the case at bar, the defendant must inevitably pay to the county, as the fees are earned, or refund to the parties entitled thereto, \$15,522.43, or so much thereof as may legally be demanded during his term of office. He is not in the least responsible for the loss of any of that money, and every principle of natural justice demands that he should not be required to repay any part of the fund that has been dissipated. The duty which the law specially enjoins upon him by virtue of his office, the performance of which will be compelled by writ of mandamus, is safely to keep and carefully to account for all moneys coming into his possession as county clerk. With respect to causes begun prior thereto, on account of which his predecessor in office received \$54,410.95, the defendant can pay to the county or to the other parties entitled thereto only \$38,888.52, or 71 per cent. of the fees to be earned or of the remainder that should be returned. It is unnecessary for the court to command the payment of that ratio, for by the return to the writ the defendant practically offers to pay upon that basis, if he can be relieved from further obligation in the matter with respect to fees received by another during his incumbency in office. The defendant must comply with the requirements of the statute, regulating the collection and payment of fees in all civil suits, actions, and proceedings that have been commenced since January 5, 1913, when he took his office. It was the duty of the defendant's immediate predecessor to keep all property

appertaining to his office and to pay and deliver the same to the person entitled thereto. L. O. L. § 3026. As the only person having a right to the possession of the money collected as fees and remaining on hand January 5, 1913, was the defendant, he was obliged to accept the sum delivered to him, but his receipt therefor did not obligate him to answer for the loss of any part of the \$15,522.43 that was dissipated by the bank which failed.

Whether or not Multnomah county is, by reason of the undertaking given to the state by the defendant's predecessor, conditioned faithfully to pay over according to law all moneys that might have come into his hands by virtue of such office, which bond was undoubtedly approved by the county court of such county, made that municipality liable in the excess of 71 per cent. to the parties entitled thereto to shares of the money lost, and for that reason must remit 29 per cent. of the fees when earned, cannot now be determined, for the county is not a party to this proceeding.

The parties who have advanced fees in civil suits, actions, or proceedings instituted prior to January 5, 1913, and are now compelled again to pay small sums before any papers in such cases will be received for filing, when they have prepaid such fees, are necessarily subjected to vexatious burdens, but it is better that the ultimate settlement of their just demands, not exceeding in any instance \$10, should be deferred for a short time rather than unjustly to impose on the defendant a burden of \$15,522.43, for the payment of no part of which is he legally or morally responsible.

No error was committed in overruling the demurrer, and the judgment is affirmed.

McBRIDE, C. J., and BURNETT, J., concur. RAMSEY, J., dissents.

(66 Or. 132)

#### JOHNS v. CITY OF PENDLETON.

(Supreme Court of Oregon. July 1, 1913.)

##### 1. MUNICIPAL CORPORATIONS (§ 330\*)—STREET IMPROVEMENTS—PATENTED MATERIAL.

Though the work of improving a street has to be let to the lowest responsible bidder, and though the council has to designate in advance the character and kind of improvement to be made, it, deeming it best, may provide that it shall be of a certain kind of patented material, the owner of the patent not being the contractor, but furnishing the material to all contractors on the same terms.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 854, 855; Dec. Dig. § 330.\*]

##### 2. MUNICIPAL CORPORATIONS (§ 444\*)—STREET IMPROVEMENTS—NOTICE OF INTENTION—DESCRIPTION.

The description in a notice of intention to improve of the portion of a street to be improved being indefinite, and incapable of ascertainment from the notice itself, the notice, be-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 133 P.—52



ing jurisdictional, gives no right to assess for the improvement.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1064, 1069; Dec. Dig. § 444.\*]

**3. MUNICIPAL CORPORATIONS (§§ 488, 489\*) — IMPROVEMENTS — ASSESSMENTS — RESTRAINING ENFORCEMENT—ESTOPPEL.**

One by waiting till completion of a street improvement is not estopped from enjoining the collection of the assessment therefor.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1147-1152; Dec. Dig. §§ 488, 489.\*]

Appeal from Circuit Court, Umatilla County; Gilbert W. Phelps, Judge.

Suit by James Johns against the City of Pendleton. Decree for defendant. Plaintiff appeals. Reversed and rendered.

This is a suit to quiet title. It originated in a dispute as to the validity of an assessment made and a lien claimed by the defendant against two lots owned by plaintiff in order to pay for work done by the Warren Construction Company in paving a portion of Jackson street with what is called "Gravel Bitulithic" pavement. The pavement is composed of a patented compound, manufactured by the use of special machinery, parts of which are also patented, and the use of the name "Gravel Bitulithic" is protected by copyright; the patents and right to use the name being the property of the Warren Bros. Company, a corporation distinct from the Warren Construction Company. The Warren Bros. Company, the owners of the patent, had placed on file in the office of the recorder in the city of Pendleton the following offer, called a "license agreement," which is as follows: "To The Honorable Mayor and City Council, Pendleton, Oregon. Gentlemen: Inasmuch as it is deemed advisable by the proper authorities that bids be received for the improvement of certain streets in the city of Pendleton, state of Oregon, with the Gravel Bitulithic pavement; and inasmuch as the construction of said pavement requires the use of certain patented processes and compounds; and inasmuch as competitive bidding in the letting of contracts for street improvements is deemed advisable, in order to provide for such competitive bidding, and at the same time secure the adoption of the Gravel Bitulithic pavement as the kind of pavement to be constructed in such streets as may hereafter be determined; the undersigned, Warren Brothers Company, as owner of all patents and processes covering the laying of said Bitulithic pavement, hereby proposes and agrees, for the consideration hereinafter named, to furnish the city of Pendleton or to any bidder, to whom a contract may be awarded to pave any street or streets in the city of Pendleton with the Gravel Bitulithic pavement, at any time within one year from this date, or at any time thereafter until this proposition is formally withdrawn, and who shall enter

into a contract with such surety or sureties as may be required by said city of Pendleton, the following materials ready for use, coupled with a free license to use any or all the patents, trade-marks or trade-names now owned or which may hereafter be owned by Warren Brothers Company, necessary to lay said pavement: 1. The necessary roadway mixture for the wearing surface having a thickness of 1½ inches (1½") after compression, prepared under the patented process of Warren Brothers Company, and delivered hot in the wagons of the city or contractor at the Bitulithic mixing plant located in the city of Pendleton; said plant to be located within three (3) miles of the work to be performed. 2. The right to use any and all patents, trade-marks, or trade-names now owned or which may hereafter be owned or controlled by Warren Brothers Company, which are necessary to be used in the laying of such pavement. 3. The bituminous flush coating cement necessary for coating the wearing surface, delivered on wagons of the city or contractor at the Bitulithic mixing plant located as above. 4. An expert, who will give proper advice as to the building of such pavement, will be furnished to the city or contractor at the expense of Warren Brothers Company. 5. Two daily examinations of the mixture as delivered on the street will be made at the laboratory of Warren Brothers Company, to determine if uniformity has been accomplished in the mixture and construction, and reports thereof will be made to the proper city authorities; said samples to be sent, prepaid to the laboratory of Warren Brothers Company, Potter street, East Cambridge, Mass., by the city or contractor. The price at which this service is offered to any and all contractors who make a bid on the Gravel Bitulithic pavement, in the city of Pendleton, state of Oregon, is ninety cents (\$0.90) per square yard of finished pavement, at which price it is also agreed to furnish the mixture for making all repairs, if any, which may be necessary for the wearing surface during the life of said patents f. o. b. Pendleton in barrels for reheating. The acceptance of bids by your city and the letting of a contract for the same is all that shall be necessary to bind Warren Brothers Company to this agreement. Respectfully submitted, Warren Brothers Company, Walter B. Warren, Vice President. The above agreement made on the understanding that it applies only to contracts, work on which can be performed continuously, aggregating not less than 10,000 square yards." It also appeared that it was the custom of the company to allow contractors to put in their own plants or for the company to furnish such plants to contractors who were allowed to manufacture the compound for themselves, paying a royalty of 25 cents per square yard to the War-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index



ren Bros. Company. In order to prevent duplication of such plants in small cities, such contractors were obligated to furnish other contractors in the same town not having such machinery the compound at the rate prescribed in the license agreement. The charter of the city of Pendleton contains the following provisions: "The council, whenever it may deem it expedient, is hereby authorized and empowered to order the whole or any part of the streets of the city to be improved, to determine the character, kind and extent of such improvement, to levy and collect an assessment upon all lots and parcels of land specially benefited by such improvement, to defray the whole or any portion of the cost and expense thereof, and to determine what lands are specially benefited by such improvement and the amount to which each parcel or tract of land is benefited. \* \* \* Within ten days from the date of the first publication of the notice required to be published in the preceding section, the owners of 80 per cent. or more in area of the property within such assessment district may make and file with the city recorder a written objection or remonstrance against such proposed improvement, and such objections or remonstrance shall be a bar to any further proceedings in the matter of such improvement for a period of six months, unless the owners of one-half or more of the property affected as aforesaid shall subsequently petition therefor. \* \* \* When the improvement of any street is ordered the recorder, upon instruction from the common council, shall immediately invite proposals for making the same, in accordance with ordinance provided, which proposals shall be opened in the presence of a majority of the common council and the contract awarded to the lowest responsible bidder for either the whole of said improvement or such part thereof as will not materially conflict with the completion of the remainder thereof. \* \* \*"

The Jackson Street improvement required 7,848.80 square yards of paving material. The plaintiff and others remonstrated against the proposed improvement, but did not specify the selection of a patented article as one of the reasons for their remonstrance. Other facts appear in the opinion. There was a decree for defendant, and plaintiff appeals.

R. R. Johnson, of Pendleton (J. P. Winter, of Portland, and Johnson & Skrable, of Pendleton, on the brief), for appellant. R. W. Montague, of Portland (Charles H. Carter, James A. Fee, and R. W. Montague, all of Pendleton, on the brief), for respondent.

McBRIDE, C. J. (after stating the facts as above). [1] The principal contention here urged is that the selection of a patented paving compound manufactured by a single company, and exclusively controlled by it, rendered it impossible for any but a single corporation to bid, and that it is therefore

inimical to that provision of the city charter of Pendleton which requires all paving contracts to be let to the lowest responsible bidder. The industry of the respective counsel has apparently covered the entire field of judicial utterance upon this question, and has brought to our notice a mass of hopelessly contradictory decisions, all plausible and some profound, indicating by their contrariety the difficulty and nicety of the question involved. On the other hand, it is argued with much show of reason that the selection of a patented article controlled by its owners renders it impossible for any but such owners or favored licensees to bid, and that a call for bids under such circumstances is a mere farce, which tends to promote monopoly, stifle free competition, and impose unnecessary burdens upon the ratepayer. The argument for plaintiff is forcibly put in the language of Sanderson, J., in the case of *Nicolson Pavement Co. v. Painter*, 35 Cal. 699: "To advertise for sealed proposals, where there can be but one bidder, to open them in open session, to examine and publicly declare them, and thereupon award the work to the lowest responsible bidder, where there is and can be but one, to notify the owners of the frontage, if they so elect, to come forward and perform work which by the paramount law of the land they are prohibited from performing under heavy responsibilities, would be to play as broad a farce as was ever enacted behind the footlights." Although, as hereinafter shown, the case there being considered contained many elements of hardship not incident to the case at bar, it shows the attitude of many of the courts in those cases where an exclusive monopoly of a patented article exists. On the contrary, it is argued that the law imposes upon the city council the duty to select in advance the kind of improvement required; that it is its duty to select the best; and that, if the best and most appropriate article for its purposes happens to be a patented article which can be supplied from only one source, the authorities should not be precluded from selecting nor the public from having the best and most appropriate article, and the one which it desires, by reason of the fact that only one person can supply it. This view of the case is forcibly and clearly set forth in the language of Mr. Chief Justice McSherry in *Baltimore City v. Flack*, 104 Md. 107, 64 Atl. 702, in a case involving the same patent which is the bone of contention in the case at bar. We quote: "Cities in the construction of public improvements ought to have, as have individuals, in the construction of their own private edifices, the right to select for use the article or substance best fitted and adapted to the purpose; and to deprive the public of the right to select and use such superior articles is opposed to public policy, and positively disadvantageous to the community. 'The force of this argument must of course, be admitted,' said the court in *Fish-*



burn v. Chicago, 171 Ill. 338 [49 N. E. 532], 39 L. R. A. 482 [63 Am. St. Rep. 236], \* \* \* and, the answer to it, which is more specious than sound as given by that court, is as follows: 'It is readily seen it is not necessary to foster and create a monopoly, and prevent competition in the letting of public contracts, by providing in ordinances that a certain substance, or article, and no other, shall be used. If it be the judgment of the city council that the most suitable and best material to be used in any contemplated improvement is the product of some particular mine or quarry, or some substance or compound which is in the control of some particular firm or corporation, the ordinance might be so framed as to make such production, substance, or compound the standard of quality and fitness, and to require that material equal in all respects to it should be employed.' In other words, if the city requires a particular thing and that thing is covered by a patent, or can only be supplied by one dealer, the city must get, not the exact thing it needs, but something else as closely resembling it as can be procured. Thus if the city is in want of certain repairs for its fire engines and those repairs are made only by one manufacturer, or protected by a patent, they cannot be purchased lest a monopoly would be fostered; but something, not the thing needed, though resembling the thing needed, would have to be substituted."

The two opinions quoted from fairly set forth the views of the courts in relation to the selection of patented articles where there is no opportunity for competitive bids; but in the case at bar it appears from the testimony that is not excluded that the patentee, the Warren Bros. Company, is not engaged in street work as a business. Its revenues are derived from sales of the manufactured product, from the sale and installation of machinery for such manufacture, and from royalties derived from the manufacture of the product by others. It does not appear from the testimony that there was anything to prevent any contractor who desired to do so from having a plant installed and from manufacturing the compound upon exactly the same terms that the Warren Construction Company required. Perhaps it would have been unprofitable to have done so, but by the same token it is frequently impractical for a contractor to bid upon a small contract in a town remote from his place of business. When bids are advertised for in any case, the contractor who bids the lowest usually is enabled to do so because he has facilities not possessed by less fortunate bidders. The man situated nearest the place to be improved, having the best equipment, having the best material, and having capital to purchase what the public demands, always has an advantage which enables him in a sense to monopolize contracts of this character.

The law required the city council to des-

ignate in advance and in the first instance the "character and kind" of improvement to be made, and it was its duty to choose that which, under all the circumstances, it thought the most suitable. There is nothing to indicate that it acted fraudulently, or that it did not choose the best; and, in the absence of any great number of litigants protesting here, we have the right to assume that a great majority of the ratepayers got what they wanted and are satisfied. It is not shown that anybody else sought to take advantage of the situation by proposing to the Warren Bros. Company to install a plant in Pendleton for the manufacture of gravel bitulithic pavement, nor that anybody ever applied to it to furnish the material to perform the contract in case they should see fit to bid upon it. This is not a case where the patentee of an article is himself a contractor for its use in a particular instance. The evidence discloses no more than that the pavement selected is covered by a patent the benefits of which are available to every contractor upon the same terms. If the use of patented articles, compounds, and machinery are to be excluded from all contracts let to the lowest bidder, then municipalities are relegated to the outworn agencies and materials of a past generation, and are unable to avail themselves of the discoveries and improvements of the present. The leading case cited by plaintiff is *Fishburn v. Chicago*, 171 Ill. 338, 49 N. E. 532, 39 L. R. A. 482, 63 Am. St. Rep. 236. It is not in point in the present controversy, and the distinction is clearly made in the opinion between those cases where the article or compound selected is one composed of materials which may be furnished by a number of persons, and is unpatented, and a compound protected by patent. In that case the ordinance provided that the "cementing material shall be a paving cement prepared from refined Trinidad asphaltum obtained from Pitch Lake, in the island of Trinidad." The plaintiffs offered proof tending to show that there were five paving companies in Chicago using Trinidad asphaltum equal for street paving purposes to that obtained from Pitch Lake, so that the real question was not whether the council could select the best material, but whether it could arbitrarily designate the product of a particular locality when products equal in quality and identical in composition could be obtained from other localities. Such a limitation was evidently fraudulent upon the face of it, and no court could have upheld it; but, while the court by way of dictum discusses the cases holding that cities may avail themselves of the benefit of scientific progress by soliciting bids for patented compounds and expresses the opinion that such practice is not sanctioned by the best authority, it recognizes the fact that it is discussing a matter not in issue in the case before it. The court says: "In Mr. Dillon's view these



cases are rather overcome by the current of authority, but, if they should be accepted as stating the correct rule, they have little application to the case in hand, for the reason the monopoly created under the ordinance under consideration is not in favor of a patented article." The liability of a judge to be absurd when he attempts to decide matters not before him is strikingly illustrated in this case referred to. After admitting the disadvantages of prohibiting a city from designating a patented pavement in its advertisement for bids, even if it is the most suitable, the court suggests, as a remedy, that "the ordinance might be so framed as to make such production, substance or compound the standard of quality and fitness, and to require that material equal in all respects to it should be employed."

How, if the patented article is the best and most suitable, another article can be "equal in all respects to it," is not clear; but the hibernicism of the remark is evident. It is needless to marshal and discuss authorities on this question where they disagree so widely. In a general way it may be said that the following cases tend in many respects to support defendant's contention. *Fishburn v. City of Chicago*, supra; *Slegel v. City of Chicago*, 223 Ill. 428, 79 N. E. 280, 7 Ann. Cas. 104; *Nicolson Pavement Co. v. Painter*, supra; *Dean v. Charlton*, 23 Wis. 590, 99 Am. Dec. 205. These are by no means all of the cases, but they are representative of all. Cases tending to support plaintiff's contention and the views of this court as herein expressed are *Baltimore City v. Flack*, supra; *Hobart v. City of Detroit*, 17 Mich. 246, 97 Am. Dec. 185; *Re Dugro*, 50 N. Y. 513; *Baird v. New York*, 96 N. Y. 567; *Mayor of Newark v. Bonnell*, 57 N. J. Law, 424, 31 Atl. 408; *Yarnold v. Lawrence*, 15 Kan. 126. It is assumed that this court has committed itself to the doctrine contended for by plaintiff by its decision in *Terwilliger Land Co. v. Portland*, 62 Or. 101, 123 Pac. 57; but such is not the case. In that case bids were advertised for improving a street with "Hassam pavement," an unpatented compound. The Hassam Paving Company had copyrighted the trade-name, but anybody could use the same ingredients in the same proportions and produce exactly the same pavement without any infringement on the copyright of the Hassam Company; but, as the bids called for Hassam pavement, nobody could submit a bid for such pavement *eo nomine* without infringing upon the copyright. If in that case the call for bids had specified the character of the compound desired by requiring it to contain sand, gravel, and cement in the same proportions as contained in the Hassam compound, any one could have bid. It was a plain case of preferring one contractor as against others possibly having equal facilities for furnishing the identical material. We note the follow-

ing distinctions between that case and this: (1) The Hassam Paving Company was actually engaged as a street contractor in laying pavement composed of its copyrighted compound. The Warren Bros. Company is not so engaged. (2) The Hassam Paving Company refused to allow other contractors to bid under their trade-name. The Warren Bros. encourage contractors to bid on contracts to be filled by the use of their compound, charging a royalty for its use. (3) The identical material used in the Hassam compound as called for in the bids could have been furnished under another name or by a description of the material. It does not appear that such is the case in the present instance. In the absence of proof to the contrary, we are bound to assume that the council of Pendleton acted in good faith and with good judgment, and that "Gravel Bitulithic" was the best pavement for use on Jackson street.

It is not shown in this case that any other pavement is equal to gravel bitulithic, that the cost of the pavement was excessive, nor that anybody was prevented from bidding by reason of the fact that the compound was covered by patents. From all that appears the plaintiff has a good pavement, put down at a reasonable price, and has suffered no actual injury by reason of the selection of the pavement in question. He stands simply on the bare technical objection that the selection of a patented compound, as a matter of law, has a tendency to create a monopoly, and that therefore he cannot be compelled to pay for the improvement. It is very evident that the objection now raised is an afterthought, which either did not occur to him before the work was completed or was suppressed. It is also evident that the plaintiff's real objection is not that the council of Pendleton has done something to foster a monopoly, but that it has improved the street at all. In its final analysis plaintiff's contention amounts to this: "The city council may determine the kind of improvement to be made, but must carefully exclude any patented improvement; or it must, at least, make its selection in the alternative." If it were shown that there were other pavements of a similar character and equally as good, the suggestion might have some force; but that fact does not appear in the testimony in this case. It is difficult to see how such a course could prevent favoritism from being shown in the selection of material or in the awarding of contracts. A dishonest council could just as easily select the material specified by a bidder whom it wished to favor after the bids were in as it could before they were called for. Suppose the council had called for bids for half a dozen different kinds of pavement retaining the right to select that one which in its judgment was the best. It is plain that, if it were so disposed, it could have selected Gravel Bitulithic, and the plaintiff would have



been without remedy. In this contention we are conceding for the purposes of the argument, without so deciding, that such alternative notice would comply with the terms of the charter, which required the council to determine in advance of the notice for bids the kind and character of the improvement. There has been no device yet invented that is sufficient to make a dishonest official act honestly; the remedy is at the polls. In these days when the light of publicity is thrown upon every act of a councilman, when the jail doors yawn before the grafting official, and the recall hovers over him, there is not that temptation for him to ply his vocation that there has been heretofore. In this particular case there is no charge made of intentional fraud on the part of the council. They complied with the letter of the law, and, as we believe, with the spirit of it. Whether they exercised the very best judgment is not for us to say.

[2, 3] Another objection is that the notice of intention to improve does not describe definitely the portion of the street to be improved. The description in the ordinance and notice is as follows: "Commencing on the south line of Jackson street and the southerly projected west line of Main street, thence north to the northeast corner of lot 6, block 7, Switzler's addition to the city of Pendleton, Oregon, thence west to the northwest corner of said lot 6, thence north to the northeast corner of lot 9, in said block 7, thence westerly parallel with the north line of Jackson street to the northwest corner of lot 4, block 6, Livermore's addition, thence south to the northeast corner of lot 7, in said block 6, thence west to the northwest corner of said lot 7, thence south to the southwest corner of lot 12, block 16, in Raley's addition, Pendleton, Oregon; thence east to the southeast corner of said lot 12, thence south to the southwest corner of lot 3 in said block 16, thence easterly parallel to the north line of Jackson street to a point on the west line of the property deeded to the city of Pendleton for cemetery purposes, which point is south of a point on the section line, 19.50 chains east of the  $\frac{1}{4}$  section corner between sections 3 and 10, township 2 north, range 32 E. W. M. (variation 23 degrees E.), thence south to a point 9.50 chains south of the said section line, thence east 2.50 chains, thence north to the south line of lot 8, block 1, in said Raley's addition, thence east to a point 230 feet due south of the southwest corner of lot 7, block 6, in said Switzler's addition; thence east 100 feet parallel with said section line, thence south 64 feet more or less to the north line of land formerly owned by the Pendleton Manufacturing Company, thence northeast along the north boundary of said land formerly owned by the said Pendleton Manufacturing Company, to the said section line, thence along said section line west to place

of beginning." There is a discrepancy in the description arising from the fact that block C, Livermore's addition, is wrongly designated as "block 6." All the monuments called for in block 6 as they appear in the ordinance and notice exist in block C, and the courses called for also correspond; but, as no distances are given, we cannot reverse the description beginning at the last call and retrace it so as to make the calls certain, especially since there is a block 6 in Livermore's addition. The description is uncertain, and cannot be ascertained from the notice itself. The notice does not refer to any map or plat of the assessment district on file, and the one actually on file is not complete in some particulars. The notice of intention to improve is jurisdictional, and the city gained no right to make the assessment against plaintiff's property. The whole proceeding was void. As held by this court in several cases, plaintiff is not estopped from enjoining the collection of the assessment by reason of having waited until the completion of the improvement. *Dillon, Mun. Corp. § 1455; Ladd v. Spencer, 23 Or. 193, 31 Pac. 474.*

The decree will be reversed, and one entered here in accordance with this opinion.

(66 Or. 359)

#### THOMAS v. SPENCER.

(Supreme Court of Oregon. July 15, 1913.)

#### 1. ADVERSE POSSESSION (§ 106\*)—TITLE ACQUIRED—VESTING OF FEE.

Adverse possession for the statutory period of ten years vests in the possessor title in fee, with all the rights incident thereto.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 604-623; Dec. Dig. § 106.\*]

#### 2. ADVERSE POSSESSION (§ 13\*)—CHARACTER OF POSSESSION.

To be adverse, possession of land must be hostile, under a claim of right, actual and not constructive, open and notorious, exclusive and continuous for the full period of ten years.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 28-30; Dec. Dig. § 13.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 227-236; vol. 8, p. 7568.]

#### 3. ADVERSE POSSESSION (§ 57\*)—CONTINUITY OF POSSESSION—EVIDENCE.

In an action to quiet title, evidence held to show that the possession by the defendant of land upon an island which was sometimes overflowed but was all suitable for occupancy and cultivation, except at flood times, was interrupted during two years of the necessary ten so as to destroy the continuity of possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 277, 278, 655, 667, 687; Dec. Dig. § 57.\*]

#### 4. ADVERSE POSSESSION (§ 70\*)—HOSTILE CHARACTER OF POSSESSION—POSSESSION UNDER VOID TAX DEED.

A void tax deed conveys no title, and one entering into possession thereunder is a trespasser.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 459-462; Dec. Dig. § 70.\*]



**5. ADVERSE POSSESSION (§ 46\*)—CONTINUITY OF POSSESSION—INTERRUPTION BY FIRE OR FLOOD.**

When the actual occupancy of land is temporarily prevented by flood or fire, the possessor has a reasonable time to resume possession after the flood or fire without there being a discontinuance of his possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 232-254; Dec. Dig. § 46.\*]

Department 1. Appeal from Circuit Court, Yamhill County; William Galloway, Judge.

Action by Leona Thomas against F. W. Spencer. Decree for defendant, and plaintiff appeals. Reversed, and decree entered for plaintiff.

This is a suit to quiet title to the S. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 23, and the S. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$ , and lots 5 and 6, of section 24, in township 5 south, range 3 west, of the Willamette meridian in Yamhill county, state of Oregon, containing 160 acres. The complaint is in the usual form.

The amended answer denies the allegations of the complaint and alleges the execution of a tax deed to the defendant by the sheriff and tax collector of Yamhill county, Or., purporting to convey to the defendant, on January 4, 1905, the above-described real property. This tax deed was recorded on page 323 of Book 32 of the records of deeds of Yamhill county on January 7, 1895. This tax deed was based upon the assessment of said real property for the year 1891, and a sale for delinquent taxes made on the 10th day of December, 1892. Said deed recites that the defendant paid for said land at said sale \$10.05.

The amended answer alleges title in fee simple in said premises in the defendant and pleads the statute of limitations and the purchase at said tax sale, and alleges payment of the taxes on said land by the defendant for the years from 1892 until the beginning of said suit, and the exclusive possession of said premises by the defendant for the ten years immediately preceding the commencement of said suit, etc., and asks that his title to said premises be quieted.

The court below entered findings and a decree against the plaintiff and in favor of the defendant. The plaintiff appealed.

Newton McCoy and H. B. Nicholas, both of Portland, and Francis D'Arcy, of Oregon City, for appellant. Carson & Brown, of Salem, for respondent.

RAMSEY, J. (after stating the facts as above). This suit was brought by the plaintiff against the defendant to quiet the plaintiff's title to the 160 acres of land described in the complaint. The plaintiff claims to be the owner in fee of said real premises and that said lands have not been in the actual possession of any one, and alleges that the

defendant claims some estate or interest therein adverse to her title and rights in said premises, etc. The defendant denies, all the allegations of the complaint and alleges that he is the owner in fee of said real premises, etc. The evidence shows that the plaintiff has a good record title in fee simple to said premises, and that she is entitled to the relief prayed for in her complaint, unless the sheriff's tax deed, pleaded by the amended answer purporting to convey said premises to the defendant, is valid, or unless the defendant obtained title to the said premises by adverse possession thereof. The counsel for the defendant, when this case was argued in this court, expressly admitted that said tax deed was void, and we find from the evidence that it is void for various reasons, but, as its invalidity is expressly admitted by counsel for the defendant, it is not necessary to set forth the reasons for its being invalid. The question for decision is whether the defendant has acquired title to the real premises in question by adverse possession.

[1] It is settled by the decisions of this court that in this state adverse possession of real property for the statutory period of ten years vests in the possessor title in fee, extinguishes adverse titles, and entitles the possessor to all the rights incident to a title in fee. *Barrell v. Title Guarantee Co.*, 27 Or. 80, 39 Pac. 992; *Parker v. Metzger*, 12 Or. 407, 7 Pac. 518; *Joy v. Stump*, 14 Or. 361, 12 Pac. 929.

[2] The statute of this state does not define adverse possession, but this court has discussed this subject in many cases and has decided what constitutes adverse possession of real property within the meaning of our statute. *Talbot v. Cook*, 57 Or. 540, 112 Pac. 709; *Chapman v. Dean*, 58 Or. 475, 115 Pac. 154; *Rowland v. Williams*, 23 Or. 515-521, 32 Pac. 402; *Curtis v. La Grande Water Co.*, 20 Or. 34, 23 Pac. 808, 25 Pac. 378, 10 L. R. A. 484; *Ambrose v. Huntington*, 34 Or. 484, 58 Pac. 513; *Willamette R. E. v. Hendrix*, 23 Or. 485, 42 Pac. 514, 52 Am. St. Rep. 800; *Wheeler v. Taylor*, 32 Or. 436, 52 Pac. 183, 67 Am. St. Rep. 540; *Slater v. Reed*, 37 Or. 274, 60 Pac. 709; *Springer v. Young*, 14 Or. 280, 12 Pac. 400; *Somner v. Compton*, 52 Or. 173, 96 Pac. 124, 1065; *McNear v. Guistlin*, 50 Or. 377, 92 Pac. 1075.

In *Chapman v. Dean*, supra, Justice Burnett states the requisites of adverse possession thus: "To prevail on such a title, the defendants must prescribe in their own right and that of their predecessors. In other words they must plead and prove title by adverse possession. To this there are five essential elements necessary: First, the possession must be hostile and under a claim of right; second, it must be actual; third, it must be open and notorious; fourth, it must be exclusive; and, fifth, it must be continuous."

In *Talbot v. Cook*, supra, the court sets

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



forth the requisites of adverse possession in substantially the same words as those quoted, *supra*.

In *Curtis v. LaGrande Water Co.*, *supra*, Justice Lord says: "To acquire a right of prescription in the lands of another upon the presumption of a grant, the possession must be adverse, continuous, uninterrupted, and by the acquiescence of the owner of the land upon which the easement is claimed. If its inception is permissive or under a license from the owner, it cannot avail to work an ouster. To effect that result, the possession taken must be open, hostile, and continuous; 'he (the person claiming adverse possession) must unfurl his flag on the land and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains and planted the standard of conquest.'"

In *Springer v. Young*, *supra*, Justice Strahan says: "But possession, to constitute a bar either at law or in equity, must be adverse. The statute nowhere defines what shall be an adverse possession sufficient to bar an entry. An adverse possession cannot begin until there has been a disseisin, and to constitute a disseisin there must be an actual expulsion of the true owner for the full period prescribed by the statute. An adverse possession is aptly defined by Ingersoll, J., in *Bryan v. Atwater*, 5 Day [(Conn.) 181, 5 Am. Dec. 136], to be 'a possession not under the legal proprietor, but entered into without his consent, either directly or indirectly given. It is a possession by which he is dispossessed and ousted of the lands so possessed.' \* \* \* So, also, if at the time one enters, or afterwards, he does not claim the title himself, but acknowledges title of another, his possession must be taken as an entry or holding in subordination to the title of the person whose right he acknowledges."

We conclude that possession, to be adverse and to ripen into title, must be hostile, under a claim of right, actual and not constructive, open and notorious, exclusive and continuous for the full period of ten years.

[8] The land in question was the homestead claim of Chas. T. J. Smith, the first husband of the plaintiff. He died in 1883, leaving the plaintiff as his surviving widow and three children his heirs at law. These children conveyed their interest in this land to their mother, the plaintiff.

The plaintiff and her husband, Smith, resided on this land four years before his death, and he resided on the land a year before he married the plaintiff. The plaintiff made the final payment of fees demanded by the United States Land Office at Oregon City for the land after the death of Mr. Smith, and the patent was issued for the land after this payment was made. When the plaintiff resided on this land, there was a house on it and about 18 acres of the land had been cleared. After the death of her husband, the plaintiff moved away and lived in Portland

and other places and made a living by keeping boarders and gave no attention to this land.

The defendant, in good faith, bid in the property at a tax sale in December, 1892, and paid \$10.05 for it. It was sold for taxes assessed for 1891, and he received the tax deed on January 4, 1895. In 1893 and 1894, before the defendant obtained the tax deed, Mr. Hawksworth, the second husband of the plaintiff, was on this land part of the time. He grubbed stumps and vine maple and repaired fences. He let W. N. Miller farm the land in 1894 and 1895. The defendant says that he took possession of this land in 1897, and that he has held possession of it ever since that date, and that he has paid the taxes on the land each year. He says he paid from \$110 to \$125 in the aggregate as taxes. He built some wire fences on the land and claims that he expended in all, in improvements on the land, from \$500 to \$600. This was expended chiefly in making and repairing fences.

This land is on Athey, or Deer Island, in the Willamette river, near Wheatland, and all of it occasionally overflows, and some of the land overflows each year. The high water destroyed much of the fences, and most of the fences built by the defendant on the land were destroyed by floods. The defendant placed a flock of goats on this place in 1903, but the evidence shows that they roamed at will on the island, and that they did not remain on this land; the fences being poor and more or less down. The defendant admits that they ran on other lands and that he had to pay damages for the goats running on the lands of other persons nearly every year.

The evidence shows that there was no house or other buildings on the land at any time since the defendant received the tax deed, and that no person lived or resided on the land at any time while the defendant has claimed to own it. The evidence shows that about seven acres of the land was cultivated most of the time while the defendant has claimed to own it, and that all of the land would have been capable of producing crops if it had been cleared. The evidence shows that it is as good land as the average land on the island and of the same general character.

The defendant was a merchant at McMinnville when he received the tax deed, and later he resided at Salem. He never resided near the land. In October or November, 1897, the defendant verbally rented the land to one Ausbe, but the renter did nothing with the land until March, 1898, and never resided on it. Hence the defendant had no such possession of the land as would cause the statute of limitations to begin to run before March, 1898.

None of the tenants of the defendant lived on this land. Their possession consisted in cultivating about seven acres of land, repair-



ing the fences which inclosed about 20 acres of land, and in being there when it was necessary in order to plant, cultivate, and harvest the crops on the seven acres of land. There were a few fruit trees on the land in 1897.

The defendant admits that there is not as much land in cultivation on this place now as there was in 1897, and says that the river washed some of it away. He admits that all the clearing done by him on the land consisted in cutting some brush to enable him to make and repair fences. The goats were taken to the place in 1903. The defendant was on the land occasionally and camped on or near it three or four months after he sold out his business at McMinnville. This was in 1903. He says he camped there at other times for a few days at a time.

The defendant's possession of the land from March, 1898, until the end of the year of 1905 may have been sufficient to constitute adverse possession, but this is not certain. He was asked this question on cross-examination, "You would have recognized the rights of the owner if you could have found them?" to which he answered, "Yes sir, *at all times.*" This answer indicates that his possession was not hostile to the owner and hence not adverse. However, on re-examination by his counsel, in response to questions that were not unsuggestive of the answer desired, he testified, in effect, that at all times after he received the tax deed he claimed to be the owner of the premises and did not acknowledge that any other person had any interest therein. If this was true, whatever may have been the character of his possession, in other respects it was hostile and exclusive. But the defendant did not have possession of the premises in 1906 or 1907. He was not on the land more than a day or two, and he had no tenants on the land in either of those years, and no part of the land was cultivated. The goats that had not been drowned roamed at will on the island, and the gates were open and the fences were down and in bad condition. Animals belonging to residents on the island roamed at will over the land in question. There was no actual, open or notorious possession of the land at any time either in 1906 or 1907. The defendant had arrangements made with a man to salt the remnants of the goats once or twice a week during a portion of this period, but he admits that he had no one even to look after the goats in 1907. The evidence shows that the goats were running at large in 1906 and 1907. There was nothing whatever in the defendant's connection with this land in 1906 or 1907 to give notice of his claim or to constitute a disseisin or ouster of the owner of the land. His adverse possession, if he ever had any, ceased in 1905.

[4] The tax deed was void and conferred upon the defendant nothing but mere color

of title. It did not invest him with any interest in the land. Every time he entered upon the land he committed a trespass.

It is the settled law of this state that possession of land, to be adverse, must be actual, open, notorious, and continuous. The trespasser "must unfurl his flag and keep it flying so that the owner may see, if he will, that an enemy has invaded his domains and planted the standard of conquest there." If the owner had gone upon the premises in 1906 or 1907, she would have seen nothing there to indicate that any one was in possession of the land. There was no actual, open, or notorious possession of these premises during that time in any one. This is not an instance where the land is not suitable for occupancy or tillage. About seven acres of the land had been in cultivation for many years, except in 1906 and 1907, and the remainder of it would be suitable for cultivation if it were cleared. In *Ambrose v. Huntington*, supra, the land was suitable for pasture only.

The plaintiff's first husband, Mr. Smith, and the plaintiff resided on and cultivated this land long enough to obtain title to it under the United States Homestead Law. Most of the people owning land on the island reside on it, and this land is of the same general character as the other lands on the island.

[8] When the actual, open, and notorious occupancy of land is temporarily prevented by floods or fire, the possessor has a reasonable time after the flood or fire has ceased to resume his actual, open, and notorious possession of the land, without there being a discontinuation of his adverse possession during the time that his occupancy was so interrupted. In this case the floods lasted only a few days at a time.

The defendant's possession may have been adverse from March, 1898, until the end of the year 1905, a period of eight years, but during 1906 and 1907 he had no adverse possession. It necessarily follows that he did not acquire title to these premises by adverse possession, and that the plaintiff's record title was not divested.

We find that the plaintiff is the owner in fee of the premises and entitled to the possession thereof and to the relief prayed for in regard thereto in the complaint, and that the defendant owns no part of said premises and is not entitled to the possession thereof or to the relief prayed for in the amended answer. We find from the evidence that the defendant paid in good faith, as taxes on the land in question, about \$115, and that these taxes were a lien on the land and had to be paid, and that the plaintiff received the benefit of said payment. The defendant has received, as rent from the land, enough to pay fully the interest on the amount paid as taxes. We find that the defendant is entitled to a decree for said \$115.



As equity favors the vigilant rather than those who slumber on their rights, and as the plaintiff and those under whom she claims delayed for a long time to institute legal proceedings to obtain their interest in this land, we think that neither party should be allowed costs or disbursements in this court or in the court below.

The decree of the court below is reversed, and a decree will be entered in favor of the plaintiff for the relief prayed for in the complaint, excepting as to costs and disbursements, and a decree will be entered in favor of the defendant and against the plaintiff for the recovery of the sum of \$115 for taxes paid, but execution for said sum of \$115 will not be issued until the expiration of 60 days from the time that the decree of this court is entered in the court below, and neither party will recover costs or disbursements in the court below or in this court.

McBRIDE, C. J., and MOORE and BURNETT, JJ., concur.

(86 Or. 1)

#### KELLY v. LEWIS INV. CO.

(Supreme Court of Oregon. July 8, 1913.)

#### 1. CARRIERS (§ 316\*)—PASSENGERS—ELEVATORS—ACTIONS—EVIDENCE.

While negligence will not be presumed, except in cases of mischief done in accordance with the generic propensities of the animal committing it, yet, an averment of negligence need not necessarily be substantiated by direct testimony, but may be inferred from the circumstances; and hence where an elevator controlled by defendant fell several stories and was stopped with a sharp jerk, negligence may be inferred by the jury on the theory of *res ipsa loquitur*.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1261, 1262, 1283, 1285-1294; Dec. Dig. § 316.\*]

#### 2. WITNESSES (§ 268\*)—EXAMINATION OF WITNESSES—SCOPE OF CROSS-EXAMINATION.

Under L. O. L. § 860, permitting cross-examination of a witness as to any matter stated in his direct examination, the engineer of the defendant, in charge of the machinery in the building where the elevator fell, having been directly examined as to the result of an inspection subsequent to the accident, may be cross-examined as to inspections prior to the accident.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948, 959; Dec. Dig. § 268.\*]

#### 3. APPEAL AND ERROR (§ 1048\*)—REVIEW—HARMLESS ERROR.

In an action against defendant for injuries to plaintiff owing to the fall of defendant's elevator, the improper cross-examination of defendant's engineer as to inspections prior to the accident is harmless, where the engineer testified that the elevator was in good order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4153-4160; Dec. Dig. § 1048.\*]

#### 4. CARRIERS (§§ 235, 280\*)—PASSENGERS—ELEVATORS.

A landlord who maintains an elevator for the benefit of his tenants in the building and their guests, while not a common carrier, is a

carrier for hire, and as such is bound to exercise the highest degree of care practicable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 966, 967, 1085-1092, 1093-1103, 1105, 1106, 1109, 1117; Dec. Dig. §§ 235, 280.\*]

#### 5. TRIAL (§ 243\*)—INSTRUCTIONS—CONTRADICTORY INSTRUCTIONS

The objection to inconsistent and contradictory instructions is that it cannot usually be determined from the verdict what ruling as given by the court below was adopted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 564, 565; Dec. Dig. § 243.\*]

#### 6. APPEAL AND ERROR (§ 1033\*)—REVIEW—HARMLESS ERROR.

In an action against the owner of a building for injuries received by plaintiff owing to the fall of an elevator, the giving of an instruction that defendant was bound to exercise the same care that a prudent person would have exercised under the circumstances, though inconsistent with the instruction which announced the correct rule that defendant was bound to exercise the highest degree of care practicable, is harmless to defendant, tending to bind him to a lesser degree of care than that which was required.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.\*]

#### 7. APPEAL AND ERROR (§ 1001\*)—CARRIERS (§ 318\*)—PASSENGERS—ELEVATORS—EVIDENCE—SUFFICIENCY.

In an action against the owner of a building for damages for injuries received by plaintiff by the fall of an elevator, evidence held sufficient to support the verdict for plaintiff, so that it could not be interfered with on appeal, in view of Const. art. 7, § 3, as amended (see Laws 1911, p. 7) providing that no fact tried by a jury shall be otherwise re-examined in any court, unless the court can say affirmatively that there is no evidence to support the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\* Carriers, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. § 318.\*]

Department 1. Appeal from Circuit Court, Multnomah County; W. L. Bradshaw, Judge.

Action by Elizabeth Kelly against the Lewis Investment Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action by Elizabeth Kelly against the Lewis Investment Company to recover damages for a personal injury. The complaint charged in effect that the defendant is a corporation; that it owns in Portland, Or., a 10-story building, having on each floor rooms which it leases, and for the accommodation of its tenants and persons dealing with or calling upon them it maintains and operates a passenger elevator; that on August 8, 1911, the plaintiff was employed by one of such tenants, and with others occupied a room in that building on the sixth floor, where she entered the elevator; that the defendant so negligently operated the car that it dropped nearly four stories when it suddenly stopped, in consequence of which she sustained severe internal injuries, particularly describing them, to her damage in the sum of \$20,000. The answer

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.



denied the negligence and the extent of the injuries complained of, admitted the other averments of the plaintiff's primary pleading, and for a further defense alleged that the accident referred to was unavoidable. The reply controverted the averments of new matter in the answer, and the cause, having been tried, resulted in a verdict and judgment for the plaintiff in the sum of \$7,500, and the defendant appeals.

Wilbur, Spencer & Dibble, of Portland, for appellant. Davis & Farrell, of Portland, for respondent.

MOORE, J. (after stating the facts as above). [1] It is contended that an error was committed in refusing to grant a judgment of nonsuit. It is insisted by plaintiff's counsel, however, that sufficient evidence of the cause and extent of the injury and of the circumstances legitimately indicating the origin of the hurt was received to entitle their client to an application of the maximum *res ipsa loquitur*, which legal precept afforded adequate proof of the want of due care, thereby authorizing the jury to deduce the conclusion from such *prima facie* case that the harm complained of was caused by the defendant's negligence, and requiring such party, if it would escape the consequence of the resulting judgment, to offer proof controverting the legitimate deduction which the jury were entitled to make from the facts proved. It is a rule of law, except in cases of mischief done in accordance with the generic propensities of the animal committing it, that negligence will not be presumed. 1 Thomp. Neg. § 853. An averment of negligence, however, need not necessarily be substantiated by direct testimony, but may be made out by circumstantial evidence from the production of which proof carelessness may be inferred. Thus where, from the relation of the parties and the manner of the accident, it appears that an instrumentality causing an injury was at the time controlled by the defendant, and that the casualty was such as in the usual course of events would not have occurred if those who managed the thing had used proper care, evidence of the injury and of the incidents accompanying and tending to produce the hurt inferentially shows that the accident arose from the want of requisite care. That is, by establishing a condition of surrounding and limiting circumstances whose existence forms an antecedent from which the principal fact of negligence may be deduced sufficient to create a *prima facie* case, requiring the defendant, who evidently had a better opportunity to know the cause of the harm, if he would avoid an adverse judgment based on such state of the case, to offer evidence tending to overcome the deduction which the reason of the jury makes from the facts and circumstances so established. Esberg Cigar Co. v. Portland, 34 Or. 282, 302, 55 Pac. 961,

43 L. R. A. 435, 75 Am. St. Rep. 651; Boyd v. Portland Electric Co., 40 Or. 128, 131, 66 Pac. 576, 57 L. R. A. 619; *Id.*, 41 Or. 336, 342, 68 Pac. 810; Chaperson v. Portland Elec. Co., 41 Or. 39, 45, 67 Pac. 928; Goss v. Northern Pac. Co., 48 Or. 439, 441, 87 Pac. 149.

Guided by this rule, the testimony given by the plaintiff and her witnesses respecting the cause of the injury will be reviewed. The plaintiff stated upon oath that August 8, 1911, she was employed by one of the defendant's tenants, who occupied rooms on the sixth floor of its building; that about 5:30 p. m. of that day she, at that floor, entered the passenger elevator; that the car immediately shot down at a terrific speed and suddenly stopped. Other testimony offered by her witnesses tended to show that the elevator rapidly descended from the sixth floor to about six feet below the third floor, where the car was suddenly stopped by the safety appliance. F. M. Lemont, who at the time was in the elevator, testified that the car stopped as suddenly as if it had struck the bottom of the shaft. Charles Klapper, who was also on the car at the time of the accident, testified that the elevator descended so rapidly that the governor, regulating the automatic safety attachment, caused a clutch to grapple the guides, and immediately to shut off the power. This witness, referring to the speed of the car, said: "It was running too fast. The sensation was the same as though one were falling, to me; just simply took the breath out of me." The foregoing includes the substance of the testimony that was introduced on this branch of the case at the time the motion for a nonsuit was interposed. From such sworn declarations the jury might have reasonably inferred that the defendant negligently operated the elevator, for as was said in a similar case by Mr. Chief Justice Phillips in *Deposit Co. v. Solitt*, 172 Ill. 222, 50 N. E. 178, 64 Am. St. Rep. 35: "The fact of the falling of the elevator is evidence tending to show want of care in its management by the operator or its servants, or that the same was out of repair or faultily constructed." No error was committed in denying the motion.

[2, 3] A. E. Worth, as defendant's witness, testified that at the time of the accident he was the engineer in charge of the machinery in the building, that the day after the injury the elevator was run as usual, and that on the following Sunday he examined the car and found that none of its parts were broken. On cross-examination he was permitted, over objection and exception, to testify as follows: "Q. You inspected it (the car) the Sunday before (the accident)? A. Yes, sir. Q. There was nothing wrong with the car? A. Nothing wrong with the car." It is asserted by defendant's counsel that in allowing the witness to testify in respect to the condition of the car prior to the injury, when he had spoken in chief of an examination of the



elevator after the accident, an error was committed. The statute permits an adverse party to cross-examine a witness as to any matter stated in his direct examination or connected therewith. I. O. L. § 860. The cross-examination complained of related to matters connected with the direct examination of the witness. Aside from this, his answer on cross-examination was not prejudicial to the defendant, and no error was committed as alleged.

[4] It is insisted that the court erred in charging the jury, over exception, as follows: "Now the degree of care required of one who maintains and operates a passenger elevator in a building into which the public is invited to come and make use of such elevator for the usual purposes is the highest degree of skill and foresight consistent with the efficient use and operation of said elevator. He is bound to use the utmost skill and care in the choice and maintenance of machinery and appliances. He is not an insurer of the safety of his passengers, but he is liable for the slightest negligence which is the proximate cause of an injury to a passenger." A landlord, who in leasing a building or a room therein agrees, in consideration of the payment of the rent reserved, to carry in a passenger elevator to and from various floors the lessee and also the persons who deal with and visit him, is not in the strict sense of the term a common carrier of passengers, because he does not engage to transport the public generally, but only a small part thereof. He is, however, a carrier of passengers for hire; the rent paid by the tenant being the compensation for which the landlord undertakes safely to carry him and his visitors by the elevator. 10 Am. & Eng. Law (2d Ed.) 946.

In a few instances it has been held that the owner of a building in operating therein an elevator was not required to exercise the highest degree of care, and was only bound to use the care demanded of an ordinarily prudent person under the circumstances. *Burgess v. Stone*, 134 Mich. 204, 96 N. W. 29; *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630; *Edwards v. Manufacturer's Bldg. Co.*, 27 R. I. 248, 61 Atl. 646, 2 L. R. A. (N. S.) 744, 114 Am. St. Rep. 37, 8 Ann. Cas. 974. By the great weight of authority, however, it has been determined that a landlord who for a consideration stipulates to maintain and operate for the accommodation of his tenants and their visitors a passenger elevator into which the public are impliedly invited to enter and be carried to desired floors is subject to the highest degree of skill and foresight consistent with the efficient use and operation of the means of conveyance, the same as is imposed by law upon public carriers of passengers. *Hutchinson, Carriers* (3d Ed.) § 100; 1 *Thompson, Neg.* § 1078; *Sweedeen v. Atkinson Imp. Co.*, 93 Ark. 397, 125 S. W. 439, 27 L. R. A. (N. S.) 124; *Tread-*

*well v. Whittier*, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175; *Deposit Co. v. Sollitt*, 172 Ill. 222, 50 N. E. 178, 64 Am. St. Rep. 35; *Springer v. Ford*, 189 Ill. 430; 59 N. E. 953, 52 L. R. A. 930, 82 Am. St. Rep. 464; *Ohio Valley Trust Co. v. Wernike*, 42 Ind. App. 326, 84 N. E. 999; *Cabbage v. Estate of Conrad Youngerman*, 134 N. W. 1074; *Kentucky Hotel Co. v. Camp*, 97 Ky. 424, 30 S. W. 1010; *Goodsell v. Taylor*, 41 Minn. 207, 42 N. W. 873, 4 L. R. A. 673, 16 Am. St. Rep. 700; *Lee v. Publishers Knapp & Co.*, 155 Mo. 610, 56 S. W. 458; *Becker v. Lincoln R. E. & Bld. Co.*, 174 Mo. 246, 73 S. W. 581; *Luckell v. Century Bld. Co.*, 177 Mo. 608, 76 S. W. 1035; *Quimby v. Bee Bld. Co.*, 93 Neb. 87, 127 N. W. 118. The instruction complained of was a proper exposition of the rule of law applicable to the case at bar, and no error was committed in charging the jury in the language employed.

[5, 6] The court gave another instruction, in effect as follows: "The defendant owed the duty to the plaintiff of exercising such a degree of care and prudence with reference to her (the plaintiff) as the most prudent person would have exercised under the circumstances." It is insisted by defendant's counsel that the part of the charge last adverted to is inconsistent with the instruction hereinbefore quoted, and for that reason the judgment should be reversed. If by the latter language the court intended that only ordinary care was required to be exercised by the defendant in the management of the elevator, this part of the charge was erroneous, as we have attempted to show in the degree of care demanded.

The objection to inconsistent and contradictory instructions is that it cannot usually be determined from the verdict what rule as given by the court the jury adopted. *Morrison v. McAtee*, 23 Or. 530, 32 Pac. 400. If only ordinary care was the standard which the jury applied to the operation of the elevator, their verdict was predicated upon a less degree of prudence and foresight than was specified in the instructions first hereinbefore referred to, so that, the verdict having been in plaintiff's favor, it is immaterial whether or not one guide or the other was taken. If, therefore, any error was committed in the giving of the latter instruction, it was not prejudicial to the defendant. *Smithson v. Southern Pacific Co.*, 37 Or. 74, 60 Pac. 907; *Farmers' & Traders' Bank v. Woodell*, 38 Or. 294, 61 Pac. 837, 65 Pac. 520.

[7] The elevator referred to herein is raised and lowered by water that is kept under pressure by steam pumps. The power is applied in a hollow cylinder to the front end of a piston, which part of the machinery is, when in operation, constantly under pressure, and though at such time water is opposed to the bottom of the piston, such force is relieved by a valve, or the water can circulate through the cylinder. To the upper end of the piston rod are attached wire cables



which, passing over contiguous pulleys, extend to the top of the building, where, again passing over similar wheels, the ropes reach downwards and are fastened to the top of the car. To the bottom of the elevator is attached a lever that is connected with another wire cable the loop of which, extending downwards, passes over pulleys near the top of the cylinder, so that a movement by the operator in the car of the lever back or forth causes the water to enter or be excluded from the cylinder at the upper end of the piston, thereby forcing the elevator to ascend or descend. Grooves at the top and bottom of the sides of the car cause it to follow upright steel guides which project a short distance from but are securely fastened to the framework of the elevator shaft. Suspended iron bars are fastened to wire cables which, running over pulleys at the top of the building, are attached to the car, balancing it. At the bottom of the elevator well and connected with the machinery are pulleys over which runs another wire cable that, extending to the top of the building, passes over other pulleys and operates a governor, the revolving arms of which have at their extremities iron balls that rise and fall as the movement of the elevator is increased or diminished. In case the car attains undue velocity, the balls rising release a grip that clutches the cable the loop of which is attached beneath the car to a safety appliance, consisting of two hinged steel wedges fastened to the elevator and set on each side of the steel guides. These wedges are operated by right and left hand screws, connected with a safety drum around which the cable from the governor is coiled, so that when the speed indicator causes the clutches to grip the cable, the descent of the car, by unwinding the slack of the rope on the drum, sets the safety appliance, causing the wedges gradually to impinge upon the steel guides until sufficient resistance is obtained ultimately to stop the car.

The testimony shows that the elevator in question has a carrying capacity of 2,500 pounds maximum test, and the speed is limited to 450 feet per minute. If the velocity of the car exceeds such restriction 25 per cent. or more the governor causes the clutches to release the steel wedges, forcing them to collide with the steel guides in the manner indicated. When the governor properly sets the safety appliance in motion, the speed of the car gradually decreases, and it continues to descend from 7 to 12 feet, depending upon the weight in the elevator. F. M. Lamont testified that at the time of the accident he was in the car, saying: "I got on with a party of six at the seventh floor. At the next stop below some other persons got on the elevator, and immediately the elevator commenced to take on speed, and some one remarked, 'It is going some,'

and in less time than it takes to recite it, we brought up with a sudden halt, and every one was in confusion; that was about all there was to it. Q. How many people would you say there were in the elevator, at the time? A. A dozen or more." Burdella C. Holt testified that in her opinion there were in the car at the time of the accident 12 or 14 people, including herself. Charles Klappper, who just preceding the injury entered at the sixth floor the descending car said upon oath: "It was full when we got on." George T. Udy, as defendant's witness, testified that he was the stationary engineer in charge of the machinery in his employer's building at the time of the accident; that beneath the car the drum which operates the safety appliance contains about six coils of wire cable, and that a little more than one coil of the rope was unwound when the car stopped. A. C. Nelson, as plaintiff's witness, testified in rebuttal that for about eight years he had been engaged as an engineer, and knew the mechanism of a hydraulic elevator. He was then asked, after stating the facts assumed as constituting a hypothetical inquiry: "From the fact the car stopped suddenly, what would you say was the cause of it?" He replied: "It goes to indicate that there must have been too much loose cable, and they were not able to rewind it around the drum. The safety was too close to the guides, whereby if it had been a shorter cable, they could not have wound it up clear around the drum; it would have taken up so that the clutch would practically have been all the way from a quarter to a half inch from the guide." The bill of exceptions has attached thereto the whole testimony from which the foregoing excerpts have been taken, and from a careful examination of which it cannot be said there was no evidence to support the verdict. Const. Or. art. 7, § 3, as amended (see Laws 1911, p. 7).

It follows that the judgment should be affirmed, and it is so ordered.

McBRIDE, C. J., and BURNETT and RAMSEY, JJ., concur.

(66 Or. 86)

CITY OF PORTLAND v. INMAN-POULSEN LUMBER CO. et al.

(Supreme Court of Oregon. July 15, 1913.)

1. MUNICIPAL CORPORATIONS (§ 697\*) — STREETS — OBSTRUCTION — OBJECTIONS BY CITY — ESTOPPEL — EVIDENCE — FINDINGS.

In an action by a city to restrain the further obstruction of certain alleged streets through property owned and occupied by defendants as a sawmill, evidence held to sustain a finding of fact that defendants purchased the property at the invitation of the city, and on its representation that it claimed no interests or rights therein, and improved and occupied the same for a sawmill for many years without any claim on the part of the city, and that to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



open streets through the same would destroy plaintiff's use.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1502-1505; Dec. Dig. § 697.\*]

**2. ESTOPPEL (§ 62\*)—STREETS—OBSTRUCTIONS—ESTOPPEL OF CITY—CITY'S RIGHT TO OBJECT.**

Defendants, being about to establish an immense sawmill plant near a slough of the Willamette river in the city of Portland, were urged by the city's authorities to do so, and the city's officers, to induce such construction, represented that the city claimed no street rights through certain platted property surrounding the slough which defendants proposed to purchase for their plant. On such representations the land was purchased by defendants in 1890 and sawmill buildings erected without reference to the existence of any streets, none of which had been graded or laid out on the ground. On November 27, 1906, the plant was destroyed by fire, and immediately thereafter defendants by the expenditure of three-quarters of a million, with the knowledge of the city's officers, constructed on the same site the largest sawmill plant in the world, which they continued to operate and maintain from that time until 1908, when the city for the first time claimed the right to open streets through the property. There was no public necessity for such streets, and, if opened, they would destroy the plant. *Held*, that the city was estopped to claim the right to open streets through the property.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 151-153; Dec. Dig. § 62.\*]

**3. ESTOPPEL (§ 62\*)—CITIES—ACTS OF OFFICERS.**

The statute of limitations does not run against a city's right to compel the opening of streets, but this does not prevent the city from being estopped by the conduct of its officers from opening the same.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 151-153; Dec. Dig. § 62.\*]

**4. ESTOPPEL (§ 112\*)—PLEADING—EFFECT.**

Equity will not concern itself with the lack of technical pleading of an estoppel as such, when all the facts necessary to constitute such estoppel are pleaded, and no objection is made to the form of the pleading.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 302; Dec. Dig. § 112.\*]

**5. ESTOPPEL (§ 62\*)—STREETS—RIGHT TO OPEN—EXTENT.**

Where a city's officers induced defendants to purchase certain property within the city's limits and construct and operate a large sawmill plant thereon, by representations that the city claimed no street rights through the same, the city was estopped to open streets through the property so long as it was used by defendant for a sawmill.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 151-153; Dec. Dig. § 62.\*]

Burnett, J., dissents.

In Banc. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by the City of Portland against the Inman-Poulsen Lumber Company, a corporation, and others. Judgment for defendants, and both parties appeal. Affirmed.

This is a suit brought by the city of Portland to restrain defendants from obstructing certain streets situated in what was formerly known as Stephens' addition to the city of East Portland, which, by the consolidation of

the two cities, has become a part of the present city of Portland. The pleadings with their exhibits would occupy several hundred pages of the Oregon reports, and are therefore omitted; it being sufficient to state that they are broad enough in their scope to cover all the contentions of the parties, and that the evidence adduced fully justified the findings of fact made by the circuit court.

Said findings are as follows:

"(1) That the city of Portland is a municipal corporation within Multnomah county, state of Oregon.

"(2) That the city of East Portland was incorporated by an act of the legislative assembly of the state of Oregon on the 29th day of October, 1870.

"(3) That Inman-Poulsen Lumber Company at the times mentioned in the complaint was, and now is, a corporation organized and existing under and by virtue of the laws of the state of Oregon.

"(4) That on the 8th day of June, 1869, James B. Stephens and Elizabeth Stephens were the owners and in possession of a certain portion of the James B. Stephens donation land claim, and he, the said James B. Stephens, filed a plat of said portion and designated the same as Stephens' addition to East Portland, and that on said plat there was shown the shore line of Stephens slough, and on said plat there were shown certain dotted lines within the bounds of said Stephens slough.

"(5) That said Stephens slough as shown upon said plat or map was surrounded by a high bank about 50 feet above the level of the water in said slough on the north bank, and 35 feet above the level of the water on the south bank thereof; and on said map or plat the portion of said slough containing water was shown with blue coloring, the same as the portion shown of the Willamette river, which likewise was shown with blue coloring, and the same was and is recorded in Book 1 at page 529, Records of Deeds of Multnomah county, Or.

"(6) That the premises hereinafter described were situated within the bounds of the city of East Portland after its incorporation.

"(7) That among the other various powers granted to the city of East Portland were the following: Article 4, § 1, subd. 3, enumerating the powers of the board of trustees: 'To prevent and remove nuisances. 11th. To remove all obstructions from the public highways or streets.'

"(8) That on July 30, 1885, there was passed by the city of East Portland Ordinance No. 501, defining the duties of street commissioners, which provide, 'The street commissioner shall keep an office at the council chamber at which he shall attend at least once each day to receive and act on such petitions and business as may be brought

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



before him; he shall keep himself thoroughly informed of the condition of all streets and highways, alleys, etc.; he shall see that no obstructions are allowed to remain upon the streets, alleys or sidewalks; he shall cause the removal of all nuisances on the streets and public grounds,' which ordinance was in force and effect from said date to the time of the consolidation of the cities of East Portland and Portland.

"(9) That the city of East Portland in 1885 established all street grades at that time, and did not establish any street grade or grades through any of the premises described in the complaint or answer herein, being the property in controversy, but established grades at that time all around the said premises so described. That neither the city of East Portland, nor the city of Portland, have ever established any street grades within the bounds of the premises described in the answer in this proceeding in paragraph 1 thereof. That the said city of East Portland never accepted, acknowledged, or claimed that any streets existed within the bounds of the premises described in said answer, and that the said city of Portland never accepted the dedication of any street within the bounds of said premises, and never intimated or claimed that any streets so existed until the month of September, 1907.

"(10) That on the 15th day of February, 1888, James B. Stephens conveyed to George W. McCoy and M. M. Clinton all the property in controversy lying west of Grand avenue, which was then known as Fifth street, together with other property, and that at said time said premises contained part of Stephens slough, as heretofore stated, which was an impassable slough about 20 to 30 feet in depth below the surface of the water and from 30 to 50 feet from the surface of the water to the top of the banks surrounding said slough, and the high ground lying to the south of said slough was rough ground, covered with stumps, trees, logs, and thick underbrush; and said grantees thereupon began to clear the same, and cleared the said tract south of said slough, irrespective of and without reference to or consideration of any street or streets, and surrounded the premises lying south of said slough and west of Grand avenue, shown on the map of Stephens addition as blocks 29, 32, 49, 50 31, and parts of 32 and 51 with a high board fence, and erected in the southwestern portion of said inclosed premises a grandstand and conducted baseball games thereon, and used the said premises as a baseball park, and excluded the public therefrom otherwise than by the payment of an admission fee, and said baseball park and said fence included that portion shown on said maps as streets within the bounds of said baseball park.

"(11) That in the year 1889 J. T. Stewart was the mayor of the city of East Portland,

and appeared anxious to encourage the establishment of manufacturing plants on the east side of the Willamette river and in the city of East Portland, and that he delivered a message to the council requesting the encouragement of enterprises within the bounds of East Portland, and that before and about said time said defendants R. D. Inman and Johan Poulsen were looking for a site upon which to locate a sawmill, and, pursuant to such message of the said mayor and the request of the city council of East Portland, Councilman Hardie, then a member of said council of East Portland, invited the said defendants R. D. Inman and Johan Poulsen to locate and establish their proposed sawmill on the east side of the river. Subsequent to said time said defendants had negotiated with George W. McCoy and Richard Clinton with a view toward locating a sawmill on the premises now occupied by the defendant Inman-Poulsen Lumber Company, and that, pursuant to the invitation and encouragement of said Councilman Hardie, the defendant Johan Poulsen in the month of August, 1889, interviewed said J. T. Stewart, who was then the mayor of said city of East Portland, and said defendant informed said mayor that he and his associates were about to acquire the said premises herein described, and that they intended to locate a sawmill upon the same, and that they intended to manufacture lumber and use the premises now occupied by them for their manufacturing plant, and requested that if said city claimed any interest or right in said premises or any portion thereof, or for the use of the public as a street or otherwise, that the same should be vacated, and he was informed by the said mayor that the said city of East Portland did not and would not claim any of said premises as a public street or highway, except that the city claimed Fifth street, now Grand avenue, as a public street. That thereupon said defendant Johan Poulsen obtained legal advice as to whether the public had any rights within the premises now occupied by defendant Inman-Poulsen Lumber Company, and was assured that no public rights existed therein. That said defendants Johan Poulsen and R. D. Inman in good faith and with reliance upon the statements and encouragement of the mayor and council of the city of East Portland began and completed the erection of a large sawmill, planing mill, and lumber plant upon said premises, and erected and built wharves and docks in the Willamette river abutting upon said premises, and proceeded to fill said Stephens slough, and to erect such other buildings as were necessary and convenient for the general manufacture of lumber and duly completed the erection of such lumber mill in the year 1890, and erected its buildings irrespective of the existence of any streets, and in good faith, and expended in the erection of said lumber mill and



plant large sums of money, and that during the period between September, 1889, and the present date, the said defendants and Inman, Poulsen & Co., a corporation, occupied all of said premises now occupied by them openly, continuously, notoriously and adversely, and has excluded the public from said premises, and during all of said time conducted the business of a sawmill under claim of right, and believing in good faith that no street easement whatsoever existed within the boundary of the premises now occupied by them. That valuable and extensive improvements were made by said defendants and by said Inman, Poulsen & Co. over the whole of said premises having the appearance of streets as shown on the map of Stephens addition to East Portland, and erected buildings across the same, and made fills with thousands of yards of materials and built adjuncts to said lumber mill and plant, and erected landings and platforms and all things necessary and convenient for the use of a large lumber manufacturing plant.

"(12) That on the 27th day of November, 1906, the whole plant of Inman, Poulsen & Co. and the defendants herein was completely destroyed by fire. Said fire occurred at night and created great excitement in the city of Portland, and that it was generally known and published within the said city that said plant had been destroyed, and it was generally known and published, and was known by the officials of the city of Portland, that said Inman, Poulsen & Co. were rebuilding a larger and more complete plant than the plant destroyed by fire as aforesaid, and that they continued the building of said plant without objection from the city of Portland or its officials, and have completed on said premises in controversy a sawmill and lumber plant with the greatest capacity of any sawmill in the world, and ever since have conducted on said premises said lumbering plant and sawmill, and have occupied the whole of said premises hereinafter described with notice to all of the officials of the city of Portland; that the defendant Inman-Poulsen Lumber Company has continued to enlarge its plant, and has succeeded to all of the interests of its predecessors in title, and now has upon said premises a lumbering plant and sawmill of an actual annual capacity of 151,000,000 feet of lumber, and that it is necessary for the practical and proper operation of said plant to occupy the whole of the premises now occupied by them, and that during the operation and extension of defendants' plant the defendant Inman-Poulsen Lumber Company has completely filled said Stephens slough with over 1,500,000 cubic yards of material at an expense of approximately \$400,000, and within said slough lying west of Grand avenue the defendants have filled in said slough with 900,000 yards of material, and that to open up any street,

through the premises now occupied by defendant Inman-Poulsen Lumber Company would destroy their plant, and make it impossible to run the same as a sawmill or lumber manufacturing plant. \* \* \*

"(14) That said defendant Inman-Poulsen Lumber Company and its predecessors have erected on said premises its improvements and made said fills at an expense of over \$800,000. That they employ about 500 men, and possess a large industry of great benefit to the city of Portland and the state of Oregon.

"(15) That there is no public need or necessity of any streets through the said premises hereinafter described and occupied by said defendant Inman-Poulsen Lumber Company. That said defendants now occupy and are in possession of the following described premises, to wit: (1) Beginning at a point sixty (60) feet north of the northwest corner of block B, in Kern's addition to the city of Portland, Multnomah county, Or., and running thence east along the north line of Division street to the west line of Grand avenue; running thence north along the west line of Grand avenue to the southerly line of the right of way of the Oregon & California Railroad Company, now occupied by the Southern Pacific Company; from thence running northwesterly along the southerly line of said right of way to the north line of Lincoln street if extended westerly; thence west to the low-water mark of the Willamette river; thence southeasterly along the low-water mark of the Willamette river to the intersection of low-water mark with the north line of block A, Kern's addition, if extended; thence east to a point thirty (30) feet south of the point of beginning; thence thirty (30) feet north to the point of beginning, saving and excepting therefrom a small portion of said real estate and premises in the northerly and westerly corner thereof now occupied by the Portland Railway, Light & Power Company as a power and lighting plant; and saving and excepting the right of way of the said Portland Railway, Light & Power Company across a portion of said premises. (2) The wharfage rights and the right to wharf out from said premises at right angles with the harbor line to the established harbor line of the Willamette river, and the right to erect and maintain docks, wharves, and other structures between the harbor line of said Willamette river and the low-water mark thereof; and all riparian rights and privileges incident and appurtenant to said real estate. (3) Beginning at the northwest corner of block D, in Kern's addition to Portland, in Multnomah county, Or., running thence north 67.67 feet for a point of beginning; running thence east to the west line of East Eighth street; thence north along the west line of East Eighth street to the Oregon & California Railroad Company's right of way, now occupied by



the Southern Pacific Company; thence north-westerly along the southerly line of said right of way to the east line of Grand avenue; thence south along the east line of Grand avenue to the point of beginning. That said premises above described include that portion shown on the said map of Stephens addition to East Portland as blocks 13, 27, 28, 29, 30, 34, 33, 32, 31, 48, 47, 49, 50, 53, 52, and 51, the same being included in descriptions No. 1 and No. 2. That description No. 3 includes the following premises shown on said map of Stephens' addition, as follows: 70, 71, 90, 69, and that part of 68, 72, and 89 lying southerly and westerly of the Oregon & California Railroad Company's right of way, now owned and operated by the Southern Pacific Company. That to open any streets through said premises would entirely destroy the defendant Inman-Poulsen Lumber Company's improvements of the value of \$1,000,000 and would work irreparable injury and mischief to said defendants, and would be a great wrong and of benefit to no one.

"(16) That from 1870 to 1873 the Oregon & California Railroad Company occupied a right of way through said premises without any reference to streets, and established the grade of said railroad track by making a cut through said premises without reference to any streets and have operated trains thereon between said dates. That James B. Stephens occupied said premises and the whole thereof from June 8, 1869, to February 15, 1888, openly, notoriously, continuously, and adversely without regard to any public right or easement therein for said period.

"(17) That the defendants will suffer irreparable injury and injustice if any streets are ordered opened up through said premises, and the rights of defendants in said premises have grown up with the encouragement of the city officials of the cities of East Portland and Portland, and are of more persuasive force than the rights of the public in or to any part of the said premises as long as said premises are used for a lumber manufacturing plant and for the adjuncts thereto, and the city of Portland is estopped from opening up any streets through said premises or undertaking to harass or annoy the said defendants, their successors or assigns, in the peaceable possession of said premises for the purposes for which they are now used or may be used as a lumber manufacturing plant.

"(18) That on the 24th day of November, 1908, the city of Portland caused six complaints to be filed against defendants Inman-Poulsen Lumber Company and Johan Poulsen, accusing them of violating said Ordinance No. 7,130, and that in each case said defendants were arrested and were charged with willfully and unlawfully maintaining and keeping buildings and structures stand-

ing within and upon certain public streets, and that said alleged streets were within the bounds of the premises heretofore described. That said defendants appeared in said actions in the municipal court of the city of Portland, county of Multnomah, state of Oregon, and defended the same, and, the title to said real estate being involved, each of said actions were certified to the circuit court for further proceedings. That on the 9th day of April, 1909, said defendants were charged with violating an ordinance providing that no street should be filled or improvement made without a permit from the city, and a complaint was filed against said defendants in the municipal court of the city of Portland, Multnomah county, state of Oregon, making such charges against the defendants, and that said defendants appeared in said court and defended said action in said court, and the title to real estate being involved the same was certified to the circuit court for further action, and that the same was duly set down for trial on motion of the city of Portland for the 5th day of January, 1911, and that the said city of Portland dismissed the same complaint. That in the month of January, 1911, 11 complaints were filed in the municipal court for the city of Portland, county of Multnomah and state of Oregon, charging defendants with obstructing alleged streets, and that defendants were arrested and appeared in said actions in said court, and the title to real estate being involved all of said actions were certified to the circuit court for further proceedings. That all of said actions are still pending against these defendants for the obstruction of alleged streets through the premises heretofore described, and none of the same have been brought to trial, and they are now pending and have not been dismissed. That all of said actions involve the same questions of title as are involved in this suit, and that the plaintiff has had ample time and opportunity to bring said actions on for trial and has neglected to do so."

Upon the trial the court made the following decree: "This cause coming on to be heard this day upon motion of defendants for a decree in accordance with equities of the cause and the findings of fact and conclusions of law heretofore made and entered herein, plaintiff appearing by Wm. C. Benbow, deputy city attorney, and defendants appearing by Geo. S. Shepherd, their attorney, and it duly appearing to the court after hearing the testimony adduced at the trial in this cause, together with arguments of counsel, that the defendants are entitled to a decree as prayed for, it is therefore ordered, adjudged, and decreed that defendants Inman-Poulsen Lumber Company is the owner and in the lawful possession of the following described premises situated in Multnomah county, state of Oregon, to wit: Beginning at a point sixty (60) feet north of the



northwest corner of block B, in Kern's addition to the city of Portland, in Multnomah county, Or., and running thence east along the north line of Division street to the west line of Grand avenue; running thence north along the west line of Grand avenue to the southerly line of the right of way of the Oregon & California Railroad Company, now occupied by the Southern Pacific Company; from thence running northwesterly along the southerly line of said right of way to the north line of Lincoln street, if extended westerly; thence west to the low-water mark of the Willamette river; thence southeasterly along the low-water mark of the Willamette river to the intersection of low-water mark with the north line of block A, Kern's addition, if extended; thence east to a point thirty (30) feet south of the point of beginning; thence thirty (30) feet north to the point of beginning, saving and excepting therefrom a small portion of said real estate and premises in the northerly and westerly corner thereof now occupied by the Portland Railway, Light & Power Company as a power and lighting plant, and saving and excepting the right of way of said Portland Railway, Light & Power Company across a portion of said premises. The wharfage rights and the right to wharf out from said premises at right angles with the harbor line to the established harbor line of the Willamette river, and the right to erect and maintain docks, wharves, and other structures between the harbor line of the said Willamette river and the low-water mark thereof, and all riparian rights and privileges incident and appurtenant to said real estate. Beginning at the northwest corner of block D, in Kern's addition to Portland, in Multnomah county, Or.; running thence north 67.67 feet for a point of beginning; running thence east to the west line of East Eighth street; thence north along the west line of East Eighth street to the Oregon & California Railroad Company's right of way, now occupied by the Southern Pacific Company; thence northwesterly along the southerly line of said right of way to the east line of Grand avenue; thence south along the east line of Grand avenue to the point of beginning. It is further ordered that after defendant Inman-Poulsen Lumber Company, its successors and assigns, shall cease to use said premises as a lumber manufacturing and sawmill site for the uses incident or connected therewith, that the public shall have street easements through said premises in accordance with the map or plat of Stephens' addition of record in the office of the county clerk of Multnomah county, Or. It is further ordered that as long as said defendant Inman-Poulsen Lumber Company, its successors or assigns, shall use said premises as a site or ground for a sawmill or lumber manufacturing, planing, or dressing plant that the city of Portland be and hereby is estopped

and restrained from claiming or undertaking to assert that any public easements shall exist within the bounds of said premises and that defendants are entitled to the peaceable possession of said premises as long as defendants, their successors, heirs or assigns, shall use said premises as a site or ground for said or kindred purposes. It is further ordered that defendants recover their costs."

Both parties appeal.

Frank S. Grant, of Portland (Frank S. Grant and Wm. C. Benbow, both of Portland, on the brief), for appellant. George S. Shepherd, of Portland, for respondents.

McBRIDE, C. J. (after stating the facts as above). [1] This case was tried before Hon. Henry E. McGinn, who was born and has lived all his life in the vicinity of the property in dispute; and his familiarity with its location and the conditions existing upon the ground admirably qualified him to understand the testimony offered. A comparison of his findings of fact with the testimony satisfies us that he found correctly; and it only remains for us to decide whether the legal conclusions drawn by him from these facts are fairly deducible therefrom.

[2] We think the city is estopped from claiming any right to use the streets in controversy. Their legal existence was a matter of grave doubt when defendants located their mill upon the premises. They did not go as trespassers or uninvited guests, but at the urgent solicitation of the city authorities of the city of East Portland, who were anxious to secure the location of the immense plant defendants proposed to erect within their boundaries. When defendants inquired in relation to the supposed streets, they were told by the mayor that Stephens, the original proprietor of Stephens' addition, had so muddled the situation with plats that it was doubtful whether any legal streets existed; that, if there were any, they were of no use to the city; and that they would never be claimed by the city. Several of the blocks occupied a deep slough with banks more than 30 feet high and having an oozy mud bottom, which rendered it difficult to bridge even with piling, and which effectually obstructed travel for a great part of the distance on the north and northeast. West of this slough was a tract of unplatted land, so that on the north it was seemingly impracticable for the little city of East Portland to bear the enormous expense of opening streets which, after passing through the property now occupied, would terminate in the Willamette river. Streets running westerly toward the river, so far as here in controversy, would pass through the property of the defendants. All the property now occupied by defendants, except the slough, was at the time defendants entered into possession of it inclosed by a fence and had been used by its owners, Clinton and McCoy, as a



baseball ground, from which the public were excluded except upon the payment of admission. With the exception that Stephens had filed a plat and delineated lots and blocks upon it, and had sold land by lots and blocks, there was nothing to distinguish the tract in question from any other unplatted land. In 1885, long before the defendants came into possession of the property, the city of East Portland established all street grades, but did not establish any grades through this particular tract, although establishing them all around it; and neither the city of East Portland, nor the city of Portland since the consolidation, has ever established any grade upon the alleged streets within the tract in question. This neglect to establish grades, coupled with the representations of the mayor and councilmen, no doubt tended to induce defendants to believe that the city either did not intend to accept the dedication of that part of the plat upon which defendants were requested to erect their plant, or that the city did not consider it had any right to those portions of the streets embraced within the tract in controversy. Acting upon the requests and representations made to them by the city authorities, the defendants proceeded to erect their mill, and to begin the work of filling up the malaria-breeding slough on the north side of their property. The city authorities have stood by all these years, and have permitted them, without protest, to enlarge their plant, to fill up the slough, and to make it safe, dry land. They have at great expense filled the slough where Grand avenue crosses it, leaving it open and unobstructed for public use. They have expended about \$800,000 in building and equipping one of the largest sawmills in the world; a mill employing 500 hands, and confessedly a great benefit to the community. There is not one rule of morals for a municipality and another for an individual. Should a private citizen request and induce another to enter upon his premises under assurance that he would never be disturbed, and stand by and, without protest, see him spend three-quarters of a million dollars in improvements relying in good faith upon the request made and the representation put forth, he would be spurned from the courtroom if he attempted to regain possession of the property. Judge McGinn showed a robust sense of justice when he said upon the trial of this case: "Dr. Lane admitted that there was no present necessity or use for these streets, and everybody else will admit that. And if the city of Portland, in my judgment, were to undertake after these years to put the Inman-Poulsen Company out of there, they would be guilty of a great wrong. I am about as strong a man along the lines of municipal ownership as you will find, but right is right; these people were there; they went in there when there was no use for

streets and they built up a great manufacturing plant, a plant that has been a great benefit to the people of the East side. It would be a crime for the city of Portland to undertake to dispossess these people after they have been there the number of years they have been." There is no reason to suppose that the opening of these streets is necessary now or will be in the near future.

The witnesses for plaintiff were T. M. Hurlburt, Joseph Buchtel, P. Kelly, Mayor—now Senator—Lane, and George H. Hymes, all old residents of Portland and familiar with the situation; and they all practically agree that there is not at this time any necessity for the opening of these streets. It is apparent that to open them would destroy the greatest single industry in the city of Portland. The sole pretext for this suit is that the plaintiff wishes to establish its right to the streets.

[3] As the statute of limitations does not run against the city, and as the improvements upon the property are practically complete, it is difficult to see how the city would be in a worse position ten years from now than it is at the present time. A fair sample of the reasons given for destroying this great industry appears in the testimony of Mr. Cellars, who, when the question of opening these streets was being mooted in the council, asked a councilman who was agitating the proposition what reason there was for opening them. The reply was: "I might want to go down to the river and spit sometime." This case comes fairly within the rule laid down in *Schooling v. Harrisburg*, 42 Or. 494, 71 Pac. 605, 9 Mun. Corp. Cas. 705; *Oliver v. Synhorst*, 48 Or. 292, 86 Pac. 376, 7 L. R. A. (N. S.) 243. It is contended that the final decision of the case last cited, reported in 58 Or. 582, 109 Pac. 762, 115 Pac. 594, overrules to some extent our previous holdings upon this subject; but such is not the case. We expressly recognized the previous ruling of this court, but declared that upon the facts disclosed upon the final hearing of that case plaintiff had not brought herself within them. In that case nobody sought out the plaintiff and besought her to build where she did, nor was there any doubt as to the existence of properly dedicated and platted streets, whose location could have been determined by an hour's investigation. There was no long-continued possession and use of the street, and no great amount of money invested in the fence which occupied it. The good faith, enormous expenditure, and long and notorious occupation of the street which characterize this case was lacking in that one.

[4] It is claimed by plaintiff that the estoppels against the city here discussed are not properly pleaded, but defendants have clearly and succinctly set forth all the facts constituting such estoppels by way of defense, and we think that, in the absence of



a demurrer or motion to strike, they are sufficiently pleaded. Equity will not concern itself as to the lack of technical pleading of an estoppel, as such, when all the facts necessary to constitute such estoppel are pleaded and no objection is made as to the form of the pleading. *Carlyle v. Sloan*, 44 Or. 357, 75 Pac. 217.

[5] We come now to the cross-appeal of defendants. The estoppels urged by defendants are well pleaded, and are abundantly proved, but they amount to no more than that the defendants were desirous of securing site for a sawmill. The authorities of East Portland were of the opinion that a sawmill at the place in controversy would be of benefit to the city, and of such a benefit that it would be of advantage to the city to waive all possible rights to the alleged streets in order to secure a sawmill at that location. The construction and maintenance of a sawmill was the motive for the assurances of the city that defendants would not be disturbed in the occupation of the streets. It is not conceivable that defendants would have been invited to occupy these streets for purposes connected with a livery stable, a tannery, or a candy factory. The estoppel should go no further than the purposes for which the acts and representations which induced them, and which were known by the defendants to have induced them, legitimately carry it. Therefore the circuit court was right in limiting defendants' right to occupy these streets to the purposes for which it originally occupied them, namely, for purposes of a sawmill. It naturally follows that, when these purposes are accomplished, the city should be permitted to resume control of the streets.

The decree of the circuit court is therefore affirmed; and, as both parties have appealed and neither has prevailed here, neither party will recover costs or disbursements in this court.

BURNETT, J., dissents.

(65 Or. 537)

McMAHAN v. OLCOTT, Secretary of State,  
et al.

(Supreme Court of Oregon. July 1, 1913.)

1. STATUTES (§ 66\*)—SPECIAL AND LOCAL.

Except where prohibited by the Constitution, a law may be local or special.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 67, 68; Dec. Dig. § 66.\*]

2. STATUTES (§ 95\*)—SPECIAL AND LOCAL—SUBJECTS.

Gen. Laws 1913, p. 215, making an appropriation out of the state's general funds for an irrigation project and reclamation of lands, is not within Const. art. 4, § 23, prohibiting special or local laws "for assessment and collection of taxes" and in 13 other enumerated cases.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 105, 106; Dec. Dig. § 95.\*]

3. STATES (§ 119\*)—LOANING CREDIT.

Gen. Laws 1913, p. 215, making an appropriation for completion, through the Desert Land Board, of a project to irrigate and thereby reclaim certain lands, the state to be paid for water rights, is a provision for a state enterprise and so does not contravene Const. art. 11, § 7, inhibiting the Legislature loaning the credit of the state.

[Ed. Note.—For other cases, see States, Cent. Dig. § 118; Dec. Dig. § 119.\*]

4. CONSTITUTIONAL LAW (§ 205\*)—PRIVILEGES AND IMMUNITIES.

Const. art. 1, § 20, inhibiting any law granting to any citizen or class of citizens privileges or immunities which on the same terms shall not equally belong to all citizens, is not contravened by Gen. Laws 1913, p. 215, providing for completion by the state of an irrigation project which it had taken over, because providing for allowance of credits to all those who had made payments to its predecessor in title for water rights, wherewith such predecessor had commenced the improvement.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 591-624; Dec. Dig. § 205.\*]

5. WATERS AND WATER COURSES (§ 216\*)—RECLAMATION OF ARID LANDS—STATUTES.

Gen. Laws 1913, p. 215, providing for reclamation by the state of arid land by an irrigation project, is for a public purpose and so within the powers of the Legislature.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 305; Dec. Dig. § 216.\*]

6. CONSTITUTIONAL LAW (§ 70\*)—DISTRIBUTION OF POWERS—WISDOM OR POLICY OF LAW.

The courts cannot question the wisdom or policy of a law; this being a legislative or political question.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-182, 187; Dec. Dig. § 70.\*]

Department 2. Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Suit by L. H. McMahan, a citizen and taxpayer of the State, against Ben. W. Olcott, Secretary of the State, and another. From a decree dismissing the suit, plaintiff appeals. Affirmed.

As a citizen and taxpayer of the state of Oregon, L. H. McMahan brings this suit to enjoin the Secretary of State and the State Treasurer of the state of Oregon from disbursing an appropriation of public funds authorized by the provision of chapter 119, p. 215, of the General Laws of Oregon for 1913. Plaintiff in his amended complaint alleges that by virtue of that act the Legislature attempted to confer upon the Desert Land Board a right to expend \$450,000 out of the state's general funds for the purpose of constructing, operating, and maintaining an irrigation project, and reclaiming 23,000 acres of land in Crook county, Or., known as the Columbia Southern Project.

It is asserted that in 1902 the State Land Board entered into a contract with the Three Sisters Irrigating Company for the reclamation of certain desert lands in said county, aggregating 27,000 acres; that agreeably to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



said contract the irrigating company sold water rights for approximately 18,000 acres of the said land and for about 1,400 acres of land owned by private parties which is not included in the reclamation scheme; that thereafter said irrigating company failed to observe the terms of the contract and passed into the hands of a receiver, whereupon the Columbia Southern Irrigating Company assumed the undertaking, only to fail, and assigned its rights to the Oregon, Washington & Idaho Finance Company, which in turn failed to consummate said irrigating project, and in consequence transferred its rights to the state of Oregon, which subsequently entered into a contract looking to the completion of the project with Alma D. Katz, who likewise was unable to carry out the project.

Asserting that not to exceed 7,000 acres of the land embraced in said reclamation scheme are patented to the state and that of this total but 5,000 acres deeded to private persons can be irrigated, plaintiff continues with the statement that of the 23,000 acres proposed to be reclaimed 13,000 acres have been sold and contractual rights have been vested in private parties adversely to the state, and that the board has no contract, deed, nor other claim by which it can irrigate said lands or compel contribution from the owners thereof towards the construction, operation, or maintenance of said irrigation project. The concluding allegations recite that the project includes about 5,000 acres of land, which the board intends to irrigate and sell to individuals at a price not to exceed \$50 per acre, whereas the land when so irrigated will be worth not less than \$100 per acre; and that the defendants will, unless restrained by an order of the court, use such funds in the project heretofore alluded.

The answer of the defendants admits the major portion of the plaintiff's amended pleading, except wherein they aver only 5,600 acres are patented to the state, of which 4,400 acres are irrigable, and 2,314.63 acres have been deeded to private parties; that of the 23,000 acres proposed to be reclaimed by the Desert Land Board, pursuant to the provisions of the act in question, water rights for about 13,000 acres were contracted to individuals by the Southern Oregon Irrigating Company or its predecessors, and that a small payment made by said persons and said company failed to complete the project, and no further payments were made; that the act authorizes the board to permit such individuals to consummate their water rights at such price as to the board may seem proper, allowing credit thereon for the amount originally paid to the defaulting company. Defendants deny any vested water rights exist in said private parties, and, unless permitted to come under the terms of said act or have their money refunded and the land resold, such persons would have no interest in said water rights or lands and would lose all sums

paid. Answering further, defendants allege the project includes at least 18,000 acres of land, which the board intends to irrigate, reclaim, and sell to private persons; and, when so irrigated, the land will be worth not less than \$100 per acre.

After the issues were joined, a stipulation was entered into by counsel on behalf of the parties litigant wherein it was agreed that the legislative act under consideration was an offspring of the session of 1913; that the project included at least 8,000 acres, which the board intends to irrigate and reclaim and sell to private persons; that when so irrigated the land would be sold for not less than \$100 per acre; and that only 5,600 acres are patented to the state, of which 4,400 acres are irrigable, and 2,314.63 acres have been sold to private parties.

Following the submission of the case, the trial court entered a decree dismissing the suit, from which adjudication plaintiff appeals, affirming as error the order of the court adjudging the act in controversy as being in accordance with the Constitution of the state.

L. H. McMahan, of Salem, in pro. per. A. M. Crawford, Atty. Gen., for respondents.

McNARY, J. (after stating the facts as above). Descriptively the project having our attention is situated in Crook county, Central Oregon, on the west side of the Deschutes river, embracing an area about 15 miles long and from 6 to 8 miles wide. Two lines of railroad parallel the district, thus affording transportation facilities, while a number of small towns near by furnish abundant opportunities for marketing. The chief source of water supply for the project is Tumalo creek, which is one of the tributaries of the Deschutes river, having its source high in the Cascade Mountains to the west.

[1, 2] The first objection urged by plaintiff to the provisions of chapter 119, p. 215, of the General Laws of Oregon for 1913, is rooted in the proposition that the legislative act is a special or local law within the meaning of the Constitution, as inhibited by section 23 of article 4. Before considering the act in its relation to our Constitution, we believe it important to observe that the Legislature of a state has power to enact any laws that are not expressly or by necessary implication prohibited either by the federal Constitution or by the Constitution of the state enacting the law, or, stated in language more terse, state Constitutions are limitations upon the legislative powers of the state. This principle is axiomatic, necessitating no reference to authorities. Section 23 of article 4 of the Constitution enumerates various subjects under 14 subdivisions wherein the passage of special or local laws are prohibited.

Counsel in his brief does not specify any particular subdivision of section 23 of the organic law inimical of the legislative act, but



in his oral argument particularized subdivision 10, which reads: "For the assessment and collection of taxes for state, county, township or road purposes." In truth, this is the only subdivision of the section in which reference is made to the subject of taxation. Doubtlessly the framers of the Constitution intended by this provision to inhibit the Legislature from enacting any special or local law concerning the methods to be employed in the assessment and collection of taxes, which would conflict with the methods of assessing and collecting taxes, as contemplated by the General Law. *Simon v. Northrup*, 27 Or. 500, 40 Pac. 560, 30 L. R. A. 171. Applying this interpretation which has the sanction of reason and judicial authority, we are unable to comprehend wherein the legislative enactment by reasons of subdivision 10 or other subdivision of section 23 is in violation of the Constitution. Unless a positive prohibition exists in the fundamental law, the Legislature has an almost unlimited field for operation, even though the law may be special or local in its character. We feel justified in saying that the statute under consideration does not contravene section 23 of article 4 of the Constitution.

[3] It is next objected that the act is antagonistic to section 7 of article 11 of the state Constitution, which provides: "The legislative assembly shall not loan the credit of the state, nor in any manner create any debt or liabilities which shall singly or in the aggregate with previous debts or liabilities exceed the sum of fifty thousand dollars, except in the case of war, or to repel invasion or suppress insurrection; and every contract of indebtedness entered into or assumed by or on behalf of the state, when all its liabilities and debts amount to said sum, shall be void and of no effect." We are unable to see that this act in any manner loans the credit of the state. It is true that a large appropriation of public funds has been made for the completion of a project to irrigate and thereby reclaim certain lands, but it is purely a state enterprise. No credit is extended to private sources to promote private schemes. The act directs the state to protect its title to the property included in the project and to make all arrangements necessary for the proper construction and completion of the irrigation works to reclaim the land. The state through the Desert Land Board fixes the price to be paid for water rights, and, from the date of reclamation of any tract, a valid lien is created in favor of the state. That the Legislature was mindful of the constitutional restrictions contained in section 7 of article 11 is evident from the provision of the act which enjoins the Desert Land Board so to fix the lien in favor of the state that when added to the amount realized from private lands shall total a sum sufficient to insure the state a return for all moneys expended by it in the reclamation of

the lands embraced in all the project. The act further provides that "all money received as maintenance fee shall be applied to the cost of maintaining said project. All money received for the purchase of land or water rights in said project shall be deposited in the general fund of the state treasury until all expenses incurred by the state in connection with said project, including" interest at the rate of "six per cent." per annum, " \* \* \* on all moneys advanced, \* \* \* shall have been repaid, after which time all money, except maintenance, received from the project shall be deposited in the reclamation fund."

From a recital of the main features of the law pertaining to the nature of the undertaking, we are of the opinion the enterprise contemplated a sovereign work which is in no wise antagonistic to the wholesome mandates contained in section 7 of article 11 of the Constitution.

[4] As an additional objection to the act, plaintiff argues that the enactment is without the purview of legislative authority to "lay a tax upon all the people and to expend the money for the profit of a few," thus invoking section 20 of article 1 of the organic law, which reads: "No law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." We think this point introduces the most serious aspects of the case. Plaintiff with much earnestness contends that the act affords undue advantages to a favored few in Crook county at the expense of all other taxpayers of the state.

As a matter of history calculated to shed a light along the way, we deem it proper to animadvert that the Carey Act adopted by the Congress of the United States provides that the federal government shall grant to each state such desert land as lies within its boundaries, not exceeding 1,000,000 acres, upon the condition that the state will cause the lands to be reclaimed by the construction of irrigation systems. At the biennial legislative sessions of this state held in 1901 (Laws 1901, p. 378) and in 1905 (Laws 1905, p. 401), the people of the state, through their chosen representatives, committed this commonwealth to the policy of reclaiming its arid lands, while the statute under consideration attempts to apply that policy to a specific locality under a plan conceived by the Legislature to be both adaptable and practicable.

An examination of the provision of the act reveals that: "Any person who holds a contract with the Columbia Southern Irrigating Company, or its successors in interest, for any tract in the project, may execute a new contract with the state, for the reclamation, under the provisions of this act, of the land described in his original contract with said company, receiving credit thereon for all money paid to said company under said orig-



inal contract; or may surrender his contract and receive, in cash, the full amount of money paid to said company on such contract, but no such refund payments shall be made by the board prior to December 1, 1914." From the language of the statute plaintiff contends special privileges are bestowed upon persons holding contracts theretofore had with the Columbia Southern Irrigating Company or its successors in interest and not granted to others. We think counsel's position is untenable, because the act operates without discrimination upon all persons placed in the same circumstances.

The facts stipulated by counsel show that about 2,300 acres lying within the project have been deeded to private parties. Yet the statute provides the Desert Land Board shall make necessary contracts for the sale and delivery of the water to lands of said private parties. While the persons holding prior contractual rights have a call upon the state for the allowance of credits upon all money paid to the defaulting companies under the original contract, yet they must enter into a new contract with the state and otherwise conform to the rules prescribed by the Desert Land Board. Thus it will be seen all persons who have prior contracts are treated alike and that as a class no special privileges are granted to one and withheld from another, but that all coming within the prescribed class enjoy the same privileges and immunities. In *re* Fred. Oberg, 21 Or. 406, 28 Pac. 130, 14 L. R. A. 577; *State v. Thompson*, 47 Or. 492, 84 Pac. 476, 4 L. R. A. (N. S.) 480, 8 Ann. Cas. 646.

Again, we must not be unmindful of the public official acts of a co-ordinate department of the state government which disclose that the state acquired by deed from the successor in interest of the Columbia Southern Irrigating Company all its rights and interest in connection with said project which included valuable water rights and improvements in connection with the project. At the time of the acquirement of this property by the state, certain individuals had made partial payments and held contracts of purchase with the company or its predecessors in interest on land lying within the reclamation district. The state in acquiring the proprietary rights of the defaulting companies obligated itself, as a matter of justice, to protect the rights of the individuals who by their contributions had brought into existence the very property conveyed to the state. To allow these private parties credit for all money paid on their contracts with the companies with which they had dealings is not granting a special privilege but simply placing them in the same position and on equal footing with those persons who may subsequently acquire rights of the state within the project. Anything short of this would be granting special privileges to those acquiring rights subsequent to the enactment of the statute in question and placing those

who have made possible the reclamation under a grievous disadvantage.

[5] The remaining objection to the statute is predicated upon the proposition that there are limits to the powers of the Legislatures in matters of taxation, not directly imposed by written Constitutions, and that any devotion of the state's activities to private ends is such a perversion of its duties as to be utterly void. *Gray on Limitations of Taxing Power*, §§ 25 and 169. Admittedly at times it is difficult to define the line of separation between a purpose which is private and one which is public, yet, upon the general undertaking of reclamation of arid lands by irrigation, we think the purpose is public. *Cookinham v. Lewis*, 58 Or. 484, 114 Pac. 88, 115 Pac. 342.

In *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369, the court enunciates the doctrine that the irrigation of arid lands is a public purpose and the water thus used put to public use. "Millions of acres of land otherwise cultivable must be left in their present arid and worthless condition, and an effectual obstacle will therefore remain in the way of the advance of a large portion of the state in material wealth and prosperity. To irrigate and thus to bring into possible cultivation these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to the landowners, or even to any one section of the state. The fact that the use of the water is limited to the landowners is not therefore a fatal objection to this legislation. It is not essential that the entire community or even any considerable portion thereof should directly enjoy or participate in an improvement in order to constitute a public use." *Gray on Limitations of Taxing Power*; In *re* Madera Irrigation Dist., 92 Cal. 206, 307, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; *Cummings v. Hyatt et al.*, 54 Neb. 35, 74 N. W. 411; *Kinney on Irrigation*, vol. 3, 1340, 1341; *Cookinham v. Lewis*, 58 Or. 484, 494, 498, 114 Pac. 88, 115 Pac. 342; *Clark v. Nash*, 198 U. S. 361, 368-369, 25 Sup. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171.

We think it is plainly apparent, from an inspection of the act, that its object is for the benefit of the public, even though incidental advantages may accrue to a few landowners within the zone of the project beyond those enjoyed by the general public.

[6] Furthermore, the principle is well established that courts are never at liberty to question the wisdom or policy of an act of the Legislature; their duty being solely to enforce such acts as are passed to the extent to which they are found to be constitutional. 8 Cyc. 766; 2 Willoughby on the Constitution, § 577.

Whether the policy set afloat by the state in any given legislative or initiative enactment is laden with sound judgment designed



to promote the welfare of the people or is fraught with dangerous consequences is a legislative or political question and not within the review of the courts so long as it is not in contravention of the Constitution or subversive of natural justice and common right.

The decree of the circuit court should be affirmed.

McBRIDE, C. J., and BEAN and EAKIN, JJ., concur.

BURNETT, J. (concurring specially). This suit was instituted by the plaintiff as a citizen and taxpayer of the state against the defendants as members of the Desert Land Board to prevent them from expending an appropriation of \$200,000 for the year 1913, and an additional sum of \$250,000 for the year 1914, in the reclamation of certain desert lands in Crook county, belonging to the state, and to be acquired by it under the Desert Land Law of the general government, commonly known as the Carey Act. The board is said to be proceeding under chapter 119, Laws of 1913, being "An act to provide for the construction, operation and maintenance and disposal, by the state of Oregon, of the irrigation project in Crook county, Oregon, commonly known as the 'Columbia Southern Project.'" The act purports to be a provision for the reclamation of lands included in Oregon Desert Land Selection List No. 13.

The complaint alleges, in substance, that at various times the state, under then existing statutes, contracted with sundry concerns for the reclamation of these lands, all of which contracting parties failed. It is agreed that 5,600 acres are patented to the state, of which 4,400 acres are irrigable, and 2,314.63 acres have been deeded to private parties. It is alleged by the complaint and admitted that the defendant Olcott, Secretary of State, threatens to and will, unless restrained, draw warrants on the State Treasurer, and the latter officer will pay those warrants to the extent of \$450,000 providing for the construction, operation, and maintenance of the irrigation project described in the act above mentioned. The prayer of the complaint is that the defendants be enjoined and restrained from drawing or paying any such warrants. The answer, together with the stipulation as to the facts, leaves no issue to be tried, except the one of law as to whether it is constitutional for the state to provide for the reclamation of the lands in question. The circuit court, having heard the parties, entered a decree dismissing the suit, and the plaintiff appeals.

As a foreword, it may be set down that the state Constitution is a restrictive instrument and not a grant of power, so that, unless forbidden by the Constitution, the Legislature may pass any act which seems to it proper. Further, the court will not hold an act of the

legislative branch of the government unconstitutional, unless it is clearly violative of that fundamental law; and lastly that, if an act is constitutional in one part and not in another, the portion which complies with the fundamental law will be enforced and the remainder disregarded. These are judicial platitudes so well settled that it is unnecessary to cite precedents in support of them.

At the argument the plaintiff contended that the law in question was a local and special law in the interest of residents of the community in which the land mentioned is situated. The legislative assembly in its discretion may enact laws of that nature, unless forbidden by the state Constitution. That instrument prohibits the legislative assembly from passing them in certain enumerated cases. Section 23, art. 4, Const. The only instance relied upon in the argument was that against the passage of such a law "for the assessment and collection of taxes for state, county, township or road purposes." The statute assailed by the plaintiff does not in any manner refer to the method of assessment and collection of taxes for the purpose indicated. So far as that is concerned, the appropriation attacked is made out of the general fund of the state treasury not otherwise appropriated. The taxes for this fund are levied and collected under a general law on that subject. Hence the act is not amenable to that objection.

Under the authority of *Cookinham v. Lewis*, 58 Or. 484, 114 Pac. 88, 115 Pac. 342, the reclamation and irrigation of arid lands is a matter of public and general interest and an appropriate object of state legislation. The legislative assembly is well within its powers in providing for the improvement and reclamation of the property of the state acquired or be acquired from the general government under the provisions of the Desert Land Act. It would be a lawful application of public funds to expend them for such purpose. The proposed disbursement of the money of the state for the purpose indicated is all of which the plaintiff complains. It is the mere expenditure of money for the improvement of the state lands, and hence is not loaning the credit of the state within the meaning of section 7, art. 11, of the state Constitution. The Desert Land Board may properly expend in a constitutional manner the funds provided for the purpose in question, the same as any other appropriation made by the legislative assembly. If afterwards an attempt shall be made to administer the law or to dispose of the state lands in an unconstitutional manner, it will be time enough to decide that question if properly raised; but that matter is not presented by the pleadings before us.

The decree of the circuit court will be affirmed.

RAMSEY, J., concurs in this opinion.



(90 Kan. 285)

**SINGER v. TAYLOR et al.**

(Supreme Court of Kansas. July 5, 1913.)

*(Syllabus by the Court.)***1. WILLS (§ 327\*) — PROCEEDINGS TO SET ASIDE—WITHDRAWAL FROM JURY.**

The withdrawal of a case from a jury called to aid the court in determining questions of fact, in an action to set aside a will because of undue influence, at the conclusion of plaintiff's evidence, is not a ground of error, and could not have operated to the prejudice of the plaintiff, since no substantial testimony of undue influence was produced.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 773; Dec. Dig. § 327.\*]

**2. WILLS (§ 163\*)—UNDUE INFLUENCE—PRESUMPTION.**

The fact that the property of a testator was unequally divided by him in his will does not, of itself, raise a presumption of undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 388-402; Dec. Dig. § 163.\*]

**3. WILLS (§ 1\*)—TESTAMENTARY CAPACITY—POWER TO DISPOSE.**

The plenary power in a testator to dispose of his property as he may see fit includes the right to make an unnatural or an unreasonable disposition of his property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1; Dec. Dig. § 1.\*]

**4. WILLS (§ 587\*)—CONSTRUCTION—"PAID."**

After making certain specific bequests and the giving of a life estate in the remainder of his property to his wife, the testator provided in his will that at the death of his wife, "I direct and it is my will that the residue of my estate shall be paid to my beloved son." Held, that the word "paid," interpreted in the light of the language in the will, is a word of gift, and will convey the residue of the estate to the son.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1279, 1281-1291; Dec. Dig. § 587.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5156-5157.]

**5. WILLS (§ 449\*)—CONSTRUCTION—PRESUMPTION—PARTIAL INTESTACY.**

In the absence of a definite provision to the contrary, it is to be presumed that a testator intended to dispose of his whole estate, and did not intend to die intestate as to any part of it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 965; Dec. Dig. § 449.\*]

Appeal from District Court, Crawford County.

Action by Sallie C. Singer against J. Luther Taylor and others. From judgment for defendants, plaintiff appeals. Affirmed.

G. L. Dunn, of Onaga, F. B. Wheeler, C. S. Dennison, O. T. Boaz, and L. W. Johnson, all of Pittsburg, and Blair, Scandrett & Magaw, of Topeka, for appellant. J. J. Campbell, of Pittsburg, and Nelson Case, of Oswego, for appellees.

**JOHNSTON, C. J.** This was an action by Sallie C. Singer to contest the will of her father, Joseph I. Taylor, on the ground that it was the product of undue influence, and she also asked to have some of its provisions construed. During his lifetime Joseph I.

Taylor accumulated considerable property, which is estimated by appellant to be of the value of \$250,000. He died on February 6, 1910, leaving a widow, Mary S. Taylor, a daughter, Sallie C. Singer, who is the appellant, and a son, J. Luther Taylor, one of the appellees. The will provided that his wife should have a life estate in all of his property, subject to a number of specific gifts. One of these was a gift of \$500 to his daughter, Sallie, for her immediate use, and she was also given the income to be derived from \$10,000, which amount his executors were directed to invest in interest-bearing securities, and at her death these were to become a part of the residue of the estate. The executors were directed to invest \$15,000 of the estate, the income of which should be paid to his son, J. Luther Taylor, until the death of Mary S. Taylor, when this fund should pass absolutely to J. Luther Taylor. The ninth paragraph of the will was as follows: "At the death of my beloved wife, Mary S. Taylor, I direct and it is my will that the residue of my estate shall be paid to my beloved son, J. Luther Taylor."

In accordance with a provision of the will the widow and son were appointed executors of the will without bond. In the trial of the case the court called a jury to aid it in determining the question of undue influence, but after all the evidence of appellant had been introduced appellees challenged the sufficiency of the evidence, and on their motion the court ruled that: "The case should be withdrawn from the consideration of the jury for the reason that the evidence offered on behalf of the plaintiff does not warrant the court in submitting the question of fact to the jury for its consideration, or for the purpose of assisting the court in making its conclusion on the second count of the plaintiff's amended petition herein filed." The court found that the will was valid, that it disposed of the entire estate of the testator, that appellant was entitled to no more than the specific gift of \$500 and the income from the \$10,000 investment after which that fund became a part of the residuary estate, and that so much of the estate as shall not be used by Mary S. Taylor in her lifetime shall become, at her death, the absolute property of J. Luther Taylor.

[1] It is insisted that the withdrawal of the case from the consideration of the jury was equivalent to sustaining a demurrer to evidence, and that while the findings of the jury are only advisory in cases of this kind, the ruling of the court nevertheless operated unjustly towards appellant, and that it was error for the court to weigh any of the evidence until the evidence of appellees had also been received. The calling of a jury was, of course, a matter within the discretion of the court. In such cases it may avail itself of the aid of a jury, and is at liberty to adopt



or reject the findings which the jury makes. Being a matter of discretion, the court, on its own motion, may dispense with the services of the jury at any stage of the trial, being careful always to see that the parties are not hampered in presenting the evidence and arguments to the court. The rules governing the presentation of a case to the jury differ in some respects from those applicable in trying a case to the court alone, and hence in some instances it might be an injustice to try one side of the case to the jury and the other to the court. *Vickers v. Buck*, 65 Kan. 97, 68 Pac. 1081. Here, however, no prejudice could have resulted from the action of the court, as it does not appear that appellant was denied the right to present fully any evidence or argument to the court that she chose after the jury had been withdrawn.

[2] Again, there was no substantial testimony offered by appellant tending to establish undue influence, and hence it is immaterial whether we view the testimony as would be done on a trial before the jury as a matter of right, or as in a case where the jury is called in an advisory capacity. Under the rules laid down in *Ginter v. Ginter*, 79 Kan. 721, 101 Pac. 634, 22 L. R. A. (N. S.) 1024, there was nothing in the case which approached fraud or undue influence such as invalidates wills. The unequal disposition of the residue of the estate after the death of the mother naturally attracts attention, and it is argued that it must have been the result of improper influence exerted upon the testator by the wife and son. There was testimony of confidential relations between the testator and his son, and that as a result the testator frequently consulted the son as to matters of business, and relied greatly on his judgment and advice. It has been determined, however, that the existence of confidential relations between the testator and the beneficiary raises no presumption of undue influence, and does not even shift the burden of proof upon the beneficiary to prove that the testator acted of his own free will in disposing of his property. Nor does the unnatural or unequal disposition of the property create a presumption of undue influence. *Ginter v. Ginter*, supra. While an unnatural disposition of property may be considered in connection with evidence of undue influence, it is ineffectual as proof in the absence of other evidence that undue influence was exercised, because in the absence of statutory restrictions every one with testamentary capacity has the right to dispose of his property according to his own desires.

[3] This plenary power of disposition of the owner as he may see fit of course includes the right to make an unnatural or unreasonable distribution. It follows, too, that he may make what would seem to most persons to be an absolutely unjust discrimination among those having a claim on his bounty. When such a discrimination is

made, courts scrutinize closely the circumstances surrounding the execution of the will to see if it was made with sufficient capacity and is the free act of the testator. No question is made here as to the capacity of the testator, and it appears that he was mentally vigorous, and also independent in both thought and action. There was an attempt to show that he often yielded to the opinion of his wife in matters about the home, but there is nothing to indicate that he was under her domination or the restraint of any one in making a disposition of his property. She appears to be partial to the son, and evidently prefers that the property should go to him as the will provides, but the testimony does not show that the will of the testator was overcome by hers, nor by that of the son, or that there was coercion of any kind by any one. In view of the value of the estate and the smallness of the portion given to the daughter, the inequality of the portions to the two children is not easily accounted for, but the will cannot be impeached because the disposition appears to us to be either unreasonable or unaccountable. The property was his own, and, being capable and without restraint, he could give or withhold as he might elect.

[4] Another question is raised as to the meaning and effect of the ninth paragraph of the will which provides that: "At the death of my beloved wife, Mary S. Taylor, I direct and it is my will that the residue of my estate shall be paid to my beloved son, J. Luther Taylor." The trial court construed this provision to mean that at the death of Mary S. Taylor the whole residuary estate should pass to and become the absolute property of J. Luther Taylor. The appellant contends that the word "paid" as used in this clause does not fairly imply the making of a gift, that its ordinary meaning is to satisfy claims or obligations as, for instance, to discharge an obligation to a creditor, or to hand over that which is due, and as used here can mean no more than that the bonds, securities, and other personal property should be delivered over to J. Luther Taylor upon the death of his mother. This view would leave the principal part of the estate undisposed of by the will, while all of its provisions unite in showing an intention by the testator to dispose of his entire property by that instrument.

As was said in *Ernst v. Foster*, 58 Kan. 438, 49 Pac. 527: "It is a general rule that a will should be construed so as to give effect to every part thereof, providing an effect can be given to it which appears to be consistent with the general purpose of the testator as gathered from the entire instrument." Syl. pt. 3. Looking at the will in its entirety it is clear that the word "paid" was used without reference to its technical meaning as a settlement with a creditor or the discharge of an obligation, but was used in its wider sense as a word of gift. The will purports to dispose of all the property of the



testator, as he gave his wife a life estate in and the use of all the property during her life, subject to certain specific gifts. The term "paid" was used as a word of gift in other parts of the will. For instance, in the third paragraph, instead of stating that the daughter was given the income from \$10,000 there was a direction that she should be paid the income from that fund by the executors. The same is true as to the provision directing the executors to pay the income from a fund of \$15,000 to J. Luther Taylor. In the sixth paragraph the executors are directed to pay to Baker University, in cash or in securities, the sum of \$3,000, and later in the paragraph the direction to pay is spoken of as a bequest. In other provisions, instead of expressly stating that the money or property is given, the words "pay" or "paid" are used in directions for distributions given to the executors. In earlier provisions of the will the testator referred to the residuary estate, directing that certain funds should, in certain events, become a part of the residue, and that when all specific bequests had been paid and the life estate had been ended by the death of his wife, there was a direction that the residue of the estate should be paid to the son. Manifestly the term "paid" was used as the equivalent of "given." A testator is not confined to particular words in making a legal disposition of his property, and courts give effect to the manifest intent of a testator, although apt legal terms are not used by him. So it has been said that: "In construing a will the meaning of the words used will be expanded or restricted so as best to express the purpose and intent of the testator." *Blair v. Blair*, 82 Kan. 464, syl. par. 1, 108 Pac. 827.

[5] Nothing in the will indicates an intention to leave a large portion of the estate undisposed of, but, on the contrary, all the inferences derivable from its language proceed on the assumption that the entire estate is to be apportioned among specified beneficiaries. In the absence of a definite provision to the contrary, it is to be presumed that the testator did not intend to dispose of a fraction of his property and die intestate as to the remainder. It has been said that: "The natural and reasonable presumption is that when so solemn and important an instrument as a will is executed, the testator intends to dispose of his whole estate, and does not intend to die intestate as to any part of his property." 30 A. & E. Encycl. of L. (2d Ed.) 668. See, also, 40 Cyc. 1409. The words of a will are to be read in the light of the other language in the will, and to be given effect according to the manifest intention of the testator. In *Lohmuller v. Mosher*, 74 Kan. 751, 87 Pac. 1140, 11 Ann. Cas. 469, a devise was made to a daughter of the testator of certain property for her

use during her life, and "after her death the property to fall to her children." The words "fall to her children" were interpreted so as to create and carry to the children the remainder in fee. In *Roosa v. Harrington*, 171 N. Y. 341, 64 N. E. 1, the testator used the words "to pay," and it was held that as used they were not to be taken in a technical sense, but as words of gift. Other authorities on this or like terms are *Sheets' Estate*, 52 Pa. 257; *Cover v. Stem*, Ex'r, 67 Md. 449, 10 Atl. 231, 1 Am. St. Rep. 406; *Den ex dem. Wortendyk v. Wortendyk*, 7 N. J. Law, 363; *In re Tatum*, 34 Misc. Rep. 25, 69 N. Y. Supp. 501; *Clark's Appeal from Probate*, 70 Conn. 195, 39 Atl. 155.

Finding no material error, the judgment of the district court will be affirmed. All the Justices concurring.

(90 Kan. 175)

## CALDWELL v. MODERN WOODMEN OF AMERICA.

(Supreme Court of Kansas. July 5, 1913.)

(Syllabus by the Court.)

### 1. APPEAL AND ERROR (§ 1178\*)—NEW TRIAL (§ 102\*)—REHEARING—EVIDENCE—JURISDICTION.

A judgment upon an insurance policy, based upon the presumption of the death of the insured person after an unexplained absence of over seven years, was affirmed. Afterwards, and while the action was pending upon a motion for a rehearing, evidence was filed in this court tending to prove that the insured person was still alive. A rehearing was granted upon the question whether the issue of death should be again tried in the district court, and upon that question, on leave given to both parties, additional evidence was filed in this court tending further to prove that the insured is living. No evidence is presented to the contrary. It is held: (1) That upon the circumstances of this case the defendant is not precluded from asserting that the insured is still alive by its failure to discover and produce proof of that fact at the trial; (2) that this court has jurisdiction to allow a new trial of the single issue of death.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4604-4620; *Dec. Dig. § 1178*; *New Trial*, Cent. Dig. §§ 207, 210-214; *Dec. Dig. § 102*.]

### 2. APPEAL AND ERROR (§ 833\*)—REHEARING—EVIDENCE.

While this court has no jurisdiction to determine the issue of death presented in the pleadings, it may, in the exercise of appellate jurisdiction, consider the new evidence in determining the question whether that issue shall be retried in the district court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3214, 3229-3240, 3244-3246; *Dec. Dig. § 833*.]

### 3. APPEAL AND ERROR (§ 833\*)—REHEARING—DISPOSITION OF CAUSE.

In the extraordinary situation presented, in order that the truth may be ascertained and justice done, a new trial of the issue to determine whether the insured person was living when the action was commenced is allowed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3214, 3229-3240, 3244-3246; *Dec. Dig. § 833*.]

\*For other cases see same topic and section NUMBER in *Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes*



On petition for rehearing. Cause remanded. For former opinion, see 130 Pac. 642.

**BENSON, J.** [1] While this action was pending upon a petition for a rehearing the defendant filed depositions in this court tending to prove that W. H. Caldwell, the insured, was still living. On consideration of this evidence the petition was granted so far as to allow a rehearing upon the question whether a new trial should be granted of the particular issue relating to the death of the insured. The parties were thereupon given leave to file further evidence in this court on that question. The defendants have filed depositions accordingly, tending further to prove that Caldwell is still living, and that he had recently visited his family at Hutchinson. No evidence to the contrary has been presented. The plaintiff objects to the consideration of this evidence, as beyond the jurisdiction of this court, and also insists that the defendant did not exercise proper diligence in discovering and producing it at the trial. It is also contended that the time for trying the issues of fact has forever passed, and that the fact that W. H. Caldwell was dead before this action was commenced is conclusively determined. The situation is extraordinary. The plaintiff, relying upon the presumption of death after an unexplained absence for over seven years, obtained a verdict and judgment based upon the fact of death so determined. That judgment was affirmed. *Caldwell v. Modern Woodmen*, 89 Kan. —, 130 Pac. 642. The petition for rehearing, however, was still pending when the discovery was made of this new evidence showing prima facie that the finding was untrue. Whatever might have been the result had the petition for rehearing been previously denied, in the present situation the court has jurisdiction to grant or refuse a new trial.

[2] This court cannot determine, it is true, from the new evidence the question whether Caldwell is living. If that issue is to be retried, it must be retried in the district court, but in the exercise of its appellate jurisdiction this court may, and in the very unusual situation presented should, in order to prevent a failure of justice, consider the new evidence in determining whether a new trial of that issue should be granted. This evidence, uncontradicted as it is, shows that a mistake was made in a finding of a fact essential to support the judgment. In view of the evidence presented at the trial and the whole situation it cannot be held that the defendant is precluded from proving the fact that Caldwell is living because of its failure to discover and produce the evidence at the trial. It may be conceded that, when the end of orderly judicial processes is reached, an adjudication, although based upon mistake, is final. Still a miscarriage of justice will not

be tolerated so long as the court, by the use of such processes, can apply a remedy.

[3] To the end that the truth may be determined and justice done a new trial will be allowed of the issue presented by the pleadings, to determine whether W. H. Caldwell was alive when the action was commenced. To preserve to the plaintiff the fruits of the litigation in case that issue shall be determined in her favor, the judgment will stand, although execution will be stayed until such determination is made; and, if the issue shall be determined in her favor, the judgment will then be enforced, together with any additional judgment for accruing costs to which she may be entitled. If the issue is determined in favor of the defendant, the judgment will be set aside, and judgment entered in its favor.

The cause is remanded for further proceedings in accordance with these views. All the Justices concurring.

(90 Kan. 208)

# REYNOLDS v. NEW CENTURY MINING CO.

(Supreme Court of Kansas. July 5, 1913.)

(Syllabus by the Court.)

## 1. MASTER AND SERVANT (§ 124\*) — DUTY OF MINING COMPANY—SAFE PLACE.

It is the duty of a mining company to exercise ordinary diligence to keep the roof of its mine reasonably safe for its laborers. This duty requires inspections with such care and frequency as reasonable prudence demands in the conditions existing.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 235-242; Dec. Dig. § 124.\*]

## 2. MASTER AND SERVANT (§ 286\*)—DUTY OF MINING COMPANY—NEGLIGENT INSPECTION—QUESTION FOR JURY.

The evidence is examined, and held sufficient to support a finding that the defendant was negligent in failing to properly examine and prod the roof of a zinc mine from which a boulder fell and injured the plaintiff, a laborer therein.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

## 3. WITNESSES (§ 268\*)—CROSS-EXAMINATION.

A witness, who had procured a statement from the plaintiff of his injuries, having testified in direct examination that he was acting at the instance of an attorney, was asked whom the attorney represented, and answered, "The insurance company." This answer was within the reasonable limits of cross-examination.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 931-948, 959; Dec. Dig. § 268.\*]

## 4. TRIAL (§ 232\*) — CAUTIONARY INSTRUCTION.

An instruction, which impresses upon the jury the importance of making true findings of fact from a candid consideration of the evidence, is not prejudicially erroneous, because it included a statement that a mistake of law may be corrected by the court while a mistake in a finding of fact upon conflicting evidence

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



cannot be corrected and other findings substituted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 524, 525; Dec. Dig. § 232.\*]

(Additional Syllabus by Editorial Staff.)

5. MASTER AND SERVANT (§ 293\*)—INJURY TO MINE EMPLOYÉ—INSTRUCTION—SAFE PLACE.

In a mine employé's action for injuries, an instruction that it was defendant's duty to furnish plaintiff a reasonably safe place in which to work was not erroneous for failure to precede the words "to furnish" by the words "to exercise ordinary care," or their equivalent, especially where there was a specific finding of negligence in this respect.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1156, 1158-1160; Dec. Dig. § 293.\*]

Appeal from District Court, Cherokee County.

Action by Ed Reynolds against the New Century Mining Company. From judgment for plaintiff, defendant appeals. Affirmed.

Keene & Gates, of Ft. Scott, and Sapp & Wilson, of Galena, for appellant. P. D. Decker, of Joplin, Mo., and C. A. McNeill, of Columbus, for appellee.

BENSON, J. The defendant appeals from a judgment in favor of the plaintiff for damages for personal injuries suffered in defendant's lead and zinc mine in which he was a laborer. The evidence tended to prove that the plaintiff and a fellow laborer were working a steam drill, but on the day when injured they had been breaking boulders and "brunoing." Their working day ended at 5 o'clock in the afternoon. About 20 minutes before that time, having finished that work for the day, they went into another part of the mine about 100 feet distant for some picks to be sent out and sharpened. When they were about 45 feet from the face of a drift where other laborers were at work, a boulder fell from the roof of the mine and injured the plaintiff. The pillars in the mine are from 20 to 90 feet apart. The roof where the rock fell was 30 feet high and was described as being of a sandy formation composed of boulders, selvedge, and flint; the selvedge being soapstone, rock, and sand run together. Shooting was done in that mine once and sometimes twice a day, sometimes at noon and always at night. The tendency of shooting was to make the roof scaly and cause it to fall, requiring frequent trimming, every day and after every heavy shot. Heavy shots were fired nearly every night. Trimming was done by means of a prod pole or a ladder and pick. There was evidence that at the place where the rock fell the roof had not been trimmed for four weeks next preceding the injury.

Among other charges of negligence was that of a failure to properly inspect, examine, and trim the roof, take down boulders and slabs liable to fall, and to properly support

it, whereby it became insecure and dangerous. It was also charged that the defendant negligently failed to make the place reasonably safe.

[1] In support of a demurrer to the evidence the argument is made that there was no testimony to show any notice or knowledge of any defect in the roof. The lack of actual knowledge of such a particular defect is not sufficient to relieve from liability, if in the exercise of proper care the defective condition would have been discovered. It was the duty of the company to exercise ordinary diligence to keep the roof reasonably safe for its laborers, and this duty required inspections to be made with such care and frequency as reasonable prudence demanded in the conditions presented. *Griffin v. Brick Co.*, 84 Kan. 347, 114 Pac. 217, 40 L. R. A. (N. S.) 1088; *Every v. Rains*, 84 Kan. 560, 115 Pac. 114. The evidence tended to show that the formation of the roof was such that an examination was required after each heavy shot. Whether this duty had been performed with reasonable diligence was a question for the jury.

In answer to questions submitted by the defendant the jury found that no person in the employ of the defendant knew of the defect in the roof before the accident, and that the plaintiff could not by the exercise of ordinary care have known of the defect. It is contended that these findings exonerate the defendant, because if the plaintiff, an experienced miner, could not by reasonable care have known the danger, the defendant could not. This argument ignores the relative duties of each and regards the laborer as an inspector. His duty is to perform the work required of him, and that of the employer is to use proper care to make the place reasonably safe. It was said in the *Every Case*: "The suggestion that the laborer could observe the defective roof as well as the employer is not persuasive. It was not the duty of the laborer to make inspection, but to attend to his work, while it was the duty of the employers to exercise proper care to make the place reasonably safe. It does not appear that the defect was open to the ordinary observation of the workmen or that they were aware of the danger." *Every v. Rains*, 84 Kan. 560, 568, 115 Pac. 114, 117.

This does no violence to the rule stated in *Morback v. Mining Co.*, 53 Kan. 731, 37 Pac. 122, that when the employer and employé are equally competent to judge of the risks, and both have equal knowledge of the surroundings, the employer cannot be culpably negligent to the employé. The miner is not charged with the duty of examining the roof high above his head as he works or goes about in the mine. He has other duties. If he knows of a defect and still neglects reasonable precautions for his own safety, or it is obvious to him while at his work,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



other considerations arise, but such a situation is not presented here.

[2] The ground foreman testified that he examined the roof in question on the morning of the injury and that there was nothing from which he could ascertain the presence of danger. On cross-examination he said: "I looked at that roof that morning between 7 and 9 o'clock. I was right to the roof, where I could lay my hand on it. From the place where the rock fell from I was about 12 or 15 feet." The jury were asked to state what negligence, if any, they found on the part of the company and who was the negligent employé. They answered: "By the testimony of the ground foreman in not properly examining and prodding roof within ten feet of where boulder fell." It was a question of fact upon the evidence of the foreman himself and all the other testimony whether this prodding was properly done. In view of the material of the roof and the ordinary effect of the shots upon it, diligence was required in inspection and care commensurate with dangers reasonably to be foreseen. It certainly cannot be said as matter of law that it was sufficient to look at the roof without otherwise testing it. Whether prodding it at points ten feet or more away was proper diligence was a question for the jury in the circumstances shown.

Complaint is made of rulings concerning testimony. The plaintiff was working on the day in question with another who was the head man on the machine (the drill). He was asked what this man said to him when they had finished all that could be done at that time and place, as before stated. The answer was: "Well, he gets up and starts off, and says, 'Come on and we will go over to this place and see something about getting some picks and send them out.' I had been working over there off and on breaking some boulders and pulling down some dirt, and I thought if there wasn't anything else to do I would put in the time until quitting time, and I just thought we would see the boss." This fellow workman had already testified that he had said to Ed. (the plaintiff), "Let's go and get some picks and send them out and have them sharpened," and that it was the custom when through working in one place to go to another and help out until quitting time. If the conversation between these men ought to have been excluded, still its admission was not prejudicial. If the men had the right to go where they did, what they said about it was unimportant. Besides, having stated what the errand was, the declaration of the reason by one to the other was of no consequence. The ruling could not have affected the substantial rights of the defendant. Code Civ. Proc. § 581 (Gen. Stat. 1909, § 6176).

[3] A witness was produced by the defendant who identified a statement of the plaintiff concerning his injuries made soon after

the occurrence. This witness testified that he obtained the statement at the instance of an attorney whose name he gave. On cross-examination it appeared that plaintiff was in bed at the time apparently suffering from the injury, and that in taking the statement the witness represented the attorney he had named. He was then asked whom this attorney represented, and he answered, over the defendant's objection, "The insurance company." Other questions were asked to test the witness' knowledge of the fact that the attorney represented the insurance company, to which the substance of his answers was that he [the witness] represented the attorney and he supposed that the attorney represented the insurance company. The argument is made that this cross-examination tended to prove a fact prejudicial to the defendant; that is, that the defense was being made by an insurance company, and was erroneous. When the defendant had shown by its own examination that the statement was obtained at the instance of the attorney named, inquiry to ascertain whom the attorney represented was readily suggested. If it was competent to inquire whom the witness represented in obtaining the statement, it was equally competent to inquire whom the attorney represented. Evidence was admissible, although perhaps not very important, to show that in procuring the statement the witness acted by authority of some one having a right to the information. Both the direct and cross examination, so far as reasonably necessary to show that fact, were competent. It is true that several similar questions were asked after the first, but the answers added nothing to the effect of the one first given.

[4] The defendant complains of an instruction in which the court sought to impress the jury with the importance of making correct findings of fact, stating in substance that, while mistakes of law might be corrected by the court, findings of fact upon conflicting evidence could not be thus corrected and different findings substituted. In its entirety the statement is true, for, while the district court may correct findings of fact not approved by the judgment and conscience of the judge, it cannot substitute other findings, but can only refer the issue to another jury. The instruction was only designed to impress upon the jury the importance of making findings from a careful and unbiased consideration of the testimony.

[5] Criticism of another instruction is based upon its phraseology rather than its substantial meaning. The court said: "It was the duty of the defendant under the law of this state to furnish to the plaintiff a reasonably safe place in which to work. \* \* \* It is argued that the words 'to exercise ordinary care' or some equivalent qualification should have preceded the words 'to furnish.' The criticism of a like instruction



was considered at length in *Kamera v. Boiler Works*, 82 Kan. 432, 108 Pac. 806. It was there held that in view of other instructions the omission was not fatal. In this case the jury were informed that the defendant could only be held liable for failing to use ordinary care to prevent injury to him, and that the negligence or want of care alleged was in failing, among other things, to inspect and examine the roof of the drift to ascertain if rocks or boulders were liable to fall. The instructions were clear in this respect, and, for the reasons stated in the *Kamera* Case, it must be held that the omission of the clause referred to was not material. Especially is this true in view of the specific finding of negligence in this respect.

The legal questions involved in this case, while important, are not novel. They have been considered in the cases cited, and others in this court. The findings of fact and verdict are supported by competent evidence. No material error is perceived in the proceedings.

The judgment is affirmed. All the Justices concurring.

(90 Kan. 244)

RAY et al. v. MISSOURI, K. & T. RY. CO.  
(Supreme Court of Kansas. July 5, 1913.)

*(Syllabus by the Court.)*

1. APPEAL AND ERROR (§ 882\*)—JUSTICES OF THE PEACE (§ 167\*)—INVITED ERROR—CONSOLIDATION OF ACTIONS.

Where one plaintiff brings two actions in a justice court against the same defendant for an amount of money, in each case within the jurisdiction of that court, and judgment is therein rendered in each case for the plaintiff, and the defendant appeals from both judgments of the district court, in which court the appellant moves to consolidate the cases, which is done, *held*, no error, although the sum of the two claims is more than \$300, and, further, if the ruling were erroneous, the appellant would not here be heard to urge an error which he had affirmatively invited.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\* *Justices of the Peace*, Cent. Dig. §§ 647-651, 654; Dec. Dig. § 167.\*]

2. CARRIERS (§ 218\*)—SHIPMENT CONTRACT—CONSTRUCTION—NOTICE OF DAMAGES.

Loss of market or of price resulting from delay in transportation is not within the provisions of a contract requiring notice of loss before cattle, which are shipped, should be removed or mingled with other stock, but loss by shrinkage in weight is within such provision.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.\*]

3. CARRIERS (§§ 159, 160\*)—CONTRACT LIMITATION OF LIABILITY—NOTICE—LIMITATIONS.

Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386, as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 (U. S. Comp. St. Supp. 1911, p. 1307), prohibits a common carrier from limiting by contract, rule, or regulation its liability for damages resulting from its own negligence or the negligence of any other common carrier into whose possession the property may come for transportation by virtue of the bill of

lading which the section requires the initial carrier to issue to the shipper. It does not limit the right of the common carrier to make a reasonable contract with the shipper requiring a notice of loss or damage or limiting the time within which an action to recover damages may be brought.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 668-671, 699-703½, 711-714, 718, 718½; Dec. Dig. §§ 159, 160.\*]

*(Additional Syllabus by Editorial Staff.)*

4. CONTRACTS (§ 4\*)—EXPRESS AND IMPLIED—PRESUMPTIONS.

Where, during the trial of a shipper's action on an implied contract, it appears that written contracts were fairly entered into and executed between the parties, which contracts provide the conditions of shipment and for notice of loss or damage, the rights and liabilities of the parties must be determined therefrom; the rule being that a contract will not be implied where a specific contract has been entered into and acted upon by the parties.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 4-6; Dec. Dig. § 4.\*]

5. EVIDENCE (§ 323\*)—ADMISSIBILITY—MARKET REPORTS.

In a shipper's action for damages, a market report was properly admitted in evidence to show loss in price from the delay in transportation.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1214-1217; Dec. Dig. § 323.\*]

6. EVIDENCE (§ 264\*)—ADMISSIONS—CONSTRUCTION.

In a shipper's action for damages to stock in transportation, an instruction that defendant's counsel having admitted in open court that certain rates offered to plaintiffs at the starting point were tariffs of the defendant, he thereby admitted that defendant was the initial carrier, was erroneous; the statement of counsel not being an express admission of such fact.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1028; Dec. Dig. § 264.\*]

Appeal from District Court, Labette County.

Action by D. D. Ray and others, partners, etc., against the Missouri, Kansas & Texas Railway Company. From judgment for plaintiffs, defendant appeals. Reversed and remanded.

Jno. Madden and W. W. Brown, both of Parsons, and F. M. Brady, of Oswego, for appellant. A. D. Neale, of Chetopa, for appellees.

SMITH, J. The appellees brought two actions against the appellant in a justice court of Labette county to recover damages on two shipments of cattle from Wichita Falls, Tex., to St. Louis, Mo. The appellees owned all the cattle, and the shipments were made at the same time in the same train and, of course, arrived in St. Louis at the same time, but they were consigned to different commission firms. Judgment for appellees was rendered in both actions. Appellant appealed to the district court, where, upon its motion, the actions were consolidated. Thereupon appellant moved to dismiss the consolidated action on the ground that it involved an amount in excess of the jurisdic-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



tion of the justice of the peace. This motion was overruled, and error is assigned on the ruling. *Ball v. Biggam*, 43 Kan. 327, 23 Pac. 565, is cited in support of this motion. In that case the amount in controversy in the justice court exceeded the jurisdiction of the court, and it was held that, as the justice court had no jurisdiction and as the jurisdiction of the district court was purely appellate, the district court had no jurisdiction.

[1] In this case the amount involved in the two cases, severally, in the justice court was within its jurisdiction, and, upon the appeal being perfected, the district court had jurisdiction of each case. At the request of appellant, and without objection from appellees, the consolidation was had. There was no error therein. Indeed, the appellant, in its brief, says, "No cause appeared why the action should not have been consolidated, and the court was compelled to do so." (Page 3.) In other words the appellant compelled the court to commit an error, and now seeks to avail itself thereof.

There were no pleadings filed except the two bills of particulars filed by the appellees in the justice court. The causes of action therein were based on the implied contract of shipment and common-law liability. On the trial, the appellant exhibited two papers, purporting to be contracts of shipment, to one of the appellees on the witness stand who then testified that he had signed one of the papers and a son of his coplaintiff and partner had signed the other about the time they started from Wichita Falls, Tex., that his partner's son was in charge of one of the shipments and received transportation to St. Louis and return by reason of signing the contract.

[4] Although the appellees brought the action on the implied contract arising from the transaction, still if at any time during the trial it clearly appeared that written contracts were fairly entered into and executed between the parties, providing the rates and conditions of shipment, and for notice of loss or damage, it will be presumed that the shipments were made upon the contracts, and the rights and liabilities of the parties must be determined therefrom. *Watt v. Railway Co.*, 82 Kan. 458, 108 Pac. 811; *Hayes v. Railway Co.*, 84 Kan. 1, 113 Pac. 421. It is a general rule that a contract will not be implied where a specific contract has been entered into and acted upon by the parties to a transaction.

[2] However, as said in *Watt v. Railway Co.*, supra, it is the province of the jury to determine, under proper instructions, whether either one or both of the contracts were entered into fairly, with knowledge or opportunity to ascertain the purport thereof, and, if not, whether the appellee or either member of the firm accepted or received benefits under either of the contracts after he had

an opportunity to inform himself of the provisions of the contract. If the contracts, or either of them, were fairly entered into, or were so used as to amount to a ratification or acceptance thereof, then the specification in the contract requiring notice to be given of loss or damage resulting from shrinkage in the weight of the cattle must be complied with in the manner specified before the appellees are entitled to recover therefor. But such provision does not apply to loss of market or depreciation in market price. *Railway Co. v. Poole*, 73 Kan. 466, 87 Pac. 465; *Railway Co. v. Wright*, 78 Kan. 94, 95 Pac. 1132; *Hayes v. Railway Co.*, 84 Kan. 1, 113 Pac. 421.

The rule where a railway seeks to escape liability by reason of a special contract is stated in *Kalina v. Railway Co.*, 69 Kan. 172, 76 Pac. 438, as follows: "Where a common carrier seeks to defeat a recovery because of an exemption from liability contained in its contract of carriage, the burden rests upon it of proving that the loss falls within the exemption provided for in such contract. Where the shipping contract contains a lawful provision requiring the shipper to do something as a condition precedent to recovery, the burden of showing the performance of such condition rests upon the shipper, and if he fail to show performance he cannot recover." (Syl. 2 and 3.)

As to the burden of proof where the action is brought alleging loss by negligence, and the railroad, in defense, sets up a special contract, it is claimed that *Railway Co. v. Dunlap*, 71 Kan. 67, 80 Pac. 34, places the burden of proof upon the carrier. We think that, properly interpreted, there is no conflict between this case and the *Kalina Case*, supra.

It does not appear that either party produced any evidence that notice was or was not given either of the shrinkage of the weight of the cattle or of the loss in market price. It follows from what has been said that appellees' evidence failed to establish a cause of action as to the loss in weight, but did not so fail as to the loss of market. The instructions should have informed the jury of this distinction, but no such instruction seems to have been requested and hence the refusal to submit the special questions, of which complaint is made, does not appear to be material error as it otherwise might have been.

[5] Complaint is made of the admission in evidence of a market report to show loss in price from the delay in transportation. Commercial dealings are largely based upon the reports made by publications of the class shown to have been produced. No error was committed in this matter.

Two papers purporting to be contracts relating to the shipments in question were produced and evidence relating to the execution thereof was received. Both papers were



offered in evidence by appellant, one purporting to be signed by one of the appellees and the other by a son of the other appellee. The former was admitted and the latter was excluded, of which complaint is made. We think the latter should also have been admitted and the jury should have been instructed, in substance, that if the contracts, or either of them, were not fairly entered into or had not been recognized as valid by the use made of them by the appellees, both or such one should be disregarded and held for naught in arriving at their verdict.

[8] Again it is urged that the court erred in its instructions, especially in the following paragraph: "The defendant's counsel having admitted in open court that the two rates claimed to have been offered to the plaintiffs at Wichita Falls, Tex., as a consideration for the execution of the special contracts, were tariffs of the defendant in this suit, he thereby admits that the defendant was the initial carrier; and therefore the defendant would be liable to the plaintiff under the federal law, regardless of such contracts, or the notices required thereunder, the defendant being liable under the federal provision of the law." We think the court erred in assuming as a fact that the appellant was the initial carrier. Doubtless the evidence was admissible as tending to establish that fact, but it cannot be said to be an express admission thereof. The weight of the evidence was for the jury to determine. While it rests entirely within the discretion of the trial court, we suggest that this is of a class of cases in which the issues would be more clearly defined should the district court on appeal order the parties to file pleadings.

[3] Section 20 of the Interstate commerce law (Carmack amendment) makes the carrier liable to the holder of the bill of lading, required thereby, for any damages caused by it or any other carrier to which it may deliver the property for which the bill of lading is issued or over whose line or lines such property shall pass, and no contract, receipt, rule, or regulation shall exempt the initial common carrier from such liability. This provision is construed to mean that the initial carrier may not by contract, rule, or regulation protect itself from damages resulting from its own negligence or from the negligence of any other carrier into whose possession the property may come by virtue of the issuance of the bill of lading. The provision does not, however, deprive the carrier from making a reasonable contract with the shipper providing for notice of loss or damage or a reasonable limitation upon the time of bringing an action for the recovery thereof.

The instruction of the court upon the interstate commerce act was not affirmatively erroneous, but omitted to qualify the limita-

tion of the right to contract as applicable to its own negligence or the negligence of other carriers receiving the property from the initial carrier.

The judgment is reversed and the case is remanded for a new trial. All the Justices concurring.

(89 Kan. 812)

AKINS et al. v. HOLMES et al. (two cases).†

(Supreme Court of Kansas. June 7, 1913.)

(Syllabus by the Court.)

1. JURY (§ 14\*)—CANCELLATION OF INSTRUMENTS (§ 24\*)—RIGHT TO JURY TRIAL—CONDITIONS PRECEDENT—TENDER.

The contract between the plaintiffs and the defendants provided for an exchange of property, that belonging to the plaintiffs consisting of real estate in Missouri and that belonging to the defendants consisting of real estate and personal property in Kansas. The personal property was delivered to the plaintiffs and the deed to the Kansas land was placed in escrow until the deed to the Missouri land should reach the depository, when both were to be delivered. The defendants then undertook to rescind. They took possession of the personal property, demanded and received their deed of the depository, and when the plaintiffs' deed subsequently reached the depository it was immediately returned to them. The plaintiffs brought suit for the specific performance of the unconsummated contract and with their pleading tendered a deed of the Missouri land. The defendants asked for rescission on the ground of fraud and for the cancellation of the contract. *Held:*

(a) The plaintiffs were not entitled to a jury trial.

(b) Tender of a deed of the Missouri land by the defendants to the plaintiffs was not required before the defendants answered praying for rescission, and such a deed was not necessary in order to restore the plaintiffs to the position which they occupied before the contract was made.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 40-60, 66-83; Dec. Dig. § 14; \* Cancellation of Instruments, Cent. Dig. §§ 33-38; Dec. Dig. § 24.\*]

2. ACTION (§ 57\*)—TRIAL (§ 374\*)—CONSOLIDATION.

The plaintiffs also brought an independent action of replevin for the personal property in which a jury was called, but it was consolidated for trial with the specific performance case. The jury returned findings of fact and a general verdict for the plaintiffs. The court made findings of fact in favor of the defendants, set aside the findings and verdict of the jury, and rendered judgment for the defendants. *Held*, the consolidation of the two actions for trial was proper, and the court was authorized to make a final determination of the issues in both cases itself, notwithstanding the conduct of the jury.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 632-675; Dec. Dig. § 57; \* Trial, Cent. Dig. § 884; Dec. Dig. § 374.\*]

Appeal from District Court, Chase County.

Action by Joe G. Akins and another against R. F. Holmes and another. From a judgment for defendants, plaintiffs appeal. *Affirmed*.

Dennis Madden and W. C. Roberts, both of Emporia, for appellants. Dudley Doolittle, of Cottonwood Falls, and Huggins, Ganse & Riddle, of Emporia, for appellees.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Ann. Dig. Key-No. Series & Rep'r Indexes 123 P.—54

† Rehearing denied July 5, 1912.



BURCH, J. The action in the district court was one to compel the specific performance of a contract to convey real estate. The relief prayed for was denied, and the plaintiffs appeal.

After negotiations between the parties, they agreed upon an exchange of property. That belonging to the plaintiffs consisted of land in Missouri and that belonging to the defendants consisted of real estate and personal property in Kansas. The agreement in its entirety was embodied in several written instruments executed on the 25th day of October, 1911. One of these was a bill of sale of the personal property given by the defendants to the plaintiffs. This property consisted of a stock of merchandise contained in a store building. Another was a lease from the plaintiffs securing to the defendants possession for a time of certain real estate which they were to convey to the plaintiffs. These instruments were executed upon the consideration of a principal contract which furnished the basis of the suit. This contract provided for conveyances of the real estate to be exchanged and contained the following provision: "Said deed to be executed by the parties of the first part [the defendants] under this contract to be executed and delivered to the Chase County National Bank of Cottonwood Falls, Kansas, there to remain until the said deed to be executed by the parties of the second part [the plaintiffs] and their wives, shall be deposited in said bank. When both of the said deeds to be executed under this contract are in the hands of the bank, the same shall be delivered to the respective parties by said bank in conformity to this contract and to carry out the intention hereof."

The negotiations were concluded at Cottonwood Falls, where the defendants, who were husband and wife, resided. The plaintiffs, who were partners and who resided in Missouri, were represented by Joe G. Akins, a member of the firm. The deed of the defendants was duly executed and deposited in the bank, and the store was turned over to Akins, who placed an agent in charge and then returned to Missouri. Fearing that the Missouri land had been misrepresented, R. F. Holmes went to Missouri to satisfy himself regarding the matter. Having done so he took immediate steps to rescind. On November 3d he demanded and received from the bank the deed of the Kansas land. On November 4th he took possession of the store building and stock of goods, locked the plaintiffs' agent out, and directed him to notify the plaintiffs of the fact, which the agent did by telegram. On November 6th the deed to the Missouri land reached the bank but was immediately returned to the plaintiffs by direction of the defendants.

The plaintiffs' petition set out the contract of the parties, repudiation by the defendants, performance, willingness to perform, and tender of a deed to the Missouri land, on the

part of the plaintiffs, and concluded with the following prayer: "Wherefore the plaintiffs pray that the said defendants be specifically required to perform their contract of sale as aforesaid; that they be required to make, execute, and deliver to the plaintiffs a good and sufficient conveyance to said property aforesaid sold to said plaintiffs herein; and that they be barred and foreclosed from setting up any claim or interest in said property, or any part thereof." The answer alleged that the defendants were induced to contract by the false and fraudulent representations of the plaintiffs and prayed for the cancellation of the land contract, which had been recorded in Chase county, of the bill of sale and of the lease. After a trial the court made findings favorable to the defendants covering all the essential facts and rendered judgment accordingly.

[1] It is claimed that the court erred in not granting the plaintiffs a jury trial. It is elementary that a jury trial is not a matter of right in specific performance cases. It is argued that the action was really one for the recovery of specific real property. The constituent elements of a cause of action for that purpose, however, and of a cause of action for specific performance are radically different, and, disregarding the prayer of the present petition, the right claimed by the plaintiffs and the wrong charged to the defendants characterize the action as one for specific performance. There is no similarity between this case and the cases of *Gordon v. Munn*, 83 Kan. 242, 111 Pac. 177, 21 Ann. Cas. 1299, and *Atkinson v. Crowe*, 80 Kan. 161, 102 Pac. 50, 106 Pac. 1052, 39 L. R. A. (N. S.) 31, 18 Ann. Cas. 242, relied on by the plaintiffs. In each of those cases the contest was between rival claimants to ownership, and the real issue was whether the title of the one party or the title of the other was such as to require an award of the property to its proponent. The court held that the form in which this issue was cast should not control the method of trial, but that the essential nature of the controversy should determine whether or not a jury trial ought to be granted. This is a case between a vendor and a vendee in which one party asks for the specific performance of an unconsummated contract to convey and the other asks for rescission on the ground of fraud. Both the form and the substance of the action are purely equitable and a jury trial was properly denied.

It is claimed that the answer was demurrable and that the judgment cannot be sustained because the defendants did not, before answering or in their pleading, tender to the plaintiffs a deed of the Missouri land. The argument is that when the defendants deposited their deed with the bank it passed irrevocably beyond their control; that when the plaintiffs' deed reached the bank the conditions of the escrow were fully perform-



ed; that the conduct of the bank in surrendering one deed and in returning the other without the consent of the plaintiffs had no effect upon the rights of the parties; and consequently that when the deed of the Missouri land reached the bank the title to such land passed to the defendants. The rules relating to the time when an instrument deposited in escrow takes effect are sufficiently discussed in the following cases: *Taylor v. Thomas*, 13 Kan. 217; *Hughes v. Thistlewood*, 40 Kan. 232, 19 Pac. 629; *Grove v. Jennings*, 46 Kan. 366, 26 Pac. 738; *Davis v. Clark*, 58 Kan. 100, 48 Pac. 563; *Guild v. Althouse*, 71 Kan. 604, 81 Pac. 172; *Stanton v. Barnes*, 72 Kan. 541, 84 Pac. 116.

Upon broad equitable considerations and in order to prevent injustice, title will be deemed to have passed at the time when the condition attached to a delivery in escrow was performed. The same assumption will also be indulged to effectuate the intention of the parties to the instrument. In such cases the fiction of a constructive delivery the moment the condition is performed is interposed in order that a passing of title may be contemplated for the protection of rights dependent upon that legal circumstance.

Speaking generally it may be said that, if a person has received money or property under a contract voidable for fraud, he must return what he has received before he is entitled to rescind. He cannot keep what he has obtained and at the same time be relieved of his own obligation, and, if he has obtained the title to real estate or the possession of real estate, he must reconvey or surrender possession before equity will aid him. This, too, is an equitable doctrine founded upon the maxim that he who seeks equity must do equity. The end to be attained, however, is equity—the accomplishment of practical justice in matters of substantial concern and not merely the punctilious observance of form and ceremony. "In all cases, therefore, the equity of the defendant is to be judged of and administered, if it be an equity at all, and, if it be not, the claim goes for nothing. If equity requires a reconveyance to precede suit, it will be so administered; if it can be protected on the trial as it may in almost every possible case, it will be so administered. If there be no equity in the case, but only an assumption of it, it ought to be disregarded." *Babcock v. Case*, 61 Pa. 427, 431 (100 Am. Dec. 654).

Very clearly the doing of equity to the plaintiffs did not require that the defendants should make tender of a deed of the Missouri land before the answer was filed. The plaintiffs had already instituted litigation, having for its object the performance of the contract, and were themselves tendering their own deed of the same land to the defendants. The demand of the plaintiffs was for a deed of the Kansas land and not of the Missouri land, and they do not pretend that they would have accepted the offer of a deed

to the Missouri land, had one been made, and discontinued the suit or otherwise changed their course. On the other hand, by this appeal they are still striving to secure a deed to the Kansas land and thereby get rid of the other.

It was not essential that the defendants should offer in the answer or at the trial to convey the Missouri land to the plaintiffs. The effect of the relief sought by the defendants was the restoration of the parties to the positions which they occupied before the contract was made, which was all that equity required. A conveyance was not necessary to accomplish that result. The plaintiffs' deed had not in fact been delivered. It was still in their possession and unrecorded. If the contract providing for the execution and delivery of the deed were canceled for fraud, there could be no reason in equity for indulging in favor of the plaintiffs the fiction of a constructive delivery and consequent passing of title. They could have no rights needing protection through the application of that equitable doctrine. On the other hand, equity would be done by condemning all the tainted instruments as without legal effect from the beginning. If the deed were still in the possession of the depositary, equity would simply cancel it instead of requiring a reconveyance. While the practice differs in different states, the cancellation of a deed which has been placed on record will ordinarily suffice to nullify its force as a conveyance without going through the formality of requiring a reconveyance by the grantee or by an officer of the court for him. Since, therefore, the judgment prayed for in the answer of the defendants would have the very effect of placing the plaintiffs in as good a situation as the one they occupied before the contract was made, the rule requiring an offer of restoration as a condition of rescission was fully satisfied.

[2] With the specific performance suit the plaintiffs commenced an action of replevin to recover possession of the stock of goods which was the subject of the bill of sale. The answer was a general denial. A jury was called in the replevin case, but the two actions were consolidated for trial. The jury were instructed in the usual way upon the issues involved, which, however, the trial demonstrated were the same in both cases. The jury returned a verdict in favor of the plaintiffs and a number of special findings of fact, all adverse to the defendants but one. The court set aside all the special findings except that one and entered judgment for the defendants notwithstanding the general verdict. The plaintiffs prosecuted a separate appeal, but it was consolidated with the appeal in the specific performance case for hearing in this court. Although the trial court adhered to the form of separate proceedings in the two cases, the result was that it disregarded the action of the jury, made contrary findings of fact of its own, and



adjudicated the issues presented in the replevin case as incidental to those involved in the suit for specific performance. In so doing the court was well within its power, since it ultimately appeared that no jury should have been called at all except in an advisory capacity.

The bill of sale of the personal property sought to be replevied was not an independent instrument creating independent rights. It recited that it was made in consideration of the contract relating to the exchange of lands. If the plaintiffs were entitled to have the land contract specifically performed, the court had authority to grant full relief by compelling a restoration of the personal property to the plaintiffs. If the plaintiffs were not entitled to have the land contract specifically performed, and the defendants were entitled to have it set aside, the court had the power to cancel the bill of sale and, if the personal property had been in the possession of the plaintiffs, to compel them to restore it to the defendants. The plaintiffs had but one right upon which relief could be predicated. That was their equitable right to have the contract specifically performed, and they could not gain any advantage by splitting the cause of action and bringing one suit at law and the other in equity. All these are fundamental principles of equity jurisprudence.

The foregoing disposes of the only matters requiring discussion at length. The findings of fact are abundantly sustained by the evidence, and the judgment is the necessary legal consequence of the findings. Some contention was made at the trial as to whose agent a certain Donelson was who took part in the negotiations leading up to the contract. The finding that he was the agent of the plaintiffs and not of the defendants is a legitimate inference warranted by proved facts and is not merely an inference based upon other inferences. The matter is not important, however, since false representations which he made to induce the defendants to contract were repeated by Akins himself. The plaintiffs were bound by the representations made by Akins, although he believed them to be true. *Maffet v. Schaar*, 89 Kan. 403. The question regarding the conclusiveness of the investigation made by Holmes was properly solved by applying to the facts found the principles approved in the following cases: *Speed v. Hollingsworth*, 54 Kan. 436, 38 Pac. 406; *Abmeyer v. Bank*, 78 Kan. 877, 92 Pac. 1109; *Circle v. Potter*, 83 Kan. 363, 111 Pac. 470; *Morrow v. Bonebrake*, 84 Kan. 724, 115 Pac. 585, 34 L. R. A. (N. S.) 1147. The syllabus of the case of *Munkres v. McCaskill*, 64 Kan. 516, 62 Pac. 42, shows that it has no application to the present controversy.

The findings and judgment would stand if some bits of evidence complained of were ignored. The court's views of the law were

indicated by the instructions given to the jury, and, except in respect to matters already noticed, no complaint is made that any one of them contained a misdirection.

The judgment of the district court in each case is affirmed. All the Justices concurring.

(89 Kan. 733;

# HOCKETT v. EARL et al.†

(Supreme Court of Kansas. June 7, 1913.)

(Syllabus by the Court.)

## 1. APPEAL AND ERROR (§ 1005\*)—REVIEW — FINDINGS OF THE JURY.

Upon the question whether a general warranty deed was given and accepted as security for a debt, or as an absolute conveyance, findings of a jury upon conflicting evidence, approved by the court, are final, unless they should be set aside for erroneous rulings prejudicially affecting the substantial rights of the losing party.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.\*]

## 2. JURY (§ 14\*)—RIGHT TO TRIAL BY JURY—EQUITABLE ACTION.

An action brought by the grantor in a deed of general warranty to have the deed declared to be a mortgage and to redeem therefrom is equitable in character, and neither party is entitled to a general verdict as a matter of right.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 40-60, 68-83; Dec. Dig. § 14.\*]

## 3. APPEAL AND ERROR (§ 1065\*)—HARMLESS ERROR—INSTRUCTION.

An instruction that, in answering questions pertinent to the issues above referred to, the burden of proving the truth of the allegations of the petition by the greater weight of the evidence is upon the plaintiff, and that a finding cannot be made in his favor unless established by the preponderance of the evidence, if erroneous at all, did not prejudicially affect the substantial rights of the defendants.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4219; Dec. Dig. § 1065.\*]

Appeal from District Court, Jewell County.

Action by J. O. Hockett against W. L. Earl and another. From a judgment for plaintiff, defendants appeal. Affirmed.

C. V. Eberstein, of Kensington, and Mahin, Mahin & Mahin, of Smith Center, for appellants. J. T. Reed, of San Diego, Cal., and E. P. Sample, of Osborne, for appellee.

BENSON, J. [1] The principal question upon this appeal is whether a warranty deed made by the plaintiff to the defendant Earl was intended as a mortgage or as an absolute conveyance. The evidence upon this issue was in sharp conflict. The finding was for the plaintiff. In this situation the conclusion of the district court is final, unless it should be set aside for erroneous rulings affecting the substantial rights of the defendant.

A jury was called upon request of the plaintiff to make findings upon particular questions of fact. While the jury was being impaneled the defendant's attorney remarked that he was not sure that the case

\*For other cases see same topic and section NUMBER in Cent. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied July 5, 1913.



was not one in which a general verdict should be returned but made no request for a general submission of the issues. In giving the instructions the court informed the jury that they had been called to answer questions then submitted to them. Each party proposed questions for the jury, but neither asked for a general verdict.

[2] The questions submitted to the jury fairly presented the issues of fact arising upon the pleadings. The jury found by their answers that the deed in question was not intended as an absolute conveyance but as security for a debt owing by the plaintiff to the defendant Earl. After the findings had been received and the jury discharged, the defendant Earl filed a motion to set aside the findings upon the grounds that they were contrary to law and not supported by the evidence. The motion was overruled, and in due time a motion for a new trial was filed, based upon several grounds, among others that the court erred "in failing and refusing to submit a general verdict to the jury." It is insisted that, in the absence of an affirmative waiver, the court was bound to require a general verdict. The general rule, however, is that the waiver may be inferred from any conduct or acquiescence inconsistent with an intention to insist upon a jury trial. *Cunningham v. City of Iola*, 86 Kan. 86, 92, 119 Pac. 317. The question of waiver, however, need not be decided, for a jury trial was not a matter of right. This is an action to have the deed declared a mortgage and to redeem therefrom. The parties stipulated the amount of the debt due from the plaintiff to the defendant in case the jury should find that the deed was given as security, and there was no question for a jury upon that matter. The action is equitable in character, and neither party was entitled to a general verdict as a matter of right. *Kimball v. Connor*, 3 Kan. 414; *Larkin v. Wilson*, 28 Kan. 513; *Woodman v. Davis*, 32 Kan. 344, 4 Pac. 262; *Hospital Co. v. Philippi*, 82 Kan. 61, 107 Pac. 530, 30 L. R. A. (N. S.) 194; *Butts v. Butts*, 84 Kan. 475, 114 Pac. 1048; *Bank v. Kackley*, 88 Kan. 70, 127 Pac. 539; *Akins v. Holmes*, 133 Pac. 849, just decided.

[3] The jury were instructed that "the burden of proving by the greater weight of the evidence the truth of the alleged matters upon which he relies for a recovery rests on the plaintiff," and that a finding could not be made in his favor upon such matters unless established by the greater weight of the evidence. The material allegations referred to were that the plaintiff borrowed the amount expressed as the consideration in the deed, and that the deed was delivered and accepted to secure the payment of the indebtedness so created. The criticism of the instruction is that the rule of preponderance as applied in this case is not correct; that, to establish the fact that an instrument purporting to be an absolute con-

veyance is only a mortgage, a higher degree of proof is required.

In *Winston v. Burnell*, 44 Kan. 367, 24 Pac. 477, 21 Am. St. Rep. 289, an instruction that there must be a clear preponderance of evidence was commented on and approved, and it was said that generally a bare preponderance was insufficient in such a case.

In an action to set aside a written contract on the ground that a party was fraudulently induced to execute it, it was held in *Insurance Co. v. Rammelsberg*, 58 Kan. 531, 50 Pac. 446, that an instruction that the preponderance need only be slight with some accompanying qualifications was erroneous. In a case of the same character it was held that an instruction was incorrect which declared that a bare preponderance was sufficient. *Bank v. Reid*, 86 Kan. 245, 120 Pac. 339.

In *Tanton v. Martin*, 80 Kan. 22, 101 Pac. 461, a case involving the charge that a party had been induced to sign a written contract by fraudulent representations, it was held that: "A charge of fraud may be established by a preponderance of the evidence. The preponderance which overcomes the presumption of honesty and innocence and all opposing evidence, and is such as will lead a reasonable man to the conclusion that fraud exists, meets the requirements of the law." In the opinion it was said: "It is sometimes said that proof of fraud must be clear and convincing, or strong and satisfactory, but this is no more than a preponderance, and that is all that the law requires. Courts sometimes disapprove of instructions which minimize the quantity of evidence necessary to repel the presumption of innocence and establish fraud, \* \* \* but a preponderance which satisfactorily establishes the fraud meets the requirements of the law."

The case last cited is referred to in *Herald v. Paris*, 89 Kan. 131, 130 Pac. 684, which was also an action involving allegations of fraud. It was there held that an instruction that the plaintiff might recover upon a bare preponderance of the evidence was so far modified by other language that the verdict should not be set aside in the absence of anything further to indicate that the jury had been misled.

It appears from these cases that instructions which declare that a slight or bare preponderance is sufficient to sustain claims of this nature are disapproved because they minimize the effect of the written instrument or convey a suggestion that it is unimportant. Without these objectionable adjectives the jury, prompted by a just sense of relative importance, acquired by general knowledge, observation, and experience, will ordinarily give due weight to a written instrument and not allow it to be overborne unless satisfied from all the evidence that it was intended for a purpose beyond that apparent upon its face.

The use of the term "preponderance of evi-



dence" without any magnifying or minimizing qualification suggests to a mind of average intelligence the degree of proof required in a case of this character. Manifestly the parol proof will not preponderate against the writing unless it convinces the jury, and if the jury are convinced by competent evidence after just examination and comparison, the proof is sufficient. As a practical matter the omission of the adjectives "clear, convincing, satisfying," or the like, is not of vital importance if no minimizing expressions are used. But even if it should be held that the term "clear preponderance," or a term of like import, should still be used in giving instructions in a proper case, the omission here was not erroneous for two reasons. First, the evidence of the plaintiff was not entirely oral. A writing signed by the defendant Earl was produced which, if not a technical defeasance, was at least persuasively corroborative of the plaintiff's version of the transaction. Second, the instructions related only to constituent findings upon an issue, which was decided by the court. The findings were only advisory, but they were sustained by the evidence and were approved by the court. It does not appear that any failure to emphasize the degree of proof required prejudicially affected the substantial rights of the defendants.

The defendants assign error upon the refusal to submit to the jury several questions presented by them and in refusing requests for further instructions. The questions submitted, however, fairly presented all the material issues, and the instructions correctly informed the jury of all matters of law necessary for the proper discharge of their duty.

The judgment is affirmed. All the Justices concurring.

(90 Kan. 215)

BOND et al. v. BANKERS' LIFE ASS'N OF  
DES MOINES, IOWA.

(Supreme Court of Kansas. July 5, 1913.)

(Syllabus by the Court.)

INSURANCE (§ 360\*)—FORFEITURE—PAYMENT  
OF DELINQUENT ASSESSMENTS — FUND  
AVAILABLE.

The articles of incorporation of an association doing business on the mutual assessment plan, together with its by-laws and other writings which entered into the contract of insurance between the member and association, examined, and it is held that neither the guaranty deposit made by a member when he is admitted to the association nor any part of the guaranty fund of the association can be applied in payment of delinquent assessments.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 913, 916-922, 924; Dec. Dig. § 360.\*]

Appeal from District Court, Marion County.

Action by Carrie J. Bond and others against the Bankers' Life Association of Des Moines, Iowa. From judgment for defendant, plaintiffs appeal. Affirmed.

H. S. Martin, of Topeka, for appellants.  
I. M. Earle, of Des Moines, Iowa, for appellee.

JOHNSTON, C. J. This was an action to recover on a contract of insurance. The appellee is doing an insurance business in Kansas and other states on the mutual assessment plan. On November 1, 1898, it issued a policy of insurance for the sum of \$2,000 on the life of W. T. Bond, who paid a membership fee of \$14.50 and gave a guaranty note promising to pay appellee \$29. In due time the note was paid by him. All assessments or calls made upon him were paid except the one which accrued on March 25, 1911, and this had not been paid at the time of his death, which occurred on July 29, 1911. The failure to pay the last assessment operates as a forfeiture of all rights under the policy unless the amount paid by the insured on the guaranty note should have been applied on the unpaid assessment. The trial court decided that the amount contributed by the insured towards the guaranty fund was not available to pay the delinquent assessments and therefore gave judgment for the insurer. Appellants contend that the guaranty deposit of \$29 belonged to the insured and was available under the insurance contract to pay defaulted assessments and keep the policy alive. They further contend that the language of the guaranty note conflicted with the terms of the policy and that the former should control, and further that, where there is an inconsistency in the governing provisions of the contract, they should be liberally interpreted in favor of the insured and as against a forfeiture. The appellee, on the other hand, insists that the provisions of the note, charter, and by-laws, as well as the plan of insurance, all unite in showing that the guaranty deposit cannot be used to pay the individual assessments of defaulting members. The application for insurance recited that it and the certificate of membership, together with the articles of incorporation and by-laws of the association, should form the insurance contract. In the guaranty note executed by the insured when he became a member there was added to the ordinary promise the words: "It is given for insurance, is not negotiable, becomes void in the event of the death of the maker, and all unpaid installments become at once due upon lapse of membership." In the certificate of membership it was recited that: "In the event of death during membership his beneficiary shall receive the sum of two thousand dollars, and the guarantee fund deposited with the association by the said member amounting to twenty-nine dollars." It also contained the provision that: "Upon the failure of the above-named member to make any payment due from him to the association at its maturity in January, April, July or Octo-



ber, of each year, his guaranty deposit and all other payments made shall be forfeited and his membership shall thereupon cease."

The following provisions of the charter and by-laws were presented to the trial court and are deemed to be pertinent to the determination of the question now submitted:

**"Articles of Incorporation.**

"Article 9. Section 2. The business of this association shall be conducted upon the mutual assessment plan, in which the payment of all assessments shall be secured by a guarantee fund, contributed by each member pro rata according to age at entry; this guarantee fund, together with the insurance provided in the certificate of membership and by-laws of the association, to be forfeited upon failure of a member to pay his assessments within the time prescribed by the by-laws of the association: Provided, however, that relief from such forfeiture, and provision for reinstatement of lapsed members may be made by the board of directors.

"Article 10. Section 1. The funds of the association shall be kept separate and distinct upon the books thereof, and shall be designated as follows, to wit: "The guarantee fund, the benefit fund, the reserve fund, and the contingent fund, and such other funds as the board of directors may hereafter establish.

"Sec. 2. The guarantee fund shall consist of the deposits pledged by each member of the association for the payment of assessments, and the said deposit required of each member shall consist of the sum of one dollar for each year of the age of the member at date of application counted at nearest birthday, and may consist of cash, or of note at 4 per cent. interest, payable on such terms as the board of directors may prescribe, and the said board shall have power to declare a certificate of membership void and of no effect upon defalcation of payment of any note executed for said deposit."

"Sec. 4. The reserve fund shall consist of all guarantee deposits forfeited to the association by lapsed members, and the interest accruing from all funds of the association of whatever nature. This reserve fund shall be set apart as an emergency fund, for the purpose of providing for death losses in excess of 1 per cent. per annum of the membership of the association and for the further purpose of advances for the payment of death losses when the benefit fund is exhausted.

"Sec. 5. The contingent fund shall consist of all moneys collected for the purpose of defraying the expenses connected with the transaction of the business of the association.

"Sec. 6. Each fund shall be used expressly for the purpose indicated in the foregoing sections of this article respectively and no appropriation shall be made of one fund for the purpose of paying a claim upon another, except as provided in section 4 of this article.

"Article 11. Section 1. In providing funds, either by established rates or by assessment, for the purpose of promptly meeting payment of all claims against the association, the board of directors may from time to time determine and fix the amount deemed necessary therefor, the place at which, and the time at which or during which it shall become due and payable, and the manner of notifying the members thereof, and may regulate the method of collecting the same; and the board may in like manner also provide funds in advance, for the payment of any claims which may be anticipated during the three months next ensuing, basing estimate therefor on the American Experience Table of Mortality."

**"By-Laws.**

"Article 1. Section 2. Applications for membership shall be accompanied by evidence of the health of the applicant, secured through medical examination, and the approval of an officer of, or employé occupying a position of trust in some banking institution. Each applicant shall deposit in cash or in notes made by him, a sum equal to one dollar for each year of his age for each certificate of \$2,000, for the guarantee fund, and one-half of that amount in cash for the first payment for the contingent fund, and shall pay 10 per cent. annually upon the amount of his guarantee deposit, for expense dues, payable one-half in January and one-half in July of each year.

"Sec. 3. Any number of certificates of membership, not exceeding three, may by provision to be made by the board, be issued to one member, and each certificate shall entitle the heirs, or legal representative, or designated beneficiary of a deceased member, to \$2,000 benefit, to be provided for by assessment on the membership levied pro rata upon the guarantee fund of the association, unless otherwise supplied, and in the event that such assessments are not sufficient to meet all claims promptly, the board of directors may levy and collect by assessment on the members such additional sums as may be necessary."

"Sec. 6. Certificates of membership in this association shall be issued and accepted by the members as quarterly term contracts between the association and the members, and shall take effect upon delivery and shall be renewable at the option of the members by payments in advance before expiration, and shall continue only during the term for which payment has been made."

"Article 3. Section 2. Each assessment shall be levied pro rata on the guarantee deposit of each member, and shall be due and payable either in January, April, July or October, unless otherwise specified in the notice of assessment, and in addition to claims then unprovided for, may provide funds in advance for payment of claims to be antic-



ipated in the ensuing three months, or any fraction thereof.

"Article 4. Section 1. No personal liability, beyond the payment of the amount due on the guarantee notes, is incurred by becoming a member of this association. All other payments are at the option of the member and shall continue only so long as he shall desire to keep his membership in force. In case of its termination by lapse or otherwise he shall be liable for no further payment, provided the notes given for the guarantee deposit shall have been paid.

"Sec. 2. Upon the failure of any member to pay any assessment or note within the time and at the place named therein, his membership shall be thereby forfeited, and his right to any share or interest in the funds or property of the association shall cease absolutely at the expiration of the time stipulated in which such payments are required to be made, and all payments made shall be forfeited to the association."

"Sec. 4. In the event of the forfeiture of the rights and privileges of a member of this association the guarantee deposit pledged by such members shall become forfeited absolutely and become the property of the association.

"Sec. 5. In the event that assessments are not paid promptly the allowance to beneficiary of deceased members shall not thereby be impaired or lessened, but the sum of such arrears shall be taken from the reserve fund, and restored eventually by collection of arrearages or forfeiture of the guarantee deposit as provided in section 2 of this article."

"Article 6. Section 1. Upon the death of any member while in good standing in the association, the guarantee deposit or pledge given by him to the association shall be returned to his beneficiary."

Under this scheme of mutual insurance, can members default in the payment of assessments without forfeiture of their membership rights? If members are unable or unwilling to pay assessments, have they a right to expect and insist that money shall be taken from the guaranty fund to meet their defaults and keep their certificates alive? The unpaid assessment in this instance was only \$3.36, and the court hesitates to enforce a forfeiture of membership if upon any reasonable theory it can be held that the association has other moneys of the insured which could have been applied to pay the assessment. So it has been said that the court, "In construing the conditions of membership when a forfeiture is claimed, will preserve, if possible, the equitable rights of the holder of the certificate of membership." *Modern Woodmen v. Jameson*, 48 Kan. 718, syl. par. 1, 80 Pac. 460. In another case of a similar kind, it was said: "No freedom of interpretation, however, should be indulged to accomplish the forfeiture of property rights." *United Workmen v. Haddock*, 72 Kan. 35, 39, 82 Pac. 583, 584 (1 L. R. A. [N. S.] 1064).

Interpreting the provisions of the certificate, charter, and by-laws as liberally in favor of membership rights as is permissible under any rule, we are unable to sustain the contention of appellants. Apart from the provision in the guaranty note that it was given for insurance, nothing is found which indicates that a member can postpone payment of assessments with the assurance that the guaranty fund will be used to relieve him from the effect of his default. As will be observed from the quoted provisions of the contract, the association has four funds, the guaranty, benefit, contingent, and reserve, and each belongs to the organization and is subject to its control. No member has any separate ownership or control of any part of these funds. The guaranty fund is, in a sense, a trust fund to be devoted to specified uses and cannot be diverted to any other use. It is made up of the sums which each member contributes as a pledge that he will pay his assessments when due, and the alternative provisions are that if he does not pay these the deposit shall be forfeited and become a part of the reserve fund. There is no provision that any part of it can be paid to or used by the member in any event. It is provided that, if a member has paid all his assessments and dies in good standing, the amount of the original deposit shall be paid to his beneficiary. The deposits which are forfeited and pass into the reserve fund are applied to the payment of death losses in excess of 1 per cent. per annum of the membership, and, in case there is not sufficient money in the benefit fund at any time to meet current death losses, resort may be had to the reserve fund containing the forfeited deposits to pay such losses, and the amount so temporarily withdrawn is to be restored to the reserve fund when the benefit fund has been replenished from assessments. On account of this provision, members are assured that losses will be paid even if a part of the members shall delay payment of assessments for a time or should absolutely forfeit their membership. The provision that the guaranty deposit shall go into the reserve fund for the payment of certain losses is wholly inconsistent with the theory that it can be used to pay assessments, and the provision that the amount of the deposit shall be paid to the beneficiary of one who was a member at his death is inconsistent with the theory that they may be devoted to the payment of the assessments of members, and so counsel pertinently ask, How can the guaranty deposit be used to pay the member's assessment when the certificate requires it to be paid in full to the beneficiary in case the member dies in good standing? It is likewise true as to the interest that may have been received on deposit obligations. It, too, goes into the reserve fund which is to be applied to specified uses, and it is clear that if it must be used for the specified purposes it is not available to pay



assessments against members. The express provision that the guaranty deposit shall be forfeited for nonpayment of assessments is irreconcilable with the theory that it can be used to pay assessments. The purposes of the guaranty deposit, including the assurance thereby given to paying members that losses will be paid although some of the members should become delinquent in the payment of assessments, would be frustrated if the guaranty fund should be depleted by paying the assessments of delinquent members. The charter provisions, as well as those in the by-laws, are not open to a construction that would permit this to be done. It is ingeniously argued by counsel for appellants that, as the guaranty note given by the insured designates the deposit as insurance, it necessarily led the insured to believe and warrants the court in holding that the deposit which he contributed was intended to be used for the insurance of himself, and that in case of necessity the money could be applied for his individual protection and to prevent a forfeiture of his certificate. If the theory could be maintained that the deposit belonged to him and was for his individual protection, there would be reason in appellants' contention that there is a conflict between this and the other provisions of the contract, and at the oral argument the writer was inclined to the view that a conflict did exist between the provisions of the note and those in the other provisions of the contract. A closer examination of all the provisions, however, satisfactorily shows that there is no real conflict in them. The deposit given is for insurance, it is true, but it is for the insurance of members in good standing and not of those in default who have forfeited membership in the association. It is association instead of individual insurance and is not subject to individual control or use.

In a case against the appellee involving the identical question presented here, the Supreme Court of Iowa decided that the assessments of members could not be paid from the guaranty fund. After setting out the pertinent provisions of the articles of incorporation and by-laws, it was said that: "Under the provisions quoted, the guaranty deposit can only be used in one of the two ways specified. If the member dies in good standing, it is paid to his beneficiary (the whole of it, not a part thereof); if he fails to pay his assessments, it is forfeited to the reserve or emergency fund. In no case can the member have the guaranty deposit used for the payment of his dues or assessments or have it used in any other way for his benefit." *Hoover v. Bankers' Life Ass'n* (Iowa) 136 N. W. 117.

Another case against appellee arose in Indiana on a like contract and where it was contended that the language in the note as to insurance made the deposit available for the payment of assessments, and the court ruled that the words of the note, taken alone,

might give rise to doubt, but when the plan of the association, as shown by the articles of incorporation and by-laws, was considered, there could be no doubt upon the proposition, and it was remarked that: "If the articles and by-laws should be construed and held to permit the payment of mortuary assessments from the guaranty fund, which is wholly made up of the guaranty deposits of members in good standing, that fund might be exhausted, and, without any provision for the reimbursement of the same by assessments levied against members, there could be no return of the guaranty to beneficiaries. Without the guaranty fund, held as a pledge and as an inducement to members to continue in good standing, and transferred to the reserve fund on forfeiture of membership for nonpayment of assessments, the strength of the association would be speedily dissipated. As we see it, this guaranty fund is the distinguishing feature of appellee association; the feature which gives it permanence and stability." *Stubbs et al. v. Bankers' Life Ass'n* (Ind. App.) 101 N. E. 638.

The same view of appellee's plan of insurance was taken in *McCoy v. Bankers' Life Ass'n*, 134 Mo. App. 35, 114 S. W. 551. The St. Louis Court of Appeals, however, took a different view of appellee's scheme of insurance and the use to which the guaranty fund might be applied. That court held that the application and the certificate constituted the contract and that the by-laws were no part of it. Some attention, however, was given to the articles and the by-laws of the association, and an interpretation contrary to that which we have placed upon them was given. *Purdy v. Bankers' Life Ass'n*, 101 Mo. App. 91, 74 S. W. 486. In a later case the same court had before it the same articles and by-laws and, after examining them, held that a forfeiture had occurred by the nonpayment of assessments and proceeded as if the guaranty fund was not available to meet such assessments. The earlier case was ignored and evidently disapproved. *Smoot v. Bankers' Life Ass'n*, 138 Mo. App. 438, 120 S. W. 719.

In a case from Minnesota, depending on similar facts and wherein a question arose as to the payment of an assessment out of the guaranty deposit, it was said: "The right was given to the association to appropriate the amount deposited in payment of death claims should the member so depositing default as to the assessments, but this provision was for the benefit of the beneficiaries of those who did not default, not for the benefit of the depositing and defaulting member. Such a provision did not operate to keep alive and in force a lapsed certificate or to continue a membership. If it could be given that effect, and it be held that membership continued so long as the amount deposited was not fully exhausted in meeting assessments, a premium would be offered to the members who declined to meet their as-



assessments. The certificates became worthless when the membership ceased, and by the plain provision of the articles the membership ceased when annual dues or a mortuary call became due and were unpaid." *Mee v. Bankers' Life Association*, 69 Minn. 210, 214, 72 N. W. 74, 76.

The judgment of the district court will be affirmed. All the Justices concurring; except PORTER, J., who did not sit.

(90 Kan. 118)

**CITY OF EMPORIA v. EMPORIA TELEPHONE CO.†**

(Supreme Court of Kansas. June 7, 1913.)

(Syllabus by the Court.)

**1. APPEAL AND ERROR (§ 100\*)—APPEALABLE ORDER—"TEMPORARY INJUNCTION."**

The difference between a restraining order and a temporary injunction is mainly in the effect produced. An order which in effect ties the hands of a going concern operating a public utility until final hearing should be deemed a "temporary injunction" from which an appeal will lie.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§. 670-680; Dec. Dig. § 100.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 6901, 6902.]

**2. TELEGRAPHS AND TELEPHONES (§ 26\*)—CONTROL—PUBLIC UTILITIES COMMISSION.**

A telephone company located in a city of the second class, operating exchanges and toll lines in the county and in four adjacent counties and in six other towns using 123 miles of line and 91 miles of toll line, with 2,400 stations in such city and 600 elsewhere, nearly one-fifth in value of its property for taxation being outside of such city, is within the provisions of section 3 of chapter 238 of the Laws of 1911 and subject to the control of the public utilities commission.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 14; Dec. Dig. § 26.\*]

**3. TELEGRAPHS AND TELEPHONES (§ 33\*)—PUBLIC UTILITIES COMMISSION—INCREASE OF RATES—INJUNCTION.**

Pending a continued litigation between such city and telephone company to prevent the latter from increasing its rates under an ordinance passed but not yet in force, application was made to the public utilities commission, and an order was made by that body permitting an increase. The trial judge thereafter temporarily enjoined the company from charging such increased rates. *Held error.*

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 21; Dec. Dig. § 33.\*]

Appeal from District Court, Lyon County.

Action by the City of Emporia against the Emporia Telephone Company. Judgment for plaintiff, and defendant appeals. Reversed.

See, also, 88 Kan. 443, 129 Pac. 187.

Gleed, Hunt, Palmer & Gleed, of Topeka, and Hamer & Ganse, of Emporia, for appellant. Ed. S. Waterbury and W. A. Randolph, both of Emporia, for appellee.

WEST, J. This case comes up on an attempted appeal from an alleged temporary

injunction and on motion to dismiss such appeal. To reach understandingly the present condition of this litigation a brief résumé is necessary. In January, 1911, the city sued the telephone company to enjoin it from putting into effect rates higher than those specified in an ordinance of June 19, 1900. The telephone company pleaded an ordinance of July 19, 1910, permitting higher charges on compliance with certain conditions and alleging such compliance. The city replied denying that the new ordinance had gone into effect even according to its own terms, and alleging noncompliance. A restraining order was granted but afterwards dissolved. June 20, 1911, judgment was given the telephone company on the pleadings; the city appealed, and the judgment was reversed, and upon a rehearing the former opinion was adhered to January 11, 1913. It was held in the original opinion (*City of Emporia v. Telephone Co.*, 87 Kan. 465, 124 Pac. 895) that as the new ordinance contained a provision that it should not take effect until the passage of a resolution declaring that the telephone company had fully and satisfactorily complied with its provisions and such resolution had not been adopted, it could not be determined from the pleadings that the defendant was entitled to judgment. It was ruled that the original ordinance fixing rates under which operations had been carried on for a term of years was by reason of acceptance and long acquiescence binding upon the company and should be upheld as against it until other rates should properly be put into effect. The technical point decided, however, was that, as the pleadings contained a denial that the ordinance was in force, the company was not entitled to a judgment thereon. On the rehearing (88 Kan. 443, 129 Pac. 187) it was said that the city had no authority to contract for rates for a term of years after the state by direct legislation or through a commission or other lawfully delegated authority had acted upon the subject. It was pointed out that chapter 121 of the Laws of 1905 empowered cities of the second class to grant by ordinance the right to enter upon the streets or alleys for the construction of telephones, and the incidental rights of cities enacting such ordinance were touched upon. The decision in *State ex rel. v. Gas Co.*, 88 Kan. 165, 127 Pac. 639, was referred to in discussing the power of cities to fix rates, and it was said: "It is sufficient to say that the rates prescribed in the ordinance should govern until some action is taken by the state or by its authority." The gas company case determined that the public utilities commission had full power under chapter 238 of the Laws of 1911 to control the rates which the gas company should charge Kansas City, but as to Rosedale, a city of the second class, it was held that under chapter 136 of the Laws of 1903 power existed to contract for and fix

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied July 6, 1913.



rates, but that in exercising this power it had contracted that the rates should not exceed those charged in Kansas City, and therefore as a matter of contract Rosedale was bound by the legal charge in the latter city.

It will be observed that the act of 1903 referred to does not include telephone companies, and therefore is applicable only by way of analogy touching municipal power to prescribe rates for a fixed term; the old ordinance having been passed prior to the act of 1903. The effect of the reversal was to remand the cause for trial, so that whatever judgment might be rendered should be upon evidence and not upon the pleadings which presented an issue to be determined. January 15, 1913, the company applied to the public utilities commission for permission to put in force rates according to a schedule filed November 10, 1911, substantially the same as the rates named in the new ordinance, and it was ordered that such rates were proper and should be charged until the further order of the commission authorizing a change. Later in the same day the city served notice that it would apply on the 16th for a restraining order and temporary injunction. A hearing on this application was begun January 16th continued to the 24th, and then to the 29th, when the judge announced that he would grant the order. At this time the company had closed its evidence in chief and the city had put on one witness and rested, reserving its evidence, as counsel states in his brief, for the hearing seven days later. Upon this announcement by the judge the company moved for a stay and that a supersedeas bond be fixed, which motions were refused, and an entry was made upon the journal reciting that it was by the court ordered, adjudged, and decreed that the application be allowed and that the defendant be restrained and enjoined until further order of the court from charging higher rates than those provided by the old ordinance and from refusing service and disconnecting telephones from patrons who refused to pay higher rates, and that the application for temporary injunction be set down for hearing February 7th. Afterwards, without notice to the defendant, another entry was made, reciting that it was ordered by the judge that the defendants be restrained and enjoined until further order and that the application for temporary injunction be set down for hearing February 7th. It appears that on January 15th the company also applied for permission to increase the rates approved on that day by the commission, which application was set for January 18th and is still undisposed of, and that on January 28th the commission issued an order to show cause why the order of January 15th should not be set aside. The judge issued a temporary restraining order to the utilities commission against the enforcement of its order

of January 15th, but this was dismissed. On January 29th the city filed a verified supplemental petition setting up the proceedings before the public utilities commission, alleging that the order was secured by fraud, and that the company was not within the jurisdiction of the commission. An amendment to the answer was filed, also a supplemental answer setting up the order made by the commission.

[1] The first question presented is whether the order actually made below was a temporary injunction or a mere restraining order; an appeal lying from the former and not from the latter. In *State v. Johnston*, 78 Kan. 615, 97 Pac. 790, it was held that a restraining order is effective only until an application for an injunction shall be heard; that a temporary injunction is a restraining order effective until the trial of the action in which it is issued; that the effect and not the name determines the class to which it belongs. In *State v. Werner*, 80 Kan. 222, 225, 101 Pac. 1004, it was said that there is little, if any, difference between the two except as to duration. In the case of *In re Sharp*, 87 Kan. 504, 508, 124 Pac. 532, it was said: "It will be observed that here the order was made by the district judge restraining and enjoining the defendant 'until the final determination of this action,' and we think upon principle as well as upon the authority last cited it should be deemed a temporary injunction rather than a mere restraining order." See, also, Civil Code, §§ 250-253 (Gen. St. 1909, §§ 5844-5847). Without attempting to differentiate to the last degree, it is sufficient to say that as the controversy involved the rates which the telephone company—a going concern—might charge, and as it had put in its evidence and rested, and the city apparently had scarcely begun the introduction of its testimony, considering the announcement by the judge that the application (which was for a temporary injunction) would be granted and that a hearing for a temporary injunction would be set for the 7th of the succeeding month, the effect of the order, in view of the two journal entries, was to tie up the telephone company until the final determination of the case, and therefore was an order from which an appeal may be had.

It is contended that the utilities commission has been clothed with the power to determine the rates which the company may charge and has made such determination. True it is stoutly asserted that the testimony already in shows conclusively that the conditions of the new ordinance have been complied with, and that the city is wrongfully refusing the resolution of acceptance, and therefore coming into a court of equity with unclean hands, and should be denied equitable relief for that reason. On the other hand, the city complains bitterly that the company is charging the rates prescribed by



the new ordinance without paying the required per cent. of its gross receipts, having been in default for over two years. It is argued that the public utilities act is merely cumulative and does not disturb the pre-existing power of cities to contract for rates, and that the validity of the rates fixed and contracted for by the ordinance of 1900 and its acceptance remains the law of the case.

If the rates ordered by the commission are to be upheld, the new ordinance is out of the case so far as the charges for service are concerned, and, as already twice decided, the old ordinance was binding on the company until in some proper way superseded; hence it is vital to ascertain the effect of the order made by the utilities commission. While it was alleged in the supplemental petition that the defendant's telephone utility is situated and operated principally and wholly for the city of Emporia and its people, and is under the exclusive authority of its own commission to control and regulate, the evidence on the hearing was to the effect that on January 1, 1911, the company was operating exchanges and toll lines in Lyon and four adjacent counties including exchanges in the towns of Emporia, Reading, Neosho Rapids, and Plymouth, and that on and since that time it operated a small exchange at Miller and at Roseau; that on and since January, 1911, it has operated 91 miles of toll line and is now operating 123 miles covering Lyon and extending into four adjacent counties; that it has 2,400 stations in Emporia and 600 outside of the city. The report to the tax commission offered in evidence on cross-examination showed a total valuation of \$194,424, \$155,049 of which is in Emporia. We think this testimony sufficient to overcome the effect of the verification of the supplemental petition and to show that the company, according to the provisions of section 3 of the utilities act (chapter 238, Laws of 1911), is subject to the jurisdiction of the public utilities commission. *State ex rel. v. Gas Co.*, 88 Kan. 165, 127 Pac. 639.

It not only appears by the pleadings that the city was at the beginning of this suit under the commission form of government pursuant to chapter 82 of Laws of 1909, but it was pleaded in the supplemental petition that the utility is under the exclusive power of the city commission, although strangely enough no mention in the briefs is made concerning the right of this body to act under the statute referred to. It is necessary, however, to examine some of the provisions of this statute. Section 30 authorizes the commissioners to permit the construction and operation of telephone lines, all contracts granting such original franchise to be by ordinance and not otherwise, no contract or privilege "now existing or which may hereafter be granted" to extend longer than 20 years from the date of such grant or extension. The fifth subdivision expressly em-

powers the commissioners "at all times during the existence of such contract, grant, privilege or franchise \* \* \* by ordinance to fix a reasonable schedule of maximum rates, and to make reasonable changes therein from time to time, to be charged such city and the inhabitants thereof for gas, light and heat, electric light, power or heat, or steam heat, and the rates of fare on any street railway, and the rates of any telephone company, or the rates charged any such city or the inhabitants thereof by any person, firm or corporation operating under any other franchise under this act; and the board of commissioners, under the provisions of this act, shall have the right to change or modify any such schedule of rates, after giving due notice and granting a hearing to the interested parties of their intention so to do." The section further provides that no rates shall at any time be fixed which shall prohibit earning at least 8 per cent. of the actual cash investment above reasonable operating expenses, maintenance, and taxes. Further, that no such franchise shall be granted until approved by a majority of electors of the city. The eighth subdivision provides that "all contracts, grants, rights, privileges or franchises for the use of the streets and alleys of such city not herein mentioned, shall be governed by all the provisions of this act, and all amendments, extensions and enlargements of any contract, right, privilege or franchise previously granted to any person, firm or corporation for the use of the streets and alleys of such city shall be subject to all the conditions herein provided for in this act for the making of original grants and franchises."

[2] Were it to be held, therefore, that the state could act through the city commission in changing the rates fixed by the old ordinance, it is plain that many restrictions would attach to such action. But, as already indicated, it is manifest that the telephone company is clearly within the provision of the public utilities commission act (chapter 238 of Laws of 1911), so that the power to fix rates rests with that commission rather than with the city commissioners. Section 10 of this act requires each public utility governed thereby to establish just and reasonable rates; section 11 requires schedules to be filed with the commission; section 12 prohibits charging rates higher than those shown by such schedules; and section 13 empowers the commission either upon complaint or upon its own initiative to investigate and after full hearing to fix and order just and reasonable rates. Other sections provide for hearing the complainant or complainants in any case and for the enforced attendance of witnesses and production of evidence on their behalf. Sections 16 and 18 provide that any order or decision made by the commission may be reviewed and corrected by a proceeding in court, and section 21, that such proceeding may be begun by



any party in interest, and that appeals from any decision of the district court may be taken to this court, and that during the pendency of such proceeding the orders of the commission prescribing rates shall remain in force unless temporarily stayed or enjoined. Section 30 provides that, unless the commission shall otherwise order, it shall be unlawful to charge higher rates than those fixed on the lowest schedule of rates for the same service on January 1, 1911. Section 33 authorizes the municipal commission to contract with any public utility situated and operated wholly or principally within the city subject to any law in force at the time as to the quality of service and the maximum rates and charges thereafter, and as to the making of extensions and additions to its plant, and provides that upon complaint by ten or more taxpayers to the public utilities commission on giving bond to pay the costs, the reasonableness of any right, privilege, or franchise granted or any order or resolution or part thereof adopted by the municipal commission may be inquired into, and if the public utilities commission after full hearing should recommend changes, and the municipal commission does not within 20 days thereafter conform to such recommendations, the public utilities commission may proceed against it in any court of competent jurisdiction to set aside any ordinance or resolution or part thereof, because of its unreasonableness or illegality or because the same is not for the best interests of the municipality. Section 39 empowers the utilities commission to compel compliance with its orders by proceedings in mandamus, injunction, or other appropriate civil or criminal remedies. Section 40 provides that the rights and remedies given by the act shall be construed as cumulative of all other remedies in force relating to common carriers and public utilities and shall not repeal any other remedies or rights now existing for the enforcement of their duties and obligations, and section 41 that all grants of power, authority, and jurisdiction contained in the act shall be liberally construed.

[3] The fixing of rates is always a legislative and never a judicial question. Reasonableness of rates is a judicial question. This case has never involved the power, nor has either of the parties sought the assistance, of the court to fix rates. The Legislature has in the way indicated delegated to the public utilities commission the power to prescribe the rates which the defendant may charge. Application having been made to this body regular in form and an order regularly made thereon, it cannot be said that this has the effect of ousting the court of jurisdiction, because jurisdiction for this purpose the court did not have.

It cannot be successfully maintained that the rates prescribed by the old ordinance be-

came, by force of acceptance and acquiescence and by virtue of the decisions already made in this case, rates determined upon by action taken by the state or by its authority; but, on the contrary, they became, as already decided, binding upon the company until such action should be taken. It is needless to consider whether the rates prescribed by the new ordinance could be deemed rates determined upon by action of the state or its lawfully constituted authority for the all-sufficient reason that, as already twice decided, such ordinance has never gone into effect. Never having become a municipal regulation, it could not by any possibility preclude the public utilities commission from exercising the authority expressly conferred upon it by the Legislature.

The company complains that the city has not passed the resolution of acceptance and put the ordinance in force, but having by order of the public utilities commission been authorized to charge, as counsel for the city says in his brief, the same rates prescribed by the new ordinance, it is difficult to see how the company could be benefited by putting it into effect.

The city complains that the rates prescribed by the old ordinance should still be deemed binding upon the company for the reason that the public utilities commission was without jurisdiction, and for the further reason that the order was obtained by fraud. The first of these reasons is already disposed of, and the second cannot be determined in this collateral manner. It is presumed that the commission when acting upon its rule to show cause and upon the application for further increase of rates will put itself in possession of all the facts and decide the matter in accordance with the essential rights of all parties concerned.

In view of the foregoing considerations, and for the reasons indicated, we hold that the trial judge erred in making the order complained of, and such ruling is reversed, and the cause remanded for further proceedings in accordance herewith. All the Justices concurring.

(90 Kan. 438)

STATE v. TAYLOR et al.

(Supreme Court of Kansas. July 5, 1913.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 125\*)—  
DUPLICITY—"LARCENY."

Under the statute making it larceny fraudulently to conceal or to sell or dispose of mortgaged property, an information charging the defendant in a single count with concealing, selling, and disposing of such property is not subject to a motion to quash because of duplicity.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.\*

For other definitions, see Words and Phrases, vol. 5, pp. 3991-4003.]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**2. CHATTEL MORTGAGES (§ 232\*)—CONCEALING MORTGAGED CHATTELS—INFORMATION—SUFFICIENCY.**

Such an information, so far as it charges a concealment of the property, is not subject to a motion to quash on the ground that the specific means employed to that end are not stated.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 484-487; Dec. Dig. § 232.\*]

**3. STATUTES (§ 203\*)—CONSTRUCTION.**

Where in a compilation of the general statutes a word which was correctly included in the official publication is inadvertently omitted, and the Legislature, for the purpose of effecting a change in the language of another part of the section, re-enacts it as it appears in the compilation, without inserting the omitted word, such word may be supplied by construction, especially where this is necessary to give effect to the manifest purpose of the statute.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 281; Dec. Dig. § 203.\*]

**4. STATUTES (§ 203\*)—CONSTRUCTION—WORDS OMITTED.**

In the phrase "the amount of twenty dollars," occurring in the present statute with regard to the fraudulent disposal of mortgaged property (*Laws 1911, ch. 226, § 1*), the word "over" should be supplied between "the amount of" and "twenty dollars"; its omission having been occasioned in the manner indicated.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 281; Dec. Dig. § 203.\*]

**5. CRIMINAL LAW (§ 1168\*)—CONCEALING MORTGAGED CHATTELS—INSTRUCTIONS—CURE OF ERROR.**

In a prosecution under the statute referred to, any error in overruling a motion to require the state to elect whether it will rely for conviction upon a concealment or a sale of mortgaged property is cured by an instruction that a conviction can only be had upon the charge of concealment.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3124, 3125, 3129-3136, 3144; Dec. Dig. § 1168.\*]

**6. CHATTEL MORTGAGES (§ 230\*)—CONCEALING MORTGAGED CHATTELS—"CONCEAL."**

The word "conceal" as used in that statute includes an intentional handling and shifting of the property in such a manner as to mislead or confuse the mortgagee in his efforts to find it.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 489-493; Dec. Dig. § 230.\*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1377-1384.]

**7. CHATTEL MORTGAGES (§ 233\*)—CONCEALING MORTGAGED CHATTELS—SUFFICIENCY OF EVIDENCE.**

The evidence held to be sufficient to sustain the conviction.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 494; Dec. Dig. § 233.\*]

*(Additional Syllabus by Editorial Staff.)*

**8. CRIMINAL LAW (§ 957\*)—NEW TRIAL—IMPEACHMENT OF VERDICT.**

On motion for new trial, testimony of jurors as to the considerations which influenced them in arriving at a verdict of guilty was properly excluded.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2392-2395; Dec. Dig. § 957.\*]

Appeal from District Court, Saline County.  
Harry J. Taylor and William F. Richards were convicted of concealing mortgaged property, and appeal. Affirmed.

R. A. Lovitt and H. C. Tobey, both of Salina, for appellants. Jno. S. Dawson, Atty. Gen., Frank T. Kuttile, of Salina, and L. W. Hammer, for the State.

MASON, J. Harry J. Taylor and William F. Richards were convicted upon a charge of concealing mortgaged personal property, and appeal.

The statute under which the defendants were prosecuted reads: "Any mortgagor of personal property or any other person who shall injure, destroy or conceal any mortgaged property, or any part thereof, with intent to defraud the mortgagee, his executors, administrators, personal representatives, or assigns, or shall sell or dispose of the same without the written consent of the mortgagee or his executors, administrators, personal representatives or assigns, shall be deemed guilty of larceny." *Laws 1911, c. 226.*

[1] The information contained but one count. It charged that the defendants did "unlawfully, feloniously and willfully, and with intent to cheat and defraud the Bank of Tescott, the mortgagee, conceal, sell, and dispose of without the written consent of said mortgagee, its representatives and assigns, the following personal property"—describing certain cattle.

The defendants urge that a motion to quash should have been sustained on the ground of duplicity, because the information charged two distinct offenses: (1) Concealing the cattle with the intent to defraud the mortgagee, and (2) selling and disposing of the cattle without the written consent of the mortgagee. It has been held that the sale of mortgaged chattels without written consent is not a violation of the statute unless fraud is intended. *State v. Miller*, 74 Kan. 667, 87 Pac. 723. A sufficient answer to this objection is found in the rule which has been thus stated: "It is a well-settled rule of criminal pleading that, when an offense against a criminal statute may be committed in one or more of several ways, the indictment may, in a single count, charge its commission in any or all of the ways specified in the statute. So where a penal statute mentions several acts disjunctively and prescribes that each shall constitute the same offense and be subject to the same punishment, an indictment may charge any or all of such acts conjunctively as constituting a single offense. Or as the same rule is frequently stated, where a statute makes either of two or more distinct acts connected with the same general offense and subject to the same measure and kind of punishment indictable separately and as distinct crimes when each shall have been committed by different persons and at different times, they may, when committed by the same person and at the same time, be coupled in one count as together constituting but one offense." 22 Cyc. 380, 381.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



In the latter form the rule has been frequently announced by this court; the cases being cited in a note to the text quoted. The rule was applied in a case arising under a statute similar to that here involved, in *People v. Wolfrom*, 15 Cal. App. 732, 115 Pac. 1088. The allegations that the cattle were concealed and were sold are not repugnant.

[2] The information is also objected to as not being sufficiently definite. It is urged that it should have alleged to whom the cattle were sold or disposed of, and how they were concealed. The defendants were convicted only of concealing the cattle, and any defects in charging the sale and other disposition are unimportant. The language of the statute was substantially followed, and we think no prejudice resulted from the want of a more detailed statement with regard to the concealment.

[3, 4] The defendants maintain also that the information should have been quashed on the ground that the statute is void because unintelligible. The penalty is thus defined, the phrase giving rise to the objection being italicized: "For selling, injuring, destroying, concealing or disposing of such property of the value of twenty dollars and under, on which the mortgagee has a lien, or of the value of over twenty dollars, on which the mortgagee has a lien of not more than twenty dollars, such person shall be deemed guilty of petty larceny, and on conviction shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding one hundred dollars, or by both such fine and imprisonment; for selling, injuring, destroying, concealing or disposing of such property of the value of twenty dollars and over, on which the mortgagee has a lien to the amount of twenty dollars, such person shall be deemed guilty of grand larceny, and on conviction, shall be punished by confinement and hard labor not exceeding five years." Laws 1911, c. 226.

The statute, after declaring it to be petit larceny fraudulently to dispose of mortgaged property which is worth \$20 or less, or on which the lien amounts to \$20 or less, declares it to be grand larceny so to dispose of mortgaged property worth \$20 and over, "on which the mortgagee has a lien to the amount of twenty dollars." On its face the statute thus purports to make the same act both a felony and a misdemeanor, and makes no specific provision for the situation where the property fraudulently concealed or disposed of is worth over \$20 and is subject to a lien of more than that amount. The explanation, however, is very simple. The basis of the statute quoted is section 1 of chapter 105 of the Laws of 1901. In that act as passed and officially published there appeared in lieu of the italicized phrase the words "the amount of over twenty dollars." In republishing the act in the General Statutes of 1901 the word "over" was by a typographical error omitted. Gen. Stat. 1901, § 4259. The

General Statutes of 1909 followed the General Statutes of 1901, and perpetuated the mistake by leaving out the word "over." In 1911 the Legislature, in seeking to amend the statute in a wholly different matter, used the compilation of 1909 as the basis. The section as there printed was re-enacted with the desired change, but, because the new act was drafted from the reprint instead of from the official publication, the word "over" was omitted from it. Under these circumstances, there is no difficulty whatever in construing the statute as though it contained the missing word. Its obvious purpose is to make the offense defined either grand or petit larceny, according to whether or not the mortgagee is subjected to a possible loss of over \$20, which could occur only when the property fraudulently concealed or disposed of was worth over \$20 and was subject to a lien of more than that amount. The inadvertent omission could have been easily supplied even if it had occurred in the original statute. 36 Cyc. 1113; *Cole v. Dorr*, 80 Kan. 251, 101 Pac. 1016, 22 L. R. A. (N. S.) 534; *State v. Radford*, 82 Kan. 853, 109 Pac. 284.

[5] At the conclusion of the state's evidence the defendants moved that the plaintiff be required to elect as to which offense it would rely upon—that of concealing mortgaged property, or that of selling and disposing of mortgaged property without the written consent of the owner. The motion was overruled. If there was any error in this, it was cured by the instruction to the effect that a conviction could only be had upon the charge of concealment, and by the fact that the defendants were convicted only on that charge. *State v. Bussey*, 58 Kan. 679, 50 Pac. 891; *State v. Schaben*, 69 Kan. 421, 76 Pac. 823.

The refusal of the court to give several instructions requested is complained of. We think the general charge sufficiently covered the matters to which they referred.

[6] It is vigorously urged that the conviction was not warranted by the evidence. The court instructed the jury in substance that the word "conceal" as used in the information included the intentional handling or shifting of the property in such a manner as to mislead or confuse the mortgagee in its efforts to find it. This instruction is not specifically attacked and is sustained by the authorities. *Clement v. Dudley*, 42 N. H. 367; *State v. Julien*, 48 Iowa, 445; *State v. Ward*, 49 Conn. 429; *Polk v. State*, 60 Tex. Cr. R. 150, 131 S. W. 580.

[7] The facts as to which there is no substantial dispute include the following: Taylor owned about 25 head of cattle which were mortgaged to the Bank of Tescott for \$1,000. With the consent of the bank Taylor on October 8, 1911, removed them from the place where they had been kept, in Ottawa county, to a pasture in Saline county which was controlled by Richards. The next day



they were taken by Richards to a pasture of his own. Taylor then obtained permission from W. F. O'Brien to place them in a pasture belonging to him. He reported to O'Brien at noon on the 10th that he had done so. About two weeks later O'Brien told Taylor he had heard the cattle were not in the pasture. Taylor asked O'Brien to look for the cattle. He did so, making an extensive search, but found no trace of them. All other efforts to find them were unsuccessful. On October 11th Richards drove about 35 head of cattle, some of which were of the same general character as some of those Taylor had mortgaged to the bank, to Beverly, and shipped them to Kansas City, where they were sold the next day. Richards accompanied the shipment, and Taylor joined him at Culver, some 12 miles on the road.

The contention of the state is that at least a part of the mortgaged cattle were included in the bunch shipped by Richards. The defendants maintain that there is no evidence whatever to this effect. No particular animals covered by the mortgage were so described as to be thereby identified with any of those shipped by Richards. The case of the prosecution depends upon circumstantial evidence justifying the inference that the mortgaged cattle or a part of them, instead of having been turned into the O'Brien pasture, were driven to the railroad by Richards. As supporting this theory the state relies upon evidence tending to show these facts: Shortly before the cattle were removed from Ottawa county Richards told F. M. Weed that he was going to drive off Taylor's cattle and ship them, and that he would get a good slice of money for doing the job. Weed told this to Samuel Christian, who helped Richards drive to the railroad the cattle that he shipped. Christian told Richards what Weed had said, and Richards responded by saying there was no danger of Christian getting into any trouble; that Taylor had everything fixed up so there would be no danger of any one getting into trouble. On the road they passed the house of a neighbor, who came out and spoke with them. Richards afterward told Christian that he would rather have kept from going past there, as this neighbor was always nosing into other people's business; that he would rather have kept off the public highway. At the station Richards gave as a reason for loading the cattle at once that no one would be so apt to notice them. A little less than a month later Richards told Christian that he intended giving him \$12.50, and Taylor intended giving him a like amount, and that would be \$25, for keeping still; that he (Richards) had \$150 of the money, and Taylor had the rest. When Taylor left the place where he was working, on the trip during which he met Richards at Culver and accompanied him to Kansas City, he stated that he was going to Abilene. He

testified that such was actually his intention at the time; that he had not then thought of going to Kansas City; that he had concluded he would drive to Culver, because he had some business there, but he could not remember what it was; that he had not thought anything about Richards before reaching Culver, although he had an idea he would be on the train; that he made up his mind to go to Kansas City after reaching Culver. Taylor met several acquaintances in Kansas City, whom he told he was there to see about a hay baler. After his return he asked one of them not to tell any one at Culver or Tescott that he had been to Kansas City, because he did not want his wife to know where he had been.

We think this evidence was sufficient to take the case to the jury and to sustain the conviction.

The jury found Taylor guilty of concealing mortgaged property worth \$500, and Richards guilty of concealing property worth \$250. The contention is made that the verdicts are inconsistent. But, as suggested in the plaintiff's brief, the jury may have been convinced that Taylor concealed the entire herd of cattle, while entertaining some doubt whether more than half of them were included in the Richards shipment.

[8] Upon a motion for a new trial, an effort was made in behalf of the defendants to require the jurors to testify as to the considerations by which the jury were influenced in arriving at their verdict. Objections to the questions were rightly sustained on the ground that they related to matters essentially inhering in the verdict itself. *L. & W. Ry. Co. v. Anderson*, 41 Kan. 523, 21 Pac. 588; *State v. Keehn*, 85 Kan. 765, 779, 118 Pac. 851.

The judgment is affirmed. All the Justices concurring.

(90 Kan. 449)

STATE ex rel. DAWSON, Atty. Gen., v.  
AMERICAN SUGAR MFG. &  
REFINING CO. et al.

(Supreme Court of Kansas. Aug. 2, 1913.)

1. CORPORATIONS (§ 668\*)—FOREIGN CORPORATIONS—REGULATION—JURISDICTION.

Where individual defendants concededly did business within the state in the name of certain foreign corporations, the court could acquire jurisdiction of the corporations by service on the general manager of each within the state and on the individual defendants for the purpose of ousting them from the right further to transact such business, though the individual defendants claimed that their acts were without authority of the corporations.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603-2627; Dec. Dig. § 668.\*]

2. QUO WARRANTO (§ 60\*)—FOREIGN CORPORATIONS—QUO WARRANTO PROCEEDING—RECEIVERSHIP.

Where it was claimed that certain individual defendants had been operating in the state in the name of certain defendant foreign cor-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



porations, and as such had obtained money by fraud and misrepresentation and without any substantial equivalent being returned, and a quo warranto proceeding was instituted by the state to oust the defendants from the exercise of corporate privileges within the state, relator was not entitled to the appointment of a receiver in that proceeding.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 71; Dec. Dig. § 60.\*]

Quo warranto by the State, on relation of John S. Dawson, Attorney General, against the American Sugar Manufacturing & Refining Company, an Oklahoma corporation, the American Sugar Manufacturing & Refining Company, a New Mexico corporation, the Consolidated Sugar Company, a New Mexico corporation, Don A. Moun Day, and others to oust defendants from the exercise of corporate functions within the state. On motions to dismiss and for a receiver. Both motions denied.

John S. Dawson, Frank Doster, and A. M. Harvey, all of Topeka, for plaintiff. D. R. Hite and H. J. Bone, both of Topeka, for defendants.

**PER CURIAM.** The state brings an action against Don A. Moun Day and L. D. W. Moun Day and two corporations, one organized under the laws of Oklahoma, the other under the laws of New Mexico. The corporate names were originally the same—the American Sugar Manufacturing & Refining Company. The name of the New Mexico corporation has been changed to the Consolidated Sugar Company. The plaintiff alleges, in substance, that neither corporation has authority to do business in Kansas, but that through the Moun Days each has operated here, receiving payment from a large number of persons on purported sales of real estate and rights connected therewith, for which no substantial equivalent was returned. It asks that the defendants be ousted from the exercise of corporate functions, and that a receiver be appointed to take charge of the business and its proceeds. Upon the hearing of the application for the appointment of a receiver, no appearance was made for either of the corporations. The Moun Days appeared specially and moved to dismiss the action upon the ground that, without service upon the corporations or upon one of them, the court can acquire no jurisdiction in this proceeding over the individual defendants; and that no valid service has been made upon either corporation because, although summons has been served upon the general manager of each, such service is void for the reason that neither corporation has ever engaged in business in this state. The motion to dismiss is overruled.

[1] The court admittedly has acquired jurisdiction of the corporations if they have been engaged in business in this state. Whether this is the case is a question of fact to which the evidence now before the

court warrants an affirmative answer. The Moun Days have been acting professedly for the corporations, doing business in their name. They assert now that they had no authority to do so. In that case they have wrongfully assumed to exercise corporate functions, and this court has jurisdiction over them in this action to oust them therefrom.

[2] We are asked through a receivership to take control of the proceeds of the business in order that those who have been imposed upon by the defendants may, so far as practicable, have restored to them the money they have paid in the belief that they were dealing with a corporation legally engaged in business here. The money in the hands of the defendants would not be forfeited merely because it was obtained by the exercise of corporate functions without authority, if their conduct had otherwise been unobjectionable. The plaintiff alleges that, apart from the question of corporate capacity, the money was obtained by fraud and misrepresentation, and without any substantial equivalent being returned. A proceeding in quo warranto is not well adapted to the investigation of a question of fraud of this character, or to the adjustment of the rights of the contributors to the fund as against the defendants or as between themselves.

A receiver will not be appointed by this court, but the pendency of this proceeding will not prevent an application for such appointment by a court of general jurisdiction. The restraining order against the transfer of any property or funds which are the proceeds of transactions purporting in any way to be those of either of the said corporations, or used in connection therewith, is continued in force for ten days from this date. Pending the final decision of the case the defendants are restrained from engaging in any business in the guise of that of a corporation.

(90 Kan. 308)

BROWN v. CRUCE et al.

(Supreme Court of Kansas. July 5, 1913.)

(Syllabus by the Court.)

1. **BILLS AND NOTES (§ 129\*)—CONSTRUCTION—LIABILITY OF MAKER—PATENTS.**

A model maker and mechanical draftsman made a model for two inventors and it was then agreed that they should pay him two-thirds the value of his work; the three to share jointly in the patent to be procured. Thereupon they executed to him a note which recited that it was for work done; "said amount due when said amount is made out of said patent or the manufacture and sale of said machine under said patent." *Held*, that the makers were obligated to put forth, together with the plaintiff, reasonable efforts thus to make the amount, and their failure or refusal so to do within a reasonable time would leave them liable for its payment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 283-292; Dec. Dig. § 129.\*]



## 2. TRIAL (§ 150\*) — DEMURRER TO THE EVIDENCE.

The rule that a demurrer to the plaintiff's evidence should not be sustained, unless there is an entire absence of proof tending to show a right to recover, followed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 346-348; Dec. Dig. § 150.\*]

Appeal from District Court, Sedgwick County.

Action by W. Stewart Brown against F. M. Cruce and another. From judgment for defendants, plaintiff appeals. Reversed and remanded.

R. C. Foulston and Frank Nighswonger, both of Wichita, for appellant. Stanley & Stanley and W. F. Lilleston, all of Wichita, for appellees.

WEST, J. The plaintiff, a patent attorney and mechanical draftsman and model maker, constructed a model for the defendants, who were attempting to procure a patent on a certain machine. After having worked some time, it was agreed that the three should share jointly in the patent, and that the two defendants should pay the plaintiff two-thirds the value of his work, and the note sued on was given, which reads: "For labor we or either of us agree to pay W. S. Brown or order one hundred and thirty-two dollars (\$132.00), said amount being for work done or recorded for which United States Letters Patent was applied for Aug. 17th, 1909, Serial No. 513,367. Said amount due when said amount is made out of said patent or the manufacture and sale of said machine under said patent." The action was brought in the city court, and it was alleged that a reasonable time had elapsed for the payment of the note and that the defendants had failed, neglected, and refused to pay the sum, although often requested so to do. A demurrer to the plaintiff's evidence was sustained after the case reached the district court.

[1] The plaintiff's theory is that, as he had performed the work for which the defendants owed him, the provision of the note that the amount was to be due when made out of the patent or the manufacture and sale of the machine carried the implication that the makers were to use reasonable efforts thus to make the amount and in default thereof to pay within a reasonable time. The defense treats the provision as a condition precedent and asserts that the case turns upon the question whether the condition had been fulfilled or whether the defendants by their negligent acts had waived it. We think both parties are substantially correct and that the case falls within the principle of Dill v. Pope, 29 Kan. 289, wherein it was held that a party purchasing property and agreeing to pay a stipulated price upon a certain condition and thereafter voluntarily disabling himself from complying with the condition

became at once liable. It appears that the patent was issued in August, 1910, and there was evidence to the effect that one offer of \$200 had been refused by the defendants and another offer of \$100 for a sixteenth interest; that the plaintiff sent men with an order for the machine that it might be exhibited, and the defendants refused to let the machine go out of their hands; and that one of the defendants stated about July, 1911, that he had been offered \$1,000. It appears that plaintiff's demand for his money was given no heed by the defendants; and, while there was testimony indicating that they had attempted to sell for \$600 or \$800, and also to the effect that the plaintiff had later on become interested in another invention which might supersede the one in question, there was some testimony tending to show lack of reasonable efforts on the part of the defendants to make the amount of the note out of the invention.

"Where a party to a contract undertakes to do some particular act, the performance of which depends entirely upon himself, and the contract is silent as to the time of performance, the law implies an engagement that it shall be executed within a reasonable time, without reference to extraordinary circumstances." 9 Cyc. 613.

"Where a debt is in fact due, and it is agreed that it shall be paid upon the happening of a future event, and the event does not happen, it is held that the law implies a promise to pay within a reasonable time." 9 Cyc. 615. See Page on Contracts, § 1156, and cases cited.

The note was given for labor, and it could not reasonably have been the intention of the parties that the makers were to pay or not as they should choose. It is more in accord with justice and fair dealing to assume that they, with the plaintiff, were to make fair endeavor to derive the amount from the patent or the sale of machines, and that their failure or refusal so to do within a reasonable time should not wipe out the debt but leave them liable for its payment.

[2] Giving the evidence the consideration required by the familiar rule applicable when a demurrer is interposed, it cannot be correctly said, as a matter of law, that it entirely failed to support the plaintiff's contention.

The judgment is therefore reversed, and the cause remanded for further proceedings.

(89 Kan. 768)

UNDERWOOD v. FOSHA et al.†

(Supreme Court of Kansas. June 7, 1913.)

(Syllabus by the Court.)

## 1. NEW TRIAL (§ 60\*)—GROUNDS—FINDINGS—INCONSISTENCY.

In an action upon two promissory notes having the same parties and the same history, judgment was rendered for the plaintiff upon

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied July 5, 1913.



one and denied on the other, apparently upon the ground that one was due and one not due when transferred to him. But the plaintiff relied upon the title of his assignor who received both notes before due, therefore the question whether the assignor was an innocent holder for value in due course was a material matter. Upon this question the findings are inconsistent. On a review of the evidence and findings, it is held that the verdict should be set aside and a new trial granted upon both notes.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 126; Dec. Dig. § 60.\*]

*(Additional Syllabus by Editorial Staff.)*

2. NEW TRIAL (§ 60\*)—GROUNDS—INCONSISTENT FINDINGS.

Where from inconsistencies in the findings on a material matter a sound basis for a judgment does not exist, a new trial should be allowed.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 126; Dec. Dig. § 60.\*]

3. PLEADING (§ 236\*)—AMENDMENT—DISCRETION.

Whether the trial court should grant an application for an amendment of defendant's answer in order to plead former adjudication is a matter of discretion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. § 236.\*]

Appeal from District Court, Riley County.

Actions by A. F. Underwood against Henry F. Fosha and another. From a judgment for plaintiff on one of the notes sued on, and for defendants on the other note, both parties appeal. Reversed and remanded, with directions.

Geo. E. Stoker, of San Francisco, Cal., and John W. Newell, of Topeka, for plaintiff. Robt. J. Brock, of Portland, Or., and Ira C. Snyder and Harold E. Harlan, both of Manhattan, for defendants.

**BENSON, J.** These appeals are from a judgment in which the plaintiff recovered upon one of two promissory notes, and was denied a recovery upon the other. The notes are for \$1,333.33 each, dated April 23, 1903, made by Fosha and indorsed by Quantic. They were made payable in 9 and 12 months from date, respectively. The recovery was upon the 12 months' note. Special findings were made, and a general verdict rendered. The plaintiff moved for judgment on the 9 months' note notwithstanding the verdict. The defendants moved to set aside certain findings and for a new trial. In origin, transfer, and history the notes are identical. The appeals are necessarily considered together.

[1] The Ashurst Land, Oil & Development Company is a California corporation, and will be referred to as the "company." At the dates involved in the history of these notes its officers were Jacob Simon, president, L. J. Abrams, vice president and general manager, and O. B. Parkinson, secretary. The plaintiff, A. F. Underwood, was a stockholder in the oil company. He was also in control and management of a general store at Tres

Pinos in that state owned by another corporation. Parkinson, the secretary of the company, was a director in the corporation owning the store. Among other duties Abrams was engaged in selling stock of the company upon a commission of 40 per cent. On April 22, 1902, he sold the defendant Fosha at his home in Riley county a block of this stock in consideration of the two notes in suit. To induce Fosha to purchase the stock and give his notes, Abrams stated that the company had 2,776 acres of land for which it had a deed, three oil wells, two of them having oil in them, but they must be drilled deeper for paying quantities, and that it had already expended \$45,000. It was proposed and agreed to that the notes should be made payable to the order of Quantic, who is a neighbor of Fosha, who should hold them until Fosha should be satisfied that the property was all right, and if not satisfied on investigation the notes should be returned. Relying upon these representations and this agreement, Fosha signed the notes, and handed them to Abrams, who promised to deliver them to Quantic. Abrams took them to Quantic, and told him that they were made to him to be held until he, Quantic, or Fosha, should make an investigation, and if not satisfied with the investigation Fosha was to have his notes back. Quantic said he had no safe place to keep them, whereupon Abrams proposed: "If you will sign them over to the company, I will take them out to Stockton and put them in the safe for safe-keeping." Thereupon Quantic indorsed the notes in blank and gave them to Abrams in reliance upon that promise.

In August, 1903, at the request of Fosha, Quantic went to California and investigated the company and its property. He found one hole, so called, where drilling was going on and that the company had a lease of two other wells a mile and a half away, upon which they had not paid anything, out of which they were to have 60 per cent. of the oil, if oil should be struck. An expenditure of \$45,000 had not been made, but when stock was sold the proceeds were put into the unfinished well. He found that the company had no deeded lands. Quantic reported his examination and its result to Fosha, and told him that it was a fraud from beginning to end, and advised him not to pay the notes. Afterwards Quantic attended a meeting of the directors of the company and inquired for these notes so held for safe-keeping. The secretary answered: "They are here, Mr. Quantic." Whereupon Quantic demanded the notes, and said: "I have investigated this property, and found it a fraud from beginning to end." Thereupon the president dismissed the meeting. Quantic then asked for some action and the return of the notes, but the directors at once left. This occurred about October 1, 1903. At this time also the secretary read to the board a letter from

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Fosha demanding the return of his notes. Afterwards at Fosha's instance Quantic wrote several letters to the secretary and to Abrams requesting the return of the notes.

On the 11th day of January, 1904, the directors of the company entered into a written contract with W. E. Youle in San Francisco. The officers of the company were present, and the contract was signed by the president and secretary. Abrams took an active part in making the contract. It provided that Youle should drill two wells to a depth of 1,500 feet (their depth then being over 600 feet) for a consideration of \$9,000, to be paid by the delivery of the two notes in suit here, a \$4,000 note made by Quantic, a note of another maker for \$1,242, shares of the company's stock of the par value of \$1,000, and the balance in cash. The notes were forthwith delivered without indorsement. At the same place and on the same date Abrams and Youle entered into what Youle calls a side contract, also in writing, whereby Youle and Abrams became partners in the drilling operations to carry out the main contract, and agreed that the net profits should be divided equally between them, Abrams to advance monthly one-half the necessary expenditure to carry it out, not exceeding \$350 per month. At this time neither Youle nor Abrams had done anything upon the contract for drilling, and all the notes were delivered as an advance payment. Youle was acquainted with the company, and knew that the Fosha and Quantic notes were given for stock in that company. He testified that he did not consider the company reputable; that it was not customary to receive pay in advance on such contracts; that he was told by the officers that he could negotiate the notes as they were becoming due; and that he considered it a velvet contract. He had asked an Oakland, Cal., bank to procure a rating on the makers of the notes, and had received a satisfactory report. The 9 months' note about to fall due was indorsed by Youle in blank for collection to a local bank. Material was sent out to the wells as soon as the condition of the roads would permit, and on February 26th work was commenced by Youle under his contract. The work was interrupted and soon stopped because of the failure of the oil company to provide casing as it had agreed in the contract to do. Youle, as appears from his testimony, had charged up to the contract \$3,000 worth of material. Groceries to the amount of \$124 were on the ground. What the material on the way or in warehouse consisted of is not stated, except a cable of the value of \$700. The contract was that he was to use the tools, machinery, and appliances of the company then on hand, but was to furnish all other tools, appliances, and machinery necessary to sink the wells, the rig, and permanent fixtures to remain the property of the company.

On January 29, 1904, Abrams, Parkinson

and the plaintiff met in San Francisco, and talked over a trade in which the notes, in suit and the \$4,000 Quantic note should be sold to the plaintiff for goods. Parkinson, who had previously been authorized by the plaintiff to find a purchaser for the goods, drew up an instrument purporting to be an agreement between Youle and the plaintiff in which the plaintiff agreed to sell these three notes for the stock of merchandise and fixtures in the Underwood store at Tres Pinos, and if the stock at regular invoice prices inventoried more than the amount of the notes to pay the difference in cash or collateral, as might be agreed. The plaintiff signed the contract which was witnessed by Abrams and Parkinson, and left it with them. Youle did not sign it at that time, and was not present. The notes were not produced, and the plaintiff had not seen them. Shortly before this writing was made Abrams had proposed to Youle a trade of the notes "for a nice little business at Tres Pinos." Youle signed the agreement soon afterwards. He testified that Abrams did not represent Underwood in the deal, but was anxious to have the contract made. He also testified: "Q. But did it not strike you a little bit peculiar that the vice president and manager, before you had given any value for these notes, should induce you to enter into a contract to trade the notes to somebody else? A. They knew that I would do that. It struck me only as being peculiar in this way: That they had a lot of confidence in me—that I was all right. Q. They knew there was no material on the ground? A. Yes; I bought a bill of groceries from Mr. Underwood—\$124 worth and that was delivered on the ground. Q. There was no material there and not a foot drilled—the drill was not in place? A. No."

About February 1st Underwood received the contract for the sale and purchase of the goods signed by Youle, either from Youle himself or by mail. Youle came to the store on that date, looked over the goods, and accepted an invoice made by the plaintiff the first of the year. The 12 months' note and the Quantic note were delivered to plaintiff without indorsement, and a written assignment was made of the 9 months' note, which was in Kansas, having been forwarded through banks for collection. Youle gave the plaintiff the report he had obtained from the Oakland bank concerning the responsibility of the makers. He took possession of the store on February 3d, the plaintiff remaining to discharge his duties as postmaster, the office being in the building, and to collect accounts reserved. The trade was closed February 3d. On February 5th Youle learned that the 9 months' note had been taken in Kansas by replevin. The secretary and president of the company and Mr. Abrams, the manager, were examined at length touching its property and holdings, but little definite information was obtained, although it appeared that



the company did not own 2,776 acres of land. Nor does it appear what land it ever owned in fee except 160 acres standing in the name of Abrams. After many evasive answers, the secretary was asked: "Q. Have they any tools or fixtures of any kind belonging to them upon their holdings at this time? A. I cannot say. I have not been down there for some time. Q. Who is in charge there, if anybody? A. Why, Youle is the man that I left in charge there; he was the last man that had charge of that. Q. How long has he been gone? A. I do not know." After many questions concerning real estate, the secretary said: "A. I will tell you what I know, Mr. Clark, in that regard, as near as I can. Q. Go right ahead. A. The Ashurst Oil Land & Development Company has an option to purchase land on which it has been paying \$50 a month for a matter of three years past or more. It has received deeds, and they are on record, your searcher to the contrary notwithstanding. If he did not find them, he is no good. I want that in the record, so that he will see it—to oil rights. Q. The record shows that. A. Not to the fee-simple title; to the land itself, including everything in it; to various portions and pieces of land down there in addition to fee title lands before testified to. Now, just what those lands are and just how many acres I am unable to state. Your abstract, if it is correct, will show the number of acres. The company also has filed locations by its agents to a number of different locations, and deeds have been made of those locations. They also have a contract with the Hamiltonian Oil Company, by which they get an interest, amounting to about one-third interest in that company and its lands—just the number of acres I am unable at the present time to state. Q. Is that all? A. There is a piece of land, I think 160 acres—I am not positive about that, that was deeded to Mr. Abrams for the benefit of the company in San Benito county from Henry D. Grayson. \* \* \* And this land in Shasta county was also purchased, and the deed taken in Abram's name for the benefit of the company, and was afterwards sold for the benefit of the company. The company has spent a good many thousand dollars in the doing of assessment work on these located lands."

Mr. Youle testified that he had found the representation of the oil company that it had 2,776 acres of land to be false. This, however, was after he had entered into the contract for drilling, and had taken the notes. The Quantic note for \$4,000 was made by Quantic for stock in the company, payable to the order of A. G. Cress to be held by the payee until the maker should have an opportunity to investigate the holdings of the company, and if not satisfied to be returned, substantially the same as in this case except that the nominal payee was Cress in the one case, and Quantic in the other. When Quan-

tic made the investigation before stated, he did so for himself as well as for Fosha. The delivery of the Quantic note in violation of the trust by Abrams, and its subsequent history, is the same as the notes in suit here. An action upon that note by Underwood resulted in findings and judgment for Quantic. Affirmed by this court. *Underwood v. Quantic*, 85 Kan. 111, 116 Pac. 361. When this case was called for trial, the defendant asked leave to amend his answer by pleading judgment in the Quantic case as a former adjudication but the motion was denied.

The following findings, among others, were made by the jury in this case, viz.:

"Would Fosha have executed the notes if Abrams had not agreed that Quantic should hold them until Fosha could satisfy himself as to the representations made by Abrams? A. No.

"Were the notes in fact placed in Quantic's hands pursuant to such agreement? A. Yes. \* \* \*

"When Youle acquired the notes on January 11, 1904, did he know that Fosha or Quantic had any defense to the payment of the notes? A. We think not. \* \* \*

"Did Youle acquire the notes on January 11, 1904, in good faith or in bad faith? A. We think in good faith.

"When Underwood acquired the notes on February 3, 1904, did he know that Fosha or Quantic had any defense to their payment? A. He should have known they had a defense against the 9 months' note, as it was eleven days past due when purchased.

"Did Underwood acquire the notes on February 3, 1904, in good faith or in bad faith? A. We think so, in good faith.

"Was defendant Henry Fosha induced to sign the notes in suit through fraud and fraudulent representations of the Ashurst Oil, Land & Development Company, or its officers and agents? A. Largely so.

"Did Fosha either by himself or through other persons make an examination of the oil fields and the holdings of this company, and was he dissatisfied and demand his note back from the oil company? A. Yes.

"Did Abrams, the general manager of the Ashurst Oil, Land & Development Company, obtain the notes in suit from Quantic with the understanding that the oil company was to keep said notes and in case Fosha demanded them back from Quantic they would return them to Quantic? A. Yes.

"Did the Ashurst Oil, Land & Development Company transfer the notes in suit to Youle, and if so was this transfer in good faith? A. We think so.

"Did Youle transfer the notes in suit to plaintiff, A. F. Underwood; and, if so, was the transfer in good faith? A. Yes.

"At the time of the purported transfer of said notes from Youle to Underwood, was Underwood acting in good faith? A. We think so.



"In the making of the pretended sale between Underwood and Youle was Parkinson acting as the agent of Underwood? A. Yes.

"At the time of said pretended sale, did Parkinson as the agent of Underwood, have actual knowledge that the notes in suit had been obtained by fraud from Fosha? A. Yes."

The plaintiff's motion for judgment on the 9 months' note on the findings is based on the finding that Youle, from whom he received it, was a holder in good faith. He invokes the proposition that a purchaser for value either before or after maturity, although with notice of a defense may enforce collection provided his assignor was an innocent purchaser. The rule is: " \* \* \* But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter." Gen. Stat. 1909, § 5311; Neg. Inst. Law, § 65. The defendants meet this proposition with the contention that the findings to the effect that Youle was an innocent purchaser are contrary to all the evidence, and should have been set aside on their motion.

The jury appears to have imperfectly understood the meaning of the term "good faith" in such transactions, or were confused in its application. They say by affirming the recital in question 26 that Abrams was the general manager of the company, and about this there was no dispute, that he undertook to hold these notes subject to an investigation to be returned to the maker on demand; and in answer to question 31 they say that Parkinson, the plaintiff's agent, had actual knowledge that the notes were obtained by fraud from Fosha. Parkinson, it must be remembered, was the secretary of the company as well as agent for the plaintiff. It is a legal impossibility that notes so held by the company, or its general manager, upon the conditions stated, could have been transferred by either in good faith. If the jury had the same conception of the term when they found that Youle took the notes in good faith, the impropriety of ordering a judgment on that finding, notwithstanding the general verdict, is readily apparent. Passing from the findings to the evidence, it is undisputed that when the defendants' representative reported the result of the investigation and the resulting dissatisfaction to the company and demanded the return of the notes the directors' meeting summarily adjourned, although the secretary then stated that the company still held the notes. After this they were transferred to Youle, as already stated, not by Abrams alone, but it seems by the action of the directors. Not

only is the finding that the company made the transfer in good faith contradicted by other findings, but by the undisputed evidence.

Bearing upon the good faith of Youle, whose rights are invoked by the plaintiff as his transferee, it will be noticed that the notes were negotiated by Abrams, the general manager, and by the company in flagrant violation of an agreement to hold them for a specific purpose. Youle, when he received them, knew that they had been given for the company's stock, and that the company was not reputable, and took them as an advance payment for work not yet commenced, contrary, as he admits, to usual custom, and on the same day took the general manager into partnership to perform the very contract upon which he received them. By the assistance of his partner, the general manager, and Parkinson, the secretary of the company, he hastened to trade the notes for a stock of goods, signing the contract for exchange before he had seen the goods or the purchaser. These and other conditions already stated, present a situation different from those ordinarily existing when commercial paper is transferred to one claiming the protection of an innocent purchaser, and make the findings concerning good faith highly important. But in view of the conclusion reached further comment on the facts will not be made. In consideration of the evident misunderstanding or misapplication of terms used in the findings, and the contradictions therein, the case should be tried again. The issues upon the two notes are not distinguishable, except as to date of maturity. The plaintiff, however, relies upon the good faith of his assignor as to both notes, and the new trial should embrace both. The principles upon which new trials are allowed or refused upon inconsistent findings are stated in *Anderson v. Pierce*, 62 Kan. 756, 64 Pac. 633, and have been applied in many cases.

[2] Where from inconsistencies in the findings upon a material matter a sound basis for a judgment does not exist, a new trial should be allowed. *Edwards v. Railway Co.*, 86 Kan. 257, 119 Pac. 872.

[3] The court did not err in refusing to allow an amendment to the answer to plead former adjudication. In the absence of any further showing, it was a matter of discretion to permit such an amendment on the eve of the trial. Besides, no estoppel appears. While the Quantic note and those in suit here were made in similar transactions, they were made to different payees at different times and upon distinct sales of stock, in one case to Quantic and in another to Fosha.

The judgment is reversed, and the cause remanded, with directions to grant a new trial. All the Justices concurring.



(90 Kan. 409)

FIKE v. ATCHISON, T. &amp; S. F. RY. CO.

(Supreme Court of Kansas. July 5, 1913.)

*(Syllabus by the Court.)*

## 1. RAILROADS (§§ 348, 350\*)—ACCIDENT AT CROSSING — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE.

The plaintiff seeks a recovery for the death of her husband caused by the negligent operations of a train at a street crossing. The evidence and findings are reviewed, and it is held: (1) That there was sufficient evidence to warrant the finding of negligence; (2) that the question of contributory negligence was one of fact for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138-1150, 1152-1192; Dec. Dig. §§ 348, 350.\*]

## 2. WITNESSES (§ 275\*)—CROSS-EXAMINATION.

The plaintiff was called as a witness by the defendant and testified that her husband was familiar with the crossing and that she had often been over it with him. On cross-examination she was allowed to testify that he always drove carefully, watching for dangers, and at night stopped to look and listen. It is held that the testimony, if incompetent, was still not prejudicial under the findings.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 924, 926, 967-975; Dec. Dig. § 275.\*]

## 3. DEATH (§ 104\*) — ACCIDENT AT CROSSINGS—INSTRUCTIONS.

An instruction was given, stating, in substance, that, in the absence of any evidence on the subject, the jury were authorized to presume that from natural instincts to protect his person and preserve his life the deceased looked and listened for approaching trains before venturing upon the crossing, and if his situation was such as to require him to stop that he did so. In connection with other instructions defining the duty of the deceased to look and listen, and stating the circumstances in which he was required to stop, the foregoing is approved.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 142-148; Dec. Dig. § 104.\*]

Appeal from District Court, Harvey County.

Action by Addie Fike against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, and C. S. Bowman, of Newton, for appellant. Wm. H. von der Heiden, A. E. Morgan, and Branine & Hart, all of Newton, for appellee.

BENSON, J. This appeal is from a judgment for damages for the death of the plaintiff's husband at a railroad crossing in Newton.

The railway company has 13 parallel tracks extending northeast and southwest through the city connecting its local yards. These tracks cross First street, which extends east and west, in a populous part of the city. The direction of the tracks will be referred to as north and south. The traffic of the main line east, west, and south out of and into Newton and the major part of the switching and

local work is over this crossing, which is in continuous use day and night. The company has long maintained an electric arc light over this crossing to light the crossing and adjacent yards, and to aid the company and the public in the use of the crossing, although not required by ordinance to do so. A switch shanty is located 80 feet south of this light where a switch tender is on duty day and night. The company maintains extensive shops and a roundhouse near the crossing. On the night of February 20, 1911, at about 8:45 o'clock, Dr. Fike came into the city from the west driving a two-horse team with a covered carriage. The night was cold and very dark, sleet was falling, and a strong wind was blowing. He had on a fur overcoat with a collar turned up about his neck and ears, and the side curtains of the carriage were on. The arc light referred to was not burning, having been out for an hour and 45 minutes. It had been burning irregularly for over a week. There was no light at this crossing except such as might have been afforded by headlights and the lanterns of employes. A switch engine was moving backward, pushing seven freight cars from the north yard to the south yard. At a point 1,400 feet north of the crossing the engineer sounded four blasts of the whistle, for the switch tender referred to, to line up a switch there. The switch tender, carrying his lantern from the shanty, turned the switch and gave the back-up signal, which was repeated to the engineer by a switchman standing on the top of the south car of the train by a circular motion of his lantern. This signal was answered by two short blasts of the whistle. The engine was then 700 feet from the crossing. It carried a headlight upon each end, but the end of a box car coupled to the engine was immediately in front of the headlight on the south end. The brakeman was facing in the direction of the moving train and wore a heavy storm coat. Dr. Fike, driving east on First street, crossed nine tracks and approached the next one with his team trotting; when he was within 15 feet of the track, and the south car of the train was 70 feet from the street crossing, the switchman standing on the south car, to use his own language, "saw the outlines of a double horse team and buggy; that is, I got a glimpse of it ahead." He immediately gave the stop signal and yelled and then heard and felt a collision. The engineer made all possible effort to stop the train but it ran on 300 feet beyond the crossing. It struck the carriage and killed the occupant. The switch tender at the side of the track also saw the horses' heads for a moment, when they were 130 feet from him and about 15 feet from the track upon which the collision occurred. He shouted and waved a stop signal with his lantern. The south car was then about 50 feet from the point of the collision and the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



train was running at a speed of 15 to 20 miles an hour. The bell was ringing all the time. Bells upon other engines at and about the roundhouse and up and down the yards were ringing and whistles were being blown at all hours of the day and night, and there were lights about the shops and roundhouse north and east of the point of the collision.

In answer to special questions the jury found the following additional facts: The hearing of the deceased was not obstructed by the manner in which his coat was buttoned about his neck and ears; the curtains of the buggy interfered with his seeing approaching objects at the side; it was more difficult to see approaching cars on account of the darkness; aside from the darkness a person in First street could have an unobstructed view of nine tracks northeasterly for a distance of a block and a half; there were no obstructions to the view between the point of the accident and 80 feet west thereof for 600 feet northeastwardly; the deceased had been familiar with the crossing for five years; there was nothing to prevent him from seeing that the electric light was not burning; switch No. 7 (the one turned for this train) was 155 feet from the point of collision; a person standing on First street just west of the nine tracks would not have a side view of a train as it approached First street from the electric light plant (which is 1,400 feet north); a lighted lantern, such as the switchman had, could be seen by a person for half a mile looking toward it who had an unobstructed view; and the train was 400 feet north of First street when the switchman swung it as a signal for the train to proceed. Further findings were that the defendant's employes were negligent in failing "to maintain lights in condition at crossings or to provide watchman for such crossing when lights are not in condition and to display light at west end of train," which negligence consisted in the "absence of light or watchman at crossing and light at west end of train."

The jury further found that, if the speed of the team was checked, the evidence did not disclose how far this occurred from the point of collision, nor when it occurred, nor whether Fike took any precautions to learn of the approaching train, and did not disclose how far he was from the place of injury when he did so, nor what precautions he took before undertaking to cross the track when he was injured, nor how far the reflection of a headlight on the west (south) end of the engine could be seen by one standing at or near the crossing, nor whether a headlight so placed next to box cars would throw a light visible that night to one standing in First street west of the nine tracks while the engine was moving between First street and a point 800 feet north, nor how far Dr. Fike could have seen the train just as he drove upon the track, but in the opinion of the jury not to exceed 40 feet. To the question wheth-

er Dr. Fike stopped his team to look and listen for cars approaching First street from the northeast before undertaking to cross the track, the jury answered, "Yes, in the absence of evidence the law presumes he did." Other questions were answered, but the statement of facts first given includes the answers so far as material.

The negligence charged in the petition was that the train was backed upon the crossing at dangerous and unreasonable speed without a crossing signal, flagman, or watchman, or other measures to guard against accident with the electric light out and in the darkness. The defendant argues that the charges of negligence are not proven, and that the death of the plaintiff's husband was caused by his own negligence.

[1] The crossing was a dangerous one. Thirteen tracks crossed the street, with railroad yards, shops, and roundhouse near by, and the constant switching and moving of cars incident to this important division point. The jury were warranted in finding that ordinary and reasonable care at such a place required that, in the absence of the arc light, a light ought to have been displayed at the end of the backing train or a watchman provided. Running such a train over the crossing on a dark stormy night in the circumstances stated, without warning or signals except the ringing of the bell and the sounding of the whistle for switching, with no light except that of the lantern of the switchman and such as might shine out from the headlight between the tender and the solid end of the box car in front of it, is evidence from which negligence might be found.

It is argued that the arc light had but recently gone out. If sufficient time had not elapsed to repair or refurnish it there was at least sufficient time to take some further precautions in switching cars until it could be restored. The fact that the city had not required a light or a watchman does not relieve the defendant from the duty to exercise such ordinary care and provide such safeguards as common prudence would dictate, in view of the dangers to be reasonably apprehended. *Mo. Pac. Ry. Co. v. Moffatt*, 56 Kan. 667, 44 Pac. 607; 2 *Thompson on Neg.* §§ 1525-1535; 3 *Elliott on Railroads* (2d Ed.) § 1156; *English v. Southern Pacific Co.*, 13 Utah, 407, 45 Pac. 47, 35 L. R. A. 155, 57 Am. St. Rep. 772, and note; *Henavie v. N. Y. C. & H. R. Co.*, 166 N. Y. 280, 59 N. E. 901.

In *Railway Co. v. Durand*, 65 Kan. 380, 387, 69 Pac. 356, 358, the following quotations from *McGrath v. N. Y. C. & H. R. Co.*, 63 N. Y. 522, appear: "Where there has been a collision at a railroad crossing with a traveler upon the highway, and the railroad company is sued for negligence in causing the collision, its negligence is made out generally by proving all the circumstances surrounding the transaction and



submitting them with proper instructions to the jury. It may be proved that the collision took place in the nighttime in a rain-storm; that the train was running fast or slow, with or without headlights; that it was backing or going forward; that it was running in a city in a crowded thoroughfare or in the country; that there were many or few tracks; that there were obstructions, making it impossible to see the train before the crossing was reached. These circumstances are proved, not to impose upon the railroad company any duty which the law does not impose or any duty to do any acts collateral to the running and management of its trains in a lawful manner upon its road, but as bearing upon the question of the manner in which it has run and managed its train. A different degree of care may be required in running trains in the dark and in the daylight, in city and country, when there are obstructions and no obstructions near crossings. \* \* \* And, in the absence of flagmen, railroad companies may, in the exercise of proper care, be required to run their trains slower or to take other precautions to protect travelers; the question in all cases being, not whether it was their duty to do any of the collateral things to warn travelers, but whether, under all the circumstances of the case, it run and managed its train with requisite care and prudence." It has been declared negligent to run a train over a public crossing at night without a headlight, or if the engine is not in front, then upon the end of the forward car. 33 Cyc. 958; *L. E. & W. Ry. Co. v. Zoffinger*, 107 Ill. 199. See, also, *Burling v. Railroad Co.*, 85 Ill. 18, and *B. & O. S. W. Ry. Co. v. Alsop*, 176 Ill. 471, 52 N. E. 253, 732.

It is contended, however, that the dangerous character of the crossing was well known to the deceased who was familiar with the situation, knew of the absence of the light, and that a watchman had not been provided, and should have exercised care commensurate with the known danger. But it was a question for the jury whether he did exercise reasonable care, and their finding if supported by competent evidence, approved by the trial court, determines the fact. It is argued that it was negligence per se to approach the track where he was killed with his team on a trot, with the sides of his carriage on and his fur coat collar turned up. While the side curtains would obstruct a view directly to the side, the tracks crossed the street diagonally. Whether he leaned forward and looked in the direction of the tracks is not shown, but the presumption is that he did all that a reasonably prudent person would have done with his knowledge of the situation, unless there is evidence tending to show that he did not. While there is evidence that he approached the track where he was killed with his team

trotting, it must be remembered that he had already crossed nine other tracks; whether he stopped before going upon the first one or afterward, before the team was seen by the switchman, is not shown, but, as the jury said, it is presumed that he did (that is, it is presumed that he exercised the care of an ordinarily prudent person unless there is evidence to the contrary). In view of other movements and other lights on or about the tracks, it might have appeared to him that to stop after crossing one or more of the tracks would only increase the peril. He had the right to use the crossing, exercising ordinary care in doing so, to be determined by the jury, not from one but from all, the circumstances. It is said that he should have observed the light of the lantern of the switchman on the moving car, but there were other lights. The train had just been deflected from another track; he might not have been able to determine with certainty that it was advancing on that particular track. The train was moving rapidly, affording but little time for observation and reflection after he had gone upon the first track. Besides, the switchman, enveloped in a heavy coat, held the lantern in his left hand as he faced south, and its light may have been partially obscured except at the moment in which the lantern was used as a signal. The deceased was bound to look ahead as well as along the tracks in the directions from which a train might approach so far as he could reasonably do so. In all these circumstances it was a question for the jury, upon all the evidence, whether he acted with ordinary prudence. *Johnson v. Railroad Co.*, 80 Kan. 456, 460, 103 Pac. 90; *Railway Co. v. Wilkie*, 77 Kan. 791, 90 Pac. 775, 11 L. R. A. (N. S.) 963, 127 Am. St. Rep. 464, 15 Ann. Cas. 731.

[2] The defendant called the plaintiff as a witness who testified that her husband frequently drove over the crossing in question and was familiar with it. On cross-examination she was permitted to testify, over the defendant's objection, that he always drove carefully watching for dangers and at night stopped to look for trains. This objection is now presented as a ground of error (citing *Coal Co. v. Dickson*, 55 Kan. 62, 39 Pac. 691). The objection made was that the testimony was incompetent, a conclusion, and that the subject was not one for expert evidence. It was a statement of what the witness had observed. The statement that Dr. Fike was careful in driving and watching on the occasion referred to in her direct testimony was not the expression of a general opinion that he was a careful driver. Evidence of this character is referred to as having probative force in *Railway Co. v. Moffatt*, 60 Kan. 113, 117, 35 Pac. 837, but whether it was admitted with or without objection is not stated.

In *S. K. Ry. Co. v. Robbins*, 43 Kan. 145,



23 Pac. 113, an action to recover damages for the death of a brakeman, where the question whether the opinion of an expert was admissible was considered, the court said: "There were eyewitnesses present who at the trial described the manner in which he ascended the ladder and the care which he exercised at the time the accident occurred; and hence there was no necessity nor propriety in admitting the opinion of an expert as to whether he was generally a careful and skillful man."

The eyewitness here only had a momentary glimpse of the team and carriage. No one observed the conduct of the deceased before that moment which immediately preceded the fatal collision.

It was said in *Frederickson v. Iowa Cent. Ry. Co.* (Iowa) 135 N. W. 12: "But we are of the opinion that evidence of the general habit in using a particular railroad crossing is competent, at least where there are no eyewitnesses of the accident. It may tend to aid the presumption of self-preservation that arises in such cases, because a person is more likely to do what he is in the habit of doing under the same conditions."

Other cases appear to hold that when there are no eyewitnesses of the occurrence the exercise of care by the deceased in such cases may be shown by his habit. *C. & A. Ry. Co. v. Wilson*, 225 Ill. 50, 80 N. E. 56, 116 Am. St. Rep. 102; *Tucker v. Railroad*, 73 N. H. 132, 59 Atl. 943.

In *Zucker v. Whitridge*, 205 N. Y. 50, at page 65, 98 N. E. 209, at page 213 (41 L. R. A. [N. S.] 683), the court, after reviewing conflicting decision upon the question disapproved evidence of general conduct of the injured person in such a case, but said: "We are not now called upon to decide whether evidence of the habits of a decedent in crossing railroads is competent when there is no eyewitness of the event." This subject was referred to but not decided in *Saunders v. Railway Co.*, 86 Kan. 56, 61, 119 Pac. 552, and it is not necessary to decide it here for the testimony, if incompetent, was still not prejudicial.

The jury in answering the question whether the deceased stopped his team to look and listen based their affirmative answer on the legal presumption and not on the testimony.

[3] Complaint is made of an instruction stating, in substance, that, in the absence of evidence whether the deceased did look and listen, the law presumes from natural instinct to protect his person and preserve life that he looked and listened for approaching trains before venturing upon the crossing, and, if his situation was such that his duty was to stop, the law presumes that he did stop. The principal objection is that there was no room for the presumption because there was evidence to the contrary. Refer-

ence has already been made to the evidence touching that matter. This objection is based apparently upon the supposition that the instruction related to the particular track but it related to the crossing and properly so.

Another criticism of the instruction is that it was not qualified by stating that the presumption would not apply if there was evidence the accident would not have occurred if the deceased had exercised due care. The introductory phrase referring to the absence of evidence upon the subject contained the qualification suggested. Other instructions correctly stated his duty to look and listen and the circumstances in which he was required to stop. No error is found in the instructions.

The motion for judgment on the findings is based largely upon the claim that they established contributory negligence; this contention has already been considered.

The judgment is affirmed. All the Justices concurring.

(89 Kan. 797)

**CAIN et al. v. WESTERN UNION TELEGRAPH CO.†**

(Supreme Court of Kansas. June 7, 1913.)

(Syllabus by the Court.)

**1. TELEGRAPHS AND TELEPHONES (§ 67\*)—FAILURE TO CORRECTLY TRANSMIT MESSAGE—LIABILITY—DAMAGES.**

The rules of liability and damages for failure to properly transmit and deliver a telegraph message, stated in *Telegraph Co. v. Simpson*, 64 Kan. 309, 67 Pac. 839, are followed.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 64-68; Dec. Dig. § 67.\*]

**2. TELEGRAPHS AND TELEPHONES (§ 67\*)—FAILURE TO CORRECTLY TRANSMIT MESSAGE—NOTICE FROM CONTENTS—DAMAGES.**

A message was delivered to an operator for transmission in the following form: "Will you give twenty five dollars per acre for farm; have been offered twenty-four; wire me if you will take that. Will hold till three o'clock." It is held that the contents of the message imparted notice of the importance and nature of the transaction, and that substantial losses might reasonably be expected from a failure to deliver it.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 64-68; Dec. Dig. § 67.\*]

**3. TELEGRAPHS AND TELEPHONES (§ 66\*)—FAILURE TO CORRECTLY TRANSMIT MESSAGE—DAMAGES—EVIDENCE.**

Evidence to prove that a sale of the farm to the addressee would have been made if the message had been delivered without change was admissible in an action against the company to recover damages for failure to so deliver it.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 61-63; Dec. Dig. § 66.\*]

**4. TELEGRAPHS AND TELEPHONES (§ 67\*)—FAILURE TO CORRECTLY TRANSMIT MESSAGE—DAMAGES RECOVERABLE.**

The proper delivery of the message as written would have resulted in a sale, but the sale was prevented by a change in the concluding sentence so that it read: "Hold till thirtieth."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied July 5, 1913.



The company is therefore liable for consequential damages.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 64-68; Dec. Dig. § 67.\*]

**5. TELEGRAPHS AND TELEPHONES (§ 67\*)—  
FAILURE TO CORRECTLY TRANSMIT MESSAGE  
—DAMAGES RECOVERABLE.**

The payment of an agent's commission reasonably necessary in effecting the sale of the farm, but which would not have been payable if a sale had been made to the addressee, whereby the net amount received for the farm was diminished, may properly be considered as an element of consequential damages.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 64-68; Dec. Dig. § 67.\*]

Appeal from District Court, Labette County.

Action by Lucy A. Cain and others against the Western Union Telegraph Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

George H. Fearons, of New York City, New & Krauthoff, of Kansas City, Mo., and W. D. Atkinson, of Parsons, for appellant. A. D. Neale, of Chetopa, for appellees.

**BENSON, J.** This appeal is to determine the measure of damages for failure to correctly transmit a telegraph message, upon the following facts: The plaintiffs owned a farm of 640 acres, occupied by Mrs. Reeves, their tenant, who had indicated a wish to purchase it. R. R. Cain, one of the plaintiffs, acting for all of them, offered the farm for sale. Mrs. Reeves made an offer for the place, which he declined, but upon her request promised to give her the first chance to buy before a sale should be made to any other person. A real estate agent, having been authorized to find a buyer, communicated to Mr. Cain an offer of \$24 per acre for the farm. Thereupon, according to his promise to give Mrs. Reeves the first chance to buy it, he delivered to the defendant at its office in Chetopa a message, as follows:

"Chetopa, Kans. 28.

"To Mrs. Lydia Reeves, Parkerville, Kans.

"Will you give twenty five dollars per acre for farm; have been offered twenty-four; wire me if you will take that. Will hold till three o'clock. R. R. Cain."

Mrs. Reeves received the message on the same day, June 28th, a little before noon, but with a change in the concluding sentence thus: "Hold till thirtieth." Mrs. Reeves desired to purchase the land and to make a better offer, but understood from the message that she had until the thirtieth day of the month to answer it. She caused a message to be transmitted to Cain on June 29th as follows:

"Parkerville, Kansas, 6-29-1910.

"To R. R. Cain, Chetopa, Kansas,

"Will take farm at that price.

"Lydia Reeves."

After waiting until after 3 o'clock in the afternoon of June 28th, Mr. Cain, having received no word from Mrs. Reeves, made a sale through the agency at \$25 per acre. In making this sale the plaintiffs became obligated to pay, and did pay, their agent a commission of \$425, which would have been saved if the sale had been made to Mrs. Reeves; the agent having no part in the negotiations with her. She was able to make the payment, and would have taken the farm at the price offered, and it would have been sold to her, had not the sale been made through the agent before receiving her message. The plaintiffs seek to recover damages to the amount of the commission paid and the telegraph toll. The defendants offered to repay the toll received, and deny any further liability. Four other telegrams had passed through the Chetopa office during the three days preceding June 28th, and one on that day between Mr. Cain, his mother, and Taggart, the agent, relative to offers upon the same farm, but the land was not described in any of them.

[1] The measure of damages for failure to correctly transmit a message by telegraph has been variously stated, and there is some discussion in the brief of a distinction between an action brought upon a breach of the contract and an action to recover damages for a tort in failing to discharge the duty resting upon a telegraph company in such cases. Without considering this supposed distinction, the rule of damages in this case is considered as settled in *Telegraph Co. v. Simpson*, 64 Kan. 309 at page 315, 67 Pac. 839 at page 841, where it was said: "The contractual obligation of a telegraph company receiving a dispatch for transmission is clear and undenied. Out of it arise the agreement to transmit correctly and deliver with reasonable promptness the message received, and the liability to pay all proper damages that may arise from its failure so to do. These damages, however, must be proximate, and not remote and speculative. They must be such as arise naturally from the breach of the contract and the probable result of such breach, so that damages resulting from other causes than the negligence of the company in transmitting or delivering may not be considered."

[2] The only question is whether the payment of the commission can be considered in awarding damages under this rule. Damages arise naturally when they occur as the natural and probable consequence of the act. If a message discloses upon its face sufficient facts to indicate its importance and the probability of damages from failure to transmit it properly, it is sufficient. The following quotations state the rule more fully:

"It is not necessary that the company be informed of all the facts and circumstances pertaining to the business transaction about

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



which the message is sent, in order for this rule to hold good. It is enough if there are sufficient facts disclosed by the face of the message to indicate its importance, and the probable consequences of its failure in not being received by the addressee as delivered to the company." Jones on Telegraph and Telephone Companies, § 538.

"It does not appear to be necessary that the company should be apprised of details if the purpose of the message is made known; they will be liable for the actual injury which directly results from thwarting that object by a negligent performance of their duties, though there is no mention of facts material to the attainment of that purpose." 3 Sutherland on Damages (3d Ed.) § 969.

"Although, in the absence of prevailing authority to the contrary, it would seem just to say that a telegram may always be presumed to be of importance, and that the law ought not to sanction negligence on the part of a telegraph company in proportion as a message may appear to be unimportant, yet it is now settled in a majority of the courts that only the cost of the message can be recovered for failure to transmit a message promptly and correctly, unless the telegrapher had notice, from the message itself, or from information furnished with it, and that its nondelivery would probably be attended with other damages. \* \* \* If the message does give such notice, the liability to full compensation for damages accrues, in case of negligence. It is not necessary that such notice should be full or explicit. It is sufficient if it gives reasonable warning, such as would put a prudent person upon diligence." 2 Shearman & Redfield on the Law of Negligence (5th Ed.) § 754.

These principles are illustrated in many cases:

A purchaser of cattle undertook to notify the owner of his intention to take them at a certain time. He delivered the following message to a telegraph company for transmission: "Want your cattle in the morning; meet me at pasture." The message was not delivered to the owner, and the buyer weighed and drove away the cattle in his absence, but there was a delay caused by this absence; the cattle being detained in the highway, causing a shrinkage in weight. Recovery was allowed for the loss incident to the decrease in weight. It was held that the company was liable for damages flowing naturally from the breach, and it was said: "In this case the terms or contents of the dispatch \* \* \* fairly indicated the necessity of its prompt delivery as well as transmission, and were such as to authorize the inference that a delay until the day following would result in confusion, and possible, if not probable, injury to one or both parties to the dispatch. While all the circumstances which led to the injury of the cattle were not found as fully, perhaps, as

they might have been, and while the question involved is a fairly debatable one, and not free from difficulty, we are inclined to the opinion that the circuit court erred in refusing to render judgment in favor of Hadley for the amount of damages conditionally assessed by the jury, and have accordingly reached that conclusion." Hadley v. Western Union Telegraph Co., 115 Ind. 191, 200, 15 N. E. 845.

A message was delivered for transmission as follows:

"R. S. Brooks, Green River, Wyo.

"Searcy there Monday noon or Tuesday morning sure. Get letters. H. Engenoe wants buy. Meet you. Price eleven.

"B. B. Brooks."

On the next day the following message was delivered:

"Rush. Ogden, Utah, Sept. 24, 1900.

"R. S. Brooks, Green River, Wyo. Searcy arrives Green River 3 a. m.; did not get anything Idaho. B. B. Brooks."

Neither of the messages was delivered to the addressee, R. S. Brooks, in charge of horses, who was waiting for a telegram giving information of the time of the arrival of Searcy, a purchaser of the horses. R. S. Brooks did not meet the intending purchaser because he did not receive the message, and the sale failed. The horses were afterwards sold at a reduced price. The court said: "It was also claimed by counsel for appellant in his oral argument that there was nothing on the face of the messages that indicated their nature or importance, and that therefore it cannot be presumed that appellant or its agents, at the time the messages were received for transmission, had in contemplation the damages that would necessarily and directly result to respondents because of any failure or neglect to properly transmit and deliver them. In other words, that appellant, when it received the messages, was not advised that they referred to the sale of a band of horses, and in case of nondelivery of the message the sale would not take place, and that damages would arise therefrom. The rule contended for by counsel for appellant has been followed by many of the courts of last resort. \* \* \* But the authorities hold, almost uniformly, that it is sufficient to create a liability on the part of a company for all damages directly and proximately resulting from the negligent acts of its agents in failing to transmit a message in the form in which it is delivered, or in omitting to send it at all, providing the message discloses enough of its nature and importance to put an ordinary and prudent person upon inquiry." Brooks & Son v. Western Union Tel. Co., 26 Utah, 147, 153, 72 Pac. 499, 500.

In Garrett v. W. U. Tel. Co., 83 Iowa, 257, 49 N. W. 88, the following message was considered:



"To Gregory, Cooley & Co., U. S. Yards, Chicago:

"Send me market Kansas City, to-morrow and next day. A. M. Garrett."

The court said that the message did "in effect, advise the agent that he was on his way to Kansas City, and that he desired market reports to be sent to him at that place. The evidence shows that the plaintiff had sent and received a great many messages from that office. We think it was, to say the least, a proper question to submit to the jury to determine whether, in view of all the facts and circumstances surrounding the parties, the defendant ought to be charged with knowledge that the plaintiff intended to act upon the result of his message in buying or selling cattle, and that it pertained to transactions which might involve loss; and, as it appeared that by the arrangement between the plaintiff and Gregory, Cooley & Co. no answer to the message was equivalent to an answer that the market was unchanged, the question of substantial damages should have been submitted to the jury."

A message answering an inquiry for terms on which apples would be sold was written: "One dollar fifty, freight thirteen cents." In transmission the word "fifty" was omitted. The claim of the company that it was not liable because it had no knowledge of the purpose of the sender was not sustained. The court said: "This claim is not tenable. The message upon its face plainly indicated a business transaction, and that it was important also appeared upon the face of the message. It was not only sent by telegraph, but the message itself bore an injunction to the receivers to 'Answer quick.'" *Dixon v. Western Union Tel. Co.*, 3 App. Div. 60, 65, 38 N. Y. Supp. 1056, 1058.

A message was written and delivered to the company in these words: "Will give One Thirty for mules answer quick." The words "Will give One Thirty" were changed in transmission thus: "Will leave One Thirty." The court said: "Where the message shows on its face, as did the one delivered by Pendleton to the defendant, that a business transaction is contemplated and that negligence in its transmission may reasonably be attended with loss, the plaintiff is entitled to recover all damages which result to him by reason of defendant delivering to him a spurious telegram, on the principle that in action ex delicto the plaintiff is entitled to recover such damages as naturally flow from defendant's negligence. In other words, the plaintiff has a right to be placed in the same position he would have been in had defendant's agents correctly transmitted the telegram." *McCarty v. W. U. Telegraph Co.*, 116 Mo. App. 441, 446, 91 S. W. 976, 977.

Many other illustrative cases are collated in a note in 117 Am. St. Rep. 286. Others are cited with comments in Joyce on Electric

Law, § 953. A valuable discussion will also be found in *Telegraph Cable Co. v. Lathrop*, 131 Ill. 575, 23 N. E. 583, 7 L. R. A. 474, 19 Am. St. Rep. 55, where messages considered in other cases are quoted and decisions upon them are stated.

[3] Evidence to prove that a sale would have been made to Mrs. Reeves if she had received the message was properly admitted. In a similar situation such evidence was held competent in *Telegraph Co. v. Sights*, (Okla.) 126 Pac. 234, where the authorities supporting the ruling are cited. The opinion also holds that default in the delivery of a message importing a mere offer to make a contract will sustain a claim for compensatory damages, although no certainty that a contract will be consummated appears upon its face. The court said: "It does not know that loss will surely follow; but it does know that loss may follow, and that its negligence may prevent the opportunity of making a contract."

Among the decisions apparently holding that recovery cannot be allowed where the default of the company results only in the loss of an opportunity to make an advantageous contract are *Bennett v. Telegraph Co.*, 129 Iowa, 607, 106 N. W. 13, which may possibly be distinguished by the fact that no offer was contained or referred to in the message, and *Lumber Co. v. Telegraph Co.*, 52 W. Va. 410, 44 S. E. 309, also *Manufacturing Co. v. Telegraph Co.*, 152 N. C. 157, 67 S. E. 329, 27 L. R. A. (N. S.) 643. In a note at page 641 of the volume last cited (27 L. R. A. [N. S.]) cases affirming and cases denying the proposition that the loss of opportunity is sufficient are collated. In the first classification the following appears: "And in *Postal Teleg. Cable Co. v. Louisville Cotton Oil Co.* [136 Ky. 843, 122 S. W. 852] 125 S. W. 266, it was said that if the message would have resulted in a sale, or in securing property or employment or other thing of value, the company would be liable for the loss that was the natural and proximate result of its negligence in handling the message." The rule thus stated is believed to be just and reasonable and well supported by authority. Other notes citing cases on this subject appear in 41 L. R. A. (N. S.) 1188; 42 L. R. A. (N. S.) 419.

The message in this case as delivered to the company plainly indicated that the sale of a farm was intended, that an offer of the price stated had been made, and that a better offer was invited. It was sufficient to suggest to the ordinary mind, and to afford notice to the operator, that if it were not delivered the benefit of a better offer might be lost. The purpose in sending the message plainly appeared to be to obtain a higher price than the one already offered. The operator was therefore reasonably informed from the contents of the message that it was not only one of business importance, but also of the nature of the transaction and of probable



losses that might reasonably be expected to follow a failure to properly transmit it. This was sufficient to create a liability for consequential damages.

[4, 5] The remaining question relates to the extent of recovery. It is insisted that the loss of commissions paid on acceptance of the offer, referred to in the telegram, is too remote to be considered. The general rule is that the loss of an opportunity to sell, occasioned by nondelivery or alteration of a telegram, is the difference between the price that would have been paid and the market value or the price obtainable after a reasonably diligent effort. *Joyce on Electric Law*, § 962; *Jones on Telephone & Telegraph Companies*, § 546. Doubtful and remote losses are excluded here as in other cases. If the plaintiffs had received only \$24 per acre, the amount previously offered, the direct loss, leaving out any consideration of commissions, would have been \$640. They were negotiating with Mrs. Reeves without the intervention of an agent, but with the other party through an agent, and therefore the result to them was a loss of \$425, paid to that agent. This loss was consequent upon the change in the message which prevented the sale to her. The net result is precisely the same as it would have been if they had sold the farm for \$425 less than her offer, without paying commissions. The commission was a reasonable expense in effecting the sale made necessary by the default of the company.

Whatever may be the general rule with reference to losses caused by the payment of the brokerage in sales of commodities upon the market, or the expense of abstracts, commissions, and the like, usually incident and fairly to be anticipated in sales of real estate as elements of consequential damages, in this particular case a direct loss of \$425 clearly appears.

The judgment is affirmed. All the Justices concurring.

(90 Kan. 230)

#### STATE v. MILLER.

(Supreme Court of Kansas. July 5, 1913.)

#### (Syllabus by the Court.)

##### 1. ABORTION (§ 1\*)—ELEMENTS OF OFFENSE.

The Legislature by section 2532 of General Statutes of 1909 made the willful administration to any pregnant woman of any medicine, drug, or substance whatsoever, or the employment or use of any instrument or means whatsoever, with intent thereby to procure an abortion or the miscarriage of such woman, with no medical advice or necessity therefor, a misdemeanor regardless of the character of the things administered or used.

[Ed. Note.—For other cases, see *Abortion*, Cent. Dig. §§ 1-5; Dec. Dig. § 1.\*]

##### 2. ABORTION (§ 1\*)—STATUTES (§ 194\*)—ELEMENTS OF OFFENSE—"ANY INSTRUMENT OR MEANS WHATSOEVER."

The term "any instrument or means whatsoever" is not limited by the rule of ejusdem

generis; rules of construction applying only in case ambiguity or uncertainty calls for aids to a correct construction of a statute.

[Ed. Note.—For other cases, see *Abortion*, Cent. Dig. §§ 1-5; Dec. Dig. § 1.\* Statutes, Cent. Dig. § 272; Dec. Dig. § 194.\*]

##### 3. INDICTMENT AND INFORMATION (§ 121\*)—BILL OF PARTICULARS—DISCRETION—APPEAL.

The matter of requiring a bill of particulars in a criminal case is discretionary, and, when no abuse of discretion is shown, no error is committed in refusing such bill.

[Ed. Note.—For other cases, see *Indictment and Information*; Cent. Dig. §§ 316-320; Dec. Dig. § 121.\*]

##### 4. CRIMINAL LAW (§ 655\*)—CAUTIONARY INSTRUCTIONS.

The statute prescribes the time and manner of instructing juries, and, if at the opening of a term it is thought best to address the panel generally touching their duties, care should be used to avoid suggestions or statements likely to influence their decision when called upon later to sit in a given case.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1520-1523, 1527, 1535; Dec. Dig. § 655.\*]

##### 5. ABORTION (§ 9\*)—EVIDENCE—COMPETENCY.

The theory of the state was that the father brought his daughter to the defendant to be relieved of a trouble which he had caused, and that she was received by the accused for the accomplishment of such purpose. Having formerly stated that a brother was the cause of her condition, the daughter testified that she thought he was, and was then asked if any other person had had intercourse with her along about that time, to which she answered, "Yes, Father." *Held* competent as tending to show the real situation and the knowledge and notice of the defendant.

[Ed. Note.—For other cases, see *Abortion*, Cent. Dig. §§ 17-20; Dec. Dig. § 9.\*]

##### 6. CRIMINAL LAW (§ 430\*)—DOCUMENTARY EVIDENCE—ADMISSIBILITY.

The accused, a registered midwife, attempted to show that a few days after the birth of the child she made out and forwarded to the local registrar a certificate of birth, and for that purpose offered, among other things, a copy of such certificate certified by the state registrar to be a true copy of the certificate on file in his office, which was refused. *Held*, that such document was receivable under section 5964 of General Statutes of 1909 (Code Civ. Proc. § 369) and was competent to show the defendant's conduct and connection with the matter forming the basis of the charge against her.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1019; Dec. Dig. § 430.\*]

##### 7. CRIMINAL LAW (§ 784\*)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

While much direct evidence was introduced, the guilt of the accused depended upon the interpretation and probative force of the circumstances shown by such evidence, and it was error to refuse the usual instruction as to circumstantial evidence and give none on that subject.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1883-1888, 1922, 1960; Dec. Dig. § 784.\*]

##### 8. CRIMINAL LAW (§§ 699, 720, 722\*)—ARGUMENT OF COUNSEL—DISCRETION—APPEAL.

While counsel should present their cause free from personality and vituperation, still the provocations and limits which should be considered and observed are primarily within the discretion of the trial court; and, unless com-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ments upon the evidence and character of the accused are so improper and unwarranted as to prejudice the jury against him and deprive him of a fair trial, they will not justify a reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1655, 1656, 1670, 1671, 1674; Dec. Dig. §§ 699, 720, 722.\*]

#### 9. CRIMINAL LAW (§ 938\*)—NEW TRIAL—GROUNDS.

Motions for new trial on the ground of newly discovered evidence, when not supported by a sufficient showing of diligence, and when such evidence is cumulative or merely contradictory of that already given, may properly be denied.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306-2315, 2317; Dec. Dig. § 938.\*]

Appeal from District Court, Sedgwick County.

Alice M. Miller was convicted of attempting to produce an abortion, and appeals. Reversed, and new trial ordered.

D. M. Dale, B. F. Hegler, Jean Madalene, and S. B. Amidon, all of Wichita, for appellant. John S. Dawson, Atty. Gen., and George McGill, of Wichita, for the State.

WEST, J. The defendant appeals from a conviction of the offense of employing means and administering substances with intent to procure an abortion and miscarriage. Six hundred and ninety-seven pages of abstract, 207 pages of briefs, and 103 assignments of error are presented for our consideration, and such brevity of statement as is possible under the circumstances will be used in giving our views.

[1] Section 2532 of General Statutes of 1909, under which the information was drawn, reads as follows: "Every physician or other person who shall willfully administer to any pregnant woman any medicine, drug or substance whatsoever, or shall use or employ any instrument or means whatsoever, with intent thereby to procure abortion or the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by a physician to be necessary for that purpose, shall upon conviction be adjudged guilty of a misdemeanor, and punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment."

The information charged that the defendant "from the 5th day of December, A. D. 1911, and each day thereafter until the 12th day of December, A. D. 1911, \* \* \* did then and there during each said days unlawfully, willfully, and intentionally cause one Goldie Chadwick to walk and run in and about a certain room and up and down flights of stairs, and \* \* \* did then and there unlawfully, willfully, and intentionally administer to her, the said Goldie Chadwick, certain medicines, drugs, and substances, a

more particular and definite description of which your informant is unable at this time to give for the reason he does not know the same. She (the said Goldie Chadwick) being then and there at all of said times a woman pregnant with child"—followed by the allegation that the intent was to produce an abortion and miscarriage, and that there was no necessity or medical advice for such acts. It is vigorously urged that the absence of an allegation that the walking and running and the medicine given were calculated to produce an abortion and the failure to charge the kind of substances administered render the information bad, and that the doctrine of ejusdem generis precludes embracing within the charge other than means kindred to the giving of drugs and the use of instruments. But, viewed from a practical and common-sense standpoint, it is clear enough that the defendant was very well advised that she was called on to meet a claim by the state that she had used the means indicated with the intent to produce an abortion and miscarriage. The Legislature has made such conduct a crime without stopping to provide that the medicine, instruments, or means used be such as are calculated to produce the intended result.

[2] The rule of ejusdem generis is merely one of construction and like all the rest is useless when the intention is so plain as to require no resort to canons of construction. Such rules and canons are of use only when ambiguity or uncertainty calls for aids to a correct solution. 36 Cyc. 1119; State v. Prather, 79 Kan. 513, page 516, 100 Pac. 57, 21 L. R. A. (N. S.), 23, 131 Am. St. Rep. 339. To make assurance doubly sure, the Legislature has enacted the common-sense rule into law and provided that "words and phrases shall be construed according to the context and the approved use of language." Gen. Stat. 1909, § 9037, subd. 2. The phrase "any instrument or means whatsoever" carries the facial evidence of a legislative intent to cover the extent of the criminal machinations and devices of the abortionist in order to protect the pregnant woman and the unborn child. Whatsoever in the law, like whosoever in the Gospel, is a word of the widest import. It is suggested that, while one might administer a known deadly poison which would imply the intent to take life, he might give a substance not known to him to be naturally productive of an abortion, and hence to charge him criminally it would be necessary to aver knowledge. The fallacy of this argument as applied here lies in the fact that the statute has made it a crime to administer anything with intent thereby to procure an abortion or miscarriage, thus making the act and intent sufficient, regardless of the character of the substance administered.

[3] Error is assigned on the refusal of the court to require a bill of particulars, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes



*State v. Reno*, 41 Kan. 674, page 679, 21 Pac. 803, page 805, is cited as fixing the Kansas rule. That, too, was a misdemeanor case, and the court said a bill of particulars might in the discretion of the trial court have been required, but that "such bill of particulars will be required only in cases where the indictment or information does not of itself definitely and specifically set forth the facts, but sets them forth only vaguely or in such general terms that the defendant could not well know what he is required to defend against." While some states do not recognize the practice at all, in most courts the requirement is discretionary. *State v. Lindgrove*, 1 Kan. App. 51, 41 Pac. 688; 22 Cyc. 371; *Rosen v. United States*, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; *Dunlop v. United States*, 165 U. S. 486, 17 Sup. Ct. 375, 41 L. Ed. 799.

In *Mathis v. State*, 45 Fla. 46, 34 South. 287, the Supreme Court of Florida gave an exhaustive review of the authorities, English and American, showing that the matter is one of discretion. No material abuse of discretion is apparent in this case.

[4] The defendant challenged and moved to quash the venire on account of certain alleged instructions given on the opening day of the term, two weeks before the trial began. The examination of the panel on their voir dire does not appear, and it must be presumed that they showed themselves qualified to sit in the case. It is contended, however, that the array were so influenced by the remarks of the court the first day of the term that they were in fact disqualified. The challenge was overruled, and it is necessary to consider the error assigned thereon. It appears that at the beginning of the term the court gave to all the assembled jurors an extended address touching the duties they were to enter upon, covering a wide field and including various observations relative to the court's previous experience in the trial of cases. In some respects it was a sort of fire-side talk and in others a more formal chart for their admonition and guidance. The intention was stated "to make a few suggestions to the jury simply for the purpose of facilitating the trial that will come before us." Suggestions were offered as to a hoped for acquaintance and mutual regard, the valuable experience about to be had, promptness in attendance, conduct in the jury room, secrecy of their proceedings, discussing the verdicts outside, sending for evidence or instructions to be re-read, the desirability of agreeing and the unwisdom of stubborn contention, certain expected interrogations concerning their connection with the Anti-Horse Thief Association, the effect on their minds of a complaint or information already made in a given case, their duty to come to no decision until all the evidence and instructions were in, their being a constituent part of the court as much as the judge, the bore of

numerous special questions and their duty nevertheless to answer them correctly, the avoidance of quotient verdicts, the propriety of refraining from reading newspaper accounts of trials in which they were sitting. Of these no complaint is or could justly be made.

During the address, however, the following statements were made, of which the defendant bitterly complains: "Some of these attorneys who are interested in some of these criminal cases and are representing some defendants are pretty jealous of the defendants' rights, as they call them, and they probably want to know if the court is saying anything at this time that may possibly prejudice the rights of their defendants, so in case their defendants happen to be convicted they might lay the foundation for error, you know, to the Supreme Court; so they have the habit, sometimes, of sending stenographers up here to take down what I am saying to you gentlemen now, and they are perfectly welcome to do so. I have no objection whatever. I will say nothing except absolutely in the interest of justice. I want every defendant who is charged with a crime to have an impartial and fair trial, but I do not believe it is the right of any lawyer to go beyond reasonable lengths to acquit a guilty person. They have the right to the best defense they can. But when they are guilty they ought to be convicted when the state makes a case beyond a reasonable doubt; and as I say any lawyer is welcome to all I have got to say here to you gentlemen, or any other time. And if there is anything improper in any of my remarks I am ready to meet that issue when it is raised, but I do believe it is my duty to make such suggestions as I feel are right for the purpose of working out justice in this case. I never, in my life, have seen but one man convicted in this courtroom that I had any reason to believe that he was not guilty. There was one such person convicted and he got a new trial, and he was not convicted again; and you men need not be afraid to put a little bit of responsibility on the court, and, if you should happen to go wrong, remember that in all these trials there are 13 men who compose the jury—12 in the box and one who sits up here—and before your verdict can become final and fixed the thirteenth juror, who sits up here, must coincide with your views, so you need not get scared in these matters, and if you go very far wrong there is still a way to correct that wrong. \* \* \* And my experience has taught me that there are more than 100 guilty men who escape to one innocent man convicted. Now that is putting it pretty strong; since I have been here on the bench, I have seen several hundred convicted and with one exception (now it is better than eight years), with one exception, I have never seen but one person convicted that I thought was innocent. And



as I said before that person got a new trial and was never tried again. But I would rather lose my arm than to send to the penitentiary a person whom I believe innocent. I don't believe it is possible for a situation to arise where it would become the duty of a judge to send to the penitentiary a person whom, in his heart, he believed innocent. I would not do it under any circumstances, and I would absolutely detest a judge who would be so heartless and so inhuman as to sentence to the penitentiary a person whom he believed innocent. I don't care if he had been convicted a dozen times by a jury. I think when a person convicted by a jury, whom the judge feels in his heart is innocent, he should grant a new trial, and keep granting a new trial until that person is discharged or declared not guilty. But I have never seen a jury do that but once. I have seen many a person turned loose when I felt down in my boots that he was as guilty as sin. And the jury found otherwise and the state may have fallen down in its proof, wasn't able to show to the jury beyond a reasonable doubt, and the jury turned him loose, notwithstanding that the judge of the court had an entirely different opinion of it; but, on the other hand, I do say that if the state proves the guilt of a defendant beyond a reasonable doubt that the public has some right, just as well as the individual, and it is your duty as jurors to see that the rights of the public are protected, as well as the rights of the individual. There are two sides to these criminal cases. The public has got some rights. But I do not apprehend you will have any trouble along these lines." It is urged that this proceeding was to the material prejudice of the defendant and in violation of the statute prescribing when and how instructions shall be given.

The three cases relied on principally to support the claim of error are *State v. Wright*, 161 Mo. App. 597, 144 S. W. 175, *Green v. State*, 97 Miss. 834, 53 South. 415, and *Jones v. State* (Tex. Cr. App.) 51 S. W. 949. In the *Wright* Case the judge, on sustaining motions for change of venue, delivered a long address in the presence of the panel against the practice of making such motions and in effect charging the defendants and counsel with falsely claiming prejudice as an excuse for delay. This was held by the Court of Appeals to render the panel incompetent to sit in the trial of the cases in which such applications had been made; another judge having been called in to try such cases, although each juror stated that the address had not influenced him to the prejudice of the defendant. In *Green v. State* the judge, during the trial, sent for additional jurors and instructed the deputy sheriff to summon young men as talesmen, stating, "We want to break this nigger's neck," referring to the defendant on trial. The accused exhausted his preemptory chal-

lenges before reaching the talesmen who had heard this remark, and it was held that a new trial ought to have been granted. In the *Jones* Case, on appeal from a conviction of assault with intent to murder, it was shown that on the day the jury were impaneled, and before the trial of any case began, the court called all the jurors to the same side of the bar and gave them a verbal charge as to their duties. Their attention was called to the law of reasonable doubt, because, as stated, the law restricted the court from giving it in particular cases as they arose. Among other things said by the court were the following: "I don't think I ever saw an innocent man convicted. We hear of them now and then and then way off, but, like the bag of gold at the end of the rainbow, when we approach they vanish. Now I believe, and I think every right-thinking man thinks with me, that it is better that an innocent man be convicted now and then than that 99 bloody murderers, burglars, and robbers be turned loose upon the county. This doctrine of reasonable doubt, as urged by shrewd lawyers in this state, has no application and should have no weight with jurors." The famous hip-pocket defense in homicide was denounced and it was said: "If the innocent man is convicted, he can appeal to the higher courts and get his case righted. \* \* \* I charge you to recollect these matters and be guided by these general instructions in the trial of each and every case that shall be submitted to you in which such matters arise, and hope that your conduct as jurors will conform to them; and if you, as jurors, are guilty of any improper conduct, I will give you notice right now that the one or ones guilty will be fined not less than \$100, and the one so fined will not get it remitted." The language was severely censured by the appellate court, but for various reasons given it was not held to be materially prejudicial. Those who have had experience as trial judges know how much easier it is to criticize their conduct and rulings than to perform their arduous and perplexing duties free from error. The address in question contained many practical and commendable suggestions to the men about to enter upon duties new and in a degree mysterious to them; and, while we think the concededly able and admirable trial judge crowded the danger line in some of the quoted remarks which should have been omitted, we are not convinced that all of those made, taken together, precluded those to whom they were directed from heeding and following proper instructions in a criminal case tried two weeks later.

[8] We have carefully examined each complaint touching the admission and rejection of evidence and find no prejudicial error or necessity for discussion in any save two which will now be noticed. The theory of



the state was that the father brought his daughter to the defendant to be relieved of a trouble which he had caused. The defense was that she was brought merely for proper care during confinement. No further reference than necessary will be made to the revolting matters testified to by various witnesses. The girl, who was 15 years old, had stated that her brother was the cause of her condition, and upon the trial she stated that she did not know but thought it was the brother. She was then asked if any one else had had intercourse with her along about that time and answered yes, that her father had. The defendant argues that the only purpose of this testimony must have been to show that the father brought the daughter to the defendant's place for the purpose of having an abortion committed. But, if such were the purpose and the fact, it would be competent as bearing upon the knowledge and intent with which the defendant received the girl, and it was not error to receive the statement.

[8] The other matter concerns an attempt to show that the defendant, who was a registered midwife, made out and transmitted a birth certificate after the child was born. The defendant testified that the birth occurred Monday morning, December 11th, and that on the following Thursday morning she made out the certificate. Her attention was then called to Exhibit D, purporting to be a printed certificate signed by the defendant stating that Goldie Veres Chadwick had given birth to a child named May Belle Chadwick, father Sylvester Chadwick. The blanks for names of county, township, and city were not filled out, but the number "2528 Second street" would seem to indicate the location of the defendant's place. It also purported to bear the signature of William Sence, registrar and to it was added or attached his certificate that it was a true copy of the one on file in the office. This exhibit was objected to as incompetent, irrelevant, and immaterial, no proper foundation having been laid, and also as a self-serving act on the part of the defendant. Upon sustaining the objection it was stated that it was desired to show by this certificate that on the second or third day after the birth the defendant filed with the city clerk of Wichita the certificate of birth marked Exhibit D, and to offer a copy thereof certified by the city clerk, and to show that the city clerk sent the original to Topeka where it then was. A similar objection to the one last made was sustained to this statement or offer. The defendant was then asked if she reported the birth to the city clerk, to which an objection was sustained. An offer was then made to show that she reported to the city clerk the time of the birth, the name of the mother, the name of the father, the day of the birth, the sex of the child, which was objected to, whereupon the prosecutor was

asked by the court if he waived the objection that it was not the best evidence, on the reply that he objected on that ground, whereupon the objection was sustained. The city clerk was put upon the stand but not permitted to testify to receiving the certificate, or rather his statement that he remembered the defendant's sending him one was stricken out and the jury admonished not to consider it. It was then attempted to be shown by this witness that about the 17th or 18th of December the defendant mailed to him a certificate of which Exhibit L was a copy. That he filed it and then forwarded it to Topeka. This exhibit was certified by the state registrar as a true copy of the original on file in his office and purported to show that at the county of Sedgwick, city of Wichita, No. 2528 Second street, Goldie Veres Chadwick gave birth to a female child, May Belle Chadwick, father Sylvester Chadwick, white, farmer, Sawyer, Kan., and that it was born alive 4:50 a. m. "Filed 12/26/1911, Wm. Sence, Registrar." This was also excluded. One peculiar thing about these documents printed or photographed in the record is that the latter gives the date of the birth as "Nov. 11, 1911," and the former "Nov. 11, 1912."

Section 10 of chapter 296, Laws of 1911, makes it the duty of a midwife to file a certificate of birth, according to the rules and regulations of the state board of health, with the local registrar within ten days after the date of the birth. The state registrar is to permanently preserve the returns received monthly from the local registrars and upon request shall furnish a certified copy for the prescribed fee. Such certified copies are by section 5964 of General Statutes of 1909 (Code Civ. Proc. § 369) made receivable in evidence with the same effect as the original, without proof that the original is not in the possession or under the control of the party desiring to use it. It was error, therefore, to exclude Exhibit L as not the best evidence. There was a dispute as to whether the child in question was the one exhibited in the courtroom, and whether Goldie Chadwick's child was born naturally or prematurely. It seems to be the theory of the state that the child was in fact made way with immediately after the mother was delivered, and considerable testimony touching the matter was given. It is now argued by the state that the certificate was not part of the res gestæ. Possibly not; but it was proper evidence bearing upon the question whether the defendant had pursued the natural and proper official conduct of a registered midwife acting bona fide and not seeking to cover up an attempted abortion, and she was entitled to show that she obeyed the requirements of the law touching a certificate of birth, and it would have been for the jury to say what her motive was in so doing. The charge and much of the evidence were of a charac-



ter naturally to breed indignation in the hearts of the triers, and for that reason it was more than ordinarily essential to a fair trial that the defendant be permitted to show what she did respecting a public record of what she claimed to have been a natural birth. What the defendant did in her professional capacity before, at, and after the birth was proper to be shown so that the jury could be informed as nearly as possible as to her entire part in the matter and the purpose which actuated her.

[7] The instructions were admirably clear and correct in respect to all matters covered, but no mention was made of the familiar rule as to circumstantial evidence when circumstances alone are relied on for a conviction. Instruction 12 requested by the defendant embodied the rule, and instruction 13 contained an elaboration thereof so that the attention of the court was thus doubly called to the matter. While the circumstances were shown by direct evidence, the guilt of the accused depended alone on the interpretation and probative force of such circumstances, thus making the case one to which the rule in question was applicable, and it should have been given. *Horne v. State*, 1 Kan. 42, 81 Am. Dec. 499; *State v. Fry*, 40 Kan. 311, page 321, 19 Pac. 742; *State v. Andrews*, 62 Kan. 207, 61 Pac. 808; *State v. Gereke*, 74 Kan. 196, 86 Pac. 160; *State v. Link*, 87 Kan. 738, 125 Pac. 70.

[8] In the argument of the case to the jury, the county attorney said that, when the defendant told them that she did not know how to perform an abortion, she committed willful and corrupt perjury; that unless they showed consideration for the prosecuting witness it would be but little use to try to convict any woman or man, and speaking of the accused said, "Will you turn her loose to practice her beastly profession upon the people of the state of Kansas?" Of course, theoretically, counsel for both sides should with fairness present their cause free from personality and vituperation. But, actually, things are not always done that way. The writer knows from personal experience the dynamic and explosive forcefulness with which counsel for the defendant pursues the prosecution and the prosecutor, and it is too much to expect the latter to assume the role of a lamb when assailed by the roar of a lion. Again, if in any case a witness does in fact commit unquestioned and palpable perjury, no rule of law precludes counsel from using Saxon language in calling the attention of the jury to what they have already observed and heard. Usually such matters may be and are controlled by the trial court, who knows better than we can the provocations and limits which should be considered and observed. The rule as stated in *State v. Baker*, 57 Kan. 541, 46 Pac. 947, *State v. Hinkley*, 81 Kan. 838, 106 Pac. 1088, and *State v.*

*Olsen*, 88 Kan. 136, 127 Pac. 625, does not warrant the holding that error materially prejudicial to the defendant was committed in this respect.

[9] Finally, it is argued that the court erred in denying the motion and supplemental motion for a new trial. We find no showing of diligence as to the first, and in support of the second an affidavit of the accused stated that the prosecuting witness, after this trial, in a case against her father, testified in another county against him, but after his conviction she made the statement that her testimony given in the trial of this case in relation to the defendant was false. The court considered both motions but deemed them and the showing made insufficient, and in this we agree. *State v. Lackey*, 72 Kan. 95, 82 Pac. 527.

The court is of the opinion that the certified copy of the certificate of birth should have been admitted, and that the jury should have been instructed as to circumstantial evidence, and that, considering all things shown by the record, the defendant is entitled to a new trial.

The judgment is therefore reversed, and a new trial ordered. All the Justices concurring.

PORTER, J. (specially concurring). I concur in the result and in what is in the opinion, except that I think the address of the learned trial judge to the jurors was so far prejudicial as to justify the inference that the defendant was prevented from having a trial before fair and impartial jurors.

(80 Kan. 264)

ONEIDA FARMERS' SHIPPING ASS'N v. ST. JOSEPH & G. I. RY. CO.

(Supreme Court of Kansas. July 5, 1913.)

(Syllabus by the Court.)

COMMERCE (§ 61\*)—TRANSPORTATION OF GRAIN —PENALTY FOR DELAY—VALIDITY OF STATUTE — POLICE POWER — INTERSTATE COMMERCE.

In an action under section 7205, Gen. St. 1909, by a shipper against an interstate railroad to recover a penalty for delays in the transportation of grain in car load lots from Oneida, Kan., to Elwood, Kan., held:

(a) Under the facts stated in the opinion the action may be maintained.

(b) Whether the shipment be regarded as completed when the grain was unloaded into the elevator of the purchaser at Elwood, Kan., and therefore intrastate, or whether it was interstate in character—because of a custom and arrangement, of which the plaintiff had no notice or knowledge, which existed between the carrier and the owner of the elevator, giving the latter "milling in transit" privileges and "proportional rates" on grain of like quality and quantity, when reshipped to points outside the state, nevertheless the state, in the proper exercise of the police power, may enact and enforce reasonable regulations designed to prevent unnecessary delays in such transportation occurring within its borders.

(c) Section 7205, Gen. St. 1909, is a proper



exercise of the police power, and, applied to the facts of this case, does not place an unreasonable burden upon interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 81-84, 100; Dec. Dig. § 61.\*]

Appeal from District Court, Nemaha County.

Action by the Oneida Farmers' Shipping Association against the St. Joseph & Grand Island Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

R. M. Emery, of Seneca, and Brown & Eastin, of St. Joseph, Mo., for appellant. Horace M. Baldwin, of Seneca, for appellee.

PORTER, J. The plaintiff in its petition states a cause of action for the recovery of a penalty under the provisions of section 7205, Gen. Stat. of 1909, for an aggregate of 28 days' delay at \$5 per day on 14 cars of grain loaded at Oneida, Kan., and shipped over defendant's railroad line to the Elwood Grain Company at Elwood, Kan. The answer set up facts showing that the defendant is an interstate railroad engaged in the business of interstate commerce, and alleged that the several cars of grain mentioned in the petition were received for transportation beyond the boundaries of the state of Kansas, and were interstate shipments which were controlled and governed exclusively by the laws regulating interstate commerce. The case was tried to the court, and plaintiff was given judgment for the statutory penalty, from which the defendant appeals.

The case was submitted upon a stipulation covering most of the material facts, supplemented by the testimony of the manager of the Elwood Grain Company. The defense to the action is based upon the contention that the shipments of grain became interstate commerce by reason of the subsequent disposition of them by the Elwood Grain Company. The main question discussed and, from the standpoint of the defendant, the only question to be determined is whether the shipments constitute interstate commerce. The ultimate question is whether the nature of the shipments is such that the state has no power to enforce the penalty prescribed by section 7205 of the Gen. Stat. of 1909.

The undisputed facts are: The shipments, which were of grain in car load lots, originated at Oneida, Kan., and, so far as plaintiff had any notice or knowledge, terminated at Elwood, Kan. Regular bills of lading were issued, showing that the cars were billed by plaintiff to the Elwood Grain Company, f. o. b. Elwood, Kan. On the arrival of the cars at Elwood, they were received by the grain company and unloaded into its elevator. The freight charges were paid and deducted from the sales account, and the balance of the purchase price remitted to the plaintiff. The grain after being unloaded into the elevator was not consumed there, but was from time to time resold by the Elwood Grain Company

and shipped to points outside the state. By an agreement between the grain company and the defendant railroad company the former was given what is known as "transit privileges," and "proportional rates," and "tonnage" allowances for the purpose of giving it a through tariff rate on grain received by it and afterwards reshipped to other points. The method of procedure was for the grain company to surrender the inbound bills (in this case the expense bill of the shipment from Oneida to Elwood) of expense upon grain received. New bills of lading were then issued to the new consignee, and the grain company was allowed a through rate upon the commodity under the tariff regulations in effect at the date of the respective shipments, and was given credit on the new shipment to the amount of freight paid by the plaintiff on the shipment from Oneida to Elwood. By its arrangement with the defendant railroad company, the grain company was entitled to free rates to certain points beyond the state, and to other points of reshipment it was entitled to "proportionate rates." It was shown that the particular cars of grain were not kept separate in the elevator and afterwards loaded and reshipped as individual cars of grain; but grain received from various points was thrown together in the elevator bins. When it was desired to reship, grain of like character and quantity was loaded in cars, and by the arrangement with the defendant the grain company had and used the privilege of "splitting the tonnage"; so that in several distinct reshipments to outside territory it was given credit of a through tariff and the benefit of the tonnage of the shipments from Oneida to Elwood. The surrender of the inbound expense bills crediting the amount upon the new expense bills was solely for the purpose of giving the Elwood Grain Company better transportation rates from Elwood to certain outside points.

There was evidence that the method described resulted in a lower freight rate, which inured to the benefit of the producer or shipper; that the privileges derived from transit and proportional rates had a part in fixing the value of grain at St. Joseph or Elwood, and as illustrating this advantage it was shown that the rate from Oneida to Kansas City was the same as the rate from Oneida to St. Joseph, and that, by the surrender of the inbound expense bill from Oneida, the transit to Gower (a point en route between St. Joseph and Kansas City) could be made without cost. It was admitted that the plaintiff had nothing to do with the subsequent transactions, and had no knowledge of them.

The practice of allowing "transit privileges" upon shipments of the character in question has the approval of the Interstate Commerce Commission, and the defendant takes the position that it necessarily follows

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



from this recognition and approval of the methods by which it allowed such privileges to the grain company that the shipments involved herein were interstate, and therefore not subject to the penalty prescribed by the state for unreasonable delay in transportation. The regulations permitting such privileges appear from Bulletin No. 6 of the Conference Rulings of the Commission, issued April 1, 1913, the substance of which was in force at the time the shipments in question were made. Rule 203 is as follows: "A milling, storage, or cleaning in transit privilege cannot be justified on any theory except that the identical commodity, or its exact equivalent, or its product, is finally forwarded from the transit point under the application of the through rate from original point of shipment. It is therefore not permissible at transit point to forward on transit rate commodity that did not move into transit point on transit rate, or to substitute a commodity originating in one territory for the same or like commodity moving into transit point from another territory, or to make any substitution that would impair the integrity of the through rate. It is not practicable to require that the identity of each car load of grain, lumber, salt, etc., be preserved, but, in the opinion of the commission, it is not possible to lawfully substitute at the transit point any commodity of a different kind from that which has moved into such transit point. That is to say, oats or the products of oats may not be substituted for corn, corn or the products of corn for wheat, nor wheat or the products of wheat for barley, nor may shingles be substituted for lumber, or lumber for shingles, nor may rock salt be substituted for fine salt, nor fine salt for rock salt; likewise, oak lumber may not be substituted for maple lumber, nor pine lumber for either oak or maple, nor may hard wheat, soft wheat, or spring wheat be substituted either for the other. These illustrations are given not as covering the entire field of possible abuses, but as indicating the view which the commission will take of such abuses as they arise." Pages 58, 59. Rule 204 reads: "It is the sense of the commission that no transit privilege should extend beyond one year." Page 59.

In a case involving the application of the principle of "milling in transit" to the manufacture of logs into lumber, Commissioner Prouty said in the opinion:

"It is well understood that at the present time this principle is applied to the movement of many commodities. Generally in its application the raw material pays the local rate into the point of manufacture; when afterwards the manufactured product goes forward, it is transported upon a rate which would be applicable to that product had it originated in its manufactured state at the point where the raw material was received for transportation; whatever has been paid into the mill being accounted for in this

final adjustment. Under this or some equivalent arrangement at the present time grain of all kinds is milled and otherwise treated in transit, flour is blended, cotton is compressed, lumber is dressed and perhaps otherwise manufactured, live stock is stopped off to test the market. It may be urged with much force that the act to regulate commerce does not sanction arrangements of this kind, and the commission early in its history intimated that such might finally be its conclusion. *Crews v. Richmond & D. R. Co.*, 1 Interst. Com. Com'n R. 401; *Id.*, 1 Interst. Com. R. 703. Such practices were, however, in use to a considerable extent at the time of the passage of the act, and since then they have become universal. To abrogate these privileges would be to confiscate thousands and probably millions of dollars in value by rendering worthless industrial plants which have been constructed upon the faith of their continuation. Nor is it a forced construction of the statute to hold that, when the product finally goes forward to the point of consumption, it but completes the journey upon which it entered when the raw material was taken up." *Central Yellow Pine Ass'n v. S. & P. R. Co. et al.*, 10 Interst. Com. R. 193, 213.

Plaintiff claims the question under consideration is settled by the case of *Gulf, Colorado & Santa Fé Ry. Co. v. Texas*, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540. The facts there were in essential respects the reverse of the facts here. The state of Texas sued and recovered from the railway company a penalty for extortion in a charge for the transportation of a car load of corn from Texarkana, Tex., to Goldthwaite, Tex. The Hardin Grain Company at Kansas City had contracted to deliver to Saylor & Burnett at Goldthwaite, Tex., two cars of corn. To fill the order it contracted with the Harrow Commission Company at Kansas City for the purchase of an equal quantity of corn to be delivered to it at Texarkana, Tex. These cars of corn originated at Hudson, S. D. They moved under an interstate shipment consigned "shippers' order notify Harroun Commission Company, Texarkana, Tex." The reason why the Hardin Grain Company contracted for the corn to be delivered to them at Texarkana was because they could fill their contract with Saylor & Burnett at Goldthwaite at about 1½ cents per bushel cheaper than if they had bought the corn for delivery to them at Kansas City and had shipped it from there to Goldthwaite. Neither the Hardin Grain Company nor Harroun Commission Company had any store or warehouse at Texarkana, but under an agreement between them the latter, through its agent stationed there, reshipped the corn to Goldthwaite for the Hardin Company by bill of lading, reciting its receipt from Hardin Grain Company and consigned to "shippers' order notify Saylor & Burnett, Goldthwaite, Tex." The shipment was transfer-



red under original seals and without breaking packages to the Texas & Pacific Railway Company, over which road and the Gulf, Colorado & Santa Fé it was transported to Goldthwaite. When the shipment reached Goldthwaite, Saylor & Burnett, acting for the Hardin Grain Company, tendered the charges prescribed by the State Railroad Commission. This the agent declined to accept, and demanded and collected a larger sum upon the theory that the transportation to Goldthwaite was part of an interstate shipment. Justice Brewer, in the opinion, said:

"The control over goods in process of transportation, which may be repeatedly changed by sales, is one thing; the transportation is another thing, and follows the contract of shipment, until that is changed by the agreement of owner and carrier. Neither the Harroun nor the Hardin Company changed or offered to change the contract of shipment, or the place of delivery. The Hardin Company accepted the contract of shipment theretofore made and purchased the corn to be delivered at Texarkana—that is, on the completion of the existing contract. When the Hardin Company accepted the corn at Texarkana, the transportation contracted for ended. The carrier was under no obligation to carry it further. It transferred the corn, in obedience to the demands of the owner, to the Texas & Pacific Railway Company, to be delivered by it, under its contract with such owner. Whatever obligations may rest upon the carrier at the terminus of its transportation to deliver to some further carrier, in obedience to the instructions of the owner, it is acting not as carrier, but simply as a forwarder. No new arrangement having been made for transportation, the corn was delivered to the Hardin Company at Texarkana. Whatever may have been the thought or purpose of the Hardin Company in respect to the further disposition of the corn was a matter immaterial so far as the completed transportation was concerned.

"In this respect there is no difference between an interstate passenger and an interstate transportation. If Hardin, for instance, had purchased at Hudson a ticket for interstate carriage to Texarkana, intending all the while after he reached Texarkana to go on to Goldthwaite, he would not be entitled on his arrival at Texarkana to a new ticket from Texarkana to Goldthwaite at the proportionate fraction of the rate prescribed by the Interstate Commerce Commission for carriage from Hudson to Goldthwaite. The one contract of the railroad companies having been finished, he must make a new contract for his carriage to Goldthwaite, and that would be subject to the law of the state within which that carriage was to be made.

"The question may be looked at from another point of view. Supposing a car

load of goods was shipped from Goldthwaite to Texarkana under a bill of lading calling for only that transportation, and supposing that the laws of Texas required, subject to penalty, that such goods should be carried in a particular kind of car, can there be any doubt that the carrier would be subject to the penalty, although it should appear that the shipper intended, after the goods had reached Texarkana, to forward them to some other place outside the state? To state the question in other words, If the only contract of shipment was for local transportation, would the state law in respect to the mode of transportation be set one side by a federal law in respect to interstate transportation, on the ground that the shipper intended, after the one contract of shipment had been completed, to forward the goods to some place outside the state? *Coe v. Errol*, 116 U. S. 517-527 [6 Sup. Ct. 475, 29 L. Ed. 715].

"Again, it appeared that this corn remained five days in Texarkana. The Hardin Company was under no obligation to ship it further. It could in any other way it saw fit have provided corn for delivery to Saylor & Burnett, and unloaded and used that car of corn in Texarkana. It must be remembered that the corn was not paid for by the Hardin Company until its receipt in Texarkana. It was paid for on receipt and delivery to the Hardin Company. Then, and not till then, did the Hardin Company have full title to and control of the corn, and that was after the first contract of transportation had been completed.

"It must further be remembered that no bill of lading was issued from Texarkana to Goldthwaite until after the arrival of the corn at Texarkana, the completion of the first contract for transportation, the acceptance and payment by the Hardin Company. In many cases it would work the grossest injustice to a carrier if it could not rely on the contract of shipment it has made, know whether it was bound to obey the state or federal law, or, obeying the former, find itself mulcted in penalties for not obeying the law of the other jurisdiction, simply because the shipper intended a transportation beyond that specified in the contract. It must be remembered that there is no presumption that a transportation when commenced is to be continued beyond the state limits, and the carrier ought to be able to depend upon the contract which it has made and must conform to the liability imposed by that contract." 204 U. S. 412-414, 27 Sup. Ct. 362, 363 (51 L. Ed. 540).

While we are not willing to go so far as to say that plaintiff is correct in assuming that the opinion quoted from settles the question of the character of the shipments involved in the present case, it is true that much of the reasoning upon which the opinion is based applies with force to the situation here. If the test of an interstate shipment, as this and other cases by the same



court indicate, is not the intention of the consignee but the nature of the transaction, the facts in the present case would make the shipments from Oneida, Kan., to Elwood, Kan., intrastate and not interstate. When the grain company accepted the grain at Elwood, it seems that the transportation contracted for by the plaintiff ended. The carrier was under no obligation, so far as the original contract was concerned, to carry it further. The arrangement between the defendant and the grain company, the consignee, was one with which the shipper who made the contract with the defendant had nothing to do, and of which it did not even have notice. It can hardly be contended that any new arrangement had actually been made for transportation to outside points before the shipment to Elwood was completed. It is true a custom of business prevailed between the consignee and the defendant railroad company, which the former, in case it so elected, might at any time within one year reship the grain and have credit on the new rate to the amount paid on the initial shipment; but before any election was made the transportation between Oneida and Elwood seems to have been a completed transaction. The cars of grain had been received and unloaded by the consignee, and the proceeds less the freight charges had been paid to the shipper, who had no further possible interest in the transaction.

In support of the contention that the shipments in question are interstate in character, the defendant, appellant, relies with confidence upon a number of authorities, among which are: *So. Pac. Terminal Co. v. Int. Comm. Comm.*, 219 U. S. 498, 31 Sup. Ct. 279, 55 L. Ed. 810; *Railroad Commission v. Worthington*, 225 U. S. 101, 32 Sup. Ct. 658, 56 L. Ed. 1004. These, being in many respects analogous cases, will be considered together. In the first, the terminal company was held to be a common carrier engaged in interstate commerce as part of the Southern Pacific Railroad & Steamship System; its piers being mere facilities for import and export traffic at the port of Galveston. Its arrangement with Young enabled him to increase his business largely and rapidly. The business consisted in buying cotton seed cake in the interior, shipping to himself in car load lots at the piers, there grinding it into meal, and sacking and loading into steamships for export. He was the initial shipper from the interior points to himself, as consignee, at the port of Galveston, from which he reshipped to the export trade, and the whole transaction was over one line of transportation; the milling in transit being a mere incident. The point decided was that the terminal facilities, though nominally owned and operated by the terminal company, were mere links in a chain of interstate transportation, and that the arrangement with Young in effect gave him an undue preference over other ship-

pers; and that where a means of interstate transportation is used for that purpose, the traffic comes under the jurisdiction of the Interstate Commerce Commission.

In *Railroad Commission v. Worthington*, supra, the facts were these: Coal was shipped from mines in Ohio to Huron or Cleveland on Lake Erie, marked "Lake Coal," and consigned by rail to the operator or some office employé, whose name was used for convenience for the purpose of designating the particular grade of coal. When a vessel arrived, the cars were moved on to the dock and loaded into the vessel. When the coal left the mines, its ultimate destination was not known, and sometimes it was sold and vessels arranged for after the coal reached the lake ports. When loaded on vessels it was carried to points in Canada. The Railroad Commission of Ohio ordered in a rate of 70 cents per ton on the coal from the mines to the lake. The court upon the facts held that "by any fair test the transportation of this coal from the mine to the upper lake ports is an interstate carriage." It appears that the coal was sometimes sold "f. o. b. vessel" and billed to the shipper, and that the carrier owned and controlled the facilities for unloading from its cars upon the docks and reloading into the vessels. In the syllabus it was ruled that the order of the State Railroad Commission was an unlawful attempt directly to regulate interstate commerce, because it established a rate on "lake cargo coal" which was billed from Ohio coal fields to Ohio ports on Lake Erie, "where such rate is applicable only to such coal as is in fact placed upon vessels at those ports for carriage to points outside the state, and covers the actual placing of such coal upon the vessels, and the trimming or distributing of it in the holds of the vessel so that the vessels may safely proceed on their interstate journey." In the opinion it was said: "But it must always be remembered that this 70 cent rate applies solely to such coal as is in fact placed upon vessels for carriage to beyond the state points, \* \* \* and the rate fixed by the commission, which is in controversy here, is applicable alone to coal which is thus, from the beginning to the end of its transportation, in interstate carriage, and such rate is intended to and does cover an integral part of that carriage, the transportation from the mines to the Lake Erie port, the placing upon the vessel, and the trimming or distributing in the hold, if required." 225 U. S. 108, 32 Sup. Ct. 656, 56 L. Ed. 1004.

In distinguishing the above case from *Gulf, Col. & S. Fé Ry. Co. v. Texas*, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540, the court says: "This was held to be an intrastate shipment unaffected by the fact that the shipper intended to reship the corn from Texarkana to Goldthwaite. \* \* \* There a new and independent contract for intrastate ship-



ment was made, the interstate transportation having been completely performed; here a rate is fixed on that part of an interstate carriage which includes the actual placing of the coal into vessels ready to be carried beyond the destination." 225 U. S. 109, 32 Sup. Ct. 656, 56 L. Ed. 1004.

The case referred to in a former part of this opinion, *Central Yellow Pine Ass'n v. S. & P. R. Co. et al.*, 10 Interst. Com. R. 193, is also relied upon by the defendant. That is the case where the "milling in transit" principles were applied to the shipment of logs to the mill and their reshipment as lumber, but the lumber company owned the lands from which the logs were cut as well as the mills where they were sawed, and logs and lumber were shipped by the same consignor. Other cases cited by defendant are: *Texas & Pacific Ry. Co. et al. v. Railroad Commission of Louisiana* (C. C.) 183 Fed. 1005; *Cutting v. Florida R. & Nav. Co.* (C. C.) 3 Interst. Com. R. 665, 46 Fed. 641; *The Steamer Daniel Ball*, 10 Wall. 564, 19 L. Ed. 999; *J. Rosenbaum Grain Co. v. R. R. Co.* (C. C.) 130 Fed. 46; *Henry A. Klyce Company v. Illinois Central Railroad Company*, 19 Interst. Com. R. 567.

It is impossible within the limits of this opinion to discuss all of them. In some of the cases the interstate character of the shipments was conceded. In others the only question involved was the propriety of permitting the use of inbound expense bills on reshipments after milling or elevation in transit. There is a wilderness of cases involving transit privileges and reconsignment rates, an elaborate discussion of which can be found in *Drinker's The Interstate Commerce Act*, vol. 1, §§ 45, 189, 190, et seq. The author says that it is not possible to reconcile all the statements and dicta contained in the numerous discussions of the courts and rulings of the Interstate Commerce Commission upon the subject. In its earlier rulings the Interstate Commerce Commission went so far as to hold that: "The fact that the owner of merchandise, which is offered to a carrier for transportation from one point to another in the same state, intends to have it further transported by a second carrier into another state does not make such first transportation interstate commerce, or render the carrier subject to the control of the commission in respect to it, even though such first carrier may be informed of the ultimate destination of the merchandise." *Mo. & Ill. Ry. Tie & Lbr. Co. v. Cape Girardeau & West Ry. Co.*, 1 Interst. Com. Com'n R. 30.

Again, in *Chicago, R. I. & P. R. Co. and Chicago & A. R. Co.*, 3 Interst. Com. Com'n R. 450, the commission held that, where the original contract provided that the shipper might stop the cattle at an intermediate point to test the market, and at his option reship to points beyond, the reshipment was not a part of the through haul; there being

no absolute contract for reshipment. In a number of more recent rulings the exact contrary is held. See cases cited in 1 *Drinker's The State Commerce Act*, § 45, note. The Supreme Court of the United States, in considering the question as to when a shipment begins to move in interstate commerce, said in the case of *Coe v. Errol*, 116 U. S. 525, 6 Sup. Ct. 477, 29 L. Ed. 715:

"There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movements for transportation from the state of their origin to that of their destination. \* \* \* 'Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced.' *The Daniel Ball*, 10 Wall. 557, 19 L. Ed. 999. But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. \* \* \* Until actually launched on its way to another state, or committed to common carrier for transportation to such state, its destination is not fixed or certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state. \* \* \* Until shipped or started on its final journey out of the state its exportation is a matter altogether in fieri, and not at all a fixed and certain thing."

Upon the facts in this case the Interstate Commerce Commission would doubtless assume jurisdiction over any controversy that might arise in respect to the use of inbound expense bills and the allowance of a proportional tariff on the reshipment, and probably the courts would uphold its jurisdiction. In the numerous cases upon the vexed question of proportional rates and reconsignment charges, there are statements and dicta intimating that, if the commission has jurisdiction of the rates to be charged, it is solely upon the principle that, "when the completed product finally goes forward to the point of consumption, it but completed the journey upon which it entered at the beginning," and the whole transaction is interstate in character.

The court is inclined to rest its affirmance of the decision of the lower court upon the broader ground that the transaction, whatever it may be designated, is not of such a character as to deprive the state of the right to exercise its police power over that part of the transportation which took place wholly within the limits of the state. In *Larabee v. Railway Co.*, 74 Kan. 808, 88 Pac. 72, it was held that:

"The internal movement of property is not freed from state control until after it has been finally released by the consignor to a



carrier for transportation to a destination fixed beyond the state line; and under the facts of this case such control is not lost until after the freight has been billed to its destination." (Syl. 5.)

"The switching of cars, loaded with freight, afterward transported to another state, which is purely local, which is independently contracted for, which has no relation to the contract of carriage under which the freight is removed beyond the border of the state, which has no relation to the ultimate destination of the cars, and which begins and ends before the destination of any car handled is fixed, is a mere preliminary incident to interstate commerce and subject to state control." (Syl. 6.)

In affirming the decision the United States Supreme Court in *Missouri Pacific Ry. v. Larabee Mills*, 211 U. S. 612, 621, 29 Sup. Ct. 214, 53 L. Ed. 352, expressly declined to rest its decision upon any distinction between interstate commerce and that wholly within the state, and upheld the principle that, in the absence of any express action by Congress, the state may regulate many matters which indirectly affect interstate commerce. The opinion by Justice Brewer cites numerous cases in which it was held that certain regulations were not unreasonable, nor in any just sense restrictions upon interstate commerce; such, for instance, as those requiring engineers to be examined from time to time to test their ability to distinguish colors (*Nashville, etc., Railway v. Alabama*, 128 U. S. 98, 9 Sup. Ct. 28, 32 L. Ed. 352); requiring telegraph companies to receive dispatches and to transmit and deliver them with due diligence as applied to messages from outside the state (*Western Union Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105); forbidding the running of freight trains on Sunday (*Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166); and numerous other matters. (See cases cited in the opinion.) In answer to the objection that Congress had already acted by creating the Interstate Commerce Commission, Justice Brewer said that this fact did not, in the absence of action by it, change the rule which existed prior to the commission, and further said: "A mere delegation by Congress to the commission of a like power has no greater effect, and does not of itself disturb the authority of the state. It is not contended that the commission has taken any action in respect to the particular matters involved. It may never do so, and no one can in advance anticipate what it will do when it acts. Until then the authority of the state in merely incidental matters remains undisturbed." 211 U. S. 623, 29 Sup. Ct. 218, 53 L. Ed. 352.

In the *Minnesota Rate Cases*, decided within the past 30 days (230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. —) the United States Supreme Court reaffirmed the doctrine that

state regulation of interstate traffic to be unlawful must be direct, and not the merely incidental effect of the exercise by the state of its police powers. The court quotes with approval the following language from the opinion in *Louisville & Nashville Railroad Co. v. Kentucky*, 183 U. S. 503, 518, 22 Sup. Ct. 95, 102 (46 L. Ed. 298):

"It may be that the enforcement of the state regulation forbidding discrimination in rates in the case of articles of a like kind, carried for different distances over the same line, may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government to be unlawful must be direct, and not the merely incidental effect of enforcing the police powers of a state."

Mr. Justice Hughes, who spoke for the court, refers to the *Larabee Mills Case*, and in the opinion said:

"The question we have now before us, essentially, is whether, after the passage of the Interstate Commerce Act and its amendment, the state continued to possess the state-wide authority which it formerly enjoyed to prescribe reasonable rates for its exclusively internal traffic. That, as it plainly appears, was the nature of the action taken by Minnesota, and the attack, however phrased, upon the rates here involved as an interference with interstate commerce is in substance a denial of that authority.

"Having regard to the terms of the federal statute, the familiar range of state action at the time it was enacted, the continued exercise of state authority in the same manner and to the same extent after its enactment, and the decisions of this court, recognizing and upholding this authority, we find no foundation for the proposition that the act to regulate commerce contemplated interference therewith.

"Congress did not undertake to say that the intrastate rates of interstate carriers should be reasonable, or to invest its administrative agency with authority to determine their reasonableness. Neither by the original act nor by its amendment did Congress seek to establish a unified control over interstate and intrastate rates; it did not set up a standard for intrastate rates, or prescribe, or authorize the Commission to prescribe, either maximum or minimum rates for intrastate traffic. It cannot be supposed that Congress sought to accomplish by indirection that which it expressly disclaimed, or attempted to override the accustomed authority of the states without the provision of a substitute. On the contrary, the fixing of reasonable rates for intrastate transportation was left where it had been found; that is, with the states and the agencies created by the states to deal with that subject. Mis



souri Pacific Ry. Co. v. Larabee Mills, 211 U. S. 612, 620, 621 [29 Sup. Ct. 214, 53 L. Ed. 352]."

There is no contention in the present case that Congress by itself or through the Commission has taken any action looking toward the exercise of control over delays in transportation such as those complained of by the plaintiff. If the state may require telegraph companies to receive and transmit interstate messages with diligence and impose reasonable penalties for failure to do so, as held in *Western Union Tel. Co. v. James*, supra, then upon the same principle so long as Congress has not already acted upon the matter of delays in the transportation of interstate shipments, the state, we think, in the proper exercise of the police power, may enact and enforce reasonable regulations designed to prevent unnecessary delays in such shipments occurring wholly within its borders. The questions raised by the appeal have been ably presented orally and in the briefs.

The judgment is affirmed. All the Justices concurring.

(50 Kan. 317)

NEWBY v. FOX et al.

(Supreme Court of Kansas. July 5, 1913.)

(Syllabus by the Court.)

1. MARSHALING ASSETS AND SECURITIES (§ 2\*)  
—RIGHT TO ENFORCE—MORTGAGES—VENDOR AND PURCHASER.

The owner of a tract of land, who gives a mortgage upon it and then conveys it in consideration of the buyer assuming the mortgage debt and giving him a note for the rest of the purchase price, secured by a second mortgage on a part of the tract, is not precluded by the fact that he is personally liable for the payment of the first mortgage from requiring a marshaling of securities, so that the parcel of land on which he has no lien shall be appropriated to the payment of the first mortgage before the remainder of the tract is resorted to for that purpose.

[Ed. Note.—For other cases, see *Marshaling Assets and Securities*, Cent. Dig. § 1; Dec. Dig. § 2.\*]

2. MARSHALING ASSETS AND SECURITIES (§ 10\*)  
—RIGHT TO ENFORCE—MORTGAGES—VENDOR AND PURCHASER.

In the situation stated the right to a marshaling of securities is not defeated by the sale of the tract which is subject only to the first mortgage to a purchaser for value, who from the record has notice of both mortgages and of the assumption of the first mortgage debt by the maker of the second mortgage, although such sale is made before such right has been asserted.

[Ed. Note.—For other cases, see *Marshaling Assets and Securities*, Cent. Dig. §§ 8, 9; Dec. Dig. § 10.\*]

3. MORTGAGES (§ 178\*)—PRIORITIES.

In that situation the rights of one who has purchased the first mortgage are not diminished by the fact that such purchase was made at the instance and for the benefit of the owner of the tract covered only by that mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 426-434, 437-441; Dec. Dig. § 178.\*]

Appeal from District Court, Butler County. Action by T. C. Newby against Martha Fox and others. From the judgment, plaintiff appeals. Modified.

T. A. Kramer, Geo. J. Benson, V. P. Moon-ey, and E. D. Stratford, all of El Dorado, for appellant. Dale, Amidon, Madalene & Hegler, of Wichita, and C. L. Aikman, of El Dorado, for appellees.

MASON, J. T. C. Newby owned a farm containing 520 acres. He procured a loan upon it for \$4,500, executing to the Warren Mortgage Company a mortgage and a commission mortgage, which will be spoken of as one instrument. Later he sold it to J. J. Maxey, who in the deed assumed the payment of the existing mortgage on the entire tract, and also gave Newby a note for \$10,100, secured by a second mortgage upon 360 acres of it. Maxey then sold the land to W. F. Young, who sold it to J. J. Norton. Neither Young nor Norton became personally liable for any part of the mortgage debt, but each accepted a deed reciting that the land was subject to both mortgages. Norton sold to Charles Bradshaw the 160 acres that was not covered by the second mortgage; the deed providing that this tract should be subject to 36 per cent. of the first mortgage. Both mortgages being in default, Newby began an action for the foreclosure of that owned by him, making Charles Hartrouff, who had purchased the first mortgage, a party. A decree was rendered for the foreclosure of both mortgages. The two tracts, that owned by Norton and that owned by Bradshaw, were ordered to be sold separately; 64 per cent. of the first mortgage debt to be paid from the proceeds of the former and the remaining 36 per cent. from the proceeds of the latter. Newby appeals; his chief contention being that the entire proceeds of the tract on which he had no lien should have been appropriated, so far as necessary, to the payment of the first mortgage, which covered both tracts, before the other was resorted to for that purpose.

[1, 2] The principle which the appellant invokes has been thus stated:

"The equitable remedy of marshaling securities, with that of marshaling assets, depends upon the principle that a person having two funds to satisfy his demands shall not, by his election, disappoint a party having but one fund. The general rule is that if one creditor, by virtue of a lien or interest, can resort to two funds, and another to one of them only (as, for example, where a mortgagee holds a prior mortgage on two parcels of land, and a subsequent mortgage on but one of the parcels is given to another), the former must seek satisfaction out of that fund which the latter cannot touch." 4 Pomeroy's *Equity Jurisprudence* (3d Ed.) § 1414; 19 A. & E. *Encycl. of L.* 1256.

"The doctrine of marshaling assets and se-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



curities is that where a creditor has a lien on two funds in the hands of the same debtor, and another creditor has a lien on one of them only, equity, on the application of the latter, will compel the former to make his debt out of that fund to which the latter cannot resort." 26 Cyc. 927.

Here Hartronft and Newby each have a personal claim against Maxey, who by the assumption of the first mortgage became directly indebted to Newby. Hartronft's claim is secured by a first lien on the tract owned by Bradshaw and also on that owned by Norton. Newby's claim is secured only by a second lien on the Norton tract. Newby has a right to require that Hartronft shall look first to the Bradshaw tract, unless this right is defeated either (1) by the fact that he is personally liable on the debt secured by the first mortgage, or (2) by the fact that the Bradshaw tract is no longer owned by Maxey, but has been bought and paid for by Bradshaw. Hartronft has no real concern in the matter. His security is abundant, and in any event he can suffer no prejudice from being required to resort first to one tract rather than to the other. The controversy is between Newby and Bradshaw and turns upon the question, Which has the superior equity?

It has been said that a marshaling of securities cannot be required by a "single creditor" (that is, one having a lien only on a single fund) who is himself bound to the "double creditor" (the one having a lien on both funds). 19 A. & E. Encycl. of L. 1286, note 7; 26 Cyc. 937, note 46. In the case cited in each of the notes referred to, Lord Westbury said: "The doctrine of marshaling is no more than this: That where one person has a clear right to resort to two funds, and another person has a right to resort to one only of these two funds, the latter may say that, as between himself and the double creditor, that double creditor shall be put to exhaust the security upon which the single creditor (if I may so call him) has no claim. But it would be utterly impossible to apply that doctrine to a case where the single creditor is in truth himself bound to the party entitled to the other security." *Dolphin v. Aylward*, 4 Eng. & Irish App. L. R. 486, 505. There, however, the situation was such that the "single creditor" had no right to require the debt he owed to be made out of the property, as appears from the statement: "Nor is any contract taken that the land shall be the primary \* \* \* fund for the payment of these debts." Page 504. The intimation is clear that, if the primary liability had been against the property, the fact that the "single creditor" was also personally liable would not have destroyed his right to ask a marshaling of securities. "Where land is sold subject to a mortgage, the effect, as between the grantor and the grantee, is to make the land the primary fund for the satisfaction of the incumbrance." 27 Cyc. 1343.

Here Newby sold the land to a buyer who assumed the mortgage debt. Young and Norton each took subject to the mortgage. While the deed from Norton to Bradshaw purported to convey title to the 160 acres subject only to 36 per cent. of the first mortgage, this was consistent with the theory that Newby's personal liability was secondary to the lien on the land. And doubtless no arrangement between the grantor and grantee in that instrument could re-establish the primary liability of Newby. He therefore owed no duty to Bradshaw to pay the first mortgage, and his obligation to Hartronft was not fatal to his claim for a marshaling of securities.

If proceedings to enforce the two mortgages had been begun while Maxey still owned the land, Newby would clearly have had the right to insist that the tract on which he had no lien should be first exhausted. To determine how far his rights in this respect were affected by the sale to Bradshaw involves the consideration of a question concerning which there is some conflict in the authorities. After noting one aspect of this conflict, the author of the article on "Marshaling Assets" in the American and English Encyclopedia of Law continues: "Subject to the foregoing qualifications it may be stated as a general rule that the right of the junior creditor as against the common debtor is practically absolute and consequently prevails against all those claiming under the debtor by lien or title subsequent in time. Generally, however, the equity will not be enforced to the prejudice of one having an equal or superior right. Subsequent purchasers or incumbrancers with actual or record notice of the facts giving rise to the equity have no such superior standing, however, as to enable them to prevent the application of the doctrine." 19 A. & E. Encycl. of L. 1260, 1261.

Where a condition has arisen under which the holder of a mortgage on a part of a tract, the whole of which is covered by a prior mortgage, would have a right to invoke the doctrine of marshaling securities against the first mortgagee and the common debtor, this right continues against any one who acquires an interest in the part of the tract not covered by the second mortgage in any of the following ways: By virtue of an attachment or judgment lien; by a voluntary or fraudulent conveyance; by purchase with actual or constructive notice that the second mortgagee has already asserted such right. See context to last citation, and notes. There are cases holding that the right may be successfully invoked against one who has purchased and paid for the tract which is subject only to the first mortgage, with notice from the record of the existence of the second mortgage; this is on the theory that such purchaser has notice of the facts which give the right, and that with such notice he can acquire no more advantageous position than that occupied by his grantor, and therefore that he



takes title subject to the same equities. *Conrad v. Harrison*, 3 Leigh (Va.) 532; *Robeson's Appeal*, 117 Pa. 628, 12 Atl. 51; *Boucher v. Smith*, 9 Grant's Ch. Rep. (Upper Canada) 347. The weight of authority, however, seems to support the contrary view, which is elaborated in an opinion by Judge Horace H. Lurton in *Gilliam and Others v. McCormack and Others*, 85 Tenn. 597, at pages 606, 607, 4 S. W. 521, at page 524, where the prior decisions are carefully reviewed. It was there said: "The proposition contended for would amount to this: That, if at any time the situation of several subsequent mortgagees is such that as between themselves such a marshaling of securities could have been invoked, by proper application to a court of equity, as would result in the satisfaction of the senior mortgages out of a fund which the junior mortgagee could not reach, whereby the fund upon which he could only go should be left for his satisfaction, this inchoate equity cannot be disturbed, displaced, or defeated by any subsequent alienation or mortgage by the common debtor or mortgagor. This rule, if admitted, would result in elevating an inchoate equity to marshal assets or securities to the high plane of a lien. Yet it would be an incumbrance or lien of which a subsequent mortgagee would have no notice by record or otherwise. It would clearly be in antagonism to our registry laws. \* \* \* It follows, therefore, from this view of the question, that *the equity to marshal assets is not one which fastens itself upon the situation at the time the successive securities are taken, but, on the contrary, is one to be determined at the time the marshaling is invoked. The equity can only become a fixed right by taking proper steps to have it enforced; and until this is done it is subject to displacement and defeat by subsequently acquired liens upon the funds.*" This reasoning is very persuasive, but if the conclusion is accepted it does not necessarily determine the exact question here involved.

The rule that, as between the original parties, the mortgagee of a part of a tract may require the holder of a prior mortgage upon all of it to proceed first against that not covered by the second mortgage is manifestly fair. It does no injury to one creditor and confers a benefit on the other, while the common debtor cannot be heard to complain. Whether it should be applied against new parties depends upon their comparative equities. 26 Cyc. 931. One who acquires title through the debtor without parting with value (as a judgment creditor or a grantee in a voluntary conveyance) cannot thereby gain any superior standing. Even a purchaser for value who becomes such with notice of a proceeding to enforce the right to have the securities marshaled must be deemed to have acted at his peril. But it might unduly extend this merely equitable right to allow its enforcement against one who has bought and paid for the singly mortgaged

land, knowing, to be sure, of the existence of the two mortgages, but having no particular reason to anticipate that the doctrine of marshaling securities will ever be invoked. The present case, however, is affected by a special feature of the relation between Newby and Maxey. The principle followed in the Tennessee case, with the reason upon which it is based, has been given this expression: "The equity of marshaling arises where the owner of property subject to a charge has subjected it, together with another estate, to a paramount charge, and the estate thus doubly charged is inadequate to satisfy both the claims. \* \* \* The equity is apparently not binding on the debtor's alienee for value, notwithstanding that he may have taken with notice of the facts, unless his interest were acquired after the institution of a suit. For although the ordinary rule is that an alienee with notice is bound by all the equities which bound his alienor, yet there is a distinction in regard to this particular equity, because the omission of the creditor to take an express collateral charge raises a presumption that he meant to leave the equity defeasible and to continue the owner's power of dealing with the second estate for value, unfettered by his claim. It is otherwise if the debtor, on creating the single claim, covenants to satisfy the paramount charge out of the other estate, or fraudulently conceals its existence. For then a purchaser taking with notice of the covenant or concealment will be bound by the same equity as the debtor himself." *Adams on Equity* (8th Ed.) pp. 271, 273.

The general rule as thus stated applies to the ordinary case where the owner of land first mortgages all of it to one creditor and then mortgages a part of it to another. The mortgagor gives the second mortgagee no assurance that he will pay the first mortgage, or that the land covered by the second mortgage shall be exonerated from liability upon the first. Equity does not read such an assurance into their contract but merely as a matter of fairness requires the first mortgage to be paid out of the tract not covered by the second. Here, however, Maxey specifically agreed that he would pay not merely the second mortgage debt but also the first. He thereby bound himself that the first mortgage should be paid without recourse upon the tract mortgaged to Newby; in effect that the other tract should be first exhausted. This obligation, being essentially contractual, could not be affected by the transfer of the singly incumbered tract. All grantees claiming under Maxey had notice from the record of his assumption of the first mortgage debt (*Knowles v. Williams*, 58 Kan. 221, 48 Pac. 856) and were bound by the implied agreement to exonerate the singly mortgaged tract from liability therefor.

A very similar situation arises where several portions of a mortgaged tract are succes-



sively conveyed to different grantees, under an actual or virtual agreement that the grantor shall pay off the lien. In that case the parcels conveyed are chargeable in the inverse order of alienation (19 A. & E. Encycl. of L. 1773; 27 Cyc. 1307), and the rule is held not to be affected by the subsequent transfer of any of the portions sold (19 A. & E. Encycl. of L. 1275). The equity arising from this situation is stronger than that ordinarily requiring the marshaling of securities. It really rests upon the contract. The mortgagor who conveys a part of the mortgaged premises by warranty deed undertakes that the buyer shall be saved harmless from the mortgage, that the tract retained shall bear the entire burden, and that the tract sold shall be exonerated. The right to the enforcement of this understanding is essentially contractual and ought not to be disturbed by subsequent transfers of the property. This distinction was noted in the Tennessee case, where it was said: "A marked distinction exists between the cases holding lands sold subject to the lien of the vendor, or that of a mortgage or judgment liable to the discharge of such lien in the inverse order of alienation. In all such cases the parcels were all actually bound by lien or incumbrance, of which the allenees had notice, either actual or constructive, and not by a mere equity, such as that to have a marshaling." *Gilliam and Others v. McCormack and Others*, 85 Tenn. 597, 4 S. W. 521.

Indeed, the whole practice of charging separate parcels of a mortgaged tract (when conveyed successively to different persons by deeds in which the grantor undertakes to pass a clear title), in the inverse order of alienation, rests upon the theory that he who buys one parcel, knowing that another has already been sold, stands on no better footing than his grantor and must submit to his own land being appropriated to the payment of the lien before that previously deeded is resorted to. This is essentially the situation here presented. Maxey at one time owned the land, all of which was subject to a first mortgage. He had given a second mortgage to Newby on a part of it and had specifically agreed with Newby to pay the first mortgage debt. The title which Bradshaw subsequently acquired, through Young and Norton, to the tract not covered by the second mortgage was carved out of Maxey's interest, and was subject to the same equities. If Maxey had deeded to Newby the tract covered by the second mortgage, in satisfaction of the note thereby secured, and had then conveyed the rest of the land to Bradshaw, directly or through others, Newby's equity would be directly within the protection of the rule regarding the inverse order of alienation. The fact that Newby held a mortgage on the parcel in which he was interested, instead of a deed, does not lessen his claim, since the essential element is present of a guaranty by the owner of the land that he shall be saved

harmless from the first mortgage. That this view accords with the opinion in the Tennessee case appears from what was later said by the Supreme Court of that state: "If the person who ought to pay the debt has conveyed different parcels of land bound for its payment, at several times to bona fide purchasers, as between such purchasers, the lands are chargeable in the inverse order of their alienation. \* \* \* It will \* \* \* be seen that, though adopted by the courts without the aid of a statute, yet it (the rule) has been so long established, and so uniformly applied, that it may well be regarded as a rule of property in this state. \* \* \* The true foundation of the doctrine is in the equities subsisting between the vendor or mortgagor and his grantee of a part of the premises subject to the superior lien. Wherever a portion of lands so subject is conveyed by a warranty deed that is properly registered, and a portion is retained by the grantor, as between himself and his grantee, that part retained becomes in equity a primary fund for the discharge of this superior lien. As is well expressed by Mr. Pomeroy, in section 1224, third volume, of his work on Equity Jurisprudence: 'The form of the deed shows that the grantee not only assumed payment of no portion of the mortgage debt but did not buy his parcel even subject to the mortgage; and the entire burden was therefore left upon the portion of land remaining in the ownership of the mortgagor. Whatever be the rights of the mortgagee to resort to either or both of the parcels, it is plainly the equitable duty of the mortgagor to assume the whole debt and thus to free the grantee's parcel from the lien.' \* \* \* The doctrine being thus established that the grantee obtains an equitable priority as against the mortgagor, and the portion of the premises left in the mortgagor's hands is primarily chargeable with the whole mortgage, the inference is natural, if not necessary, that the same burden follows this portion when subsequently conveyed by the mortgagor to the second grantee." *Meek v. Thompson*, 99 Tenn. 732, 735-737, 42 S. W. 685, 686, 687.

It cannot be contended that Newby, in failing to have Maxey's note to him secured by a mortgage on the entire farm, expressed a willingness that the tract which was afterwards conveyed to Bradshaw might be disposed of by Maxey without any regard to his rights. What motives actuated Newby and Maxey in making their contract is not a matter of inquiry. The contract made, even when interpreted as giving full force to Newby's equity of marshaling the securities, did not place Maxey in the same situation as though he had given a mortgage for the \$10,100 upon the entire 520 acres. He was at liberty by paying the first mortgage to free the 160-acre tract absolutely from all lien.

The suggestion is made that the doctrine of marshaling securities was not rightfully



invoked because proof was not made that Newby's lien was insecure. There was sufficient evidence, however, to that effect, and in any event, if Newby's claim is actually secure, the order regarding the marshaling of securities can work no prejudice to the other parties.

[3] The appellant also maintains that Hartnoff bought the first mortgage at the instance of Bradshaw to have this mortgage handled in such a manner as to be most beneficial to his own interest. The claim is made that this arrangement resulted in Newby's mortgage becoming a first lien. No reason is perceived why such result should follow.

The El Dorado National Bank has a claim upon the second mortgage and has also appealed from the judgment, but for the purpose of the questions here involved its interests are the same as those of Newby, and no separate statement of them is required.

The judgment of the district court is modified so as to require all the proceeds of the Bradshaw tract to be devoted to the payment of the first mortgage before any part of the proceeds of the Norton tract are applied to that purpose. The necessary change of language will be indicated in the mandate. All the Justices concurring.

(90 Kan. 332)

**YOUNG MEN'S CHRISTIAN ASS'N OF SALINA, KAN., et al. v. UNITED STATES FIDELITY & GUARANTY CO.**

(Supreme Court of Kansas. July 5, 1913.)

*(Syllabus by the Court.)*

**1. CONTRACTS (§ 214\*)—BUILDING CONTRACT—CONSTRUCTION—"FINAL PAYMENT."**

A contract for the erection of a building contained a clause, which, after reciting the whole sum to be paid for work and materials, provided "that such sum shall be paid by the owners to the contractors in current funds and only upon the certificates of the architects, as follows: On or before the first of every month the architects shall make written estimates of all work and material furnished on the contract during the preceding thirty days and eighty per cent. of same shall be paid the contractors by the owners when presented. The final payment shall be made within ten days after the completion of the work included in this contract and all payments shall be due when certificates for the same are issued." *Held*, that the "final payment" referred to the 20 per cent. of the amount of the estimates after the 80 per cent. had been paid (citing Words and Phrases, vol. 3, p. 2803).

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 980-995; Dec. Dig. § 214.\*]

**2. PRINCIPAL AND SURETY (§ 115\*)—CONSTRUCTION.**

A bond of indemnity was executed by a surety company against pecuniary loss resulting from the failure of a contractor to comply with the terms of a building contract. The bond referred to the contract and contained a condition that no liability should attach to the surety unless the owner should give notice to and obtain the consent of the surety before making the final payment provided for in the contract.

*Held*, that the failure to retain the required percentage discharged the surety to the extent of the premature payments.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 244-268; Dec. Dig. § 115.\*]

Johnston, C. J., and Burch and Benson, JJ., dissenting.

**Appeal from District Court, Saline County.**

Action by the Young Men's Christian Association of Salina, Kansas, and others against the United States Fidelity & Guaranty Company. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

Z. C. Millikin, of Salina, for appellant. Burch & Litowich, of Salina, McClintock & Quant, of Topeka, and Thos. L. Bond and David Ritchie, both of Salina, for appellees.

PORTER, J. The question to be determined in this case is whether a bond given by a surety company guaranteeing the faithful performance of a contract for the erection of a building is discharged by the failure of the owner to retain the final payment provided for in the contract until the completion of the building and until the bonding company has consented thereto.

The defendant is a corporation engaged in writing surety bonds for compensation. In November, 1909, A. H. Ritter & Son, builders, entered into a written contract with the Young Men's Christian Association of Salina (herein referred to as the "Association") for the construction of an association building at a cost of \$34,600. The contract was executed in duplicate, and a copy with exhibits showing the plans and specifications was submitted to the bonding company, and in December, 1909, the company executed its bond for which it was paid a premium. The building was finally completed except as to a few minor details in the fall of 1910. The contractor defaulted in payment of certain claims for material and labor, and some of the subcontractors filed liens. The Association brought suit on the bond to recover damages for the breach of its conditions. The jury returned a verdict for the Association and also made findings of fact. The defenses were raised by a demurrer to the evidence, by a motion for a directed verdict, and a motion for judgment on the findings.

The building contract provided, among other things, that the building was to be erected according to plans and specifications prepared by a firm of architects at Salina and under their direction, and that they should construe the meaning of the plans and specifications. During the progress of the work a dispute as to whether the basement walls should be 21 or 25 inches in thickness arose between the Association and the architect. Smith, who acted for his firm, which resulted in his resignation. The Association thereupon substituted one Barnes its secretary, who

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.



from that time acted as superintendent of construction. He was without experience as an architect or builder, and his substitution without notice to or knowledge of the bonding company is one of the defenses pleaded in the answer and relied upon at the trial. Another defense is that certain material alterations in the plans were made without the knowledge or consent of the surety. The third defense is that the required percentage of money earned by the contractor was not retained by the Association as required by the bond and that the failure to comply with this condition discharged the surety. From our view of the case it is not deemed necessary to consider any of these defenses except the last.

In respect of this defense the plaintiff Association makes the contention: First, that the provision in the contract whereby it was to pay 80 per cent. of the written estimates of all work and material for 30 days preceding the first of each month does not in so many words say that 20 per cent. should be retained, or that the final payment mentioned should be 20 per cent. of such estimates; and, second, that the provision was solely for its benefit and not that of the surety, and moreover was not a provision prohibiting it from making payment in full at any time it saw fit to do so, but on the contrary it was intended by the provision that it should be wholly optional with the Association to retain part of the payments or to pay the whole sums due to the contractors for any work or material furnished "when certificates for the same" were issued.

[1] As to the first contention, we think it is clear that the contract provision for the payment of 80 per cent. of the estimates of material and work furnished contemplated that 20 per cent. might be retained as the "final payment," and that the only reasonable construction to be given to the words "final payment" is that they mean 20 per cent.; that is, the percentage remaining due after the payment of the 80 per cent. mentioned.

Article 9 of the contract reads: "It is hereby mutually agreed between the parties hereto that the sum to be paid by the owners to the contractors for said work and materials shall be thirty-four thousand six hundred (\$34,600.00) dollars, subject to additions and deductions as hereinbefore provided, and that such sum shall be paid by the owners to the contractors in current funds and only upon the certificates of the architects, as follows: On or before the first of every month the architects shall make written estimates of all work and material furnished on the contract during the preceding thirty days and eighty per cent. of same shall be paid the contractors by the owners when presented. The final payment shall be made within ten days after the completion of the work included in this contract

and all payments shall be due when certificates for the same are issued."

The bond refers to the contract, and the conditions of the bond, in respect to the matter under consideration, read: "Now therefore, the condition of the foregoing obligation is such that if the principal shall well and truly indemnify and save harmless the said obligee from any pecuniary loss resulting from the breach of any of the terms, covenants or conditions of the said contract on the part of the said principal to be performed then this obligation shall be void, otherwise to remain in full force and effect in law, provided, however, that this bond is issued subject to the following conditions and provisions: First. That no liability shall attach to the surety hereunder unless in the event of any default on the part of the principal in the performance of any of the terms, covenants or conditions of said contract the obligee shall promptly and in any event not later than thirty days after knowledge of such default deliver to the surety at its office in the city of Baltimore, written notice thereof with a statement of the principal facts showing such default and the date thereof; nor unless the said obligee shall deliver written notice to the surety at its office aforesaid and the consent of the surety thereof obtained before making the principal the final payment provided for under the contract herein referred to. Second. That in case of such default on the part of the principal the surety shall have the right if it so desire to assume and complete or procure the completion of said contract, and in case of such default the surety shall be subrogated and entitled to all the rights and properties of the principal arising out of said contract and otherwise, including all sureties and indemnities theretofore received by the obligee and all deferred payments, retained percentages and credits due to the principal of such default or to become due therefor by the terms and dates of the contract."

In their brief counsel for plaintiff (appellee) say: "Appellant in his brief assumes that the contract and bond required the retention of 20 per cent. of the contract price until final settlement was made. Neither the contract nor the bond contains any such recital or provision. Contracts and bonds in other cases may contain such recitals. No provision was made in the contract in this case for the retention of any percentage until final settlement. \* \* \* The language of the contract is '80 per cent. of which shall be paid the contractors by the owners,' and is not, as counsel assumes, '20 per cent. shall be retained by the owners.' And the contract further provides that 'all payments shall be due when certificates for the same are issued.' These are the only provisions in either contract or bond concerning payment or retention of any per cent."



In *O'Neill v. Title Guaranty & Trust Co.*, 191 Fed. 570, at page 571, 113 C. C. A. 211, at page 212, the contract provided: "Payments to be made on the first day of each month in the following manner: Ninety per cent. of the amount of labor and material in place in said building, and fifty per cent. of the amount of material on the ground, the final payment to be made when the building is fully completed to the satisfaction of the architect." The Court of Appeals for the Sixth Circuit approved the holding of the trial which was stated in the following language: "I think the parties contemplate, in such a contract, that at least 10 per cent. of the contract price shall be found remaining in the final payment to be made, and that, when the owner has paid, on estimates, 90 per cent. of the contract price, he should at least prima facie treat the remainder as the final payment." 191 Fed. 572, 113 C. C. A. 213.

In *Cowdery v. Hahn et al.*, 105 Wis. 455, 81 N. W. 883, 76 Am. St. Rep. 923, the contract provided that payments were to be made from time to time in amounts up to 85 per cent. of the value of the material furnished and the labor performed; final payment to be made within 30 days after the contract was fulfilled, all payments to be made upon written certificates. It was construed as meaning that only 85 per cent. was to be paid during the progress of the work, and 15 per cent. after the contract was fulfilled, and that the payment of the entire contract price, when \$275 of the work remained to be done, released the surety, who in that case was a private individual and not a surety company.

As before stated, we think the only reasonable construction of the language of the building contract is that the "final payment" mentioned was the 20 per cent. remaining after the payment of 80 per cent. of the amount of the estimates. It obviously could not have been intended to refer to the amounts that happened to remain unpaid to the contractor, or to subcontractors on claims for labor and material at the time the building was completed. There is some conflict in the authorities upon the question of whether a provision of this character in a building contract is solely for the benefit of the owner or for the mutual benefit of the owner and the surety. The bond refers to the contract, and the authorities are well settled that the two must be construed together. They constituted one transaction. The contract for the erection of the building was entered into first. Before any steps were taken under the contract, a copy of it was furnished to the bonding company and an application made for indemnity. The bond guarantees the faithful performance of the contract upon certain conditions, among which is the condition that no liability shall attach to the surety unless the Association "shall deliver written notice to the surety,"

and the consent of the surety obtained before making "the final payment provided for in the contract herein referred to." There would be nothing upon which this carefully worded provision for the protection of the surety could operate, if, as contended, the plaintiff had the right to pay out the entire contract price before the completion of the building and without notice to the surety. In our opinion the provision in the contract that "all payments shall be due when certificates for the same are issued" cannot be construed to destroy the meaning of "the final payment," but it must be read together with what precedes it in the same article in reference to the final payment. That part of the contract reads: "On or before the first of every month the architects shall make written estimates of all work and material furnished on the contract during the preceding thirty days and eighty per cent. of same shall be paid the contractors by the owners when presented. The final payment shall be made within ten days after the completion of the work included in this contract and all payments shall be due when certificates for the same are issued."

There is no ambiguity. The words "all payments shall be due when certificates for the same are issued" refer to the 80 per cent. of each estimate, and this provision is clearly for the benefit of the contractor. In the first instance, before there was any surety, the provision in the contract authorizing the owner to retain 20 per cent. as a final payment was solely for the benefit of the Association. As between it and the contractor the Association might waive the right to retain the amount due above the 80 per cent. and pay the entire amount of each estimate. Eighty per cent. it was obliged to pay when estimates from the architects were presented. And all such payments were due to the contractor as a matter of right "when certificates for the same" were issued. When the bonding company made its contract with the Association, the provision for retaining all sums due upon estimates above the 80 per cent. became a condition which the Association as between itself and the bonding company was obliged to fulfill. The contract of suretyship expressly provides that the surety shall not be liable unless upon written notice to the surety its consent be obtained before making final payment and in case of default there is a provision subrogating the surety to all the rights of the principal arising out of the contract for the erection of the building, including all deferred payments and "retained percentages." The purpose of a provision for retaining a percentage of the money due in contracts of this character has been stated by the courts to be primarily to remove from the contractor the temptation to abandon his work and to furnish an incentive for him to continue until the final completion of the contract.



"The object of reserving such percentages is manifestly to furnish an incentive to the contractor to finish the work, and to secure both the owner and guarantor; and it has been so often held that a failure on the part of the owner to retain the percentage will release the surety that little more than a citation of some of the decisions is necessary." *O'Neill v. Title Guaranty & Trust Co.*, 191 Fed. 570, 113 C. C. A. 211.

In *Prairie State Bank v. United States*, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412, Chief Justice Fuller said: "That a stipulation in a building contract for the retention, until the completion of the work, of a certain portion of the consideration, is as much for the indemnity of him who may be guarantor of the performance of the work as for him for whom the work is to be performed; that it raises an equity in the surety in the fund to be created; and that a disregard of such stipulation by the voluntary act of the creditor (owner) operates to release the sureties, is amply sustained by authority."

Counsel for the bonding company concedes that the rules of strict construction applicable to ordinary sureties is not enforced in the case of a bond written by a corporation engaged in the business (*Hull v. Insurance Co.*, 86 Kan. 342, 120 Pac. 544; *Lumber Co. v. Douglas*, 89 Kan. 308, 131 Pac. 563), but contends that the obligation cannot be extended beyond the plain meaning of the expressed terms.

In the case of *George A. Hormel v. American Bonding Co.*, 112 Minn. 288, 128 N. W. 12, 33 L. R. A. (N. S.) 513, the Supreme Court of Minnesota had the same question before it. After deciding that bonds of this character, though resembling contracts of suretyship, are in effect contracts of insurance to which the rules of construction peculiar to contracts of suretyship proper do not apply, the court laid down the following general rule: "If a guaranty insurance bond is fairly open to two constructions, one of which will uphold and the other defeat the claim of the insured, that should be adopted which is most favorable to the insured; but the plain intention of the parties cannot be nullified by construction." (Syl.) The jury had found that there was no failure to retain. The court, while adopting and approving the liberal rule of construction of such contracts, reversed the judgment on the ground that the owner had failed to comply with a provision of the contract requiring him within a reasonable time to notify the company of the contractor's default. The case is reported in 33 L. R. A. (N. S.) 513, with a quite exhaustive note in which the author says that the case is sustained by the overwhelming weight of authority, and that, if a contract of this kind is ambiguous or fairly open to two constructions, it will be construed favorably to the assured. The

Minnesota court in the case just quoted from approves the pro tanto rule as applied to the provision requiring that a percentage of the cost price be retained until the completion of the building. This is in accord with the rule that is frequently adopted in construing ordinary insurance policies. The pro tanto rule which is followed by some of the courts regards the failure to retain the required percentage as releasing the surety to the extent of the unauthorized payment. Other courts which follow the same strict interpretation of contracts of this kind as in cases of volunteer or gratuitous sureties go to the full extent of holding that the failure to retain the required percentage will discharge the surety absolutely and in any event.

The two lines of authorities fairly illustrate the application of the two rules of construction. In the Minnesota case, *supra*, the court approved an instruction of the trial court submitting to the jury the question of fact whether the owner failed to retain the percentage, and this upon the theory that, if there was a failure to retain, "it released the bond pro tanto only." On this branch of the question the court said: "It was held in the case of *Simonson v. Grant*, 36 Minn. 439, 31 N. W. 861, that such an overpayment would release the surety absolutely. That case, however, was not, as is this case, one of guaranty insurance, and the rule of strict construction was applied. It would seem to follow logically, from the rule of construction applicable to guaranty insurance, that any overpayment would release the surety company pro tanto only."

No reason is suggested why a surety company may not by its contract require that the usual percentage of the building cost shall be retained until the building is completed and until it has notice of the default of the contractor and consents to the final payment. We are impressed with the reason and justice of the rule that a surety company, although engaged in the business for profit, should be released from liability to the extent of any payments made in excess of the amount or in advance of the time expressly provided in the bond itself. To hold otherwise would require the courts to make for the parties a new contract and one not contemplated at the time the contract sued upon was entered into.

The following authorities are in point on the general proposition: *Backus v. Archer*, 109 Mich. 666, 67 N. W. 913; *Klessig v. Allspaugh*, 91 Cal. 231, 27 Pac. 655, 13 L. R. A. 418; *Glenn County v. Jones*, 146 Cal. 518, 80 Pac. 695; *Fid. & D. Co. v. Agnew*, 152 Fed. 955, 82 C. C. A. 103; *Shelton v. American Surety Co.*, 131 Fed. 210, 66 C. C. A. 94. And as to failure to comply with a condition requiring notice to the surety, see *Knight & Jillson Co. v. Castle*, 172 Ind. 97, 87 N. E. 976, 27 L. R. A. (N. S.) 573; *Hormel*



v. American Bonding Co., *supra*, 112 Minn. 288, 128 N. W. 12, 33 L. R. A. (N. S.) 513.

The case of *Fidelity & D. Co. v. Robertson*, 136 Ala. 379, 34 South. 933, cited by plaintiff, appellee, in which it was held that a provision of the kind in question is solely for the benefit of the owner of the building, has been overruled by the case of *First Nat. Bank v. Fidelity & D. Co.*, 145 Ala. 335, 40 South. 415, 5 L. R. A. (N. S.) 418, 117 Am. St. Rep. 45, 8 Ann. Cas. 241. In the latter case the Alabama court holds that the failure to comply with a condition in the building contract which provided that the owner *might* retain payment of certain classes of claims discharged the surety. The case is reported in 5 L. R. A. (N. S.) 418 with a note, where many cases from courts which adhere to the rule of absolute discharge of the surety by the failure to retain required percentages are cited, as well as some adhering to the rule that the surety is released only to the extent of the excess payment.

In the case at bar there is little room for the application of the *pro tanto* doctrine, because it appears that a compliance with the requirement would have relieved the surety of all liability. The amount for which the jury found the surety company liable is \$1,423. The contract price was \$34,600; extra work \$141. The Association retained the sum of \$5,056. If it had retained \$6,779, which was 20 per cent. of the contract price of the building, it would have had on hand more than sufficient to pay the full amount of the judgment obtained against the surety company. The contract of the bonding company is quite different from those in many of the decided cases. The parties saw fit to provide expressly in the bond that no liability should attach to the surety company "unless the said obligee shall deliver written notice to the surety at its office aforesaid and the consent of the surety obtained, before making to the principal the final payment provided for under the contract herein referred to."

There is no ground for a claim of ambiguity in the phraseology in which this condition is expressed, nor, as already observed, is there any basis for a misunderstanding of the meaning of the words "final payment," for they are defined in the building contract to which the bond refers.

Words & Phrases defines a final payment as follows: "A 'final payment' is a last payment. Where a contract provided that a person might retain out of the money payable to the contractor 25 cents per lineal foot for the work done, which money was to be retained for six months, and was to be paid over at the expiration thereof, provided that the work should be in good order, such 25 cents per lineal foot is evidently the last or final payment, instead of the payment made within 30 days after the acceptance of the work. *Johnson v. City of New*

*York*, 48 Hun, 620, 1 N. Y. Supp. 254, 255."

We fully recognize the distinction between ordinary sureties and insurers. *Hull v. Insurance Co.*, 86 Kan. 342, 120 Pac. 544; *Lumber Co. v. Douglas*, 89 Kan. 308, 131 Pac. 563. There can be no question of the rule in the case of an ordinary volunteer surety. Where a builder has the privilege, as between himself and the contractor, of withholding a percentage of the estimates as the work progresses, as security for the performance of the contract, he is under an obligation to exercise the privilege for the benefit of a volunteer surety. 32 Cyc. 223; 40 Cent. Dig. tit. Principal and Surety, § 284 et seq. There are cases holding that this rule is not changed by the fact that the surety has received a compensation for executing the bond. *National Surety Co. v. Long*, 79 Ark. 523, 96 S. W. 745.

[2] From the cases we have cited in this opinion it will appear that the weight of authority supports the doctrine that a surety who is compensated for the risk he assumes is not entitled to the benefit of that rule, and can require the withholding of the percentage only when, as in this case, he has specifically contracted for it.

We have carefully examined every case cited by plaintiff, appellee, on this branch of the case. In none of them was there a provision in the bond declaring that no liability should attach to the surety if the owner failed to retain the required percentage. This difference alone is sufficient to deprive the decisions of any force as authority in the present case. In support of the doctrine that the right under the terms of contract to retain 20 per cent. of the contract price was exclusively for the benefit of the owner, the plaintiff, in addition to the case overruled by the Alabama court, *supra*, cites *Meyers v. Wood*, 26 Tex. Civ. App. 591, 65 S. W. 671. In the opinion in that case the Civil Court of Appeals of Texas cites no authorities, and dismisses the proposition with the mere statement that the right to retain the required percentage was exclusive to the owners, which they might exercise or not as they saw fit, and their failure to do so would not of itself release the sureties. Another case cited is *United States F. & G. Co. v. Trustees of Baptist Church (Ky.)* 102 S. W. 325. There the Kentucky Court of Appeals held that where excess payments were necessarily made in order to satisfy claims of laborers who otherwise would have asserted liens on the property from which the surety was bound to save the obligee harmless, such payments did not constitute a breach of the building contract sufficient to relieve the surety. No authorities are cited, and the decision turns on the liability of the surety to pay the identical claims advanced by the owner. In the case of *Wolf v. Aetna Co.*, 163 Cal. 597, 126 Pac. 470, the evidence was held sufficient to justify a finding that there were



no premature payments. In *Am. Surety v. Scott*, 18 Okl. 264, 90 Pac. 7, the contract authorized the retention of 20 per cent. The bond required the owner to retain 15 per cent. until the building was completed. It was held that there was no violation of the bond in the payment of all sums up to 15 per cent.

In the case of *Drumheller v. Am. Surety Co.*, 30 Wash. 530, 71 Pac. 25, the question of premature payments was neither involved nor discussed. In *Lumber Co. v. Gillard*, 136 Cal. 55, 68 Pac. 576, and *Ætna Ind. Co. v. Waters*, 110 Md. 673, 73 Atl. 712, the question of premature payments was not involved. In *Blauvelt v. Kemon*, 196 Pa. 128, 46 Atl. 416, there was no provision for retaining a percentage, and, besides, it was found that there was no overpayment. In *Chapman v. Eneberg*, 95 Mo. App. 127, 68 S. W. 974, the 15 per cent. was paid according to the express provisions of the contract. Moreover, in the opinion the court expressly approves the pro tanto doctrine in a case of failure to comply with a requirement in the bond that a percentage be retained.

In *Ill. Surety Co. v. Hotel Co. (Ky.)* 118 S. W. 967, the only question remotely connected with this was upon what sum the 25 per cent. should be computed; and it was held that the original contract price plus the extras should be considered.

In *St. John's College v. Ætna Co.*, 135 App. Div. 480, 120 N. Y. Supp. 496, it was held that the payment was not premature because the amount paid did not exceed 80 per cent. of the work actually done at the time.

In the case of *Allen Co. v. U. S. F. & G. Co.*, 122 Ky. 825, 93 S. W. 44, it was held that the surety was not discharged because estimates were not certified by the architect; the certificates stating that he was present at the meeting of the building committee for the purpose of ascertaining and certifying in the manner provided by the contract.

In *De Mattos v. Jordan*, 15 Wash. 378, 46 Pac. 402, the owner accepted an order drawn by the contractor for payment of brick and took it out of the next estimate; and also advanced money to pay for material which was in possession of the railway company and without which the work could not proceed. The amount so paid was taken out of the next estimate. These were held not to be premature payments.

We therefore conclude that the bond and the contract are to be construed together and that the provision in the latter, authorizing the Association to retain the balance after paying 80 per cent. of the estimates, required the Association, as between itself and the surety company, to retain it; and that the failure to retain the percentage until notice to and consent of the surety, when by complying with the condition the Association would have had in its hands a sum sufficient

to satisfy the claims for which the findings show the surety company was liable on the bond, discharged the surety company from all liability.

It follows that the judgment is reversed, and the cause remanded, with directions to enter judgment for the defendant.

MASON, SMITH, and WEST, JJ., concurring. JOHNSTON, C. J., and BURCH and BENSON, JJ., dissenting.

(24 Idaho, 380)

HOBBS v. TWIN FALLS CANAL CO. et al.  
(Supreme Court of Idaho. July 5, 1913.)

1. CORPORATIONS (§ 189\*)—EXERCISE OF CORPORATE POWERS—RIGHT TO ENJOIN.

Where H. enters into a contract with a corporation and purchases certain property, and by the terms of the contract it is stipulated and agreed that the corporation shall subsequently organize another corporation and that H. shall thereupon surrender his contract and take a certain amount of stock in the new corporation in lieu of his property and contract rights, and it is stipulated and agreed that the new corporation shall have no power or authority to execute notes and mortgages on the property of the corporation, and the new corporation is subsequently formed, and, instead of the articles of incorporation providing that such corporation shall have no power or authority to execute notes and mortgages, they contain the reverse and provide that the corporation shall have the power and authority to execute notes and mortgages, and H. thereafter surrenders his original contract and accepts in lieu thereof the stock of the newly formed corporation, *held*, that he cannot subsequently maintain an action against the new corporation to enjoin the corporation from exercising the powers enumerated in its charter and executing notes and mortgages in accordance therewith.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 706-722; Dec. Dig. § 189.\*]

2. WATERS AND WATER COURSES (§ 232\*)—IRRIGATION COMPANY—POWERS.

*Held*, that the Twin Falls Canal Company, organized under the laws of this state and to which the original construction company, the Twin Falls Land & Water Company, transferred all the water rights, canals, dams, reservoirs, easements, and franchises originally acquired and constructed, became the owner in fee of the entire irrigation system, and that the landowners who purchased water rights were merely stockholders in the corporation, and that the only voice they have in the management or control of the irrigation works and system is such voice as their stock entitles them to have in the corporation as such, and that the directors of the corporation have the power and authority under the articles of incorporation and the statute of the state to execute mortgages upon the property of the corporation to secure loans.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 321, 322; Dec. Dig. § 232.\*]

3. WATERS AND WATER COURSES (§ 232\*)—IRRIGATION COMPANY—MORTGAGES—EFFECT OF FORECLOSURE.

*Held*, further, that a mortgage executed by the Twin Falls Canal Company, in conformity with its articles of incorporation and the state statute upon all the property of the corporation, would cover the entire canal system and water appropriations, easements, and franchises, and that, in the event of a foreclosure

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



of such mortgage and sale of the property, the purchaser would acquire such property, but that the water would still be appurtenant to the lands to which it had once been applied (section 4, art. 15, Const.) upon payment by the landowner of reasonable rates established in conformity with law.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 321, 322; Dec. Dig. § 232.\*]

4. **WATERS AND WATER COURSES (§§ 232, 234\*)**  
—IRRIGATION COMPANY—ASSESSMENTS.

Any mortgage or other indebtedness of the Twin Falls Canal Company must be defrayed by assessments upon the stockholders who are landowners and water users under the canal system, and it is the duty of the directors from time to time to levy assessments in accordance with law for defraying mortgage and other indebtedness as the same falls due. *Held*, further, that the Twin Falls Canal Company was organized under the general incorporation laws of this state, and that it was not organized under and is not governed by the provisions of chapter 14, title 4, of the Civil Code, which relates to and governs "religious, social and benevolent corporations" (Rev. Codes, §§ 3011-3026).

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 321, 322; Dec. Dig. §§ 232, 234.\*]

Sullivan, J., dissenting.

Appeal from District Court, Twin Falls County; Edward A. Walters, Judge.

Action by E. R. Hobbs against the Twin Falls Canal Company and another. From judgment for the defendant named, plaintiff and the defendant not named appeal. Affirmed.

S. H. Hays, of Boise, for appellant Hobbs. Sweeley & Sweeley, of Twin Falls, for appellant Twin Falls Land & Water Co. A. M. Bowen and J. W. Porter, of Twin Falls, for respondent.

**AILSHIE, C. J.** This is an appeal from a judgment of the district court denying an injunction.

The Twin Falls Canal Company is seeking to issue bonds against the property of the company consisting of its irrigation system, water appropriation and franchises, for the sum of \$300,000, and to execute a mortgage on the system to secure the payment thereof. The appellant Hobbs is a stockholder in the respondent company and a settler under this canal system on land to which a water right is appurtenant and which water right is represented by the stock appellant owns in the corporation. The appellant the Twin Falls Land & Water Company is the company which constructed the system in the first place and is known as the construction company. For convenience we shall hereafter refer to the Twin Falls Canal Company as the canal company and to the Twin Falls Land & Water Company as the construction company.

The appellant Hobbs applied to the district court for an injunction to restrain the issuance of bonds and the execution of the mortgage as proposed by the corporation, and

this appeal is taken from the order and judgment denying the relief sought.

On the 2d day of January, 1903, the construction company entered into a contract with the state board of land commissioners of the state of Idaho, whereby it agreed to build a canal system and irrigation works in what now constitutes Twin Falls and Lincoln counties. This work was to be done under the terms of what is commonly known as the Carey Act (Acts Aug. 18, 1894, c. 301, § 4, 28 Stat. 422 [U. S. Comp. St. 1901, p. 1554]). Under this contract with the state, the construction company was to sell water rights in the canal system or rather give contracts to persons filing upon the lands described therein which were embraced in the Carey Act segregation, and these water rights or contracts were to be subject to certain conditions and stipulations which were set out and recited at length. It was stipulated and agreed by this contract that upon the settler's filing upon the lands and making final payment and proof of improvement on the land, as required by the provisions of law, and making the required payments on their water right contracts and the completion of the irrigation system, the entire irrigation system, including all the property and franchises belonging thereto and the water appropriations, should be conveyed and transferred to a corporation to thereafter be organized under the laws of the state of Idaho and to be named and designated as the Twin Falls Canal Company, and a copy of the proposed articles of incorporation of the canal company was attached to the contract with the state.

Upon the final completion of the system and conveyance thereof to the canal company and upon final payment on these several water contracts, they were to be surrendered up, and in lieu thereof the settler was to have, at the option of the construction company, one of two kinds of contract or conveyance as stipulated and provided for in the contract with the state. The stipulation in this respect was as follows: "It is further stipulated and agreed that any and all contracts upon which water rights or shares in the canal are sold may by express agreement provide that upon full payment of the purchase price there shall be given at the option of the second party hereto either a warranty deed for an undivided interest in the canal system or shares in the Twin Falls Canal Company, Limited, hereafter described, one share of stock for one share of water right. Whereas it is determined to be necessary to provide a convenient method of transferring the ownership and control of said canal from the said party of the second part herein to the purchasers of shares or water rights in said canals, and of determining their rights among themselves and between said purchasers and the party of the second part herein, and for the purpose of levying

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



and collecting reasonable tolls, charges, and assessments for the care and maintenance of said canals, it is further hereby provided that at any time after the completion of the entire system of dam and canals as hereinbefore provided in the specifications and within seven years from the date of this contract, or at any time prior thereto, upon the consent of the state board of land commissioners, a corporation shall be formed under the laws of the state of Idaho, to be known and called the Twin Falls Canal Company, Limited, having the powers and limitations and with the mutual covenants and agreements substantially as set forth in the draft of the articles of incorporation hereunto attached, marked Exhibit B. 'But said articles of incorporation must conform to the provisions of this contract, and must be approved by the state board of land commissioners before said corporation can be formed.' The said corporation shall be formed by said second party at its expense; all the stock thereof being subscribed by the second party and such other persons, not exceeding six, as may be necessary, and all the stock being subscribed by or for said second party. And immediately upon the formation of said corporation said second party shall by good and sufficient deed convey to it the dam and entire system of canals, and the dam and irrigation works and the water rights connected therewith, free of all debt, lien, or incumbrance. And upon the formation of said corporation the shares or water rights theretofore sold or contracted to be sold shall be converted into or replaced by the shares of said corporation, share for share, and from and after the date of the formation of said corporation the party of the second part shall sell to purchasers or owners of lands under the canal system shares of stock of said corporation upon the same terms in all respects as hereinbefore provided for the sale of water rights or shares prior to the formation of such corporation."

The appellant purchased a water contract and settled upon a tract of land under this canal system. The system was constructed and completed and the construction company exercised its option to organize the canal company and to issue to settlers and purchasers of water contracts certificates of stock in the canal company rather than to execute warranty deeds for an undivided interest in the canal system. The canal company was accordingly incorporated under the general incorporation laws of the state, and the articles of incorporation provided, among other things, that "the purpose for which this corporation is formed is to own, hold, maintain and operate certain canals and a dam across Snake river in Idaho connected therewith, \* \* \* to construct, maintain, and operate for the benefit of its stockholders storage reservoirs for the impounding of water appropriated by it, and generally to do

be done in conducting the business and supplying to its stockholders water for irrigation and domestic purposes." The proposed articles of incorporation of the canal company which were attached to and made a part of the original contract between the construction company and the state contained the following paragraph: "But this corporation shall have no power to borrow money or to execute or negotiate any note, bond or other obligation for the payment of money, nor shall it convey by way of deed or mortgage or deed of trust any of its real property or water rights." Thereafter, and subsequent to the purchase by the appellant of his water contract and by and with the consent of the state, acting through the state board of land commissioners, and at the instance and request of the construction company, the canal company was incorporated and organized for the purpose of taking over this system, and the proposed articles of incorporation were changed in reference to the power of the corporation to borrow money and execute and negotiate notes, bonds, and mortgages, and that clause as contained in the articles of incorporation was made to read as follows: "And the corporation shall have power to borrow money and to execute and negotiate notes, bonds or other obligations for the payment of money for the purpose of raising revenue to defray the expense of the maintenance and operation of the canal system."

Subsequent to the organization of the canal company as a corporation under the general incorporation laws of this state, appellant received shares of stock in the corporation which were equivalent to and represented the interest he had purchased by his previous water contract.

Under this state of facts and these conditions, the appellant contends and urges: First, that the canal company is without power or authority to borrow money or execute or negotiate any note, bond, or other obligation for the payment of money or to mortgage or incumber the property, water rights, or canal system; second, that the execution of a mortgage would be without right or authority; third, that no necessity is shown for a mortgage and bond issue; fourth, that the rights of all settlers on the tract irrigated by this canal system are governed by the terms and conditions of their water contracts made with the construction company, and that these water rights represent a proportionate interest in the irrigation works. These propositions are so bland and interdependent that a general determination of the status of the respective parties under these several contracts and their relation to these two corporations will be determinative of the propositions above advanced.

[1] The first argument advanced by counsel for appellant is that the appellant entered into his contract and purchased his water



right from the construction company prior to the organization of the canal company and at a time when the construction company's contract with the state specifically stipulated and provided that the corporation to be thereafter organized and known as the Twin Falls Canal Company, to which the canal system and water rights and franchises should be conveyed, should have no power or authority to borrow money or execute or negotiate any note, bond, or other obligation for the payment of money, and should have no authority or power to execute any mortgage or deed of trust to any of its property, and that the canal company is bound by that stipulation and that appellant is in a position to demand its observance and enforcement. As we view this matter, it is unnecessary for us to go into the question of the power of the state and the construction company by mutual consent to change the stipulation contained in the original contract, for the reason that appellant subsequently acquiesced in this change and accepted his certificate of stock in the new corporation, the canal company, and the corporation from which he accepted his certificates of stock had the contrary provision in its articles of incorporation granting it the full power and authority to execute notes, bonds, and mortgages and to hypothecate the property of the corporation for the payment of such loans.

A question almost identical with this was considered by the Supreme Court of Iowa in *Dempster Mfg. Co. v. Downs*, 126 Iowa, 80, 101 N. W. 735, 106 Am. St. Rep. 340, 3 Ann. Cas. 187, and the court said: "By accepting the stock in the corporation every stockholder assents to the terms and conditions found in the articles. \* \* \* The corporation is created by the adoption of the articles. These form the very basis of its existence. Every one who deals with it or its stock is charged with knowledge of their contents. To the end that the greatest publicity may be attained, as a condition precedent to commencing business they are required to be recorded in the office of the recorder of deeds in the county where its principal place of business is to be kept, and filed and recorded with the Secretary of State. \* \* \* For the same reason, every one who acquires certificates of stock must be assumed to know that they were issued by virtue of articles of incorporation, and that these may be found in the office of the Secretary of State. Indeed, the very object of requiring the filing and recording the articles is to give them the same publicity, as nearly as may be, as statutory charters and render them easily accessible to all who may be interested in ascertaining their contents. These articles are expressive of the relative obligations of the company and stockholders and inhere in the certificates of stock, in whosoever hands they may come. The certificates are undoubtedly continuing assurances of owner-

ship, but the ownership is such as is stipulated in the articles." See, also, *Atty. Gen. v. Belle Isle Ice Co.*, 59 Mich. 157, 26 N. W. 312, 60 Am. St. Rep. 287; *Marsh v. Mathias*, 19 Utah, 350, 56 Pac. 1074; *Cook on Corporations*, § 522; *Jones v. Hale*, 32 Or. 465, 52 Pac. 311; *Callahan v. Chilcott Ditch Co.*, 37 Colo. 331, 86 Pac. 123; *Hause v. Mannheimer*, 67 Minn. 194, 69 N. W. 810; *Lincoln Park Chapter v. Swatek*, 204 Ill. 228, 68 N. E. 429.

Whatever merit there might be in this contention, and whatever cause of complaint the appellant might have had, the remedy would have to be sought against the company with which he contracted, namely, the construction company. He could not pursue his remedy against a corporation which was not in existence at the time his contract was made and which was organized under the laws of the state years after his contract was made with the construction company. When he accepted his certificates of stock in the new corporation and surrendered his original contract, it was his duty to ascertain the powers, liabilities, and obligations which the new corporation assumed and to ascertain if it had the qualifications of the corporation which the construction company had originally contracted to organize and to which this irrigation system was to be transferred.

[2] This brings us to the consideration of the inquiry as to the nature of the property or interest which appellant owns by reason of his certificates of stock in the canal company. It has been suggested that the canal company, which is the operating corporation, is governed by the provisions of chapter 14, tit. 4, of the Civil Code, rather than by the provisions of the general incorporation laws. Chapter 14, tit. 4 (sections 3011 to 3026, Rev. Codes), is entitled "Religious, social and benevolent corporations," and it is evident at once that this is no such corporation. It is neither religious, social, nor benevolent. It was not organized under these provisions of the statute. On the contrary, it was organized under the general incorporation laws dealing with private corporations formed for general business purposes. The articles of incorporation recite: "That the undersigned have formed and by these presents do form an incorporation under and pursuant to the provisions of chapter 1, tit. 4, of the Civil Code, Revised Codes of Idaho, and acts amendatory thereof." Chapter 1, tit. 4, comprises sections 2710 to 2792, inclusive, which deal with the incorporation and powers of general business corporations. The canal company was not incorporated in compliance with chapter 14 of title 4. The articles of incorporation specifically provide that the corporation shall acquire, own, hold, and operate the canal system, dams, and reservoirs and do all things necessary to be done in "conducting the business of supplying to its stockholders water for irrigation and domestic purposes." The



entire irrigation system, including the dams and all water appropriations and all easements and rights of way and franchises acquired by the construction company, were conveyed and transferred to the canal company, and it became the owner in fee of all this property. The landowner who purchased a water right became a stockholder in the corporation, and he had a voice in this corporation equivalent to the number of shares of stock he held and could exercise that only in the same way that a stockholder in any business corporation can exercise his power as a stockholder. The corporation is the owner of the property, and the certificates of stock represent the interest that each holder thereof has in such corporation. The articles of incorporation of the canal company provide that the corporation shall "distribute among its stockholders and others equally and ratably the water diverted from said Snake river by and through said dam and canal, and pursuant to the appropriations aforesaid, and for that purpose to fix, charge, and collect from its stockholders, and others using the water so furnished by it or entitled to use the same, reasonable tolls, rentals, maintenance, or service charges in such manner as may be determined by regulations or by-laws adopted for that purpose, or by means of assessments levied upon its stock in accordance with the laws of the state of Idaho." In other words, this corporation was under the necessity of distributing the water of the system ratably and proportionately among its stockholders, and the ownership of a certificate of stock in this corporation was the only evidence necessary to entitle the holder thereof to the distribution of water upon his lands. It is true that it was not contemplated that the canal company should operate this system for a profit. It was only contemplated that it should collect rates or assessments sufficient to defray all the expenses of operation, maintenance, and repairs. There could be no object in collecting more, for the reason that, if there should be any dividends to declare, the payments would be made to the same people from whom the assessments had been collected.

[3] If this system should be mortgaged and the improbable should occur, and the mortgage would have to be foreclosed and the property sold for the satisfaction thereof, the purchaser would undoubtedly take the entire property covered by the mortgage, which in this case would be the canal system, dams, reservoirs, water appropriations, easements, and rights of way; and, while the landowners would still have their certificates of stock in the canal company, the canal company would have no irrigation system and no water for distribution. If the landowner should thereafter procure water from the purchaser, he would be under the necessity of paying such reasonable rates as might be established in conformity with law. In this

connection it should be observed that a sale at foreclosure could not deprive the landowner, who has once used and applied the water to his lands, of his constitutional right under section 4, art. 15, to continue to receive the water for his land upon payment of reasonable rates and compliance with such equitable terms and conditions as might be imposed. *Knowles v. New Sweden Irrigation Dist.*, 16 Idaho, 227, 101 Pac. 81. It seems to us, however, that it is hardly worth while diverting to or considering the possibility of this canal system being sold under foreclosure of a mortgage. This or any mortgage executed by the canal company will have to be paid by assessments levied against the stockholders in the corporation. Section 2750, R. C. The stockholders are the landowners who are receiving and applying the water of the system to their lands. In other words, the landowners are the owners of the corporation. The corporation is their creature. It, after all, is nothing more than a holding company. It would be next to impossible for all these landowners to get together and join in transacting the business of the community, and so they are transacting their business through this corporation formed under the general laws of the state.

[4] It will be to the interest of every landowner to have sufficient assessments made from time to time to defray any indebtedness, whether it be for current expenses and maintenance or the defraying of a bonded indebtedness. We apprehend that the stockholders could compel the directors of the corporation to levy an assessment for this purpose if they should fail or neglect to do so.

As above observed, the articles of incorporation of the canal company authorize the corporation to execute notes and mortgages and incur indebtedness. In addition to this, the general laws of the state under which this corporation was organized authorizes such a corporation to mortgage and convey any of its real or personal property "other than its franchises of being a corporation." Section 2769, R. C., amended 1909 Sess. Laws, p. 163. We have no doubt of the power of this corporation, both under its charter and the statute of the state, to incur the indebtedness and execute the mortgage here in question. Besides, the very nature of the business of this corporation would necessitate the exercise of such a power from time to time. The water carried through this system is diverted from the Snake river by means of a large and expensive dam across the river. If this dam should go out at any time or sustain any serious damage, it would be almost imperative that it be repaired or constructed at once in order to save hundreds and perhaps thousands of settlers from suffering irreparable loss and injury. The same would be true in perhaps a lesser degree if flumes should break and canals should be washed away or destroyed, and for these



and many other reasons which might be supposed it is necessary and essential that this corporation have the power to borrow money and the necessary and attendant power to give security for the payment of the money so borrowed.

It is finally urged that if this corporation, the canal company, has the power to borrow money and execute mortgages, it must be done by a vote of the landowners or stockholders, and that it cannot be done by its directors. This contention seems to rest upon the suggestion previously made that this corporation is governed more by the provisions of chapter 14, tit. 4 (sections 3011-3026), of the Civil Code, than by the general incorporation laws. Under the provisions of the incorporation laws with reference to religious, social, and benevolent corporations, mortgages must be authorized by a vote of the members of the corporation (section 3015, R. C.), but, as previously observed, this chapter does not apply to this canal company, nor does it apply to a business corporation. This corporation is governed by the general incorporation laws, and under their provisions the directors act for the corporation (section 2728, R. C., as amended 1909 Sess. Laws, p. 159), have the power to borrow money and execute notes and mortgages (section 2769, R. C., as amended by 1909 Sess. Laws, p. 163), and it is not essential to their validity that the sanction of the stockholders be had. *Thomp. on Corp.*, §§ 1185, 1192.

We conclude that the canal company has the power and authority both under its articles of incorporation and the statute of the state (section 2769, R. C., as amended by the 1909 session of the Legislature [1909 Sess. Laws, p. 163]) to borrow money and execute bonds and mortgages therefor, and that the directors of the corporation may do so without submitting the question to the stockholders. As to the form, contents, and legal effect of the mortgage in its various stipulations and covenants, we express no opinion, for the reason that no question is raised or presented in respect thereto. We have only dealt with the power and authority of the corporation to mortgage and of the directors to represent and act for the corporation in so doing.

The judgment should be affirmed, and it is so ordered. Costs awarded in favor of respondents.

STEWART, J., concurs.

SULLIVAN, J. (dissenting). I am unable to concur in the conclusion reached by the majority of the court. The Twin Falls Canal Company is an operating company on a Carey Act project and was not organized for the purpose of making a profit for its stockholders but for the purpose of holding title to the canal system and water right belonging to the water users under said Carey Act project and to maintain and operate said

system not for pecuniary profit. The majority lay more stress upon the title to chapter 14, tit. 4, in which are included sections 3011 to 3026, than the provisions of the sections therein would warrant. Section 3011 provides as follows: "Any number of persons associated together for *any purpose* where pecuniary profit is not their object, may incorporate themselves as provided in this title"—and the majority say in their opinion that the Twin Falls Canal Company is neither religious, social, nor benevolent, and at the same time concede that it is not organized for pecuniary profit. The codifier of the statutes gave that chapter a title, which title only expressed the views of the codifier and not of the Legislature that enacted said law. The provisions of that chapter clearly include every corporation, *the object and purpose* of which is not pecuniary profit. Section 3016 of said chapter refers to all "corporations organized for purposes other than for profit," thus clearly showing by that section that it was intended to include all corporations where pecuniary profit was not their object. Such a corporation cannot organize under the general law by simply so declaring in their articles of incorporation. If they are organized when pecuniary profit is not their object, they then come within the provisions of said chapter, regardless of what may be declared in their articles of incorporation.

The real object and purpose of said canal company was to hold the legal or paper title to said canals, etc., and operate the canal system and do all things necessary to be done in "conducting the business of supplying its stockholders with water for irrigation purposes." It is simply an operating company—a trustee for those who own the equitable title to said irrigation system and water rights.

Section 3015 of said chapter provides that directors or trustees of such corporation may mortgage or sell the real estate held by them whenever a majority of the members of said corporation, present at a meeting called as therein provided, may so direct by their vote. The directors of such a corporation have no authority to mortgage or sell the real estate belonging to it without a majority vote of its stockholders, and the board of directors of said canal company evidently understood that it required a majority vote of the stockholders to authorize them to mortgage all of the property belonging to it, for at a regular session of said board held on August 8, 1911, when the board considered the necessity of improving said canal system and establishing other reservoirs, a resolution was passed by the board directing a special meeting of the stockholders to be called for the 9th of October, 1911, at the hour of 10 o'clock a. m., at the offices of the corporation at Twin Falls, in Twin Falls county, for the purpose of deciding whether "the board of directors shall be authorized to issue the bonds of this corporation for said amount



[\$300,000] for the purposes mentioned, together with the rate of interest, time of maturity, and all other matters concerning the issuance of said bonds." Said motion was carried unanimously by the five directors, and the proper notice was given of such meeting, and the meeting was held, and at said meeting the board was not authorized by a majority of the stock to issue said bonds. A majority of the stock was not represented at said meeting. The board evidently "took the bit in their own teeth" and determined they would saddle this indebtedness upon the property belonging to said shareholders without their consent, which, as I view it, they had no right or authority to do. Under said articles of incorporation and under the law the board of directors had no authority to mortgage or bond the property belonging to said corporation without the assent of those holding a majority of the stock, which assent must be procured in the regular manner. While the corporation has authority under its articles of incorporation and by-laws to borrow money, no such power is conferred on the board of directors under its articles of incorporation or by-laws. If they are permitted to mortgage this property and the shareholders lose title thereto through foreclosure of the mortgage, the board of directors will be permitted to do indirectly what they are not authorized to do directly; that is, to sell or dispose of such property or put it in a position by mortgaging it that the title will be lost to the real owners. See 3 Thompson on Corp. § 2563. A different rule is applicable to ordinary business and commercial corporations whose object and purpose is pecuniary profit.

The majority hold if said mortgage should be foreclosed the purchaser would take the entire property covered by the mortgage, which would include, in this case, the canal system, dams, reservoir, water appropriations, easements, and rights of way, and the landowners would be left with their worthless paper certificates of stock in the defunct canal company, and that company would have no irrigation system and no water for distribution.

It is held by the majority that, if the landowners should thereafter procure water from the purchaser, he would be under the necessity of paying such reasonable rates as might be established in conformity with law. In other words, he would be permitted to purchase another water right which might be taken away from him by another board of directors mortgaging the system, provided it was purchased by a corporation. This no doubt would be a great benefit to the stockholder to permit him to purchase his water right a second time.

It is a well-settled rule of law that no board of directors has the right and authority to dispose of all the property of the corporation,

both real and personal, unless they are given such authority by the articles of incorporation or by by-laws or by a vote of the majority of the stock. Boards of directors of commercial corporations, which are organized for the purpose of conducting a business and making a profit out of it, are generally given authority by the articles of incorporation and by-laws to contract indebtedness and provide ways and means for the payment of it. But a different rule applies to said canal company, the sole purpose and object of which is to hold title to the property belonging to stockholders and, as stated in the articles of incorporation, to conduct "the business of supplying its stockholders water for irrigation and domestic purposes." The stockholders of this corporation had the right, under the law, to control, by a majority vote of the stock, the borrowing of money and giving of a mortgage to secure the payment thereof, but the board of directors had no such authority unless first authorized to do so by the stockholders. Said corporation ought not to be permitted to do anything that would nullify valid liens or incumbrances now existing against said property.

Much more might be said in regard to the board of directors of such a corporation not having autocratic power under the law to sell the property of the corporation outright or to dispose of it indirectly by giving a mortgage thereon which may by foreclosure as effectually deprive the stockholders of their property as if the board of directors sold it directly, but I will refrain.

The judgment of the trial court ought to be reversed, and the stockholders given the opportunity to pass upon the question of incurring said indebtedness, as said indebtedness is not intended to be incurred for the payment of any present indebtedness due from the corporation to any one.

(24 Idaho, 317)

#### LITTLE WILLOW IRR. DIST. v HAYNES.

(Supreme Court of Idaho. June 26, 1913.)

#### 1. WATERS AND WATER COURSES (§ 230\*) — IRRIGATION DISTRICTS — CONFIRMATION OF BOND ISSUE—NOTICE OF HEARING.

Under the provisions of sections 2401 and 2402, Rev. Codes, a notice of hearing on petition for the approval and confirmation of a bond issue of an irrigation district need not describe the lands within the district, but it is sufficient where it recites that "notice is hereby given that the petition of the board of directors of the Little Willow Irrigation District has been filed, praying that the proceedings for the issuing of bonds of the district be examined, approved, and confirmed," and the notice states the time and place for the hearing and states that "the prayer of said petition is that each and all of the proceedings taken for the authorization of the bonds of said district may be examined, approved, and confirmed by this court."

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 319; Dec. Dig. § 230.\*

For other definitions, see *Words and Phrases*, vol. 5, pp. 4839-4844; vol. 8, p. 7733.]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



2. WATERS AND WATER COURSES (§§ 224, 230\*)—IRRIGATION DISTRICTS—CONFIRMATION OF BOND ISSUE—NOTICE OF HEARING—"PUBLIC CORPORATION"—"QUASI MUNICIPAL CORPORATION."

When an irrigation district is duly and regularly organized under the laws of this state and becomes a quasi municipal or public corporation, from that time, henceforward all persons owning lands within the district and subject to the jurisdiction thereof have notice that such lands are within the jurisdiction and taxing power of the district, and a notice for the confirmation of the bonds of the district is notice to every property owner within the district that all property therein is affected thereby, and the naming of the district by its corporate name is sufficient description and notice that all the property in the district will be affected by the proceeding.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 315, 316, 319; Dec. Dig. §§ 224, 230.\*

For other definitions, see *Words and Phrases*, vol. 6, pp. 5781-5785; vol. 7, p. 5886; vol. 8, p. 7771.]

Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.

Action by the Little Willow Irrigation District against R. E. Haynes. From a judgment for plaintiff, defendant appeals. Affirmed.

R. E. Haynes, of Payette, pro se. Thompson & Buckner, of Caldwell, for respondent.

AILSHIE, C. J. This is an appeal from an order of the district court, approving and confirming the proceedings of the Little Willow Irrigation District, for the issuance of the bonds of the district in the amount of \$165,000. The proceeding was had under sections 2401 and 2402, Rev. Codes.

[1, 2] Only one question is presented on this appeal. It is urged by appellant that the notice of the hearing given by the clerk under the order of the court did not sufficiently describe the lands within the Little Willow Irrigation District. The essential part of the notice given is as follows: "Notice is hereby given that the petition of the board of directors of the Little Willow Irrigation District has been filed, praying that the proceedings for the issuing of bonds of the district be examined, approved, and confirmed in the above-entitled court, and that the hearing of said petition has been set for the 10th day of May, 1913, at 9 o'clock a. m. of said day, in the courtroom of this court, at the courthouse in Caldwell, Canyon county, state of Idaho. The prayer of said petition is that each and all of the proceedings taken for the authorization of the bonds of said district may be examined, approved, and confirmed by this court. Any person interested in the subject-matter of the petition may, on or before the day fixed for the hearing thereof, demur to or answer said petition." It will be observed that this notice stated that the hearing was to be upon an application or petition "praying that the proceedings for the issuing of bonds of the

district be examined, approved, and confirmed." The name of the district is given as "the Little Willow Irrigation District." Proceedings had already been taken creating and organizing the district, and under the law of this state an irrigation district, when once created in accordance with the statute, becomes a quasi municipal or public corporation. *Hertle v. Ball*, 9 Idaho, 193, 75 Pac. 953; *City of Nampa v. Nampa, etc., Irr. Dist.*, 19 Idaho, 779, 115 Pac. 979; *Pioneer Irrigation District v. Walker*, 20 Idaho, 605, 119 Pac. 304; and *Elliott v. McCrea*, 130 Pac. 785.

The district, having been created in accordance with statute and being an existing public corporation under the law, constituted notice to every person who owned land within the district of the boundaries thereof and that his lands constituted a part of the district and were subject to any bond issue made by the district for its use and benefit. After a municipal or public corporation has once been formed, it is no longer necessary to incorporate the description of property within that district in any notice issued by or in the name of the corporation, especially where the proceeding relates to and affects all the property within the district alike. Section 2402, Rev. Codes, provides for the notice that was issued in this case, and, among other things, says: "The notice shall state the time and place fixed for the hearing of the petition, and the prayer of the petition, and that any person interested in the subject matter of said petition may, on or before the day fixed for the hearing thereof, demur to or answer said petition." We think the notice in this case complied with the statute and was sufficient to apprise every property owner of the proceeding and to bind him thereby.

The irrigation statute of California is very similar to ours in this respect, and this identical question was considered by the Supreme Court in *Fogg v. Perris Irrigation District*, 154 Cal. 209, 97 Pac. 316, and the court held a notice like the one given in the case at bar sufficient, and in discussing the question said: "The proceedings for the organization of the district, as we have seen, were regular on the face of the record. The district thereby became prima facie a quasi municipal corporation, with defined boundaries established and recorded, and this record constituted constructive notice of the location of the boundary lines to all the inhabitants of the district and to the world. The existence of the Perris Irrigation District and the location of its boundaries being matters of record, the statement in the notice that the petition was for the purpose of confirming the proceedings for the sale of the bonds of the Perris Irrigation District was sufficient to inform any owner of lands situated in the district that his lands would be affected, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



that he was interested in the matter to be adjudicated. It was equivalent to a declaration that the lands in the Perris Irrigation District would be affected, and any landowner could, by reference to the official records of his county, ascertain whether or nor his land was included therein. The name of the district, it having by that name a *prima facie* legal existence as such, evidenced in the manner prescribed by law by the necessary official record of the proceedings and order upon which it was declared organized, was a sufficient identification of its boundaries. It constituted a *prima facie* political subdivision of the state for the purposes of an irrigation district, and all persons were required to take notice of the facts shown in the record of its organization."

The judgment in this case should be affirmed, and it is so ordered. Costs are awarded in favor of respondent.

SULLIVAN and STEWART, JJ., concur.

(24 Idaho, 221)

**PAYETTE HEIGHTS IRR. DIST. v. HAYNES.**

(Supreme Court of Idaho. June 26, 1913.)

Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.

Action by the Payette Heights Irrigation District against R. E. Haynes for confirmation of bond issue. From judgment for plaintiff, defendant appeals. Affirmed.

R. E. Haynes, of Payette, pro se. Thompson & Buckner, of Caldwell, for respondent.

AILSHIE, C. J. This case involves the same question considered and passed upon in Little Willow Irrigation District v. Haynes, 133 Pac. 905, which has just been decided by this court. On the authority of that case, the judgment in this case must be affirmed, and it is so ordered. Costs awarded in favor of respondent.

SULLIVAN and STEWART, JJ., concur.

(24 Idaho, 233)

**CLOPTON et al. v. MEEVES.**

(Supreme Court of Idaho. June 24, 1913.)

1. BROKERS (§ 82\*)—PLEADING (§ 237\*)—APPEAL AND ERROR—HARMLESS ERROR—VARIANCE—AMENDMENT.

Where a plaintiff, in an action to recover commissions for the sale of real estate, alleges that he was employed as a real estate broker, and the defense is interposed that he had acted in a dual capacity and had collected commission from the purchaser, if the proofs justify it, the court may properly find that the plaintiff was a middleman employed only to bring the vendor and purchaser together, and, under the provisions of sections 4225 and 4226 of the Revised Codes, the court might order the pleadings immediately amended to conform to the proofs.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 101-103; Dec. Dig. § 82; \* Pleading, Cent. Dig. §§ 603-619; Dec. Dig. § 237.\*]

2. BROKERS (§ 87\*)—RIGHT TO COMMISSION—DUAL EMPLOYMENT.

If a real estate agent or broker is employed as a mere middleman for the purpose only

of bringing vendor and purchaser together, and has no further duty imposed upon him by his contract of employment, and does not undertake to advise or counsel either side, and the parties so understand his employment and are so advised, he may charge and receive a commission from both vendor and purchaser.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 52-54; Dec. Dig. § 67.\*]

3. BROKERS (§ 87\*) — RIGHT TO REPRESENT BOTH PARTIES.

If a real estate broker, who claims to have been only a middleman, has assisted either party in effecting or negotiating a trade or sale, or has made representation to either as to the value or advantages of the property of the other, he has to that extent made himself a partisan agent of the one or the other, and can no longer rightfully or lawfully represent the other party to the transaction.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 52-54; Dec. Dig. § 67.\*]

4. BROKERS (§ 87\*) — RIGHT TO REPRESENT BOTH PARTIES—MIDDLEMAN.

The real purpose of the distinction made in the law between an agent and a middleman is to secure honest, fair, and open service from the agent, and to enable both vendor and purchaser to know whether the broker is acting as a partisan agent, or merely for the purpose of bringing the parties together, and from whom he is expecting compensation, and to remove from the agent as far as possible any temptation to serve one party to the detriment or disadvantage of the other.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 52-54; Dec. Dig. § 67.\*]

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Action by R. H. Clopton and others against Peter Meeves. From a judgment for plaintiffs, defendant appeals. Reversed.

Garland Draper and W. A. Ricks, both of Boise, for appellant. Harry S. Kessler, of Boise, for respondents.

AILSHIE, C. J. This action was instituted for the collection of a commission for the exchange of real property. Plaintiff alleged: "That on or about the 1st day of February, 1912, the defendant listed the said real estate with the plaintiffs for sale or trade, and that said plaintiffs on or about the 10th day of July, 1912, found a purchaser who was ready, able, and willing to purchase and exchange said land at a price agreeable to the defendant." The defendant alleged that the plaintiff acted for and represented the purchaser, and received a commission from the party to whom defendant made the exchange, and was the agent of the other party, and that the plaintiffs had thereby precluded themselves from collecting a commission from the defendant. It appears that about February, 1912; the appellant listed his land for sale or trade with the respondents, and that no particular understanding or agreement was had with reference to the commission or compensation to be paid or the scope of the agency or authority of the real estate brokers. It appears, however, that the respondents were in the real estate business,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



known and understood as ordinary real estate agents are known and understood in the business. Some time in May, 1912, appellant noticed an advertisement in a local paper, wherein certain property was offered for sale or trade, and appellant immediately went to respondents' office, and asked that one of the firm go at once and look at the property with a view to securing the same in exchange for a certain portion of his lands which they had listed. Clopton, a member of the respondents' firm, immediately went and saw the party who had inserted the advertisement in the paper, and had an interview with him and examined his property. After he returned he saw appellant and described the property to appellant, and told him that he "thought it was a fair proposition"; that he considered it a good chance or a good property, or something of that kind, and he thereafter took appellant to see the property, and introduced him to the owner, whose name was Batt. After an interview had between appellant and Batt and the examination by appellant of Batt's property, Clopton took Batt to examine appellant's property. These negotiations were carried on for some time, and finally an agreement was reached, and an exchange and transfer of the property was had. When Clopton first saw and interviewed Batt, he entered into an agreement with him, whereby Batt was to pay respondents a commission in the event an exchange or sale should be made. After the transaction was closed and the exchange of property was completed, the respondents presented their bill to Batt for commission, which he paid. They thereafter called on Meeves, the appellant, for a commission from him, and he refused to pay, and this action was thereafter instituted.

[1] The original complaint was filed in this case and the action was instituted on the theory that the plaintiffs in the action were real estate brokers, and that they had listed defendant's property and undertaken to sell or exchange the same, acting in the capacity of real estate brokers. The court found, however, "that the plaintiffs in making said exchange had no discretion as agents for the said defendant in making the price or the terms of said exchange, but that said plaintiffs acted as middlemen, bringing together the defendant and the said Charles Batt for the purpose of making the aforesaid exchange." The judgment was entered on the theory that the respondents had acted as middlemen in simply bringing the parties together, and that they in no way acted as agents for either.

The appellant contends that the plaintiffs, having commenced their action for services as brokers and agents under the allegations of their complaint, cannot now recover as middlemen. Technically this contention is correct, but under the liberal rule adopted by our statute (sections 4225 and 4226, Rev.

Codes; Western Loan, etc., Co. v. Kendrick State Bank, 13 Idaho, 336, 90 Pac. 112; Pennsylvania, etc., Mining Co. v. Gallagher, 19 Idaho, 106, 112 Pac. 1044; Johnson v. Gary, 18 Idaho, 627, 111 Pac. 855) we think the court might properly find according to the facts, and that this variance would not be fatal. If the trial judge had thought it necessary, he might have ordered an immediate amendment to support the evidence and finding.

[2, 3] The important and essential question to be considered in this case is the sufficiency of the evidence to support the findings and judgment. There is no question but that the appellant listed his property with respondents as real estate brokers with the understanding that they would find a purchaser for the property or some one with whom he could make an exchange. It is admitted that the appellant had no notice or information that respondents were going to receive a commission from Batt, and, indeed, appellant had no reason, either by way of actual or constructive notice, to suppose that the respondents were expecting to receive compensation from the other party to the transaction, or that they considered their relation to appellant such as would permit or justify their entering into such a relation with the other contracting party. Mr. Clopton, who negotiated the deal, and who acted for respondents throughout this transaction, testified on the witness stand as follows: "Q. Well, you took some part in this trade, did you, you were the one—principally the one that put this trade through? A. I suppose I was the one that put this trade through. I didn't have any help that I found out about. Q. Didn't Meeves help you? A. Not that I know of. Q. You did most of the work? A. I examined both properties and got the men together; they were only together at certain times when I took them together. Q. You did most of the negotiating then on both sides? A. Yes; there was nobody else doing anything that I found."

Respondents appear to have had a written notice posted in their office during the times of this transaction, stating their terms and commission charged by them in such transactions. They did not pretend to say that the appellant ever saw this notice, or had his attention called to it. They do claim, however, that he was in their office a great deal, and that this was posted on the wall, and that he had an opportunity to see it, and they draw the inference that he did see it on account of its being conspicuous. He denies, however, having any notice whatever of this. This notice was written in ink on a sheet of paper six by nine inches, and contained the following words:

RATES OF COMMISSION		
1st	\$3,000	5%
2nd	\$3,000	3%
Balance		2½%

In case of Trade or Exchange, each party pays one-half of all commissions, Values being equal.



It is clear to us from all the facts and circumstances of this case that whether the appellant had ever seen the foregoing notice or not, he had no reason whatever to suppose that in this transaction the respondents were representing any one but him, and he clearly had no reason to infer that they were going to represent the other party, or charge him a commission for carrying on this transaction.

It seems that the entire negotiation for this exchange of property was carried on by Clopton, and apparently he advised each party as to what he thought of the other party's property and the fairness of his offer. According to his own story, he must have entered actively into the negotiation. He was more than a disinterested onlooker, more than a mere middleman, whose only duty is to bring the prospective contracting parties together. A distinction has been drawn by the courts between what is commonly known as a real estate broker or agent, who undertakes to find a purchaser for a piece of property and to represent the owner in negotiating a sale, and that other personage known as a middleman, who is not supposed to take any interest in negotiating the deal on the part of either party. This latter character has been variously defined by the courts.

This court in *Synnott v. Shaughnessy*, 2 Idaho (Hasb.) 122, 7 Pac. 82, pointed out the distinction between an agent and a middleman as follows: "It is laid down as the law that if an agent act openly, and with the consent of both owner and purchaser, he may contract for and receive commission from both. \* \* \* And again, if the extent of the agency be merely to bring the parties together, and does not involve the duty of negotiating for either, the agent is termed a 'middleman,' and may contract for and receive commission from both. \* \* \* This is true also if each has agreed to pay the agent a commission, with or without the other's consent, if his duty is simply to bring the parties together."

The *Synnott-Shaughnessy* Case is cited with approval by the Supreme Court of Iowa in *Stapp v. Godfrey*, 139 N. W. 893, and in that case Mr. Justice Deemer, speaking for the court, says: "As we understand it, a middleman is one who acts as agent of both parties, and who sustains no such confidential relations to either as that he is bound to look after his interests. He is the agent of both, and merely brings the parties together in order that they may negotiate; he being under no duty of negotiating for either. *Synnott v. Shaughnessy*, 2 Idaho (Hasb.) 122, 7 Pac. 82. Strictly speaking, a middleman is one who simply undertakes to bring the parties together, and does not involve the duty of negotiating for either. He may contract for and receive a commission from both, for such an agreement is implied from the nature of the agency. *Stewart v. Mather*, 32 Wis. 344; *Hedden v. Shepherd*, 29 N. J. Law, 334;

*Rupp v. Sampson*, 16 Gray (Mass.) 398, 77 Am. Dec. 416. If the agent is understandingly employed as a mere middleman to bring the parties together, he may receive a commission from both with or without the other's consent, provided it is simply his duty to bring the parties together."

The case of *Stapp v. Godfrey* is very interesting and illuminating, for the reason that it is similar in its principal facts to the case at bar, and the court there held that the plaintiff, who was asking to recover a commission, was more than middleman, and was in fact an agent who actually participated in the negotiations. In course of the discussion in that case the court said: "It is familiar doctrine that a real estate broker cannot act as agent for both buyer and seller, and receive a commission from each, without the consent of both. But this consent may sometimes be inferred from the nature of the agency." The court also quoted at length from *Casady v. Carraher*, 119 Iowa, 500, 93 N. W. 386, which latter case considered and discussed the difference between the state of facts under which an agent will be termed a middleman, who may collect a commission from both parties, and an agent or broker who can collect from only the party employing him. In the *Casady* Case the court said: "Fidelity in the agent is what is aimed at, and as a means of securing it the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principal." *Clark v. Allen*, 125 Cal. 277, 57 Pac. 985; *McLure v. Luke*, 154 Fed. 647, 84 C. C. A. 1, 24 L. R. A. (N. S.) 659; note to *Leathers v. Canfield*, 45 L. R. A. 44; *Little v. Philpps*, 208 Mass. 331, 94 N. E. 260, 34 L. R. A. (N. S.) 1046; 19 Cyc. 226, 227; *Walker, Real Estate Agency*, §§ 475, 578.

It must be conceded we think, that if the broker who claims to have been only a middleman assisted either party in effecting or negotiating the trade or made any representations to either as to the value or advantages of the property of the other, he, to that extent, made himself a partisan agent, and could no longer rightfully and lawfully represent the other party to the transaction. *Strawbridge v. Swan*, 43 Neb. 781, 62 N. W. 199; *Stapp v. Godfrey*, 139 N. W. 895; *Lindt v. Brewing Co.*, 113 Iowa, 200, 84 N. W. 1059; *Rice v. Wood*, 113 Mass. 133, 18 Am. Rep. 459; *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *Friar v. Smith*, 120 Mich. 411, 79 N. W. 633, 46 L. R. A. 229; *Pinch v. Morford*, 142 Mich. 63, 105 N. W. 22.

[4] An examination of the discussions that have taken place in the several courts of the country over this question discloses that the main object of the law in drawing the distinction between the two classes of employment is to enable the party employing the agent to obtain honest service, uninfluenced and unbiased by the private and monetary in-



terests or opportunities of the agent. In this class of cases the real and important inquiry is not whether the agent has in fact overreached his principal, but whether he has placed himself in a position where there might be "an inevitable conflict between duty and opportunity" (*Just v. Idaho Canal, etc.*, 16 Idaho, 650, 102 Pac. 881, 133 Am. St. Rep. 140), so that he might thereby be tempted to sacrifice the interest of one of his principals in order to consummate the sale or transaction and thereby secure his commission. It is the common experience and unanimous verdict of mankind that "no man can serve two masters," and so when a man goes into a court of justice seeking to recover a judgment, where the proofs show that he has been occupying this twofold relation, the law denies him relief on the grounds that public policy forbids courts lending sanction or approval to an employment or relation which is by such general consent calculated to overtempt the one occupying such relation. When a man employs a real estate agent or broker to sell or exchange his property, he has a right, in the ordinary and usual course of business, to assume that he will have the advantage of the honest and fair advice of the agent as to prices and values, and any other matters necessarily involved in such a transaction, and he also has a right to assume that such agent is better informed on these questions than any one else. If the agent and broker under such circumstances expects to claim subsequently that he is only a middleman, and that he has a right also to collect a commission from the purchaser, honesty and square dealing would dictate that he notify the vendor at the time of the employment, or as soon thereafter as he determines to assume this dual capacity or the roll of representative of both the vendor and vendee. A man who has property to sell would not ordinarily place much reliance upon the judgment of the agent of the prospective purchaser as to its value or the advantages of its location, or anything else in relation thereto. On the other hand, the vendor would have a right to place great reliance upon his own agent, who is supposed to be possessed of peculiar and unusual knowledge and information on these questions. If, on the other hand, the agent is going to collect a commission from both the vendor and vendee, and his commission is contingent upon the sale or transfer being consummated, then it is at once of most vital importance to him to see that the sale or transfer be made. In such a case, if his advice and judgment is to be taken, there is great danger of its being exercised to the detriment and disadvantage of one of the parties. It will become a matter of interest to the agent to eliminate differences between them and cause one or the other to cut his price on the property, or to make terms more

favorable than he otherwise would do. Whenever he does this, he enters a contest between the duty he owes to his employes, on the one hand, and the opportunity for private gain on the other, and in such a contest there is grave danger of duty being routed and opportunity coming off victorious.

In the case under consideration, the evidence does not support the finding that respondents were only middlemen employed for the sole purpose of bringing the parties together; it rather establishes their agency as real estate brokers, and that they were employed as the agents of appellant. The judgment must be reversed, and it is so ordered, and the case is remanded, with direction to the trial court to make findings and enter judgment in favor of the defendant, appellant herein. Costs awarded in favor of appellant.

STEWART, J., concurs.

(24 Idaho, 216)

#### FISCHER v. DAVIS et al.

(Supreme Court of Idaho. June 12, 1913. On Petition for Rehearing, July 5, 1913.)

#### 1. APPEAL AND ERROR (§ 564\*)—TRANSCRIPT OF TESTIMONY—PREPARATION—EXTENSION OF TIME.

Under the provisions of subdivision 1 of section 4434 of the Revised Codes, as amended at the 1911 session of the Legislature (Sess. Laws 1911, p. 379), an appellant who desires "a transcript of the testimony and proceedings \* \* \* shall first procure from the district judge an order directing the reporter to prepare said transcript or specified portion thereof, which order shall limit the time within which the reporter shall complete and lodge the same." In the event any further order for extension of time is necessary, the district judge has the jurisdiction and authority to grant such further time as may be required.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.\*]

#### 2. APPEAL AND ERROR (§ 564\*)—TRANSCRIPT OF TESTIMONY—PREPARATION—CONTROL OF APPELLANT.

Under the amended and revised appellate practice and procedure, as adopted by the 1911 session of the Legislature, the appellant has no control over the getting out of the transcript either of the reporter's notes or of the judgment roll and record in the case except to file his praecipe for the record and pay the estimated fees therefor until the transcript is delivered to him for service.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.\*]

#### 3. APPEAL AND ERROR (§ 629\*)—TRANSCRIPT—PREPARATION—MANDATES—ISSUANCE.

The amended and revised appellate practice and procedure, as adopted by the 1911 session of the Legislature, leaves the preparation of the transcript of the reporter's notes and the record in the case to the court reporter and the clerk of the district court, and the duty of filing such record in the Supreme Court is imposed upon the clerk of the district court, and, on failure by the reporter or the clerk to discharge this duty promptly and with diligence, either

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the district judge or the Supreme Court may issue orders and mandates to compel prompt and timely action on the part of these court officials.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2765; Dec. Dig. § 629.\*]

**4. APPEAL AND ERROR (§ 628\*)—PREPARATION OF TRANSCRIPT—FILING—EFFECT.**

A failure on the part of either the court reporter to prepare a transcript of his notes or on the part of the clerk of the district court to prepare and deliver a transcript or file the same in the Supreme Court cannot result in or work a dismissal of the appeal unless the appellant has been guilty of laches and negligence or has in some way contributed to or encouraged the delay and failure on the part of the proper officer to act.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2750-2764; Dec. Dig. § 628.\*]

**5. APPEAL AND ERROR (§ 564\*)—TRANSCRIPT—PREPARATION—JURISDICTION OF DISTRICT JUDGE.**

*Held*, that under the provisions of section 4434 of the Revised Codes, as amended by chapter 119 of the Session Laws of 1911 (Sess. Laws 1911, p. 379), it was the purpose and intent of the Legislature to vest the jurisdiction and authority in the district judge to control the getting out of reporter's notes and to grant necessary extensions of time for the reporter to transcribe his notes and to make all orders in relation thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.\*]

**6. APPEAL AND ERROR (§ 627\*)—TRANSCRIPT—PREPARATION—EXTENSION OF TIME.**

Rule 77 of the rules of the Supreme Court with reference to extensions of time within which to extend reporter's notes and the showing to be required by the district judge before granting such extensions is directory and not mandatory, and a failure to comply therewith will not work a dismissal of an appeal where the appellant has been diligent in the prosecution of the appeal and has done everything required of him by statute to be done.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2744-2749, 3126; Dec. Dig. § 627.\*]

**7. APPEAL AND ERROR (§ 627\*)—APPELLATE PRACTICE—STATUTORY PROVISIONS—COMPLIANCE.**

This court will require a strict compliance with all the provisions of the revised and amended appellate practice and procedure, as enacted by the 1911 session of the Legislature, in so far as those provisions contemplate the speedy prosecution of appeals and the elimination of delays.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2744-2749, 3126; Dec. Dig. § 627.\*]

**8. APPEAL AND ERROR (§ 621\*)—TRANSCRIPT—PREPARATION—REPORTER'S TRANSCRIPT—SUPREME COURT RULES—SUSPENSION.**

Under the amended and revised statutes prescribing the appellate practice and procedure, a reporter's transcript of the testimony, duly signed and certified by the judge of the district court, takes the place of a statement or bill of exceptions, and the time for filing a transcript on appeal, as prescribed by rules 23 and 25 of the Supreme Court (96 Pac. x), is suspended during the time the reporter is preparing his notes and until the same is settled and allowed by the district judge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2724-2731; Dec. Dig. § 621.\*]

**9. WATERS AND WATER COURSES (§ 167\*)—NAVIGABLE WATERS (§ 39\*)—RIPARIAN OWNERS—RIGHTS—OBSTRUCTIONS—CHANGE OF CHANNEL.**

As a general rule of law applicable to a river or stream of water with well-defined banks and a permanent channel or bed, a riparian owner of lands abutting on such stream has no right to place obstructions out into the stream or channel thereof for the purpose of changing the natural course of the stream or for any other purpose that would be injurious or damaging to the riparian owner on the opposite side thereof or to the owner of land abutting on the stream either above or below.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 192, 194-202; Dec. Dig. § 167; \* Navigable Waters, Cent. Dig. §§ 21, 53, 82, 103, 112, 117, 127, 239-244; Dec. Dig. § 39.\*]

**10. WATERS AND WATER COURSES (§ 167\*)—NAVIGABLE WATERS (§ 39\*)—OBSTRUCTIONS—CHARACTER OF STREAM.**

The general rule applicable to flowing streams of a permanent character and well-defined banks and channel or bed is subject to many exceptions in case where a stream is vagrant and constantly changing in its course and channel and flows through a level, sandy, and gravelly formation and is constantly filling in on one side and cutting out on the opposite side and thus damaging riparian proprietors.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 192, 194-202; Dec. Dig. § 167; \* Navigable Waters, Cent. Dig. §§ 21, 53, 82, 103, 112, 117, 127, 239-244; Dec. Dig. § 39.\*]

**11. WATERS AND WATER COURSES (§ 167\*)—NAVIGABLE WATERS (§ 39\*)—RIPARIAN PROPRIETOR—CRIBBING—STOCKADES—RIPRAPPING.**

A riparian proprietor has a right to build cribbing, stockades, or riprapping along the natural bank of the stream in order to protect the banks and the abutting lands.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 192, 194-202; Dec. Dig. § 167; \* Navigable Waters, Cent. Dig. §§ 21, 53, 82, 103, 112, 117, 127, 239-244; Dec. Dig. § 39.\*]

**12. WATERS AND WATER COURSES (§ 167\*)—NAVIGABLE WATERS (§ 39\*)—RIPARIAN PROPRIETOR—RIGHTS.**

The law will not permit one riparian proprietor to build structures in the channel or bed of the stream so as to impede or interfere with the flow of the current or render it necessary for another riparian proprietor to build riprapping, cribbing, a breakwater, or other structure in order to protect his land from washing or erosion caused by the additional burden and flow of water cast upon it by reason of the encroachments of such opposite riparian proprietor.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 192, 194-202; Dec. Dig. § 167; \* Navigable Waters, Cent. Dig. §§ 21, 53, 82, 103, 117, 127, 239-244; Dec. Dig. § 39.\*]

**13. WATERS AND WATER COURSES (§ 179\*)—NAVIGABLE WATERS (§ 39\*)—RIPARIAN PROPRIETOR—RIGHTS—CHARACTER OF STREAM.**

In dealing with streams of the nature and character of the Boise river where it flows through the Boise valley, a court must take into consideration the natural conditions and the peculiarities of the stream and the country and formation through which it flows and its vagrant and changeable character, and also the fact that great reservoirs and lakes have been formed and prepared and are being prepared for the storage of the waste, surplus, and overflow of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



this stream in the high-water period, and that in the near future there will be no high-water season in this stream where it flows through the Boise valley.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 244-250, 256-259, 263, 264; Dec. Dig. § 179.\* *Navigable Waters*, Cent. Dig. §§ 21, 53, 82, 103, 112, 117, 127, 239-244; Dec. Dig. § 39.\*]

#### On Petition for Rehearing.

#### 14. COSTS (§ 61\*)—APPORTIONMENT.

Where plaintiff sued to restrain defendants from maintaining a cribbing or breakwater in a river, and defendants answered, traversing the principal allegations of the complaint and filing a cross-complaint alleging that plaintiff was maintaining an obstruction on his side of the stream which caused damage to defendants, and prayed an injunction and \$11,000 damages, and the court concluded that neither party was injured or damaged by the other and dismissed the suit, it was error to tax all the costs against plaintiff, but each party should have been required to pay his own costs under Rev. Codes, §§ 4901, 4903, authorizing a division of costs.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 272; Dec. Dig. § 61.\*]

#### 15. JUDGMENT (§ 606\*)—CONCLUSIVENESS.

Where, in a suit by a riparian proprietor against his neighbors for an injunction to restrain the obstruction of the stream, defendants also filed a cross-bill for an injunction and to recover damages, and the court found that neither party had sustained any damage and dismissed the suit, the judgment was no bar to a subsequent action to recover damages sustained by plaintiff since the trial.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1120; Dec. Dig. § 606.\*]

**Appeal from District Court, Ada County;**  
Chas. P. McCarthy, Judge.

Suit by Eugene Fischer against Thomas J. Davis and others. Judgment for defendants, and plaintiff appeals. Affirmed.

See, also, 19 Idaho, 493, 116 Pac. 412.

B. F. Neal, of Boise, for appellant. Richards & Haga, of Boise, for respondents.

**AILSHIE, C. J.** The respondents moved to dismiss the appeal in this case upon the following grounds: "(1) Because the reporter's transcript was not completed and lodged within the time prescribed by subdivision 1 of section 4434 added to the Revised Codes by Laws of 1911, p. 379, an express mandatory statute; (2) because the trial court purported to grant an extension of time in contravention of rule 77, and appellant wholly failed to complete his transcript within the time allowed by that rule; (3) because the trial judge had no jurisdiction to settle the transcript under the facts of this case; and (4) because the transcript on appeal was not filed within 60 days from the perfecting of the appeal, and no extension of time was asked for or obtained."

It appears that the judgment was entered in this case on the 4th day of April, 1912, and the appeal was perfected on the 1st day of June, 1912, by filing notice and an undertaking on appeal. On the same day (that is, June 1, 1912) the district judge made and

filed an order allowing 40 days for the preparation of the reporter's transcript of the evidence. Thereafter, and on July 9, 1912, the judge signed an order granting an additional period of 40 days for the preparation of the reporter's transcript. This latter order was made on the application of counsel for appellant, and the order was made without serving or filing any affidavit or showing as required and provided for in rule 77 of the rules of this court. The latter order gave the reporter, until the 20th day of August, 1912, to prepare and lodge a transcript of his notes. The reporter's transcript, however, was not, as a matter of fact, completed and lodged until September 24th, on which date it was served upon counsel for respondent. Counsel for respondent appeared before the trial judge at the time of the settlement of this transcript and made objections on the ground that the court was without jurisdiction to settle and allow the same.

This motion involves a construction of section 4434 of the Revised Codes, as amended by chapter 119 of the Session Laws of 1911 (Sess. Laws 1911, p. 379) and rule 77 of this court. It is conceded in the outset that there was no compliance with rule 77. That rule provides as follows: Rule 77: "In no case shall the time granted for the preparation of the transcript of the reporter's notes, under the provisions of section 4434, as enacted by the 1911 session of the Legislature, exceed forty days, including any and all extensions granted for the purposes therein specified: Provided, that in extraordinary cases, or in case of an unusually large record, or in case of sickness of the reporter, a party desiring an extension of time, may, upon filing affidavits showing the cause for the same and serving the same on the adverse party and giving notice of the time and place of hearing, which shall be not less than two days, and upon such hearing and good cause appearing, be granted an extension or extensions, not exceeding in the whole an additional forty days." In the last analysis this motion rests on the validity and authority of the foregoing rule adopted by this court and whether or not that rule is in harmony with the statute and is binding and operative. The appellant complied with the first part of the rule in that he procured an order directing the reporter to prepare the transcript and fixing the time for that purpose, not exceeding 40 days. There was, however, no attempt to comply with the proviso to that rule, namely, that additional extensions should not exceed 40 days and that these additional extensions beyond the first 40 days should be made upon affidavit and notice. The statute (subdivision 1 of section 4434), as amended, provides that the appellant who desires "a transcript of the testimony and proceedings \* \* \* shall first procure from the district judge an order di-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



recting the reporter to prepare said transcript or specified portion thereof, which order shall limit the time within which the reporter shall complete and lodge the same.

\* \* \* It shall be the duty of the reporter, upon service of said copy of order and receipt of his estimated fees, to forthwith prepare said transcript and to complete the same and lodge the original and copies with the clerk of the district court within the time allowed by said order, or within such further time as the district judge may, by order, allow."

[1] It will be observed from the foregoing quotation that no limitation as to time is placed upon the district judge in allowing time to the reporter in which to prepare the transcript. Neither is any limitation placed upon the district judge as to "such further time as the district judge may by order allow." It would seem, therefore, that the Legislature has left the matter of time of getting out transcripts entirely to the supervision and control of the district judge, and that in this matter he is given that same legal discretion which he has in any other matters submitted to his judgment and discretion as a judge. The spirit of this statute evidently contemplates that the district judge will exercise the power and authority vested in him in the light of the necessities thereof; the principal and chief consideration being the amount of time actually necessary to enable the reporter to prepare the transcript without giving the particular case undue preference over other work of equal rank or which may be prior in point of time and entitled to prior consideration. This statute evidently contemplates that the reporter, being the appointee of the district judge and subject to discharge by him at any time, is subject to the orders and directions of the judge, and that the judge will, best know the condition of the business and the amount of work that his reporter is doing and will be in a position to know whether an extension of time is necessary, and, if so, the probable length of time requisite to do the particular work required.

Section 4434 and sections 4440, 4441, 4442, (Laws 1911, p. 377), and sections 4818 and 4820a (Laws 1911, p. 375), being the 1911 revisions and amendments of the appellate practice and procedure, were intended to both cheapen and expedite appeals, and one of the chief results of this revision and amendment has been in a large measure to transfer the duty and responsibility of preparing appeals from the attorneys who are prosecuting them to the court officers; and, since these statutes have become operative, this court has been repeatedly confronted with the question as to where the responsibility rested for the delay in the prosecution of an appeal and the accomplishment of the purpose of the Legislature to secure quick and speedy determination of appeals from district courts.

[2] It will be seen that the appellant must file a praecipe for the record and transcript or such part thereof as he may desire and pay the fees demanded. If he desires the reporter's notes extended, he must "procure from the district judge an order directing the reporter to prepare such transcript or specified portion thereof, which order shall limit the time within which the reporter shall complete and lodge the same."

[3, 4] The statute makes no further requirement of the appellant or his attorney until after he has been furnished with the copies of the transcript. He must then within five days specify and designate any errors or omissions and corrections necessary to be made and serve a copy on the adverse party or his attorney.

[5] The statute does not impose any duty upon the appellant or his attorney in the matter of procuring further extensions of time within which the reporter may complete the transcript of his notes. The matter seems to rest in the hands of the district judge, and it would appear to be the duty of the reporter to make the application himself directly to the district judge or to notify the attorney for appellant and request him to make the necessary application and give him the information on which to base such application. If, however, the reporter fails to notify the attorney for appellant that he will not be able to complete the transcript within the time originally allowed, there is no way for the appellant or his counsel to know that it will not be completed until after the time has expired, unless he hunts up the reporter and ascertains that fact. It is a well-settled rule of law that litigants or parties dealing with public officers are not chargeable with the delays, mistakes, negligence, or inaction of such officer, and that they cannot be deprived of any legal right by the negligence, delay, or refusal to act on the part of such officers, provided they do the things required to be done by them personally. *Cameron v. Calkins*, 43 Mich. 191, 5 N. W. 292; *State v. Estes*, 34 Or. 196, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25; *Dean v. O. R. & N. Co.*, 38 Wash. 565, 80 Pac. 842; *Stewart v. Raper*, 85 Neb. 816, 124 N. W. 472.

In the case at bar it appears that counsel for appellant did everything required to be done by him, and that he was diligent and was constantly after the reporter, urging him to get this work out. It does not appear that the work could have been completed sooner without delaying other work which was equally entitled to attention and consideration. The reporter should have procured an order giving him an extension of time necessary to complete this transcript. The failure, however, to do so should not be visited upon the appellant in a case where he shows that he was diligent and continually urging the completion of his work.



*Smith v. Jaccard* (Cal.App.) 128 Pac. 1023. The only remedy an appellant has where the reporter fails to get a transcript out in due time is to apply to the district judge for an order or writ of mandate. This might be done merely by motion as the matter is pending before the court and the reporter is a court officer.

[6] It follows from what has already been said that rule 77 of this court is directory and advisory only and not mandatory, and that an appeal cannot be and will not be, in every instance, dismissed for a failure to comply with this rule. In other words, a failure to observe the requirements of rule 77 with reference to extension of time for preparing reporter's transcript and the showing that should be made before granting such extensions can only become a cause or ground for dismissing an appeal in cases where the appellant or his counsel has neglected some duty imposed upon him or has been guilty of laches in neglecting to call any unreasonable delays to the attention of the trial judge or the reporter who is charged with the duty of preparing the transcript of his notes or the clerk of the court who is making up the final transcript for the Supreme Court. Rule 77 will be taken, however, as a standard and measure of diligence in determining when parties are guilty of such laches as will justify the dismissal of an appeal.

[7] This court shall in all respects insist upon the prosecution of appeals with diligence and dispatch. This court has in several cases indicated its purpose to require a compliance with the provisions of the 1911 amendments and revision of the appellate practice and procedure. See *Kelley v. Clark*, 21 Idaho, 231, 121 Pac. 95; *Grisinger v. Hubbard*, 21 Idaho, 469, 122 Pac. 853; *Furey v. Taylor*, 22 Idaho, 605, 127 Pac. 676; *Edwards v. Anderson*, 23 Idaho, 508, 130 Pac. 1001; *Strand v. Crooked River Mining Co.*, 23 Idaho, 577, 131 Pac. 5.

What has already been said is applicable to the contention made by respondent that the transcript was not filed in this court within 60 days after the appeal was perfected as required by rules 23 and 25 of this court. Under the amended statutes as above cited, the appellant is no longer chargeable with the duty of filing the record in this court. That duty has been transferred to the clerk of the district court (subdivision 3 of section 4820a, Sess. Laws 1911, p. 375), and the necessary fees for that purpose are paid by appellant to the clerk of the district court at the time he files his praecipe for the transcript. Subdivision 1, § 4820a, 1911 Sess. Laws, 375. A failure on the part of the clerk of the district court to discharge this duty with diligence and dispatch may be reached by the appellant on application either to the judge of the district court or to this court. If, however, the judge of the district court grants extensions of time for the reporter to

get out his transcript beyond the 60-day period, it will be impossible for the clerk to send the transcript to this court within that time.

[8] We think, however, that the proviso found in rule 25 of this court "that the time during which the trial court, or judge thereof, may hold a bill of exceptions, or statement, prior to the settlement, and filing thereof, and the time during which the attorney for the respondent may retain the transcript on appeal before certifying, or refusing to certify the same, shall be excluded in computing the time, either under this rule, or under rule 23, within which the transcript on appeal shall be filed," applies to the settlement and allowance of the reporter's transcript of the evidence. The statute (section 4434, amended by 1911 Sess. Laws, 379) provides that a transcript of the reporter's notes duly settled and allowed shall take the place of a statement or bill of exceptions as the same was required under the statute before amendment.

For the foregoing reasons, the motion to dismiss the appeal is denied.

This brings us to a consideration of the case on its merits. The action was brought to procure an injunction restraining the defendants from maintaining a cribbing or obstruction in the Boise river. A temporary injunction was issued and an appeal was taken to this court, and the judgment of the lower court was affirmed. 19 Idaho, 493, 116 Pac. 412. The case was subsequently tried on the merits, and this appeal is from the judgment. The plaintiff and defendants are opposite riparian proprietors along the Boise river. The defendants filed a cross-complaint charging the plaintiff with maintaining an obstruction along the stream on his side which they alleged caused an unusual volume of water to flow across and onto the defendants' lands and erode and wash away the land and do great damage to the defendants as riparian proprietors. The court heard the case and denied any relief to either party, holding that neither obstruction was a damage or injury to the opposite landowner. The material findings made by the trial court are Nos. 4, 5, 6, and 7 and are as follows:

"(4) That the said defendants in the spring of 1910 constructed a certain cribbing on the westerly side of such river at a point opposite the southerly end of a certain gravel bar situate in such river for the purpose of protecting the said lands of defendants from erosion and being washed away during high-water period in such river. That said river at the point of said cribbing is about 362 feet wide. That said cribbing extends into the channel of said river a distance of about 74 feet and at an angle of about 45 degrees to said channel.

"(5) That the construction and maintenance of such cribbing does not and will not injure the lands of plaintiff,



"(6) That during the years 1908 and 1909 the plaintiff constructed on the lands of plaintiff an embankment adjacent to such river and along the easterly side thereof for the purpose of protecting the said lands of plaintiff from erosion and being washed away during high-water periods in such river.

"(7) That the erection and maintenance of such embankment by plaintiff does not and will not injure the lands of the said defendants."

[9] It is well settled, as a general rule, that "a riparian owner of lands abutting upon a stream has no right to place obstructions out into the stream for the purpose of changing the natural course of the river, or for any other purpose that would do damage to a riparian owner on the opposite side, or to owners of land abutting upon said stream either above or below." *Fischer v. Davis*, 19 Idaho, 493, 116 Pac. 412. This is particularly true with reference to streams that have well-defined banks and a permanent channel or bed. The Boise river, however, is not such a stream. While it carries a considerable volume of water, especially during the high-water season, still it is a vagrant stream with low banks where it traverses the valley and is constantly changing its channel in flowing through and over a sandy and gravelly formation. This stream was meandered when the government survey of public lands was made, and yet it appears that in many places no part of the stream is now within the boundary lines of the river as meandered at the time of the survey. In some instances it is as much as a half mile away. In order for those who are using their land along the stream to be able to improve the same with any assurance of obtaining results or any degree of safety, it is necessary to protect the banks from erosion either by means of cribbing, riprap, or stockades. The appellant, in an effort to protect his lands, pursued the course of riprapping the banks along the stream on his side and followed the natural course of the bank in all its curves and angles. The respondents, on the other hand, in order to protect their lands on the opposite side, built cribbing from a projecting point in almost a right line with the general course of the stream, but at that particular point where the cribbing extended into the channel of the stream it was at an angle of about 45 degrees to the channel as it curved toward respondents' land. The evidence shows that this structure did not tend to throw the water onto appellant's lands but rather to turn the water in the direct general course of the stream and prevent its cutting out the banks on respondents' side of the stream. The trial court finds that this cribbing would in no way injure or damage the opposite landowner, and for that reason concludes that he is not entitled to a permanent injunction. The evidence supports this finding.

[10, 11]. A stream of this kind and charac-

ter must be dealt with differently from the ordinary river with a fixed and permanent bed and well-defined banks and channel, and the courts must take the physical facts and conditions into consideration in rendering decisions with reference thereto.

[13] Another thing which the court will take into consideration in entering judgments with reference to this stream is that large reservoirs have been constructed by the government reclamation service for impounding water from this stream during the high-water season, and that another large reservoir is being constructed some 23 miles above Boise City which it is estimated will collect the entire surplus flow of the Boise river during the high-water period. When these projects are completed, there will no longer be any particularly high-water season in the Boise river below the points of diversion, and for that reason it would hardly seem necessary for a court to cause these cribbings, embankments, and stockades to be removed which are so placed that they do not cause damage to other riparian proprietors and where they will not in all probability cause injury or damage in the future.

It must also be taken into consideration in this case that this is an application for a permanent mandatory injunction, and the contest is waged between two opposite riparian proprietors. No question arises here as to the interest of any other person or riparian proprietor. In this case both parties have already constructed their works in order to protect the banks against the erosion and washing by the waters of the stream, and so any additional velocity that may be given this stream at this particular point by reason of the structure on one side is equally guarded against by a like or similar structure on the opposite side. In other words, the structure erected by one of these parties does not force or compel the other party to erect a like or similar structure for the protection of his land. In this case the work has been done on both sides of the stream for the protection of each riparian proprietor, and the trial court finds that the channel of the stream is left sufficiently wide to carry the entire volume of water that is ever likely to flow in that stream, and the evidence abundantly supports this finding.

[12] The law will not permit one riparian proprietor to build structures into the channel or bed of a stream so as to impede or interfere with the flow of the current or to render it necessary for another riparian proprietor to build cribbing, a breakwater, or other structure in order to protect his land from washing or erosion caused by the additional burden cast upon it by reason of the encroachments of the other riparian proprietor. *Fischer v. Davis*, 19 Idaho, 493, 116 Pac. 412; *Fowler v. Wood*, 73 Kan. 511, 85 Pac. 763, 6 L. R. A. (N. S.) 162, 117 Am. St. Rep. 534; *Geurkink v. City of Petaluma*, 112 Cal. 306, 44 Pac. 570.



As said by this court on rehearing in *Fischer v. Davis*, supra: "A court of equity should never permit such a thing to be done where there is a showing that it will in all reasonable probability result in 'great or irreparable injury' to some one else."

Upon the whole record in this case, we are satisfied the appellant is not entitled to the injunctive relief sought, and that the trial court properly dismissed the case. The judgment will be affirmed, and it is so ordered. Costs are awarded to respondents.

SULLIVAN and STEWART, JJ., concur.

#### On Petition for Rehearing.

AILSHIE, C. J. A petition for a rehearing has been filed in this case, in which counsel discuss the main proposition considered and disposed of in the original opinion.

We find no reason to change or alter the views heretofore expressed by the court upon these questions. Our attention, however, has been called to one matter which should have been considered by the original opinion and which was evidently overlooked. The appellant brought to the attention of this court the action of the trial court in denying and overruling his motion to retax the costs in the case, and appellant has assigned that action of the court as erroneous. The appellant commenced his action against respondents to procure an injunction restraining respondents from maintaining a cribbing or breakwater in the river. Respondents answered traversing the principal allegations of the complaint and also filed a cross-complaint alleging that appellant was maintaining an obstruction on his side of the stream which was causing damage to the defendants, and prayed for an injunction restraining the plaintiff from continuing to maintain this obstruction, and also alleged that defendants had sustained \$11,000 damages and prayed judgment against him for that sum. All these questions were tried, and the trial court, after hearing all the evidence, concluded that neither party was injured or damaged by the other, and that neither could recover damage from the other or have an injunction. Notwithstanding this conclusion, the trial court taxed all the costs of the case up against the plaintiff, who is appellant here. This, we are satisfied, was erroneous. Under the facts of this case, each party ought to have been required to pay his own costs.

[14] We think the fair construction of sections 4901 and 4903, Rev. Codes, requires the taxing of costs incurred by each party up against the party who incurred such costs in a case like the one under consideration. We do not understand either *Bemmerly v. Smith*, 136 Cal. 5, 68 Pac. 97, or *Abram v. Stuart*, 96 Cal. 235, 31 Pac. 44, as opposed to this construction and holding.

Counsel has also suggested that the appellant should have the right to maintain an ac-

tion against respondents for the purpose of recovering compensation for any damages incurred since the trial of this case by reason of the erection and maintenance of the cribbing which was the subject of appellant's action in this case. That question is not involved in this case and of course cannot properly be discussed or considered.

[15] It would seem clear, however, that the judgment in this action is no bar to the appellant's right of action against respondents for any damage which he may have sustained since the trial of the present case if he is able to establish that he has sustained damages. We conclude, therefore, that the judgment in this case must be modified to the extent above suggested. The cause will therefore be remanded to the district court, with direction to tax the costs incurred by each party against the party who incurred the same, and, if any item of costs has been incurred alike by both parties, that such expenditure be divided equally between the parties. Costs of this appeal will be equally divided between appellant and respondents.

SULLIVAN and STEWART, JJ., concur.

(24 Idaho, 36)

BOISE DEVELOPMENT CO., Limited, et al.  
v. IDAHO TRUST & SAVINGS  
BANK, Limited, et al.

(Supreme Court of Idaho. Feb. 3, 1913.

On Rehearing June 26, 1913.)

#### 1. INJUNCTION (§ 136\*)—INJUNCTION PENDENTE LITE.

The general rule adopted by courts in granting an injunction pendente lite is more liberal than is applied upon the trial of the cause upon its merits.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 305, 306; Dec. Dig. § 136.\*]

#### 2. WATERS AND WATER COURSES (§ 177\*)—NAVIGABLE WATERS (§ 39\*)—BREAKWATER—INJUNCTION—APPREHENDED INJURY.

Where an application is made by a riparian owner for a permanent injunction, restraining a riparian owner upon the opposite side of the stream from constructing and maintaining a dam or breakwater, upon the ground that the construction of such dam or obstruction will cause the water to overflow the land of the riparian owner who applies for such injunction, the petitioner should be required to show reasonable grounds for apprehending an actual injury or a reasonable probability of injury before the court adjudges a permanent injunction.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 260-262; Dec. Dig. § 177.\* *Navigable Waters*, Cent. Dig. §§ 21, 53, 82, 103, 112, 117, 127, 239-244; Dec. Dig. § 39.\*]

#### 3. WATERS AND WATER COURSES (§ 177\*)—NAVIGABLE WATERS (§ 39\*)—BREAKWATER—PERMANENT INJUNCTION—APPREHENDED INJURY.

Where application is made for a permanent injunction to restrain the construction and maintenance of a breakwater located upon the lands of a riparian owner, where no showing is made of any real or imminent danger or damage, and it is not shown to any degree of certainty that even a reasonable apprehension, prospect, possibility, or contingency of any ac-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



tual injury exists, an injunction cannot be granted to allay the fears and apprehension of a riparian owner of land upon the opposite side of the stream as to what may occur in the future. It is incumbent upon the petitioner to show that the acts against which he seeks protection are not only threatened but will in all probability be committed to his injury. The injury must be material and actual and not fanciful or theoretical or merely possible.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 260-262; Dec. Dig. § 177;\* *Navigable Waters*, Cent. Dig. §§ 21, 53, 82, 103, 112, 117, 127, 239-244; Dec. Dig. § 39.\*]

**4. WATERS AND WATER COURSES (§ 177\*)—NAVIGABLE WATERS (§ 39\*)—RIPARIAN PROPRIETORS—RIGHTS—OVERFLOW.**

If the injury to a riparian owner on the opposite side of the stream from the place where the breakwater or dam is located will as certainly occur without the embankment, because of the natural overflow, the party seeking an injunction must prove that the additional water cast upon the land will in all probability damage him.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 260-262; Dec. Dig. § 177;\* *Navigable Waters*, Cent. Dig. §§ 21, 53, 82, 103, 112, 117, 127, 239-244; Dec. Dig. § 39.\*]

**5. WATERS AND WATER COURSES (§ 167\*)—NAVIGABLE WATERS (§ 39\*)—RIPARIAN OWNERS—RIGHTS.**

A riparian owner of land abutting upon a stream, whether navigable or nonnavigable, has the legal right to place barriers, such as dams and breakwaters, for the protection of his lands and to prevent the overflow or damage by the stream, but in so doing he cannot place such dam or breakwater in the channel or course of the stream as will change the course of the river or divert the course of the water and will result in destroying or overflowing the lands of the owners abutting on said stream either above or below.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 192, 194-202; Dec. Dig. § 167;\* *Navigable Waters*, Cent. Dig. §§ 21, 53, 82, 103, 112, 117, 127, 239-244; Dec. Dig. § 39.\*]

**6. WATERS AND WATER COURSES (§ 167\*)—NAVIGABLE WATERS (§ 39\*)—RIPARIAN OWNERS—CONSTRUCTION OF STREAM.**

A riparian owner may repel the water flowing in a stream and cause it to flow in the channel of the stream which it has left during high water, if by so doing he inflicts no injury to the riparian owner upon the opposite side of the stream.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 192, 194-202; Dec. Dig. § 167;\* *Navigable Waters*, Cent. Dig. §§ 21, 53, 82, 103, 112, 117, 127, 239-244; Dec. Dig. § 39.\*]

**7. WATERS AND WATER COURSES (§ 170\*)—NAVIGABLE WATERS (§ 39\*)—CONSTRUCTION OF DAM—INJURY TO OPPOSITE PROPRIETOR—INJUNCTION.**

*Held*, that the record in this case clearly shows the evidence and findings of the court are not sufficient to justify the issuing of a permanent injunction.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 244-250, 256-259, 263, 264; Dec. Dig. § 179;\* *Navigable Waters*, Cent. Dig. §§ 21, 53, 82, 103, 112, 117, 127, 239, 244; Dec. Dig. § 39.\*]

**8. INJUNCTION (§ 8\*)—DENIAL—EFFECT.**

*Held*, that the defendant in this case, the appellant here, is in no way relieved from any liability arising from injury which results to

the respondents or any other riparian owners on the opposite side of the river from the appellant, if such injury is caused by the construction of the breakwater in question in this action. Neither does it mean that the appellants cannot be enjoined at any time from maintaining said breakwater when the circumstances show clearly that the construction of the breakwater will cause the water to back up or overflow, erode, or injure the lands of the respondents, should such breakwater bring about such result in the future.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 7; Dec. Dig. § 8.\*]

Appeal from District Court, Ada County; John F. MacLane, Judge.

Suit by the Boise Development Company, Limited, and others against the Idaho Trust & Savings Bank, Limited, and others. Judgment for plaintiffs, and defendants appeal. Reversed.

A. A. Fraser, of Boise, for appellants. P. E. Cavaney, of Boise, for Boise City. Smead, Elliott & Healy and Hawley, Puckett & Hawley, all of Boise, for respondents.

STEWART, J. This action was instituted in the district court of Ada county by plaintiffs, respondents here, against the defendants to secure a permanent injunction restraining the defendants from completing a certain dam constructed by defendants in Boise river, and from filling in a portion of the river channel behind said dam, and from maintaining the same when completed and compelling the defendants to remove the portion so constructed and all obstructions made by defendants in the channel of the Boise river. The cause was tried to the court and findings of fact and conclusions of law were made by the trial court, and judgment rendered in favor of the plaintiffs perpetually enjoining and restraining the defendants from the completion of that certain dam or breakwater now erected in the channel of the Boise river. This appeal is from the judgment.

The complaint alleges the facts as follows: That the Boise Development Company is a corporation; that the Idaho Trust & Savings Bank is a corporation; that Boise City is a municipal corporation; that the Boise Development Company is the owner of a valuable interest in a certain tract of land commonly known as Ridenbaugh Island, and more particularly described as Boise City Park Subdivision, and is in possession of said property and all riparian rights appurtenant to said tract, and is the owner of such riparian rights; that such land forms a part of the south bank of the Boise river; that the defendant Idaho Trust & Savings Bank has platted a certain tract of land described as Riverside Park addition to Boise City, Idaho, and recorded the same, and that said tract of land lies along the westerly line of Ninth street in said Boise City and along the north bank of said Boise river;

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



that a portion of the tract so platted, about three acres thereof, lies in the channel of the Boise river and forms a part of the banks and bed thereof opposite and across the river from the lands of plaintiff; that the plat of the tract was submitted to the mayor and common council of Boise City by the Idaho Trust & Savings Bank and was by the city accepted; that the streets and alleys shown on the plat are dedicated and donated to the public by deed of donation duly executed and indorsed, and that the extreme southern edge of said tract so platted forms a street referred to upon the plat as Park boulevard, which street and the whole thereof lies in the channel and forms a part of the bed of the Boise river; that the Idaho Trust & Savings Bank is erecting a dam or breakwater out into the channel of the Boise river along the southerly line of said addition as platted, which dam extends from a point on the north bank of said Boise river about 150 feet below the Ninth street bridge in said Boise City approximately 1,200 feet in a westerly direction to another point on the north bank of the Boise river, which dam or breakwater extends out into the channel of the Boise river about 240 feet, cutting off and obstructing a large portion of the natural channel of the river and changing the natural course thereof; that, on account of said changing of the natural course of the river and the obstructing of the natural channel thereof, the whole of the waters of said stream will be compelled to flow along the south bank of the river and on, to, and against the lands of the plaintiffs and are causing and will cause said lands to be overflowed, eroded and washed away; that the breakwater is being so constructed with the intent, object, and purpose of causing the waters to flow on, to, and against the lands of the plaintiffs, and that the plaintiffs have protested against the erection and maintenance of the dam and breakwater; that the Idaho Trust & Savings Bank proposes to complete the construction of said breakwater and maintain the same, and it is the purpose of the trust company to fill in, behind the dam, the bed of the river to a level with the adjoining lands on the bank of the river to the great and irreparable injury of plaintiffs, and each of them; that the plaintiffs have no plain, speedy, and adequate remedy at law whereby to redress and prevent such injury and damage, nor any remedy whatsoever; that the dam and breakwater form a portion of the street platted as Park boulevard, and that the title to the breakwater is in Boise City, and that the mayor and common council proposes to maintain the same in its present condition and to accept and maintain the same as a part of said boulevard when completed, to the great and irreparable injury and damage of the plaintiffs and each of them; that the dam and breakwater extends across the thread of the

stream of the Boise river onto and upon the lands of the company to its irreparable injury and damage and is an obstruction to the free use by the plaintiffs of the lands and property of the plaintiffs and the riparian rights and possessions of the plaintiffs; that the maintenance of the dam or breakwater and the filling in of the channel of the river will result in continuous and constantly recurring damage and injury to the plaintiffs; that the completion and maintenance of the dam and the filling in of the channel will cause such frequent, continuous, and constantly recurring damages to plaintiffs and to each of them as to result in a multiplicity of suits to redress and prevent such damage and injury, unless restrained so to do.

A separate answer was filed by Boise City to this complaint, and in the answer the city puts in issue the allegations of the complaint and admits that Boise City entered into an agreement with the Idaho Trust & Savings Bank, as alleged in the complaint, and that such agreement was still in full force and effect. The answer of the Idaho Trust & Savings Bank puts in issue all the material allegations of the complaint.

The court in its findings found: (4) That the Boise Development Company is the owner of a certain tract of land known as Ridenbaugh Island, more particularly described as Boise City Park Subdivision. (6) That the Idaho Trust & Savings Bank platted a certain tract of land described as Riverside Park addition to Boise; that said tract lies along the westerly line of Ninth street in Boise, and along the north bank of the Boise river; that a portion of said tract so platted, about three acres, lies in the ordinary high-water channel of the Boise river and forms a part of the banks and bed thereof directly opposite to and across the river from the lands of plaintiffs and each of them. (8) That the Idaho Trust & Savings Bank was maintaining a dam and breakwater which it had erected prior to the time of filing the complaint out in the channel of the Boise river along the southerly line of said addition as platted, which dam extends from a point on the north bank of the Boise river about 150 feet below the Ninth street bridge in said Boise City approximately 1,200 feet in a westerly direction to another point on the north bank of the Boise river, which dam or breakwater extends at one point out into the channel of the Boise river about 240 feet, cutting off and obstructing a large portion of the natural channel of said river during high-water season of each year and changing the natural channel thereof to that extent. (9) That the dam or breakwater extends out into the main high-water channel of the river about one-half the distance across the same, and by reason thereof the width of the stream at its narrowest part opposite the lands of the plaintiff is about 132 feet; that the tendency



of the river in the past years has been towards the north bank thereof, being the bank upon which the defendant's property abuts, and has eroded and cut away said north bank to a considerable extent; that the current of the river will strike the retaining wall or breakwater at an angle of approximately 30 degrees, and that it will be deflected therefrom at the same angle towards the lands of the plaintiffs, and that the effect of this deflection is problematical and not ascertainable with certainty prior to the actual observation thereof, as owing to the gravelly nature of the soil and the geological formation of the country through which the river runs it is impossible to determine in advance of such actual observation whether the river will cut a new channel, will deepen the present channel, or will tend to widen that channel by the erosion of the plaintiffs' property; that there is a reasonable probability that the river will overflow or erode the plaintiffs' property to an unascertained and at present unascertainable extent; that the construction and maintenance of said breakwater threatens plaintiffs' property with irreparable injury, but it cannot be foretold with certainty that such injury will actually and necessarily result in view of the possibility of the deepening of the channel.

(11) That the maintenance of the breakwater and the filling in of the channel of the river as proposed by the defendant will, it is reasonably probable, result in continuous and constantly recurring damages to the plaintiffs unless the completion and maintenance thereof is abated and enjoined, and a multiplicity of suits to redress and prevent such damage and injury may in reasonable probability result unless the breakwater is abated and maintenance thereof enjoined.

From these facts the trial court found, as a conclusion of law, that the defendants should be restrained and enjoined from the maintenance and completion of the dam and breakwater, and restrained and enjoined from filling in a part of the bed of the Boise river, and should be commanded to remove the breakwater in said Boise river or so much of it as is necessary to permit the waters of the river to flow over and along the channel of the river to the same extent as prior to the erection of the breakwater, and to such an extent that the same shall not injure or damage the property of the plaintiffs; that a permanent injunction issue restraining the defendants from further erection and maintenance of the breakwater.

In the brief of counsel for appellant there are eight assignments of error. In these respective assignments the error is assigned against each finding of the court upon the material issues, and in the argument of counsel these various assignments of error are combined in two contentions, and the entire argument is in reference to these two questions: First, that the evidence fails to

establish the finding of the trial court that the maintenance of the dam or breakwater will cause the plaintiffs great or irreparable damage or any damage whatever. Second, that the evidence establishes the fact that, if any damage should occur by reason of the maintenance or completion of this dam or breakwater, the plaintiffs have a plain, speedy, and adequate remedy at law in damages therefor. These two questions will be considered together, and we shall first consider whether counsel for appellant is correct in contending that the findings of the court do not show that the plaintiffs will suffer great and irreparable damage by reason of the construction, maintenance, and completion of this breakwater. In connection with this contention, our attention is directed to findings Nos. 9 and 11, which are in the following language:

Finding No. 9: "That said dam or breakwater extends out into the main high-water channel of the river about one-half the distance across the same; that by reason thereof the width of the stream at its narrowest part opposite the lands of the plaintiff is about 132 feet; that the tendency of the river in past years has been toward the north bank thereof, being the bank upon which the defendants' property abuts, and has eroded and cut away said north bank to a considerable extent; that the current of the river will strike the retaining wall or breakwater at an angle of approximately 30 degrees, and that it will be deflected therefrom at the same angle towards the lands of the plaintiffs; that the effect of the deflection is problematical and not ascertainable with certainty prior to actual observation thereof, as owing to the gravelly nature of the soil and the geological formation of the country through which the river runs it is impossible to determine in advance of such actual observation whether the river will cut a new channel, will deepen the present channel, or will tend to widen that channel by the erosion of the plaintiffs' property; that there is a reasonable probability that the river will overflow or erode the plaintiffs' property to an unascertained and at present unascertainable extent; that the construction and maintenance of said breakwater threatens the plaintiffs' property with irreparable injury, but it cannot be foretold with certainty that such injury will actually and necessarily result in view of the possibility of the deepening of the channel."

Finding No. 11: "That said breakwater is an obstruction of the free passage, in the customary manner, of a navigable river, and as such is a nuisance. That the maintenance of said breakwater and the filling in of the channel of the river as proposed by the defendants will, it is reasonably probable, result in continuous and constantly recurring damages to the plaintiffs unless the completion and maintenance thereof is abated and



enjoined, and a multiplicity of suits to redress and prevent such damage and injury may in reasonable probability result unless the said breakwater is abated and maintenance thereof enjoined."

It is argued that the findings are not sufficient as a basis for decreeing a permanent injunction.

Before considering the foregoing findings of the trial court, it is proper to call attention to the allegations of the complaint with reference to the injury alleged to have been suffered by the plaintiffs at the time the action was commenced and the probable injury to be sustained if the obstruction is continued. We find no allegation in the complaint, and the trial court does not find that the plaintiffs had, at the time the action was commenced, sustained any damages from the construction of the dam or breakwater by the defendant. The sole object and purpose of the suit is to secure a perpetual injunction against the maintenance of said dam in the future and because of threatened future injury to plaintiffs' lands. The anticipated and threatened injury is such as may result to plaintiffs because of changing the natural course of the river and the obstruction of the natural channel of the river so as to cause the lands of the plaintiffs to be overflowed, eroded, and washed away; and it is alleged that such dam or breakwater is being so constructed with the intent and object of causing the waters to flow on, to, and against the said lands of plaintiffs and for the purpose of filling in behind the dam so as to cause great and irreparable injury to plaintiffs and each of them.

Section 4288, Rev. Codes, provides that an injunction may be granted in the following cases: "(1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually. \* \* \* (3) When it appears during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual."

This court, in the case of *Gilpin v. Sierra Nevada Con. Min. Co.*, 2 Idaho (Hasb.) 696, 23 Pac. 547, 1014, considered the foregoing statute and says: "The statute seems to be framed to meet the case of such an injury as is here complained of. The subject-matter of the litigation is a mine, which is valuable only for the mineral it contains. To remove that mineral is certainly waste, and waste is one ground for the issuance of this writ. It is also great injury; and that is another ground, whether it be reparable or not. Irreparable injury is still another ground, disjoined in the statute from the other grounds." In that case the court also held

that where a party alleges that acts are being committed and threatened to be continued in violation of his rights, which will cause waste, great or irreparable injury, he is entitled to a writ restraining the commission of such acts, particularly where the subject-matter of the litigation is a mine, and the act complained of is the removal of the ore therefrom, which renders the mine worthless. In that case, of course, the facts showed that the court disposed of the question and arrived at the conclusion that "on the whole, upon this point, it may well be questioned whether the plaintiff has not fully shown that the injury, if consummated, will be irreparable. But, whether it be fully shown or not, the other statutory grounds, as we have seen, are sufficient to authorize him to claim an injunction." In that case, however, there can be no question but that the allegations and evidence show clearly that the purpose of the parties was to take ore out of a mine. Of course the taking of ore out of the mine would be a great waste of property of the mineowner and an irreparable injury and entitle the owner to an injunction, and the rule would apply.

In the case of *Staples v. Rossi*, 7 Idaho, 618, 65 Pac. 67, this court was dealing with the question of the removing of timber by trespassers who had cut the same upon land claimed by another party, suit being brought to establish the plaintiff's title, and in that case the court said: "Injunction will issue to restrain temporarily an act which will result in great damage to the plaintiff, although the injury is not irreparable, and notwithstanding that other remedies lie in behalf of plaintiff." This same doctrine is announced by this court in *Pierce v. Grice*, 10 Idaho, 443, 79 Pac. 387.

[1] The foregoing cases relate to the granting of an injunction pendente lite, and the rule adopted by courts in granting an injunction pendente lite is more liberal than is applied upon the trial of the cause upon its merits. As heretofore stated, there is no allegation in the complaint and no finding of the trial judge that there has been any injury to plaintiffs' land.

[2] In the case of *Lorenz v. Waldron*, 90 Cal. 243, 31 Pac. 54, the Supreme Court of California, in discussing this question, says: "Even the possibility of such injury is negated by a considerable preponderance of the whole evidence. But a mere possibility, or anything short of a reasonable probability, of injury is insufficient to warrant an injunction against any proposed use of property by its owner. Injury, material and actual, and not fanciful or theoretical, or merely possible, must be shown as the necessary or probable result of the action sought to be restrained." *Genet v. D. & H. C. Co.*, 122 N. Y. 529 [25 N. E. 922]. The *Lorenz* case cites with approval *Lutheran Church v. Maschop*, 10 N. J. Eq. 57; *Sherman v. Clark*, 4 Nev. 142, 97 Am. Dec. 516; *High on Injunc-*



tions, § 790; and a number of cases sustaining the holding in the Lorenz Case.

In *Sherman v. Clark*, supra, the Supreme Court of Nevada held: "It must also be made to appear that there is at least a reasonable probability that a real injury will occur if the injunction be not granted."

[3] In the case of *Windsor v. Hanson*, 40 Wash. 423, 82 Pac. 710, the Supreme Court of Washington had under consideration a similar question, and in that decision quoted from 21 Eng. & Am. Enc. of Law as follows: "Or when the injury apprehended is doubtful, contingent, or eventual merely." Commenting upon this rule the court said: "The apprehended damage is problematic, to say the least. The results which may ultimately flow from the obstruction of the stream cannot, in the nature of things, be determined or adjudicated at this time. The respondent, however, has no right to place obstructions in the stream which will cause the water to back up and overflow the land of the appellant to his injury; and, should the obstruction which he proposes to place in the stream bring about such a result in the future, the appellant will have a right of action therefor which should not be cut off on the record before us."

In the case of *Lester Real Estate Co. v. City of St. Louis*, 169 Mo. 227, 69 S. W. 300, the Supreme Court of Missouri had under consideration the question now involved and said: "Hence neither in fact nor in theory has the plaintiff's property been damaged by anything that has been done or can be done under any ordinance now in existence, and without the authority of an ordinance nothing can be done. No real or imminent danger or damage is shown, and there is not even a reasonable apprehension, prospect, possibility or contingency of any such shown to exist. In 16 Am. & Eng. Enc. Law (2d Ed.) p. 361, the rule is thus stated: 'The court cannot grant an injunction to allay the fears and apprehensions of individuals. They must show the court that the acts against which they ask protection are not only threatened but will in all probability be committed, to their injury. An injunction should not be issued to prevent the doing of an act unless the petitioner shows reasonable grounds for apprehending that it will otherwise be done. If, however, it is shown that the defendants threaten to do the wrong, and that they have the power, the court will issue the writ.' The same rule is substantially laid down in Bisp. Eq. (3d Ed.) p. 492, where it is said: 'A mere threat, or an act which may upon some contingency or at some remote time prove a nuisance, will not warrant the interference of the court. And the injury must not be contingent merely; an apprehension on the part of the complainant of a possible or speculative harm will not be enough.' See, also, 1 Beach, *Inj.* § 17; 2 Beach, *Inj.* § 1301; 1 High, *Inj.* (3d Ed.)

886; Story on Equity Jurisprudence, vol. 2 (13th Ed.) p. 226, § 924a."

The authorities bearing upon this question are found collated and cited in 16 Am. & Eng. Enc. Law (2d Ed.) p. 361, and also in volume 22, Cyc. p. 758.

[4, 5] In the case of *Fischer v. Davis*, 19 Idaho, 493, 116 Pac. 412, this court had under consideration a similar question to the one involved in this case, and after reviewing a number of cases said: "We believe the rule to be that riparian owners of land abutting upon a stream, whether navigable or non-navigable, have the right to place such barriers as will prevent their lands from being overflowed or damaged by the stream and for the purpose of keeping the same within its natural channel. But we are of the opinion that a riparian owner of lands abutting upon a stream has no right to place obstructions out into the stream for the purpose of changing the natural course of the river, or for any other purpose that would do damage to a riparian owner on the opposite side or to owners of land abutting upon said stream either above or below."

[6] This rule is discussed in the case of *Gulf, C. & S. F. Co. v. Clark*, 101 Fed. 678, 41 C. C. A. 597, and it is held: "A riparian owner upon a stream may construct necessary embankments, dikes, or other structures to maintain his bank of the stream in its original place and condition, or to restore it to that condition, and to bring the stream back to its natural course, when it has encroached upon his land; and, if he does no more, other riparian owners cannot recover damages for the injury his action causes them."

This doctrine is also discussed and clearly announced in the case of *Barnes v. Marshall*, 68 Cal. 569, 10 Pac. 115: "The defendant had a right to protect his land from the threatened change of the river's channel by building a bulkhead as high as was his original bank before it washed off. He thereby took no right from the plaintiff; he simply attempted to maintain his own. Ang. Water Courses, § 333. 'A riparian proprietor may in fact legally erect any work to prevent his lands from being overflowed by any change in the natural state of the river and to prevent the old course of the river from being altered.'"

The Supreme Court of California, in the case of *Lamb v. Reclamation District No. 108*, 73 Cal. 125, 14 Pac. 625, 2 Am. St. Rep. 775, where a general discussion is indulged in by the court of the question now under consideration, cited and approved *Shelbyville & Brandywine Turnpike Co. v. Green*, 99 Ind. 205, wherein it was held: "That plaintiff could protect his land from overflow of the Big Blue river by erecting a levee on its bank at a place where there was 'a depression washed out across the lands of plaintiff,' and where, 'when there was a rise in said river, the water passed out over said



lands of plaintiff,' although it caused a great overflow on the premises of defendant, to its damage."

It seems to be a general rule that a riparian owner may repel the water flowing in a stream and cause it to flow in the channel of the stream which it has left during high-water, if by so doing he inflicts no injury to the riparian owner upon the opposite side of the stream. If an injury to a riparian owner on the opposite side of the stream from the place where the breakwater or dam is located will as certainly occur without the embankment because of the natural overflow, the party seeking an injunction must prove that the additional water cast upon the land will in fact damage him, and this, we think, has not been done in this case. *Keck v. Venghause*, 127 Iowa, 529, 103 N. W. 773, 4 Ann. Cas. 716; *Collins v. Keokuk*, 91 Iowa, 293, 59 N. W. 200; *Dorr v. Simersen*, 73 Iowa, 89, 34 N. W. 752; *Plagge v. Mensing*, 126 Iowa, 737, 103 N. W. 152.

The Supreme Court of Kansas in *Whitehair v. Brown*, 80 Kan. 297, 102 Pac. 783, 18 Ann. Cas. 216, held: "A showing made by a landowner that it has recently occasioned the temporary flooding of his property to a greater extent [this refers to the maintenance of a dam] than ever before does not necessarily entitle him to an injunction against it. He must also show reasonable grounds for fearing the recurrence of the conditions occasioning his new injury with such frequency as seriously to affect the value of his land, or other considerations rendering his remedy at law inadequate."

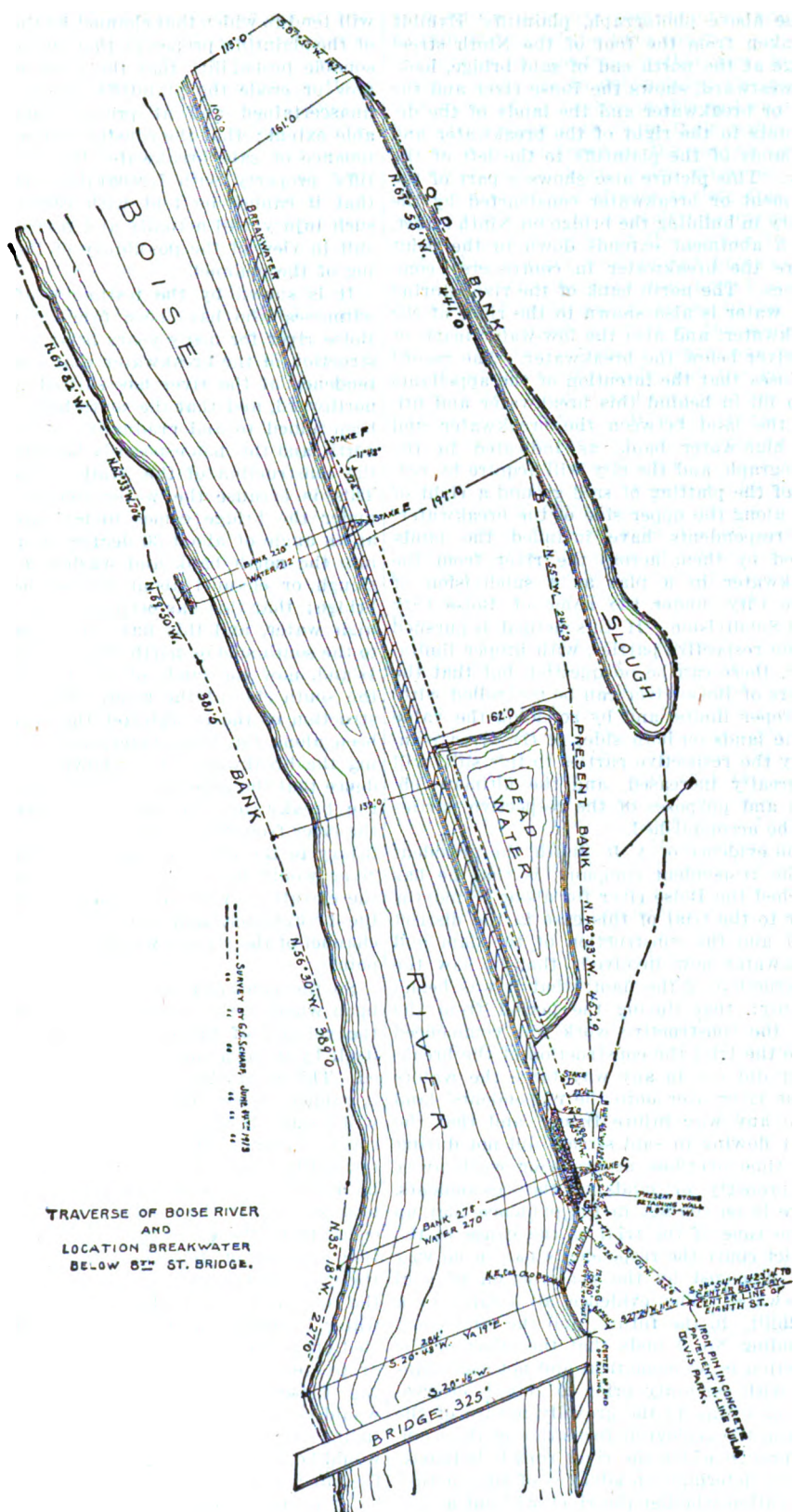
The rule announced in the cases above cited is a general one and applies to the pleadings and facts in this case that a riparian owner of land abutting upon a stream, whether navigable or nonnavigable, has the legal right to place barriers such as dams and breakwaters for the protection of his lands and to prevent an overflow or damage by the stream, but in so doing he cannot place such dam or breakwater in the channel or course of the stream as will change the course of the river or divert the course of the water and will result in destroying or overflowing the lands of a riparian owner on the opposite side of the river or the lands of owners abutting on said stream, either above or below.

[7] Turning now to the record in this case, we find that upon the beginning of the trial of said cause the respective parties to the suit stipulated certain facts as follows: That in the year 1876 the main channel of Boise river ran near South Boise along the south side of what is known as Ridenbaugh Island and approximately one-half mile south of the breakwater in controversy, and a slough ran from the Boise river approximately along the present south bank of the river from the head or easterly end of what is known as Ridenbaugh Island and adjoining the main channel of the Boise river at

a point about one-half mile westerly from the present Ninth Street bridge. In 1878 the river suddenly changed its course and from that time until the present date the main channel of the river has been along the lines of the former slough. The north bank of the main channel began to gradually change, owing to the action of the current of the river which flowed directly against it, and for a number of years the north bank of the river gradually receded and was washed away; that 20 years ago the county commissioners of Ada county, in order to stop the inroads of the river current upon the north bank of the river, caused a large amount of riprapping, consisting of placing lava rock, stone, and boulders in walls and layers along the north bank of the Boise river; that at various times the current of the Boise river has washed away and eroded the north bank. The farthest north that said bank has been extended is along the lines shown upon plaintiffs' Exhibits A and B, which are marked "a" on said exhibits; the present bank of Boise river, as shown on said plats, is marked as line "b" and has so existed as the north bank of the river about 20 years; that at various times since that date detritus and debris have been carried to the space between the present bank and the bank farther north which existed prior to the formation of the present north bank, and the space between the two banks has been filled to the present level; that lines "a" and "b," as above indicated, are the ordinary high-water banks upon the north side of the river; that the object of the defendants in constructing the breakwater is to maintain the north bank of the Boise river along the line of said breakwater and to fill the place between the breakwater and the present north bank and cause the same to be permanently improved and utilized for streets, sidewalks, and town lots and similar purposes.

It is also apparent from the evidence that the trust company and Boise City are the owners, under a certain contract, of the lands which are to be protected by the construction of such breakwater upon the north bank of Boise river, beginning at a point about 150 feet below the Ninth street bridge in said Boise City and extending approximately 1,200 feet in a westerly direction to another point on the north bank of the river, which dam or breakwater extends out into the channel of the Boise river about 240 feet, cutting off and obstructing a large portion of the natural channel of said river during the high-water season of each year. The evidence also shows that this breakwater has been constructed below high water and above low water upon the lands of the plaintiffs, and that it is the purpose of the trust company to utilize such lands and improve them, and such lands have been platted and described as Riverside Park addition to Boise City.







The above photograph, plaintiffs' Exhibit A, taken from the foot of the Ninth street bridge at the north end of said bridge, looking westward, shows the Boise river and the dam or breakwater and the lands of the defendants to the right of the breakwater and the lands of the plaintiffs to the left of the river. This picture also shows a part of the abutment or breakwater constructed by the county in building the bridge on Ninth street, which abutment extends down to the point where the breakwater in controversy commences. The north bank of the river during high water is also shown to the right of the breakwater, and also the low-water mark of the river below the breakwater. The record discloses that the intention of the appellants is to fill in behind this breakwater and utilize the land between the breakwater and the high-water bank, as indicated in the photograph, and the city will acquire by reason of the platting of said ground a right of way along the upper side of the breakwater; the respondents have included the lands owned by them across the river from the breakwater in a plat as a subdivision of Boise City, under the name of Boise City Park Subdivision. If this method is pursued by the respective parties, with proper limitations, there can be no question but that the waters of Boise river can be controlled within proper limits, and by so doing the value of the lands on both sides of the river, owned by the respective parties to this suit, will be greatly increased, and the ultimate objects and purposes of the respective parties will be accomplished.

The evidence of A. R. Smith, the president of the respondent company, is that he has watched the Boise river for about 18 months prior to the trial of this case in the district court and the construction of the dam and breakwater now involved; that he saw the construction of the dam; that it was begun in July; that during the period from the time the constructive work was commenced up to the trial the construction of the breakwater did not in any way force the waters in the river over onto the respondents' land or in any way injure them; and that the water flowing in said stream did not during that time overflow or erode or wash away the property or lands of the respondents. There is no conflict in the evidence that up to the time of the trial of the cause in the district court the respondents had in no way been damaged by the construction of said breakwater. The evidence all relates to a possibility in the future, and the trial court in finding No. 9 finds that the effect of the deflection is problematical and not ascertainable with certainty prior to actual observation, as owing to the gravelly nature of the soil and the geological formation of the country through which the river runs it is impossible to determine in advance of such actual observation whether the river will cut a new channel, will deepen the present channel, or

will tend to widen that channel by the erosion of the plaintiffs' property; that there is a reasonable probability that the river will overflow or erode the plaintiffs' property to an unascertained and at present unascertainable extent; that the construction and maintenance of said breakwater threatens plaintiffs' property with irreparable injury, but that it cannot be told with certainty that such injury will actually and necessarily result in view of the possibility of the deepening of the channel.

It is shown by the testimony of several witnesses who have been familiar with the Boise river for many years prior to the construction of the breakwater that the general tendency of the river has shifted gradually northward, and that the south bank has also been added to and gradually shifted to the north, and this has especially been true since the construction of the Ninth street bridge. This is because the water coming through under the bridge comes under said bridge at an angle of about 30 degrees and has cut into the north bank and washed a kind of slough or channel about 30 feet below the bridge; that this has occurred from extreme high water, and this has caused accretions to the south side or north side of Ridenbaugh Island, now the lands of the respondent on the south side of the river. Since the construction of the breakwater the current has been along the breakwater, and after striking the breakwater it is shown by the evidence that the general course is parallel with the breakwater; it is not diverted across the river from the breakwater; and the only injury to the lands on the south side of the river would arise by reason of the rise in the elevation of the water along the line of the breakwater, and the main and natural channel of the stream would be at a different point.

So the contingency of an injury depends upon whether the current of the stream and the velocity of the water will take care of itself by its own volume in the course diverted. This no doubt is one of the reasons why it cannot be ascertained whether there ever will be any injury and was the basis of the court's findings. This is very clearly demonstrated by the witness Carter, who seems to be a witness of some experience. This witness says: "If the greater volume and the currents in there are practically parallel to that breakwater, that the thalweg or flow of the river nearer the breakwater than it is on the convex side. And if a greater volume of water is thrown into any stream, it is carried off in two ways: With greater velocity or greater cross-section—and in a stream like the Boise river that greater cross-section would be obtained by erosion where the maximum current velocities are found, which would be in the channel way of the river. So the effect of building that breakwater would be, if a larger volume of water than is now passing through should pass down through



the river and it should be confined or that section is insufficient to carry it, the section will enlarge itself so that it will carry it; and, if a greater volume of water passes there than can be carried at the velocities depending upon the slope of the river, then of course the river would spread over whatever lands were lower next to it. But there would be practically no erosion in that case; the erosion would be confined to the river bed and spread; the water would go over any place where the water can reach which is lower than the water surface or lower than the banks where it is confined." The reasoning and theory of this witness seems to the court to be sound and well founded, although other witnesses who testified gave opinions which in effect contradict the above theory. This same witness testified in answer to the following question by the court: "The channel being wider prior to the construction of the retaining wall, is there any way in which it can be determined with any degree of definiteness which one of these three methods the river would actually adopt to carry off this water? A. Not without knowing the character of the river bottom; if that were known it could be determined. The Court: It is quite largely problematical in every river which one of these measures it will adopt to carry it off? A. Yes, sir; it will always deepen the river rather than widen if the material is such that it can be transported readily, assuming that the water flows as it does against this breakwater here." There is other evidence supporting the theory of the statement of the witness Carter. Many other witnesses were introduced, who were also experts, who did not wholly agree with Carter, but the contradictions are not of such a character as to question the correctness of the judgment of this witness.

There is no showing made of any real or imminent danger or damage, and it is not shown to any degree of certainty that even a reasonable apprehension, prospect, possibility, or contingency of any actual injury exists. An injunction cannot be granted to allay the fears and apprehensions the respondents have as to what may occur in the future. It was incumbent upon respondents to show that the acts against which they asked protection are not only threatened, but will, in all probability, be committed to their injury. The injury must be material and actual and not fanciful, theoretical, or merely possible. From the finding of the trial court it is apparent that the injury apprehended is doubtful, contingent, or eventual and problematical, and that the court was unable to determine that any damage would result from the construction of the breakwater resulting from the flow from the obstruction of the stream, and the trial court did not make a finding at all that actual damage would result. We think that the proof in this case, when taken

as a whole, supports this doubtful and uncertain finding of the trial court.

There is no question in this case, in our opinion, but that in determining the respective rights of the parties in this suit an equal duty rests upon both as to their rights and duties with reference to the control of the waters running down Boise river, so that the channel of the stream is left free and open to a sufficient capacity to carry the water, and that each of the parties to this action has a right to construct breakwaters so as to control the water and keep it within reasonable boundaries. As shown by the stipulation, the Boise river from the south to the north bank for many years was about a quarter of a mile wide, but the current of the water changed and the river has been narrower and taken a different course, and the banks of the regular and natural flow of the stream have been drawn in; and there is valuable land on each side which by proper construction of dams and breakwaters can be used to great value by both riparian owners.

From a general review of the evidence in this case we do not believe that it is sufficient to justify the issuing of a permanent injunction.

[8] This does not mean, however, that the appellants are relieved or can be relieved from a liability arising from injury which results to the riparian owners on the opposite side of the river, if such injury is caused by the construction of the breakwater in question. Neither does it mean that the appellants cannot be enjoined at any time from maintaining said breakwater when the circumstances show clearly that the construction of the breakwater will cause the water to back up and overflow or erode or injure the land of the respondents; and, should such breakwater bring about such a result in the future, the appellant will have a right of action which should not be cut off on the record before us.

For these reasons the judgment in this case is reversed. Costs awarded to appellant.

AILSHIE, C. J., and SULLIVAN, J., concur.

#### On Rehearing.

STEWART, J. We granted the application for a rehearing in this case, not because of any doubt as to the correctness of the opinion previously announced, either upon the facts or the law, but because of our desire to prevent any misconception concerning the position of the court and the effect of the judgment.

The facts stated in the original opinion and the rules of law therein announced have been cited in the recent case decided by this court, the case of Fischer v. Davis, 133 Pac. 910, and in the latter case this court has followed the same general principles of law as were applied to the facts in this case.



The oral argument upon the rehearing was practically the same argument that was presented at the first hearing. After the argument the court found that the evidence and the maps were indefinite and insufficient to furnish the court the necessary data and measurements upon which to enter a proper decree in accord with the opinion of the court after such consideration. The court notified counsel for the respective parties and consulted with such attorneys as to the court's selecting an engineer to ascertain the facts desired, which the engineer should furnish to the court, to which counsel on both sides consented. The engineer was appointed, and surveys and measurements made by the engineer have been designated upon the ground by proper stakes and marks, and also upon the map, Exhibit A; and, upon such evidence of the engineer and the evidence heretofore taken, this court now orders the following judgment:

The judgment of the trial court is modified in that the appellants are enjoined and restrained from the completion of the dam or breakwater now erected along the Boise river extending from the eastern end of said breakwater and designated by the letter "G" placed upon Exhibit A by Scharf, the engineer appointed by this court, and hereafter described, and extending westerly to a stake at the west end of the dotted line upon Exhibit A, designated by letter "F" upon Exhibit A, as follows: Commencing at an iron pin in the concrete pavement in the center of Eighth street and on the north line of Julia Davis Park, said pin being S. 34° 54' W. a distance of 423.4 feet from an iron pin in the concrete pavement at the intersection of the center lines of Eighth and Battery streets in Boise City; thence S. 85° 07' W. a distance of 135.6 feet to an intersection with the west face of stone retaining wall at "G," and the place of beginning of proposed wall; thence on a curve to the left with radius of 32.75 feet and tangent to the stone retaining wall at "G," the course of said wall being N. 8° 43' W., through a central angle of 55° 08' a distance on the curve of 31.6 feet to a point; thence N. 63° 51' W. a distance of 5.1 feet to a stake "C" set 20 feet northerly at right angles from the Boise river face of the easterly end of timber breakwater; thence N. 63° 51' W. parallel to said timber breakwater a distance of 111 feet to stake "D"; thence parallel to said breakwater a distance of 645.3 feet to stake "E" set on the southerly line of a gravel bar and 20 feet northerly at right angles from the Boise river face of said timber breakwater; thence 75° 33' W. a distance of 97.5 feet along the southerly edge of said gravel bar to an intersection with the said timber breakwater. The total length of proposed breakwater is 885.4 feet. The appellants are also required to remove the said dam or breakwater heretofore

erected by appellants from its present location between the eastern end of said breakwater as presently constructed and extending westerly to stake "F" designated on Exhibit A and described above, where the present embankment joins the breakwater stake and designated above by Engineer Scharf and described on the map, Exhibit A.

The appellants are granted permission to maintain the present embankment from the point designated by the letter "F" on the survey of Engineer Scharf westward as presently erected, and to erect an embankment beginning at line "G" established on Exhibit A by Engineer Scharf and as indicated by the dotted line designated by the engineer extending westerly from stake "G" to stake "F" a distance of 885.4 feet, where it connects with the present embankment at that point.

The trial court is also directed to amend his findings and judgment in accordance with the foregoing modification of the opinion. The costs of the appeal are awarded to the appellants, except the cost of the survey by the engineer appointed by this court, and this cost is allowed in the sum of \$27.75 and taxed against the appellants.

AILSHIE, C. J., and SULLIVAN, J., concur.

(24 Idaho, 322)

LEACH v. VILLAGE OF NEZ PERCE et al.  
(Supreme Court of Idaho. June 27, 1913.)

1. COUNTIES (§ 26\*) — ESTABLISHMENT OF COUNTY SEAT.

The temporary county seat of Lewis county was established by the Legislature, and by the act creating said county the Legislature delegated the authority to establish the permanent county seat of said county to the electors of said county.

[Ed. Note.—For other cases, see Counties. Cent. Dig. § 26.\*]

2. COUNTIES (§ 29\*)—COUNTY SEAT ELECTION —CANVASS OF BALLOTS.

Held, that the vote cast at said election for Ho and Vollmer cannot be consolidated and counted together.

[Ed. Note.—For other cases, see Counties. Cent. Dig. § 29; Dec. Dig. § 29.\*]

3. COUNTIES (§ 29\*)—COUNTY SEAT ELECTION —QUALIFIED VOTERS.

The provisions of section 2, art. 18, of the state Constitution, and section 357 of the Revised Codes, refer to the removal of a county seat from its permanent location, and not to the permanent location of a county seat where the Legislature has temporarily fixed the county seat of a new county, and left it with the electors to select the permanent county seat.

[Ed. Note.—For other cases, see Counties. Cent. Dig. § 29; Dec. Dig. § 29.\*]

4. COUNTIES (§ 35\*)—COUNTY SEAT ELECTION —QUALIFIED VOTERS.

Under the provisions of said sections of the Constitution and statute, no person is permitted to vote at an election held for the removal of a county seat that has been permanently fixed, who has not resided in the county 6 months and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Revised Indexes.



in the precinct 90 days before he offers to vote.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 38-45; Dec. Dig. § 35.\*]

**5. COUNTIES (§ 25\*)—CREATION—LOCATION OF COUNTY SEAT—LEGISLATIVE POWER.**

The Legislature has plenary power in the creation of new counties, except as limited by the provisions of the Constitution, and in creating new counties it has the authority to establish the permanent county seat, or it may delegate that power to the qualified electors of such new counties, and an election for such purpose is not held for the purpose of removing a county seat permanently located, but for the purpose of locating a permanent county seat.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 25; Dec. Dig. § 25.\*]

**6. COUNTIES (§ 29\*)—CREATION—LOCATION OF COUNTY SEAT—QUALIFICATION OF VOTERS.**

Under the act creating Lewis county, the Legislature delegated the authority to locate the permanent county seat of said county to the electors of said county qualified to vote at a general election.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 29; Dec. Dig. § 29.\*]

**7. COUNTIES (§ 29\*)—CREATION—LOCATION OF COUNTY SEAT—QUALIFICATION OF VOTERS.**

*Held*, that the electors at said election were not required to reside in the county 6 months and in the precinct 90 days, but if they had the other qualifications, and had resided in the state six months and in Lewis county 30 days, they were qualified to vote at such election.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 29; Dec. Dig. § 29.\*]

**8. SUFFICIENCY OF EVIDENCE.**

*Held*, the evidence does not show that fraud or corruption was practiced at said election.

Appeal from District Court, Lewis County; Edgar C. Steele, Judge.

Action by El A. Leach against the Village of Nez Perce, a municipal corporation, and others to set aside a county seat election. From a judgment for defendants, plaintiff appeals. Affirmed.

J. S. McDonald, of Vollmer, and C. T. McDonald, of Grangeville, for appellant. F. E. Fogg, S. O. Tannahill, and P. W. Mitchell, all of Nez Perce, for respondents.

**SULLIVAN, J.** This action was brought to have the election in Lewis county which was held for the purpose of establishing permanently the county seat of that county, under the provisions of section 4 of an act to create and organize the county of Lewis, approved March 3, 1911 (see Sess. Laws 1911, p. 77), declared and adjudged void. The action was tried by the district court, and judgment entered sustaining the validity of said election. The appeal is from the judgment.

Several errors are assigned, but the principal assignment is based on the insufficiency of the evidence to justify the findings of the court.

[1] It appears from the record that an election was held in Lewis county on the 5th of November, 1912, for the purpose of locating

the permanent county seat of said county, as provided by section 4 of the above-cited act. That section is as follows: "The temporary county seat of said county of Lewis shall be, after the establishment of said county, located at the village of Nez Perce, Idaho, and at the general election to be held in 1912, a vote, as provided by law, shall be had as to the location of the permanent county seat of said Lewis county." In the month of November, 1911, the citizens of the western part of Lewis county held a mass meeting at Ilo and selected a block of ground 300 feet square for the permanent location of county buildings, in the town of Vollmer, which town adjoins and borders on the town of Ilo. Said block of ground so selected also borders on the townsite of Ilo, and was to be donated to the county, provided the county seat was located there. The names of the towns of Ilo and Vollmer both appeared on the official ballot at said election and also the town of Nez Perce. The result of the election as shown by the returns was that 1,539 votes were cast in favor of Nez Perce, 735 in favor of Ilo, and 573 in favor of Vollmer, thus giving Nez Perce a clear majority of 231 over the combined votes of Ilo and Vollmer.

[2] It is first contended that since the towns of Ilo and Vollmer were adjoining towns, and that the citizens had selected a block of ground for the erection of the county buildings in Vollmer and adjoining Ilo, the votes cast for both Ilo and Vollmer should be counted together, and if that were done, Ilo and Vollmer would have a majority of the votes, provided certain other alleged illegal votes were excluded that were counted for Nez Perce. In support of the contention that all of the votes cast for Ilo and Vollmer should be counted together, counsel cites *Smith v. Magourich*, 44 Ga. 163; *State v. Woody*, 17 Ga. 612; 11 Cyc. 376. In our view of the matter, said authorities are not in point in the case at bar, and the Ilo-Vollmer votes ought not to be consolidated or counted together. However, it would make no difference whether the votes for said two towns were counted together or not.

[3, 4] The next contention is based on the insufficiency of the evidence to support the findings. Under that head it is contended that there were no legal votes cast at said election except those cast in Cold Springs and Kamiah precincts, for the reason that in the other precincts in the county all persons were permitted to vote at said county seat election who had resided in the state 6 months and in the county 30 days, and it is contended that under the provisions of section 2, art. 18, of the state Constitution, and section 357, Rev. Codes, no person should have been permitted to vote at said election who had not resided in said county 6 months and in the precinct where he offers to vote

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



90 days. The question then is directly presented as to whether or not all persons voting at said election must have resided in the county 6 months and in the precinct 90 days.

Said section 2, art. 18, of the Constitution is as follows: "No county seat shall be removed unless upon petition of a majority of the qualified electors of the county, and unless two-thirds of the qualified electors of the county, voting on the proposition at a general election, shall vote in favor of such removal. A proposition of removal of the county seat shall not be submitted in the same county more than once in six years, except as provided by existing laws. No person shall vote at any county seat election who has not resided in the county six months, and in the precinct ninety days."

Said section 357, Rev. Codes, refers to section 3, art. 18, of the Constitution, and is as follows: "Every person over the age of twenty-one years, possessing the qualifications following, shall be entitled to vote at all elections: He shall be a citizen of the United States and shall have resided in this state six months immediately preceding the election at which he offers to vote, and in the county thirty days: Provided, that no person shall be permitted to vote at any county seat election who has not resided in the county six months, and in the precinct ninety days, where he offers to vote; nor shall any person be permitted to vote at any election for the division of the county, or striking off from any county any part thereof, who has not the qualifications provided for in section 3, article 18, of the Constitution; nor shall any person be denied the right to vote at any school district election, nor to hold any school district office on account of sex."

It will be observed that said section 3 of the Constitution does not apply to the creation of new counties.

Section 19 of article 3 of the Constitution provides that the Legislature shall not pass local or special laws in any of the cases therein enumerated, one of which is as follows: "Changing county seats, unless the law authorizing the change shall require that two-thirds of the legal votes cast at a general or special election shall designate the place to which the county seat shall be changed." That provision provoked considerable debate in the constitutional convention (see volume 2 of Idaho Constitutional Convention, pp. 1227, 1233, 1234, 1236, and 1239); and said section 2 of article 18 of the Constitution was also debated to some extent, as shown by said volume 2, Idaho Const. Con. pp. 1775-1800. It clearly appears from those debates that said sections of the Constitution were intended to apply to the removal of a county seat, and not to the location of a permanent county seat upon the organization of a new county.

The provisions of said section 19, art. 3, above referred to, are not applicable to the case at bar, nor are the provisions of section

2 of article 18 of the Constitution, above quoted, applicable, as this is not a case of a removal of a county seat.

Section 357 of the Revised Codes, above quoted, was first enacted by the first state Legislature. See Sess. Laws, 1890-91, p. 93. The first section concerning the removal of county seats reads as follows: "All elections for the removal of county seats shall be held at the same time and place at which general elections are held." Then follow provisions for circulating petitions and the procedure for holding such elections. Those sections were adopted for the purpose of carrying into effect the provisions of the Constitution above quoted. Said act of 1891 was re-enacted in 1899 simply to cure some irregularities that were supposed to exist in the passage of the former act. The provisions concerning the removal of county seats were not changed. Upon a revision of the statutes of this state, as found in the Revised Codes of 1909, the act of 1891 and 1899, which was an act providing for the holding of general and special elections, was divided up by the code commissioner under the proper heads, and it is clear that that part of said section 357, to wit, "provided, that no person shall be permitted to vote at any county seat election who has not resided in the county six months, and in the precinct ninety days, where he offers to vote," was intended to apply to county seat removals, and not to elections held for the purpose of locating permanently the county seat of a new county. If the law as it stood prior to the time of said code revision applied only to the removal of county seats, the code commissioner was not authorized to extend the application of that provision in any manner, and has not done so.

[5, 6] The Legislature has plenary power in the creation of new counties except as limited by the provisions of the Constitution, and in the creation of a new county it has authority to establish the permanent county seat; but in the creation of Lewis county the Legislature did not exercise that power, but delegated it to the electors of the county. Said question was to be voted upon at the next general election after the creation of said county. That election was not for the purpose of removing a county seat permanently located, but for the purpose of fixing a permanent county seat. The qualifications of electors to vote for the removal of a permanent county seat, as prescribed by the Constitution, do not apply to the electors voting for the permanent location of a county seat when the Legislature, after creating a new county, has provided that the permanent county seat shall be determined by an election, unless the Legislature also provided that at such election the qualifications of the electors must be the same as the qualifications for the removal of a county seat, as prescribed by the Constitution. In this case



the Legislature did not do that, but submitted the question of the location of a permanent county seat to the electors, and it was clearly the intention to permit each and every voter who was qualified to vote in that county at the general election for state and other officers to vote upon the question of the permanent location of the county seat.

[7] There is therefore no merit in the contention of appellant that an elector was required to reside in said county 6 months and in the precinct 90 days to be entitled to vote at said election.

[8] Fraud and corruption at said election are charged in the complaint, but there is not sufficient evidence in the record to show that there was any fraud or corruption practiced at said election.

It is also charged that the number of electors had greatly increased in certain precincts in said county over those voting at the prior election. But there is nothing in the record to show that the increase was not a natural and fair increase, or that at the previous election many persons had not registered and voted. This court takes notice that the population of the counties of this state is rapidly increasing.

It is contended that there was an error in the count of the ballots at said election; that there were six more ballots cast for the permanent location of the county seat than there were voters who actually appeared at the polls and voted. That fact, however, would not so taint the whole election with fraud as to require the setting aside of said election. After deducting said six ballots from the majority vote received by the village of Nez Perce, there would still be a majority of 225 over the combined vote of Ilo and Vollmer.

We do not find sufficient error in the record to require the reversal of the judgment. The judgment must therefore be affirmed, with costs in favor of the respondents.

AILSHIE, C. J., and STEWART, J., concur.

(24 Idaho, 336)

DAVIDSON GROCERY CO. v. JOHNSTON  
et al.

(Supreme Court of Idaho. June 28, 1913.)

1. PLEADING (§ 399\*)—"VARIANCE."  
"Variance" means "material difference." It is not a variance when the proof does not show all the points in a declaration. Variance arises when there is a substantial departure from the issue in the evidence adduced, and must be in some matter which in point of law is essential to the charge or claim.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1339-1342; Dec. Dig. § 399.\*]

For other definitions, see Words and Phrases, vol. 8, p. 7283.]

2. ACTION (§ 28\*)—SALES (§ 355\*)—WAIVER OF TORT—VARIANCE.

Where a complaint alleges a cause of action for the recovery of the value of personal

property sold and delivered, and the evidence shows a tortious taking and conversion, the action is one of assumpsit upon contract of sale and promise; and, if demand is made for the property, and the property is not delivered to the seller, and the answer admits that the defendant had purchased personal property of plaintiff and paid for it, and alleges payment for all the property bought and purchased of the plaintiff, recovery may be had for the value of the property proven to have been tortiously taken.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 196-215; Dec. Dig. § 28;\* Sales, Cent. Dig. §§ 1025-1043; Dec. Dig. § 355.\*]

3. ACTION (§ 28\*)—PLEADING (§ 387\*)—RIGHT OF ACTION—VARIANCE—WAIVER OF TORT.

Where the evidence offered is in support of the pleadings consisting of the complaint and the answer, the evidence is not in variance with the allegations of the pleadings. The right of recovery arises under the rule of law that the owner of the goods may sue to recover the reasonable value thereof on the rightful assumption that the taker proposed, not to take the same without compensation to the owner, but to pay him the reasonable value thereof.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 196-215; Dec. Dig. § 28;\* Pleading, Cent. Dig. §§ 1300-1304; Dec. Dig. § 387.\*]

4. ACCOUNT STATED (§ 7\*)—DEFINED—ELEMENTS—ACTION.

An account stated is a document, a writing which exhibits the state of account between the parties, and the balance owed one to the other, and when assented to, either expressly or impliedly, it becomes a new contract. An action upon it is not founded upon the original items, but on the balance agreed to by the parties; but the account, in order to constitute a contract, should appear to be something more than a mere memorandum. It should show upon its face that it was intended to be a final settlement up to date, and this should be expressed with clearness and certainty.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 41-49; Dec. Dig. § 7.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 93-98; vol. 8, p. 7561.]

5. APPEAL AND ERROR (§ 1002\*)—VERDICT—EVIDENCE.

When there is a substantial conflict in the evidence, the verdict of the jury will not be set aside by this court on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

6. SALES (§ 359\*)—ACTION FOR VALUE—SUFFICIENCY OF EVIDENCE.

Held, that the evidence supports the verdict of the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 511, 1056-1059; Dec. Dig. § 359.\*]

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Action by the Davidson Grocery Company against Duncan Johnston and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Hawley, Puckett & Hawley and Chas. M. Kahn, all of Boise, for appellant Raabe. C. H. Edwards, of Boise, for appellant Johnston. Cavanah, Blake & MacLane, of Boise, for respondent.

STEWART, J. This is an action for conversion of personal property of the value of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
133 P.—69



\$7,517.25. The case was tried to a jury, and a verdict was rendered in favor of the plaintiff for the sum of \$5,000. An appeal was taken from the judgment, and the evidence is brought to this court on appeal for review.

The complaint alleges that the Davidson Grocery Company is a corporation, existing under the laws of Idaho, and that between the 1st day of December, 1910, and the 5th day of January, 1912, the plaintiff sold and delivered to the defendants at the special request of said defendants, about 25,725 pounds of coffee of the reasonable value and agreed price of 25 cents per pound; 3,600 pounds of tea of the reasonable value and agreed price of 30 cents per pound; 100 pounds of sugar of the reasonable value and agreed price of 6 cents per pound—amounting in the aggregate to the sum of \$7,517.25, that said sum, nor no part thereof, has been paid, and that the same is due. A separate answer was filed by each of the defendants. The defendant Raabe denies the incorporation of the plaintiff company, for lack of knowledge or information sufficient to form a belief; the defendant also specifically denies the portion of the complaint alleging the sale and delivery of the property described in the complaint. As a separate answer and defense the defendant also alleges that, during the times mentioned in the complaint, the defendant was and is engaged in conducting a retail coffee, tea, and spice business in Boise, and that plaintiff was at all times mentioned in the complaint, and long before and still is, engaged in conducting a wholesale grocery and coffee roasting business in Boise, and doing a jobbing business in coffees, teas, and spices, and that during said time there existed a certain course of business dealings and transactions, consisting of the purchase from the plaintiff by the defendant of coffees, teas, and spices, and such other articles of merchandise as are usually handled and kept and sold by retail dealers, and that during such transactions between plaintiff and defendant the plaintiff has always, at the time of delivery of goods so purchased from plaintiff, made, rendered, and delivered to the defendant its itemized bill, showing the kind, quantity, and price of such article of goods; and on the 1st and 15th day of each and every month during the entire course of such business dealings and transactions between plaintiff and defendant, plaintiff would make and render to defendant its account stated of every and all transactions; that the accounts stated contained a full and correct statement of all goods sold and delivered, and said accounts were accepted, acquiesced in, and paid by the defendant, and said payments were accepted by plaintiff, and every one of the accounts stated were received and marked "Paid" by plaintiff, and by it returned to the defendant Julius Raabe. The answer of defendant Johnston denies the specific allegations of the complaint, and denies any indebtedness to the plaintiff.

Three questions are presented to the court: (1) That there is a variance between the pleading and proof, in that allegation of sale and delivery does not permit proof of a tortious conversion; (2) that the semimonthly bills rendered by plaintiff constituted an account stated, which is binding upon the parties; (3) that the evidence is insufficient to justify the verdict. We will consider these questions separately.

[2, 3] 1. Was there a variance between the pleading and proof, in that the allegation of sale and delivery does not permit proof of a tortious conversion? While the allegation of the complaint does allege a sale and delivery, and does not allege tortious conversion, and the evidence shows that the goods were taken by the defendant and converted to his own use without consent of plaintiff, yet the courts seem to hold that where personal property is tortiously taken, the party aggrieved may waive the tort and sue in assumpsit for the value of the property. This is the rule announced by the Supreme Court of California in the case of *Fratt v. Clark*, 12 Cal. 89, and is cited and approved in other cases decided by that court. *Roberts v. Evans*, 43 Cal. 380; *De La Guerra v. Newhall*, 55 Cal. 21; *Lehmann v. Schmidt*, 87 Cal. 15, 25 Pac. 161.

Cyc. in volume 4, p. 332, announces a rule which seems to apply to the question under consideration, and the author says: "All the authorities agree that, where personal property is tortiously taken and converted into money or money's worth, the owner may waive the tort and sue the wrongdoer in assumpsit for its value." The author also calls attention to the views of many courts as to the right of the owner to sue in assumpsit where the wrongdoer has not sold or otherwise disposed of the property, but retains it for his own use, and cites the courts approving the rule that if the wrongdoer has not sold the property, but still retains it, the plaintiff has a right to waive the tort and proceed upon an implied contract of sale to the wrongdoer. In the citations the states of California, Kansas, Mississippi, Missouri, Montana, New York, North Dakota, Oregon, Tennessee, Wisconsin, are referred to.

The complaint alleges a sale and delivery of the personal property, and that demand has been made for the reasonable value of said property. The defendant in his answer alleges business dealings and transactions between the defendant and the plaintiff consisting principally of the purchase from plaintiff by defendant of coffee, tea, spices, and other articles kept and sold by retail dealers, and that the plaintiff has always, at the time of delivery of the goods and wares so purchased from plaintiff by defendant, made, rendered, and delivered to the defendant its itemized bill or invoice, showing the goods and quantity and price of the articles sold and purchased. Upon the trial a demand was made by defendant of plaintiff for a bill of particu-



lars, and a bill of particulars was furnished by plaintiff, which shows upon its face different articles, and shows: "Duncan Johnston and William Raabe to Davidson Grocery Company, Dr. April 27, 1912." Then follow dates, the pounds of the articles, and the price, the total of which is \$7,602.35, and a credit is given for a double charge in December, 1911, leaving a balance of \$7,486.10.

The evidence offered was in support of the pleadings, both the complaint and the answer, and the evidence was not in variance with the allegations of the pleadings, and the rule declared by the Supreme Court of Montana in the case of *Galvin v. Mac M. & M. Co.*, 14 Mont. 508, 37 Pac. 366, in accord with the other authorities above cited, applies in the present case. The court said: "The point is raised by appellant that there is a fatal variance between the proof and the allegations of the complaint, because the complaint alleges a sale of personal property described, and seeks to recover the reasonable value thereof, but the proof shows a tortious taking and conversion. The complaint is in the nature of assumpsit upon contract of sale and purchase, but the proof discloses a tortious assumption, detention, and unwarranted refusal to deliver said stock to plaintiff, on his demand therefor; and these facts, together with the implication which the law draws therefrom, are relied upon to support the complaint alleging a sale. No variance can be maintained on such a situation. The authorities at common law, and also those relating to code procedure and remedies, hold that a declaration in assumpsit is supported by proof of the wrongful taking and conversion of personal property; but there is a line of cases which confines the right of election to waive the tort, and sue and recover the value of the goods converted as if sold to the wrongful taker, to cases where the latter had himself disposed of the property. This distinction has received very careful consideration and extended discussion by courts of last resort, and we think the great weight of reason and authority—especially of decisions under the reformed procedure—disregard that distinction as immaterial in cases where the owner of the goods sues to recover the reasonable value thereof, on the very proper and rightful assumption that the taker proposed, not to take the same without compensation to the owner, but to pay him the reasonable value thereof."

The evidence shows the facts that during the period of dealing between the parties Raabe was a customer of the Davidson Grocery Company, and as such customer was every month buying large quantities of teas and coffees from that company; for these purchases he was given semimonthly bills, which he promptly paid. These bills, however, did not cover, or purport to cover, the items in issue in this case which Raabe is claimed to have converted, nor was any such

conversion known or suspected by plaintiff until about January 5, 1912, and the bills rendered subsequently to that time were rendered simply for the semimonthly periods, not for general balance. These bills as rendered were to the Boise Tea & Coffee Company, of which Raabe was proprietor and owner, and not to the partnership of Johnston and Raabe. It appears, also, that the Davidson Grocery Company did not discover that these goods were being taken from the respondent until January 5, 1912, at which time the president of the plaintiff company became suspicious of the defendants, and made an investigation in connection with others, and satisfied himself that the defendants had been taking coffee, tea, and sugar from the plaintiff without accounting for such property, and discovered that Johnston was delivering coffee and tea to Raabe, and upon making such discovery discharged Johnston, and forbade Raabe from coming to the plaintiff's place of business. We shall discuss this question further on, but this is sufficient to show that there was no variance between the complaint and the evidence.

[1] "Variance" means "material difference." It is not a variance when the proof does not show all the points in a declaration. A variance arises when there is a substantial departure from the issue in the evidence adduced, and must be in some matter which in point of law is essential to the charge or claim. *Kelser v. Topping*, 72 Ill. 226; *Warrington v. State*, 1 Tex. App. 168; *House v. Metcalf*, 27 Conn. 631; *Plumb v. Griffin*, 74 Conn. 132, 50 Atl. 1; *Skinner v. Grant*, 12 Vt. 456; *State v. Wadsworth*, 30 Conn. 55.

[4] 2. Did the semimonthly bills rendered by plaintiff constitute an account stated which is binding upon the parties? The answer of Raabe contains a special defense, wherein it is alleged that statements of account were given to him twice each month, and were paid, and were made after the plaintiff had reason to believe that there was a taking of property wrongfully by the defendants, and in such answer it was alleged that all of said accounts were accepted, acquiesced in and paid by the defendant, and every one of said payments was accepted by plaintiff, and each and every one of said accounts stated was received and marked "Paid" by plaintiff, and by it returned to defendant Raabe, and by reason of such facts that the plaintiff is barred the right to recover by an account stated between the parties and paid by appellant.

The general rule of definition of an account stated is: An account stated is a document, a writing, which exhibits the state of account between parties and the balance owed one to the other, and when assented to, either expressly or impliedly, it becomes a new contract. An action upon it is not founded upon the original items, but upon the balance agreed to by the parties. But the account, in order to constitute a contract, should ap-



pear to be something more than a mere memorandum; it should show upon its face that it was intended to be a final settlement up to date, and this should be expressed with clearness and certainty. *Beltaire v. Rosenberg*, 129 Cal. 164, 61 Pac. 916; *Harrison v. Henderson*, 67 Kan. 194, 72 Pac. 878, 62 L. R. A. 760, 100 Am. St. Rep. 386.

It is proper here, however, to call attention to the fact that the answer of defendant Raabe denies the liability of the defendant, and also the allegations of the complaint, which consist of allegations of sales and delivery of certain quantities of coffee and tea, but alleges that he purchased and received certain coffee and tea from the plaintiff for which he received bills semimonthly, and that he paid such bills. It will thus be observed that it is not alleged in the answer that the goods covered by the bills alleged to have been received by the defendant from the plaintiff monthly were the same goods alleged in the complaint to have been sold by plaintiff and delivered to defendant. We are not aware of any rule of law that an account stated arises against a creditor by the making and delivery, by a wholesale merchant to a retail dealer, who purchases goods from the wholesaler, of bills monthly for goods sold and delivered, or that the payment of such bills precludes the creditor from recovering for additional or other items of goods not known to the plaintiff to have been taken from his store at the time of the rendition of such bills, and not covered by the monthly bills delivered and paid, when such goods were taken extending through a long period of time and undiscovered.

In the case of *Colorado F. & I. Co. v. Chappell*, 12 Colo. App. 385, 55 Pac. 606, the Colorado Court of Appeals quotes with approval from *Perkins v. Hart*, 11 Wheat. 237, 6 L. Ed. 463, the following: "If, to a bill for an account, the defendant plead, or in his answer rely upon a settled account, the plaintiff may surcharge by alleging and proving omissions in the account, or may falsify by showing errors in some of the items stated in it. The rule is the same in principle at law. A settled account is only prima facie evidence of its correctness. It may be impeached by proof of unfairness or mistake, in law or in fact." That was an action of indebitatus assumpsit, to which a settlement upon an account stated was interposed as a defense. The charges, in this replication, of fraud and misrepresentation by the defendant, did not constitute the statement of a cause of action. The real question was whether the settlement was intended to embrace this controversy. If the coal and iron company was ignorant of the existence of the facts out of which the controversy finally arose, then the claim now asserted was not intended to be, and was not, included. The replication asserted a want of

knowledge of facts which it was necessary to know in order to a settlement of the matter in litigation; and the fraud of the plaintiff was alleged, not as a groundwork of an action, but as a reason for the ignorance. The cause of action was the misappropriation by the defendant of the money of the coal and iron company, to whose rights the plaintiff had succeeded; and surely the defendant's act was none the less a conversion, and the conversion was none the less wrongful, because of his false representation concerning the use made by him of the money. His fraudulent practices in connection with the act did not change the legal character of the act."

The monthly bills could in no way come within the rule announced above of an account stated, and could in no way bind the parties in this action, except as to the items contained in them.

[5, 6] 3. Is the evidence sufficient to justify the verdict? This contention is the real question upon which a reversal is urged. There are 333 closely written pages of typewritten evidence, and upon the entire evidence there is no question but that there is a conflict, upon certain facts testified to by witnesses for the plaintiff and denied by witnesses for the defendant, in many of the particulars involved in the transactions which tended to show the secret conversion of the property, the value of which is involved in this case. This court, however, in considering this matter, is guided by the universal rule, adopted by this court, that where there is a substantial conflict in the evidence the verdict of the jury will not be disturbed, and it is useless to cite authorities. The Code prescribes the rule: "Sec. 4824. Upon an appeal from a judgment, the court may review the verdict or decision and any intermediate order or decision, if excepted to, which involves the merits or necessarily affects the judgment, except a decision or order from which an appeal might have been taken: Provided, that whenever there is substantial evidence to support a verdict the same shall not be set aside."

Guided by this rule we will refer in a brief way to the evidence, which shows that the Davidson Grocery Company was engaged for several years in the wholesale business in Boise, and as such sold coffee, tea, and spices, etc. During nearly all the time between December 1, 1910, and January 5, 1912, the period covered by the allegations of the complaint, and shown in the bill of particulars introduced in this case, for which the action was brought to recover the value thereof, Johnston, one of the defendants and appellants, was in the employ of the respondent, and had charge of the coffee and tea department of the company, and his duties were roasting coffee and delivering it and other articles, on orders only sent from the main office of the company,



which sales were recorded in a book kept there under his supervision, and such book was introduced in evidence. There was also a young man by the name of Simonsen, who was working under the direction of Johnston. The defendant Raabe during this time was engaged in the retail business of coffee, tea, and sugar at Boise, under the name of the Boise Tea & Coffee Company, and was a constant customer of the plaintiff. He would often come to the plaintiff's place of business in person about noon, and receive coffee, tea, and sugar, which were delivered to him by Johnston at the tea and coffee department of the plaintiff.

There is some evidence which shows that other proprietors, who were customers of plaintiff, did not make a general practice of coming in person for goods, but generally sent drivers, or the plaintiff delivered the goods. It was the rule of plaintiff to have the goods charged at the time the order came to the plaintiff, or, if the goods were to be delivered at a future date, the entry was made upon the company's books as they were delivered. An arrangement was made between the plaintiff and the defendant Raabe by which he was to have a discount of 5 per cent. on all purchases over 800 pounds in any one month. About twice each month the plaintiff would send to the defendant Raabe statements of the account of the Boise Tea & Coffee Company. None of these monthly statements, except a few commencing December 11, 1911, covered the transactions included in the complaint or bill of particulars. The reason for this, as shown by the evidence, was that the plaintiff did not know about these at the time the statements were made out.

About January 5, 1912, Davidson, president of the plaintiff company, became a little suspicious about the conduct of the defendants, and this led him to investigate, and he secured other parties and made investigation, and by such investigation the defendants were caught in taking the goods of plaintiff, and because of this act Johnston was discharged and Raabe was notified not to come to plaintiff's place of business. The evidence shows the details of the facts relating to the acts of the defendants in taking sacks of coffee and tea from the plaintiff's place of business, and also the conversation that was had by the president of the plaintiff company with Raabe, at the latter's place of business, after this discovery, wherein Davidson asked Raabe, "Where is that tea?" to which he replied, "What tea?" Davidson answered, "The tea you just brought up," and, while they were talking, Davidson went back of the partition there and saw the two chests of tea. Then he said, "These two chests of tea, what about this? Those two chests of tea, where is a bill for that tea?" Raabe replied that Johnston was going to give him a bill. Davidson requested him to put the tea and coffee in the wagon and go

back to his place of business. When they arrived there, Raabe remained—at Davidson's request—on the front platform of the building while Davidson went up to the third floor, where Johnston was. Johnston was then asked what was the weight of the tea that the Boise Tea & Coffee Company got that morning, to which Johnston replied, "He didn't get any tea." Davidson then said: "Well he has—well, he did take two chests of tea away from here this morning, and I have gone up there and brought them back, and the tea. He is downstairs now and I want you to come down and confront him." Johnston then said: "Oh, yes, yes; I did put two chests of tea down on the front platform, and I guess he took them up there. That's all right." Davidson replied that it was not all right, as he had been watching him before that, and had discovered a number of instances where he had been doing this same thing. When Johnston came down where Raabe was, he endeavored to make the excuse that he was going to sell Raabe five chests of tea, and that he just sent up these two chests and would charge the rest afterward. This is only one instance of taking which was secretly discovered by plaintiff, and which was related as evidence in the case. It could not aid this case to relate all of these instances. They were testified to, and the jury heard the evidence. The plaintiff testified that from the examination of the books kept by Johnston he found that on December 9, 1910, Johnston charged Raabe with 2,600 pounds of coffee, and between that date and December 31, 1910, he had delivered to him 1,985 pounds, and on January 3, 1911, he gave him 1,600 pounds more; Johnston claiming that the 1,600 pounds had been charged on December 9, 1910, and paid for. This made 3,585 pounds he had delivered to Raabe, when he should have delivered only 2,600 pounds, making 985 pounds which Raabe received without any charge or payment being made therefor. This was testified to by Davidson, and the jury evidently believed what the witness said upon this question, and we think the jury were justified in their conclusion. The credibility of this witness and his statements, and the books which Johnston kept, and which were in evidence, deserve credit, and are convincing proof.

There is positive and certain evidence by a number of witnesses as to specific acts of taking coffee, tea, and sugar, and we will recite here an incident. The witness Sargent, a merchant at Collister station, was at the plaintiff's place of business about noon on September 19, 1911, and saw Johnston hand Raabe a 100-pound sack of sugar in the following manner: "Q. You may state what you saw him do, if anything, at that time and place. A. On the 19th day of September, about the noon hour I heard Mr. Johnston ask Mr. Raabe if he got that; he said 'No,' and Mr. Johnston said to him to



get on his wagon. Just at that time all the Davidson Grocery Company's employes were all off of the first floor. I saw Johnston grab a sack of cane sugar, carry it a distance of about 20 feet, and hand it to Mr. Raabe at the front end of his delivery wagon. Johnston went back to the building, and Mr. Raabe went uptown. Q. Then, did he take this sugar away that Johnston handed him? A. He did."

Davidson, the president of the plaintiff company, after making the discovery on or about January 5, 1912, had an examination made of the stock book that was kept as a general index or measure of the business which Johnston was doing. Each page represented a month, and the days of the month were entered in the left-hand column. In parallel columns were headings of the different grades of coffee, and the last column, with the exception of the totals, showed deliveries to the Boise Tea & Coffee Company, which was the plaintiff's principal customer. This book was Johnston's own record as to the amount of coffee put out by his department. The examination which Davidson had made disclosed that by comparing this book with the charges made in the office downstairs, it was found that Johnston had sent through his department certain amounts of coffee in excess of the charges made on the books. The account is somewhat extensive, and it is sufficient to say that the total shortage is shown as \$6,246.

The importance of these books to Johnston, and his transactions as there disclosed, is shown very clearly by the witness Simonsen. Simonsen was asked this question: "Did you have any talk with Mr. Johnston shortly after January 5, 1912, if so, state what it was. A. On the night of January 8th, I went to the telephone. Mr. Johnston had called me and asked me if I would walk down Franklin street. [Here follows the route.] \* \* \* He said he wanted to talk with me. So I said I would, and hung up the phone, and Mrs. Simonsen asked me where I was going, and I told her; she advised me not to go, so I telephoned, called Johnston's residence, and Mrs. Johnston answered the telephone, and I asked her for Mr. Johnston, and she said that he had just left; so I told her that I wasn't going to meet him. She says, 'Now, Seymour.' So I went out and turned on the porch light and waited for Mr. Johnston to come. A few minutes later he came down to the house, and I told him to come in the parlor where it was warm. He said 'No,' he would rather talk with me in the hall alone, and so I went in the hall and talked to him. He requested me to burn up a coffee book that he had kept a record of the business previous to January 1, 1911. He says: 'All the records are recorded from this book into the book we are keeping the records in now, and nobody but you and I know that the book is up there.' He said: 'I have done a great

deal for you, and I would like to have you do that much for me.' He says: 'I haven't slept for three nights, and if you will do that it will ease my mind.' I wouldn't promise him that I would do it. I told him I was willing to do anything that was right for him or the Davidsons, either one; only I didn't know that that was right. He says: 'You know that in the book that—that isn't in the other book, and it won't do any harm to burn it.' And he says: 'You have got a good thing down there, and I wouldn't work there again. I would probably work a week to get my reputation back.' He says: 'I don't want to, I wouldn't work there any more; only, whatever you do, look out for the Jew; he will get any one in trouble.'" He testified also that the next morning Johnston came down to the store, and that there was another party there, and they talked a few minutes, and as quick as the other gentleman left Johnston asked Simonsen if he had burned the book. "I told him, 'No.' He asked me where it was, and I told him that I had hid it, and that was all that was said about the book. Only a few minutes later we were talking about business." This question was asked the witness: "Now, what book did he have reference to? I hand you plaintiff's Exhibits Nos. 1 and 1A. A. This is the book that he had reference for me to burn."

There is much other evidence, and the books were introduced and different accounts presented, and many statements made by different witnesses for the plaintiff and denied by witnesses for the defendants, but upon all the evidence, conflicting as it may be upon specific acts and conduct of the defendants in the taking of the property, and the condition of the books and the statement of Johnston, the jury having passed upon the weight of the evidence and what part of the evidence was convincing, and having determined the preponderance of the evidence, this court does not feel justified in setting aside the verdict. Much of the evidence in this case is circumstantial, and there is a mass of figures and details, and the jury having determined these questions, and having given due consideration to the weight of evidence, and such facts not being explained or in any way excused, there can be but one conclusion, and that is that Raabe and Johnston conspired together for illegal purposes, and that the acts carried out by them in pursuance of their concerted action, with reference to the taking and converting of the property taken, were sufficient to show they were wrong, and that the jury were justified in finding the verdict rendered.

We find no reversible error in the record. The judgment is affirmed. Costs awarded to respondent.

AILSHIE, C. J., and SULLIVAN, J., concur.



(35 Nev. 143)

## STATE v. DYE. (No. 2,016.)

(Supreme Court of Nevada. July 14, 1913.)

## CRIMINAL LAW (§ 519\*) — EVIDENCE — "VOLUNTARY CONFESSION."

Where defendant with two others was indicted for arson, and the complaining witness and the sheriff advised him to protect himself, the theory of the prosecution being that his codefendants were the principals who had instigated him to burn the prosecuting witness' store, and the prosecuting witness told him that he only wanted the principals, and others told him that his statements to a detective while in jail were sufficient to send him to prison, a confession elicited under such circumstances is not voluntary; for to be voluntary a confession must be made without hope or inducement of reward.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1163-1174; Dec. Dig. § 519.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7344, 7345.]

Appeal from District Court, Elko County; Mark R. Averill, Judge.

William Dye was convicted of arson, and he appeals. Reversed and remanded.

Patrick A. McCarren, of Carson City, Perky & Crow, of Boise, Idaho, and King & King, of Salt Lake City, Utah, for appellant. Cleveland H. Baker, Atty. Gen., James Dysart, Dist. Atty., F. S. Gedney, both of Elko, and Lewers & Henderson, of Reno, for the State.

NORCROSS, J. Appellant was jointly indicted with Antone Primeaux and Roy Primeaux in the Fourth judicial district court, in and for Elko county, for the crime of arson. A severance of trials was obtained, and the appellant was tried prior to his codefendants, and convicted of arson in the second degree. From a judgment entered upon the verdict and from an order denying his motion for a new trial, defendant has appealed.

The trial of appellant lasted nearly 40 days, and the record on appeal is embodied in four volumes aggregating about 5,000 typewritten pages. Since the trial and appeal of the case against defendant Dye, the trial of his codefendants has been had, and the latter acquitted. The indictment charged: "That the said defendants, Antone Primeaux, Roy Primeaux, and William Dye, on or about the 10th day of June, A. D. 1910, in the town of Tuscarora, county of Elko, state of Nevada, and before the finding of this indictment, without authority of law, did, feloniously, unlawfully, willfully, and maliciously burn and cause to be burned, a certain building, then and there situated in the town of Tuscarora, county of Elko, state of Nevada, and then and there the property of A. W. Sewell and J. W. Linnell, copartners doing business under the firm name and style of A. W. Sewell & Co., which said building was then and there of the value of \$2,000, and was known as and called the A. W. Sewell & Co. store, which said building was then and there occu-

pled as a store by said corporation, and contained a stock of goods, wares, and merchandise of the value of \$15,000, then and there the property of said A. W. Sewell and J. W. Linnell." It was the theory of the state upon the trial of appellant that Dye and his codefendants had entered into a conspiracy to burn the store building of A. W. Sewell & Co.; the motive being that A. W. Sewell & Co. was a rival business competitor of the defendant Antone Primeaux. The record contains many assignments of error, but we think it only necessary to consider one.

It is contended by appellant that the court erred in admitting in evidence a confession made by defendant Dye implicating his codefendants. It is contended that this confession was inadmissible for the reason that it appeared, under the undisputed testimony, to have been given under promise and inducements of reward made by the sheriff, who had the defendant in charge, and by the prosecuting witness, A. W. Sewell, and by agents of the latter. We think the objection to the admissibility of this confession should have been sustained, and that its admission was prejudicial error. It clearly appears from the testimony that the complaining witness, A. W. Sewell, considered the appellant but a tool of the defendants Primeaux, whom he regarded as the originators of the conspiracy, and they were the parties whose conviction he most desired. It is clear that this view of the situation was both directly and indirectly impressed upon the mind of the appellant. Prior to the confession a conversation was had between the sheriff and the defendant in the county jail, in which the sheriff said to appellant: "Bill, you watch out for Bill Dye." The sheriff also testified to the effect that he probably told appellant: "If you tell the truth, it will be a whole lot better for you." In a conversation between the appellant and the prosecuting witness, had in the county jail prior to the confession, the latter said to appellant: "Bill, you ain't to blame. It is others I blame. It is better for you to take care of yourself." The witness also testified that he probably told appellant that it would be better for him to tell what he knew of the case. At the time of the conversation with the complaining witness at which the confession was obtained, the complaining witness admits that he said: "Bill, I want the principals in this proposition. It wouldn't do me much good to send you to prison, for they could hire some one to do the job again. Bill, I want the head man in this." Besides these conversations had with the defendant by the sheriff and the complaining witness, it appears that a number of other parties in the employ of the complaining witness were seeking to obtain a confession from the appellant; that, among others, one Dewey, an employed detective, was placed in the jail with appellant, who

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



also advised appellant in effect that it would be better for him to make a confession. Appellant was also told by counsel for the prosecution that statements which he had made to the detective Dewey while the latter was in jail with him were sufficient to send him to prison. During this time the appellant is shown to have been in poor health.

It is clear from all of the testimony and circumstances relative to this confession that the idea was thoroughly impressed on the mind of the appellant by agents of the prosecution that a confession implicating his co-defendants Primeaux was what they wanted, and that if he would make such a confession it would be better for him. That this was not a voluntary confession, made without hope or inducement of reward, offered by persons in authority, we think too clear for extended argument or consideration. In *State v. Carrick*, 16 Nev. 129, this court, speaking through Hawley, J., said: "The law excluding confessions is based in a spirit of charity for the weakness of human nature, and rests upon the theory that a man, when charged with crime, and threatened with the punishment of the law, or promised immunity therefrom, may be induced, while in an alarmed and excited condition of mind, to make statements that are not true. Such statements, when so made, are and should be excluded by the courts. \* \* \* It is only in cases where the confession is obtained by mob violence, or by threats of harm, or promises of favor or worldly advantage held out by some person in authority, or standing in such intimate relation from which the law will presume that his promises or threats will be likely to exercise such an influence over the mind of the accused as to induce him to state things that are not true that will authorize the courts to exclude the confession or admission. The law in its general application to this question, as well as others, is founded in reason and common sense. Its object is to ascertain the truth, and it is not its purpose to reject any reliable and competent means of attaining it."

The admission of the confession in evidence was strenuously opposed. Six days were devoted to this one question. Many facts and circumstances were detailed in the evidence, but the main facts referred to, supra, appear without substantial contradiction. In support of the rule that confessions, secured in the way in which this one was, are inadmissible, we cite *People v. Barric*, 49 Cal. 342; *People v. Thompson*, 84 Cal. 598, 24 Pac. 384; *People v. Castro*, 125 Cal. 521, 58 Pac. 133; *State v. Jackson*, 3 Pennewill (Del.) 15, 50 Atl. 270; *Dixon v. State*, 113 Ga. 1039, 39 S. E. 846; *Mitchell v. State* (Miss.) 24 South. 312; *Commonwealth v. Myers*, 160 Mass. 530, 36 N. E. 481; *Commonwealth v. Curtis*, 97 Mass. 574; *State v. York*, 37 N. H. 175; *People v. Kurtz*, 42 Hun (N. Y.)

335; *State v. Wintzingerode*, 9 Or. 153; *Searcy v. State*, 28 Tex. App. 513, 13 S. W. 782, 19 Am. St. Rep. 851; *Newman v. State*, 49 Ala. 9; *Territory v. Underwood*, 8 Mont. 131, 19 Pac. 398; *State v. Jay*, 116 Iowa, 264, 89 N. W. 1070; *Sullivan v. State*, 66 Ark. 506, 51 S. W. 828, 12 Cyc. 461.

Judgment reversed, and cause remanded for a new trial.

TALBOT, C. J., concurs. McCARRAN, J., having been attorney for defendant in the case when tried in the lower court, did not participate in the opinion.

(35 Nev. 319)

**GAMBLE et al. v. SILVER PEAK MINES et al.** (Nos. 1888-1917.)

(Supreme Court of Nevada. Jan. 4, 1913. Rehearing Denied May 27, 1913.)

**1. APPEAL AND ERROR (§ 832\*)—REHEARING—SCOPE.**

As a rule, questions raised for the first time on petition for rehearing will not be considered.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3215-3228; Dec. Dig. § 832.\*]

**2. COURTS (§ 37\*)—ESTOPPEL TO DENY JURISDICTION—APPEAL.**

While as a rule a jurisdictional question may be raised at any time, a party may become estopped by his conduct to raise such question, and a party who has treated a judgment as final and asked an affirmance or reversal on appeal cannot afterwards contend that it was not final so that the appellate court had no jurisdiction to consider the appeal.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 147-149, 151, 156; Dec. Dig. § 37.\*]

**3. COURTS (§ 35\*)—JURISDICTION.**

The first duty of courts is to keep within their jurisdiction, and any affirmative act by a court implies that it has jurisdiction to so act.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 147-149, 151, 156; Dec. Dig. § 35.\*]

**4. APPEAL AND ERROR (§ 832\*)—PETITION FOR REHEARING—QUESTIONS DECIDED.**

Where both parties have proceeded in the appellate and trial courts upon the assumption that the judgment appealed from was final, neither party will be permitted to contend for the first time on petition for rehearing that the judgment was not final so as to be reviewable.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3215-3228; Dec. Dig. § 832.\*]

**5. APPEAL AND ERROR (§ 832\*)—REHEARING—QUESTIONS CONSIDERED—JURISDICTIONAL QUESTIONS.**

A court may at any time, even of its own motion or on petition for rehearing, determine a jurisdictional question, and in some cases should not refuse to consider a suggestion of want of jurisdiction on petition for rehearing, notwithstanding the rule that a party may waive such question by proceeding as if the court had jurisdiction.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3215-3228; Dec. Dig. § 832.\*]

**6. APPEAL AND ERROR (§ 832\*)—REHEARING—QUESTIONS CONSIDERED.**

A court should not consider, on petition for rehearing, a question which has been adju-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & P. & R. Indexes



licated according to the contention of the parties merely to deprive the court of jurisdiction in a case where the court would not have had jurisdiction if the question had been raised on the original hearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3215-3228; Dec. Dig. § 832.\*]

#### 7. APPEAL AND ERROR (§ 832\*)—REHEARING—QUESTIONS CONSIDERED.

Defendants cannot first contend on petition for rehearing that the Supreme Court should modify an order reversing and remanding the case by directing the trial court to enter judgment for defendants dismissing the action with costs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3215-3228; Dec. Dig. § 832.\*]

Talbot, C. J., dissenting in part.

Appeal from District Court, Washoe County; W. H. A. Pike, Judge.

On rehearing. Petition denied.

For former opinion, see 34 Nev. 351, 128 Pac. 111.

Samuel Platt and George A. Bartlett, both of Reno (Rush Taggart and Clarence B. Mitchell, both of New York City, of counsel), for appellants. J. W. Dorsey, of San Francisco, Cal. (R. M. F. Soto, of San Francisco, Cal., of counsel), for respondents.

NORCROSS, J. Upon petition for a rehearing, counsel for respondents raise, for the first time, the question of the jurisdiction of this court to consider and determine the appeal. Want of jurisdiction is urged upon the ground that the judgment entered in the court below was not a final judgment, and therefore an appeal therefrom would not lie.

[1] This court has repeatedly held that questions raised for the first time on petition for rehearing will not be considered. *Kirman v. Johnson*, 30 Nev. 154, 93 Pac. 500, 96 Pac. 1057; *Brandon v. West*, 29 Nev. 135, 85 Pac. 449, 88 Pac. 140; *Powell v. N. C. O. Ry.*, 28 Nev. 305, 343, 82 Pac. 96; *Beck v. Thompson*, 22 Nev. 419, 41 Pac. 1.

[2] While it is a general rule that a jurisdictional question may be raised at any time, it is also settled in this court that a party may, by his conduct, become estopped to raise such a question. A party in an appellate court who has treated the judgment as final and asked that the same be affirmed or reversed will not be heard afterwards, when the decision has gone against him, to contend that the judgment was not final and the court therefore without jurisdiction to determine the questions presented on the appeal.

In *Costello v. Scott*, 30 Nev. 88, 94 Pac. 223, a case where the finality of the judgment was questioned for the first time on petition for a rehearing, we said: "Even if there was room for argument as to whether the judgment rendered in this cause was

a final judgment, appellants, by treating it as such and appealing therefrom, are estopped to deny the finality of the decree"—citing *State v. Commissioners*, 22 Nev. 78, 85 Pac. 300.

In *State v. Commissioners*, supra, this court said: "Lander county treated it as a final judgment when it appealed from it to this court, and we entertained the appeal and decided the case upon its merits. Having treated the entry as a judgment decisive of the merits of the case, and having taken and received the benefit of a remedy which it was otherwise not entitled to, we think that Lander county, and consequently the defendants, as its representatives, should now be estopped to claim that no final judgment has been entered in the action. In *Bigelow on Estoppel*, p. 601, the author says: 'It may accordingly be laid down as a broad proposition that one who has taken a particular position in the course of a litigation must, while that position remains unretracted, act consistently with it.' \* \* \*

In *Clark v. Dunman*, 46 Cal. 204, the court said: "The only point to be decided under the agreed statement is whether the decree of August 20, 1869, is a final money judgment in the sense of the statute, and therefore bore interest. The plaintiff in this action treated the decree as final when he prosecuted an appeal from it. If it was not final his appeal should have been dismissed on that ground. But we entertained the appeal and decided the cause, and in justice the plaintiff should now be estopped to deny the finality of the decree."

In *Brandon v. West*, supra, we said: "There was no motion made to dismiss the appeal from the judgment because of any alleged defect therein, nor was the sufficiency or regularity of the appeal questioned upon the presentation of the cause. The case was briefed, argued, and presented as though the appeal was entirely regular. Its sufficiency, therefore, cannot now be questioned upon petition for rehearing."

In *Taylor v. Crook*, 136 Ala. 354, 34 South. 905, 96 Am. St. Rep. 26, it was held that one who induces the dismissal of an appeal on the ground that the decree is not final cannot afterward claim as against a bill of review that it was final. See, also, *Ohio & Mississippi Railway Co. v. Heaton*, 137 Ind. 14, 35 N. E. 687.

In *Silver Peak Mines v. District Court*, 33 Nev. 120, 110 Pac. 508, we said: "By the stipulation in the lower court regarding a bond to be given in compliance with that section, petitioners became estopped to deny that the section governed the undertaking to stay execution in the case, or to assert, as they have done, that the other sections controlled the stay bond. This is not the first time that we have had occasion to hold that the parties are estopped to rely in this court

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



upon a position the reverse of that taken by them in the district court."

We see no valid reason why the rule of estoppel to question the finality of the judgment ought not to apply as well to a respondent who has assumed throughout the proceedings that the judgment was final. In this case counsel for respondents, not only did not question the finality of the judgment in brief or oral argument, but prayed for its affirmance. In the lower court they stipulated that the statement on motion for a new trial should be regarded as the statement on appeal from the judgment. They also petitioned for and obtained an order for the issuance of a writ of assistance as a part of the process to carry out the judgment, assuming, as they must have done for such purpose, that the judgment was final. 4 Cyc. 294; 3 Standard Procedure, 140; *Stanley v. Sullivan*, 71 Wis. 586, 37 N. W. 801, 5 Am. St. Rep. 245. See "Argument for Respondents," *Silver Peak Mines v. District Court*, 33 Nev. 108, 110 Pac. 503.

In the briefs filed by counsel for respondents in the prohibition proceedings last above cited, which briefs were referred to and made a part of the briefs filed in this case it was one of the contentions of counsel for respondents, as a reason why prohibition would not lie against the issuance of the writ of assistance, that the petitioners in that case had the right of appeal from the order granting the writ, under the provisions of Compiled Laws (Cutting) § 3425. Under that section, the order, if appealable, was so because it was "a special order made after the final judgment." In this court and the court below both parties have contended that the judgment was final, and both parties have sought for and obtained relief upon the theory that the judgment was final, and both courts have assumed its finality.

[3] It is a primal duty of all courts to keep within their jurisdiction. Whenever a court takes any affirmative action there is an implied adjudication that it has jurisdiction to so act. 11 Cyc. 700; *Manier v. Trambo*, Fed. Cas. No. 18,309; *Cook v. Weigley*, 68 N. J. Eq. 480, 59 Atl. 1029.

[4] Whether the judgment is final or only interlocutory is a question of law. That question having impliedly been determined in favor of its finality, and both parties having proceeded in both courts upon the assumption that it was final, neither party will be heard to raise the question for the first time on petition for rehearing.

[5] Undoubtedly, a court, at any time, even of its own motion, may determine a question of jurisdiction, and there are cases where, notwithstanding that the rule as to waiver would ordinarily apply, the court should not refuse to take notice of a suggestion of want of jurisdiction; for example, a case like that of *In re Castle Dome Mining Co.*, 79 Cal. 246, 21 Pac. 746, where a party interested in maintaining the judgment and

who would be injuriously affected by its reversal is not made a party to the appeal by the service of notice of appeal upon him.

[6] A court, however, should not be required, on petition for a rehearing, to go into the consideration of a legal question, which has virtually been adjudicated in accordance with the contentions of all the parties, for the sole purpose of affecting the jurisdiction in the event the direct ruling might be contrary to that implied.

The lower court determined all the issues raised by the pleadings in the case, and the judgment entered was manifestly intended as a final judgment, and it was so treated by all the parties.

In addition to the jurisdictional question, the petition for a rehearing is confined to an argument of the questions fully considered and determined in the opinion heretofore rendered. We entertain no doubt as to the correctness of the conclusion heretofore reached upon the merits of the case.

[7] Included in the reply to the petition for a rehearing, counsel for appellants have requested this court to modify the order heretofore made by directing the court below to enter a judgment in favor of the defendants dismissing the action with costs. No contention was made, upon the hearing that such an order should be made by this court. If counsel for appellants were of the opinion that this is such a case as would justify this court in directing a judgment in appellants' favor, they should have presented that question upon the original hearing when opposing counsel would have had a full opportunity to be heard in opposition. A question as to the modification of the order heretofore entered, in the respect suggested, will not now be considered. *Brandon v. West*, 29 Nev. 138, 85 Pac. 449, 88 Pac. 140.

The petition for a rehearing is denied and the cause remanded.

SWEENEY, C. J., concurs.

TALBOT, C. J. (concurring in the order reversing the judgment and dissenting from the order denying the petition for rehearing).

The opinion of the majority of the court, stating the facts at length, the contentions of the parties, and the history of the case, with a copy of the contract in dispute, will be found in 34 Nev. 351, and 126 Pac. 111. Since the rendition of the opinion the petition for rehearing and answer thereto have been filed, and the petition has been denied by the two members of this court who concurred in the opinion.

Consideration of the controlling facts is essential to a proper understanding of the case.

In the spring of 1893 the defendant Gamble went to New York and obtained from John I. Blair an option on all the stock of the Silver Peak Mines, with the privilege of investigating the property, making surveys,



prospecting, taking ore from the mines, and working it at the mill; the proceeds to be paid to the Silver Peak Mines unless he purchased the property, in which case the same would become a part of the purchase price of \$500,000, \$200,000 of which was required to be paid on or before the 1st day of November, 1893. Under date of August 5, 1893, he assigned a half interest in this contract to Chadbourne. A short time thereafter Gamble took out experts and had them examine and report upon the mines. In consideration of the receipt of \$250 from Chadbourne and J. B. Wright, and transportation, Gamble agreed, on October 30, 1893, to go to New York to try to obtain a bond on the property of the Silver Peak Mines and to transfer to Chadbourne and Wright a one-third interest each in any bond he might acquire.

Under date of November 13, 1893, Gamble obtained from John I. Blair an agreement for an option on the property of the Silver Peak Mines. The time for fulfilling certain conditions connected therewith was extended by John I. Blair to February 1, 1894. In January, 1894, C. J. Canda, who represented John I. Blair and the Silver Peak Mines and transacted the business for them and was secretary of the company, had received a letter from Chadbourne stating that they had concluded to send L. J. Hanchett to New York. As a result of the latter's visit to that city and of his negotiations with Canda, John I. Blair by letter dated February 2, 1894, extended the time for the execution of the contract or option until the 1st day of May, 1894. On April 24th, J. B. Wright wrote to Canda asking for an extension of 90 days from May 1, 1894. On May 4, 1894, Canda wrote to Wright saying that they would give him all reasonable extensions necessary, but objecting to recommending Mr. Blair to give as much as 90 days' additional time. In the letter Canda stated that he was informed Mr. Chadbourne was one of Mr. Wright's most influential associates.

On June 4, 1894, Wright wrote to Canda, expressing gratification for the extension by telegram to July 1st. On June 19, 1894, Canda wrote to Wright that as the result of a full conference with Hanchett he was sending a proposed contract executed by the Silver Peak Mines, to execute both copies if satisfactory, and to send one back to Canda, or both if they did not meet with his approval. Canda also stated in this letter that the contract was slightly changed from the copy which Hanchett had taken with him.

On July 27, 1894, Canda wrote to Wright, inclosing contract as they in New York had modified it, asking Wright to return to Canda the two executed copies of the contract sent to Wright on June 19th, and saying that they would defend the title to the mines until Wright was satisfied to pay for them. The contract inclosed with Canda's letter of July 27, 1894, was in the same form as the

one given by the Silver Peak Mines in the name of Hanchett, of date September 7, 1894, which is in controversy, excepting that the date for the party of the second part to be put in possession and commence development work was August 1, 1894, in the contract sent to Wright, and October 1, 1894, in the one sent to Hanchett, and the dates allowing election to purchase August 1, 1895, and December 31, 1895, respectively, and the periods for payment were accordingly.

On July 27, 1894, Canda transmitted a letter of John I. Blair to Wright, agreeing that if he exercised the option Blair would deliver on the completion of the purchase all the shares of the capital stock of the Silver Peak Mines. It will be observed that the time for exercising the option under this letter and under the agreement to Wright, which belonged to him and his associates, had a long time to run after the date of the contract in the name of Hanchett.

The evidence is clear and undisputed that Gamble secured the option originally and conveyed an interest to Chadbourne; that later Gamble, Chadbourne, and Wright had Gamble go to New York to obtain an option or extension in which they would each hold a one-third interest; that later Chadbourne and Wright sent Hanchett to New York as their representative to obtain a further extension or option, which was given to May 1st. While these fiduciary relations existed with Gamble, Chadbourne, and Wright, and within the period of 90 days which Wright had asked of Canda as an extension of their option from that date, Wright, with the assistance of Hanchett, obtained the agreement of July 27th in his own name, but had that agreement returned to Canda, and nearly 11 months before the time for its fulfillment had expired Wright, Hanchett, and Canda had another contract, in similar form but with different dates for payment and performance, executed by the Silver Peak Mines in Hanchett's name, under date of September 7, 1894, which is the one in controversy.

Upon the delivery of this contract a direct agreement was executed between Wright and Hanchett, which provided that Wright should have, clear of expense, a 20 per cent. interest in the contract in the name of Hanchett. On September 5, 1894, Wright stated in a telegram to Canda: "On account of the pressure of company business caused by the late strike I find I will not be able to personally attend to Silver Peak business and will place it entirely in the hands of Mr. L. J. Hanchett to personally supervise and manage. On that account would like much to have the bond made in his name instead of mine." On September 8, 1894, Hanchett wrote to Canda: "There are too many people in the bond, on our side, who want to share but who will not put up any money. For that reason Mr. Wright telegraphed you to change the bond to my name, as that will re-



duce the number interested so that agreements can be reached and work commenced. I am to look after the interests of Mr. Wright and the ones directly interested, that is, ones who have put up the money or have an active part in raising it. All of the above so that you will understand why I am delaying and why I want the bond transferred to me."

The contract in controversy, dated September 7, 1894, in Hanchett's name, was forwarded with Canda's letter to Wright dated September 19, 1894. On the same day Canda wrote requesting the return of the other agreement, which had been signed by the company, making it clear that Wright, notwithstanding he was a party to the venture and a part owner in the option, which had originally been secured by Gamble and later as an extension in the name of Wright for the parties to the venture, was mainly instrumental in securing the new contract in the name of Hanchett, and was assisted in so securing the same by Hanchett, Canda, and the Silver Peak Mines without the consent of Gamble or Chadbourne. These facts, as shown by letters, telegrams, contracts, and depositions, beyond dispute indicate that Wright, Hanchett, Canda, and the Silver Peak Mines, while well knowing that Gamble and Chadbourne had an interest in the option, given for the Silver Peak Mines, surrendered the contract in the name of Wright while they knew it was owned by him in common with Gamble and Chadbourne and had a new agreement executed in the name of Hanchett for the purpose of depriving Gamble and Chadbourne of their two-third interest in the agreement or option and eliminating them from the venture. This was done with the intention and side agreement on the part of Wright and Hanchett that Wright should have 20 per cent. clear of expense and Hanchett the remainder of any money which might be made out of the option, and with the willingness of Canda and the Silver Peak Mines to transfer the rights of Gamble and Chadbourne to Wright and Hanchett, at their suggestion, when they had millionaire kindred and associates who it was hoped might be induced to pay the Silver Peak Mines a half million for the property.

It is shown not only by the deposition of Gamble that Canda, who acted as agent for the company in all the negotiations, was informed regarding the associated interests of Gamble, Chadbourne, and Wright, but notice of this was also given to Canda. In the letter of December 12, 1894, to Canda, Gamble stated: "Of course, I can hold Mr. Wright and Hanchett by law to give me the interest agreed upon. \* \* \* The entire facts are as follows: Mr. Wright and Chadbourne made an agreement with me to carry my one-third interest of the amount we would hold and they were to furnish the money for all expenses. \* \* \* Mr. Wright claim-

ed that Mr. Hanchett had some business of his on in New York and would attend to this for me. I was not to pay any of the expenses under my contract, but for fear something might happen I paid one-third of the expense. When Hanchett returned he claimed an interest in the contract. \* \* \* Then Mr. Wright assigned the contract to Mr. Hanchett. Why I do not know. I then asked Mr. Wright to give me a contract for my one-third and he told me to go to Hanchett." In January, 1895, Gamble wrote to Canda: "These men were my partners, and I don't see how they can make a contract on the side without telling me and then declare me out. My lawyers say that I can hold Wright and Hanchett to the original agreement, but I don't want a lawsuit if it can be avoided, and this can be avoided by telling them to do as they agreed to do by and with me. If you will do that Mr. Hanchett will lose no time in signing over my interest."

On November 21, 1895, the Silver Peak Mines extended to August 12, 1896, the option which had been given in the name of Hanchett on September 7, 1894. This extension inured to the benefit of Gamble and Chadbourne because they were part owners in the contract for the reason stated before. Canda, the representative of the Silver Peak Mines, had declined to recognize any further rights in Gamble; and as Gamble could not obtain recognition of his rights in this agreement, which in effect withheld from him any opportunity of going into possession of the mines or purchasing them if he obtained the required money or found parties willing to take them over, he filed his complaint in this action on March 2, 1896, and on March 6, 1896, a *lis pendens*, asking to be decreed the owner of a one-third interest in the contract, over five months before the termination of the extension obtained by Hanchett.

The Silver Peak Mines brought suit against Hanchett in the United States Circuit Court for the Southern District of New York on April 6, 1897, and in the United States Circuit Court in Nevada on April 17, 1897, asking for a finding that the Hanchett contract was terminated, for the payment of royalties, and for damages for improper mining, which actions resulted in judgment being rendered against Hanchett.

John I. Blair brought a suit against the Silver Peak Mines and Hanchett in the federal court of Nevada in July, 1897, to foreclose the mortgage given by the Silver Peak Mines to him in 1879 for \$204,000, bearing 6 per cent. interest, obtained judgment, and had the property sold. In 1898, Blair recovered judgment in the United States Circuit Court for the Southern District of New York against the Silver Peak Mines for \$68,000 for money which he had advanced to enable it to maintain and develop its properties. He brought suit upon



that judgment and obtained judgment in the United States Circuit Court for the District of Nevada, and had the property sold. Gamble, Chadbourne, and Wright were not made parties in any of the suits brought by the Silver Peak Mines or by Blair, and it will be observed that all of these actions were brought after the filing of the complaint and the *lis pendens* in the present case brought by Gamble.

If notice to a corporation is required to be given to one agent or officer more than another, it would ordinarily be given to the secretary. Canda, as the agent and secretary of the Silver Peak Mines, and as the business representative of John I. Blair, conducted the negotiations and secured the execution of the contracts. Blair, living in New Jersey, at the advanced age of about 90 years, was not to be seen by the parties securing the options, and the negotiations, when conducted personally or by letter, were with Canda in New York. Notice to Canda as the representative of Blair and the company, and as secretary of the company, was notice to Blair and to the company; consequently they all had notice that Gamble and Chadbourne and Wright were interested in the option and extensions. Canda, and through him the Silver Peak Mines and John I. Blair, certainly had notice of their own acts and that they had given the original option to Gamble with the understanding that he would induce men of capital to join in the enterprise; that he made trips to the property and at considerable expense had taken experts to examine and report upon it; that he had conveyed interests in the option to Chadbourne and Wright; that Chadbourne and Wright had assisted in securing an extension; that Chadbourne and Wright had sent Hanchett to interview Canda in New York and secure an extension or a new agreement giving an extension or further time, the agreement for which was given in the name of Wright; and that before the contract given to Wright for the benefit of Gamble, Chadbourne, and Wright had expired, Wright, by conspiring with Hanchett and Canda, obtained from the Silver Peak Mines a new option or extension in the name of Hanchett, and surrendered the one given to Wright for the benefit of himself, Gamble, and Chadbourne.

In addition to knowing all the facts which indicated the ownership of Gamble, Chadbourne, and Wright in the option, notice was given to Canda and the Silver Peak Mines of such ownership, although not necessary. Soon after the contract was executed in the name of Hanchett, and perhaps as soon as Gamble became aware of it, he wrote to Canda asserting his rights, stating that they were trying to deprive him of his interest and control by having the agreement taken without his name; and pleading to be protected. Consequently it appears that before the

commencement of this suit by Gamble, and long before the institution of the suit by the Silver Peak Mines against Hanchett, Canda and the Silver Peak Mines were informed regarding the claims of Gamble, and before the contracts in the name of Hanchett were given, and regarding the facts which in law gave Gamble, Chadbourne, and Wright an interest in the contracts, including the last extension or agreement executed in the name of Hanchett.

The original promotion and expenditures were by Gamble, by reason of whose efforts Chadbourne, Wright, and Hanchett became interested. There was no pretense by Gamble that he had the money for developing the mines and building reduction plants or purchasing the property, but he made it plain from the beginning that he was seeking an option for the purpose of inducing men with capital to join him. Blair had long held the stock or mines, which had become hundreds of thousands of dollars in debt, and was anxious to sell or deal with some one who would make disposition of them.

Gamble was good enough to use as a promoter to interest men who might be induced to develop and purchase the property at a big price. It is shown by their correspondence that Gamble was given the option with the express understanding between him and Canda and Blair and the Silver Peak Mines that he would try to interest men with means. It was not expected that he would pay his own money for the mines. They were all aware that he was without means to buy the property. Under the well-settled rules of equity and just legal principles, after Chadbourne, Wright, and Hanchett had been induced to join and take an interest with Gamble in the option, Hanchett and Wright and the Silver Peak Mines could not by a surrender of the option without the consent of Gamble and Chadbourne shift it to the name of Hanchett so as to deprive them of their interest or defraud them of their right to share in the venture. Under these circumstances, Gamble ought not to be deprived of his interest because not possessed personally of means to buy the property, nor should any different rule of law be applied against him because he is poor, nor is the long and persistent opposition of his wealthy opponent any good reason for depriving him of his rights. He is as much entitled to comply with the terms of the agreement if he obtains any money required from others as if he possessed any amount needed for fulfilling the agreement and taking over the property.

Canda wrote in his letter to Hanchett of September 19, 1894: "I send this to Mr. Wright with a letter to Mr. Wasson, asking him to return to me, before he delivers these to you, the original papers which have been signed by the company, and which he holds. It does not seem right that contracts exe-



cuted by the company should be in two hands at the same time." And notwithstanding the contract in the name of Wright had not expired at the time Canda forwarded the one in the name of Hanchett, in the letter of January 8, 1895, Canda wrote to Gamble: "Mr. Wright also permitted his contract to expire, and after some weeks we entered into an agreement with Mr. Hanchett. The contract stands with him." Canda, who represented the corporation, and whose knowledge was notice to the Silver Peak Mines, had the Silver Peak Mines give an option to Gamble with the expectation that he would induce men with capital to develop or buy the mines; and after Gamble had induced Chadbourne and Wright to take an interest with him in the option, and after Wright and Chadbourne had authorized Hanchett to try to obtain in New York an extension or further option on the property one-third of the expense of Hanchett's trip there being paid by Gamble, the Silver Peak Mines, acting through Canda, and while fully cognizant that Gamble had secured the option originally and that Chadbourne had acquired an interest in it, gave to Wright in his name the extension for which Gamble, Chadbourne, and Wright as parties to the venture and Hanchett had been working; and before this contract in Wright's name had expired it was surrendered by him, and at the instigation of Wright and Hanchett a new contract or extension was given by the Silver Peak Mines in the name of Hanchett.

By Wright first taking a contract in his own name while he was a party to the venture with Gamble and Chadbourne, and surrendering that contract and having another one taken in the name of Hanchett, and the side agreement made between Wright and his father-in-law Hanchett, providing that Hanchett should hold four-fifths of the agreement for his own use and one-fifth as trustee for Wright, and that Hanchett at his own expense was to perform the acts required of Wright, it is evident that Wright and Hanchett, Canda, and the Silver Peak Mines were quite willing to eliminate Gamble and Chadbourne and their interest from the contract or option to meet the desires of Wright and Hanchett to secure for themselves the money to be made out of the option, without having to give Gamble and Chadbourne their proportions. Such practices should not in a court of equity deprive Gamble or Chadbourne of their rights in the venture. The moral sense of some men is so blunted that they believe they may deprive others of their rights by acquiring a contract, deed, or evidence of title or ownership in a different name, and it is the duty of a court of equity by its decision to correct such erroneous conclusions and give relief against the perpetrators of such fraudulent acts.

Canda and the Silver Peak Mines, in their eagerness to dispose of the property upon which such a large amount had been expended, complied without hesitation with the requests of the men associated with wealthy interests. Gamble having taken the original option, and having induced the men who might obtain the necessary means to join in the venture, had served a purpose, and, being considered no longer necessary to carry out the project, there was an attempt to cast him and Chadbourne aside in order that Wright and Hanchett might secure the benefits to which Gamble and Chadbourne, the pioneers in the project, might be entitled, notwithstanding the agreement of Wright and Chadbourne to carry Gamble's one-third interest and to furnish the money for expenses.

Whether these methods of high finance on the part of business men in New York and California be considered as "without the slightest warrant for a charge of fraud or double-dealing," and whether Wright and Canda and Hanchett and the Silver Peak Mines believed that by such practices they could eliminate Gamble and Chadbourne and any interest which they held or profits to which they might be entitled in the venture, equity and just legal principles will not sanction such methods.

As Hanchett was aware that Gamble was the original party and had taken Chadbourne and Wright in as parties to the venture, Wright and Hanchett could not justly deprive Gamble and Chadbourne without their consent of their interest by taking extensions or new contracts in the name of Wright or in the name of Hanchett. Although Canda and the Silver Peak Mines had full knowledge of these fiduciary relations, which under the law would prevent the rights of Gamble and Chadbourne from being cut off by shifting the contracts or taking them in the name of Wright or Hanchett, the rights of Gamble and Chadbourne would remain and be protected the same if Canda and the Silver Peak Mines had not been aware until given notice by or before suit that Gamble and Chadbourne held any interest in the venture.

As was said by the Supreme Court of the United States in *Root v. Railway Co.*, 105 U. S. 215, 26 L. Ed. 975: "Where a defendant has wrongfully intermeddled with property already impressed with a trust, he may be required as a trustee to account for it, as was done in the case of *People v. Houghtaling*, 7 Cal. 348, because trust property may be followed, wherever it can be traced, into whosoever possession it comes, except that of a bona fide purchaser without notice."

There is no pretense that after Gamble had acquired the original option, taken experts to examine and report upon the mines, made trips to New York to secure contracts and extensions, and endeavored to find men



to finance the promotion, and had arranged for Chadbourne to take a one-half interest with him, and later for Wright to take a one-third interest with him and Chadbourne. Gamble ever sold or parted with his remaining one-third interest, nor that Chadbourne ever parted with his one-third interest, unless they lost them through the legerdemain of Wright, Hanchett, and Canda in shifting to the name of Hanchett the option, not yet expired, in which Gamble and Chadbourne were part owners, or by taking a new agreement in the name of Hanchett.

When one in a fiduciary capacity seeks to have the right and property held jointly by him and others forfeited, he may generally believe that it belongs to him alone if he obtains the title in his own name. But the rights of the parties cannot be properly determined by the belief of Hanchett or Canda or the self-serving statements of Hanchett or any one else. The law is well settled that partners, persons interested in a joint adventure or as agents, must act in good faith for the protection of the rights of their associates, and equity will not permit one by trick or by obtaining an agreement or title in his own name to deprive others of their interest. It is legitimate for one of the parties to take a contract of conveyance in his own name for the benefit of the others, and with the intention of holding it for the rights of his associates; but when, as is evident in this case, an option is shifted to the name of one of the parties, or by one of the owners to another person who knows that it has been secured by or belongs to the real owners, for the purpose of depriving the others of their interests, it is more than constructive fraud, and is actual and intentional fraud, although the parties perpetrating it believe they can hold the entire right and that the others will no longer have any interest.

Canda, after having been put in position to negotiate with Wright and Hanchett through the efforts and expenditures of Gamble, and knowing that Gamble, Chadbourne, and Wright had become owners in the option, may have believed that by giving a new contract in the name of Wright, or by canceling or taking up the contract which had been given to Wright while he was a party in the venture with Gamble and Chadbourne, and executing a new contract in the name of Hanchett, any rights which Gamble or Chadbourne had in the option would be eliminated; but in the light of many decisions such is not the law, and his belief could not effect the rights of the parties. Under the usual presumption that an existing condition is presumed to continue until the contrary is shown, the interests acquired by Gamble, Chadbourne, and Wright would remain in them until something arose to indicate the contrary. As soon as Wright took an interest with Gamble and Chadbourne and be-

came a party to the venture, and when Hanchett acted for Wright and Chadbourne and at the expense of Chadbourne, Gamble, and Wright in securing an extension and new agreement, Wright and Hanchett became bound to act in good faith for the protection of Gamble and Chadbourne, and any agreement acquired by them, whether in their individual names or otherwise, giving an extension of the option, was for the benefit of the other parties in interest, or for Gamble and Chadbourne to the extent of their proportions.

The law gives these rights, and they do not depend upon any such considerations as some slight discrepancy in the incompetent and improperly admitted evidence regarding statements of Hanchett and Canda, in the nature of conclusions and self-serving, as to whether Gamble and Chadbourne had any interest in the contract executed in the name of Hanchett. The contract which Hanchett secured in his own name by collusion with Wright, before the expiration of the contract given in the name of Wright, was held by him in trust for them or in fraud of their rights. The rights of Gamble and Chadbourne ought not to be lost or controlled by any assertions or beliefs of Hanchett or Canda. And although Canda, Blair, and the Silver Peak Mines had notice of these fiduciary relations and of all the necessary facts, which showed that in law Gamble and Chadbourne held and continued to hold their interests, it is immaterial whether that corporation had such notice, for no more could be required of it than compliance with its agreement, which would be the same whether Hanchett alone or others were the real owners of the option.

In *Botsford v. Van Riper*, 33 Nev. 191, 110 Pac. 710, in the opinion by Justice Sweeney, concurred in by Chief Justice Norcross and a full court, it is said: "The law is well established that property purchased or acquired in connection with a joint adventure or profits realized from a joint adventure of the joint property of the parties interested, where one party holds title to the same, that such property is held in law to be the property of his associates, and the party holding the same is holding their proportionate share as trustee for them. 23 Cyc. pp. 455-459; *Hayden v. Eagleson*, 15 N. Y. St. Rep. 200; *Fueschsel v. Bellesheim*, 14 N. Y. St. Rep. 610; *Richardson v. McLean*, 80 Fed. 854, 26 C. C. A. 190; *Morris v. Wood* [Tenn. Ch. App.] 35 S. W. 1013; *Lyles v. Styles*, 15 Fed. Cas. 1143, No. 8,625; *Cunningham v. Davis* [Tenn. Ch. App.] 47 S. W. 140; *Matthews v. Kerfoot*, 64 Ill. App. 571; *Jones v. Davis*, 48 N. J. Eq. 493, 21 Atl. 1035; *Spier v. Hyde*, 92 App. Div. 467, 87 N. Y. Supp. 285; *Calkins v. Worth*, 215 Ill. 78, 74 N. E. 81; *Putnam v. Burrill*, 62 Me. 44; *McCutcheon v. Smith*, 173 Pa. 101, 33 Atl. 881; *Getty v. Deylin*, 54 N. Y. 403; *Church v. Odell*, 100 Minn. 98.



110 N. W. 346; Knapp v. Hanley, 108 Mo. App. 353, 83 S. W. 1005; Hancock v. Tharpe, 129 Ga. 812, 60 S. E. 168; Reilly v. Freeman, 1 App. Div. 560, 37 N. Y. Supp. 570; Marston v. Gould, 69 N. Y. 220; Humburg v. Lotz, 4 Cal. App. 438, 88 Pac. 510; Williams v. Love, 2 Head [Tenn.] 80, 73 Am. Dec. 191; King v. Wise, 43 Cal. 628. We further find that the law is well established that the relation between joint adventurers is fiduciary in its character, and the utmost good faith is required of the trustee, to whom the deal or property may be intrusted, and that such trustee will be held strictly to account to his coadventurers, and that he will not be permitted by reason of the possession of the property or profits, whichever the case may be, to enjoy an unfair advantage, or have any greater rights in the property by reason of the fact that he is in possession of the property or profits as trustee than his coadventurers are entitled to. The mere fact that he is intrusted with the rights of his coadventurers imposes upon him the sacred duty of guarding their rights equally with his own, and he is required to account strictly to his coadventurers, and, if he is recreant to his trust any rights they may be denied are recoverable. 23 Cyc. 455; Cole v. Bacon, 63 Cal. 571; Hambleton v. Rhind, 84 Md. 456, 36 Atl. 597, 40 L. R. A. 216; Seehorn v. Hall, 130 Mo. 257, 32 S. W. 648, 51 Am. St. Rep. 562; Scudder v. Budd, 52 N. J. Eq. 320, 26 Atl. 904; Getty v. Devlin, 54 N. Y. 403; Hollister v. Simonson, 18 App. Div. 73, 45 N. Y. Supp. 426; Reilly v. Freeman, 1 App. Div. 560, 37 N. Y. Supp. 570; Delmonico v. Roudebush [C. C.] 5 Fed. 165; Morris v. Wood [Tenn. Ch. App.] 35 S. W. 1013; Knapp v. Hanley, 108 Mo. App. 353, 83 S. W. 1005; O'Hara v. Harman, 14 App. Div. 167, 43 N. Y. Supp. 556; Calkins v. Worth, 215 Ill. 78, 74 N. E. 81; King v. Wise, 43 Cal. 628. Counsel for appellant seem to lay stress on the fact that by reason of the appellant putting up most of the costs in putting through this deal, and the fact that the respondents were financially embarrassed, that this is a further proof indicative of the weakness of or lack of the consideration of the agreement sought to be enforced. As before stated, the mere mutual promise of the parties furthering and rendering their aid, advices, and suggestions, if agreed to, was sufficient consideration to support the contract under joint adventure; but the law is well established that the furnishing of capital by the parties to a joint adventure is not necessary to the validity of the contract, so long as the original agreement on which the contract was entered into was carried out. Boqua v. Marshall, 88 Ark. 373, 114 S. W. 714; Van Tine v. Hillands [C. C.] 181 Fed. 124. The evidence discloses, and the findings of the lower court are to the effect, that the respondents performed their part of the contract entered into, and stood

ready at all times to further aid, as far as lay in their power, pursuant to their agreement, the consummation of the deal originally agreed upon. That they were not called upon to do so by appellant is not a sufficient reason in law or equity to invalidate their right to share in the profits of the deal, because the appellant saw fit to take the reins and do most or all of the work himself after the original agreement was made and entered into. The fact that it required large sums of money to carry the deal through, counsel for appellant seem to believe, vitiates the consideration of the agreement alleged, for the reason it is admitted respondents were practically penniless. We fail to see any merit in this contention."

The opinion of Justice Norcross in *Costello v. Scott*, 30 Nev. 48, 93 Pac. 1, 94 Pac. 222, is also worthy of consideration.

In the case of *Hunt v. Patchin* (C. C.) 35 Fed. 816, there were three owners as tenants in common of mining claims in Lincoln county, and by failure to do the annual work there was a forfeiture. The relocation by one of the owners was adjudged to be in trust for the others. In the course of the opinion, Judge Sawyer said: "I am entirely satisfied that these claims were relocated under the new names at the time for the benefit of all the original owners, or else they were located in bad faith by the defendant, after giving his associates, by his conduct, the right to believe, and when they did believe, that the location was for the benefit of all. Under this state of facts, I am clearly of the opinion that a trust arises in favor of complainant under the operation of law."

In *Lakin v. Mining Co.* (C. C.) 11 Sawy. 238, 25 Fed. 337, a case similar, but not exactly like this, it was held that: "Where one party wrongfully obtains the legal title to land, which in equity and good conscience belongs to another, whether he acts in good faith or otherwise, he will be charged in equity as a constructive trustee of the equitable owner. Can it be doubted, on the facts as they appear in the pleadings and evidence, that defendant got whatever title he has to the interest of complainant and Jones in the mines in question through a breach of faith and confidence? It seems to me not. He must therefore be charged as trustee of their interests."

In the case of *Royston v. Miller* (C. C.) 76 Fed. 50, involving the Kingston mines near Austin, Judge Hawley held that a co-owner who undertakes to do the work necessary to hold mining claims cannot acquire any interest in them against his co-owners because of the failure to do such work.

As said regarding joint adventures in 23 Cyc. 454, 455: "If no date is fixed by the contract for the termination of the adventure, or its termination is dependent upon the happening of a contingency, the agreement remains in force until the purpose is ac-



complished, or the happening of the contingency, and neither party can end it at will by notice or otherwise. \* \* \* Where property is purchased as a joint venture, it is not material in whose name the title is taken, as any one holding the title will be regarded as trustee for his associates. \* \* \* Persons united for a common purpose must be loyal to that purpose and each other. None may, without the consent of all the associates, appropriate to his own use the common property, or by any dealing therewith secure an unfair advantage over those interested with him. An advantage or profit secured by one inures to the benefit of all. \* \* \* Those aiding him in procuring an advantage may, in equity, be held equally liable with him for the fraud." See also, the note in 17 Ann. Cas., page 1022.

In *Trice v. Comstock*, before the Circuit Court of Appeals, 121 Fed. 622, 57 C. C. A. 648, 61 L. R. A. 176, it is said in the opinion: "For reasons of public policy, founded in a profound knowledge of the human intellect and of the motives that inspire the actions of men, the law peremptorily forbids every one who, in a fiduciary relation, has acquired information concerning or interest in the business or property of his correlate from using that knowledge or interest to prevent the latter from accomplishing the purpose of the relation. If one ignores or violates this prohibition, the law charges the interest or the property which he acquires in this way with a trust for the benefit of the other party to the relation, at the option of the latter, while it denies to the former all commission or compensation for his services. \* \* \* And, within the prohibition of this rule of law, every relation in which the duty of fidelity to each other is imposed upon the parties by the established rules of law is a relation of trust and confidence. The relation of trustee and cestui que trust, principal and agent, client and attorney, employer and employé, who through the employment gains either an interest in or a knowledge of the property or business of his master, are striking and familiar illustrations of the relation. From the agreement which underlies and conditions these fiduciary relations, the law both implies a contract and imposes a duty that the servant shall be faithful to his master, the attorney to his client, the agent to his principal, the trustee to his cestui que trust, that each shall work and act with an eye single to the interest of his correlate, and that no one of them shall use the interest or knowledge which he acquires through the relation so as to defeat or hinder the other party to it in accomplishing any of the purposes for which it was created. 2 Sugden on Vendors (8th Am. Ed.) 406-409; Mechem on Agency, pp. 455, 456; Tisdale v. Tisdale, 2 Sneed (Tenn.) 596, 608, 64 Am. Dec. 775; Ringo v. Binna, 10 Pet. 269, 280, 9 L. Ed. 420; McKinley v. Williams, 74 Fed. 94, 95,

20 C. C. A. 312, 313; *Lamb v. Evans* (1893) 1 Chan. Div. 218, 226, 236; *Connecticut Mutual Life Insurance Co. v. Smith*, 117 Mo. 261, 295, 22 S. W. 623, 38 Am. St. Rep. 656; *Van Epps v. Van Epps*, 9 Paige (N. Y.) 237, 241; 1 *Levin on Trusts*, 246, 180; *Davis v. Hamlin*, 108 Ill. 89, 49, 48 Am. Rep. 541; *Winn v. Dillon*, 27 Miss. 494, 497; *People v. Township Board*, 11 Mich. 222, 225; *Grumley v. Webb*, 44 Mo. 444, 454, 10 Am. Dec. 304; *Lockhart v. Rollins*, 2 Idaho (Hasb.) 540, 21 Pac. 413; *Eoff v. Irvine*, 108 Mo. 378, 383, 18 S. W. 907, 32 Am. St. Rep. 609; *Robb v. Green* (1895) 2 Q. B. 315, 317-320; *Louis v. Smellie* (1895) 73 Law Times (N. S.) 226, 228; *Gardner v. Ogden*, 22 N. Y. 327, 343, 350, 78 Am. Dec. 192."

If Wright had not become associated with Gamble and Chadbourne as a party to the venture and part owner in the option which Gamble had secured, and if Hanchett had not undertaken to act in confidential relation for the parties in securing the new contract or extension given to Wright, he would have been at liberty to have taken in his own name and for his exclusive benefit a new contract from the Silver Peak Mines if the option secured by Gamble and the agreement sent to Wright had expired, and a judgment against him under such a contract would have terminated all rights under it if the court had jurisdiction. But as Wright, under his agreement with Gamble and Chadbourne, had become a party to the venture with them and a part owner of the option secured by Gamble, and as Hanchett had undertaken to act for the others in securing the extension and new contract in the name of Wright, the one which he and Hanchett later secured in the name of Hanchett by having the one in the name of Wright surrendered before it had expired inured to the benefit of Gamble and Chadbourne to the extent of the proportions to which they were formerly entitled under their agreement with Wright, regardless of whether there was any intention by Wright or by Hanchett or Canda to defraud Gamble and Chadbourne of their rights, although such intention is shown, and regardless of whether by these practices Wright and Canda believed that they had cut off the rights of Gamble and Chadbourne by eliminating their names in the new agreement, and regardless of anything that Hanchett or Canda said or believed regarding Gamble having no further interest.

Even more unwarranted than basing the decision of this court on a judgment of the federal court, which appears to have been without jurisdiction, is the claim that Gamble had no interest in the contract executed in the name of Hanchett because Hanchett and Canda testified that Hanchett told Canda that Gamble had no interest in the contract. Such evidence was not even properly admitted, and should not have been given



any weight. It was not for Hanchett when, through selfish motives, seeking to deprive Gamble of his rights in options obtained from the Silver Peak Mines, to make the law for this court by declarations in his own favor. Back of these assertions the facts prevail over mere declarations of self-interest.

Although there may be a variance in the bare statement as a conclusion of Hanchett that Gamble had no interest and of Gamble that he had an interest, there is no dispute in regard to the controlling facts, which show that Gamble had, and that Hanchett, Canda, and all the parties interested knew that Gamble had, secured the option originally, and that by reason of his obtaining it and through his efforts and expenditures Chadbourne and Wright and Canda had become interested in the option, either as partners or as parties to a joint venture, to which the ordinary rules of partnership would apply, and under which each would be bound to act in good faith for the protection of the rights of the others. Under these conditions, any assertion of Canda that Gamble had no interest, whether made with the belief that he had none because Hanchett had so asserted, and any statement or acts of Hanchett or Canda in surrendering the option and executing the agreement for a new one in the name of Hanchett, whether done by either or both of them for the purpose of eliminating Gamble, could not deprive him of his right as a partner or party to the joint venture. Gamble was asserting and writing to Canda that Gamble had an interest in the final contract, and was pleading with Canda to protect him in that interest. There would be quite as much, if not more, reason for holding that Gamble had an interest in the agreement because he so asserted, as for holding that he had none because Hanchett so stated. If the declaration of Canda or Hanchett could curtail or control Gamble's rights, it should be remembered that, if there were any conflict between their declarations and that of Gamble, the determination of the lower court on such conflict should not be disturbed. 23 Cyc. 462, and Nevada cases.

There is no testimony by Hanchett, Canda, or any one else, nor any evidence of any act or fact, which in law would deprive Gamble of the one-third interest which he admittedly retained as the original party in securing the option, and there is no evidence indicating that Chadbourne ever parted with the interest conveyed to him by Gamble. Surrendering the contract in the name of Wright and the giving of a new one in the name of Hanchett, obtained by the collusion of Wright and Hanchett, without any authority from Gamble or Chadbourne, and before the expiration of the contract executed by the Silver Peak Mines to Wright, which was owned by Wright, Gamble, and Chadbourne, did not deprive Gamble and Chad-

bourne of their interest, but equity carried it into the contract obtained in the name of Hanchett.

A court of equity, in order to do justice, need not consider seriously the contention of appellant "that each of the various options set forth in the evidence constituted a separate, complete, and independent contract between the parties named therein and none others," nor the further contention that "no oral testimony could be admitted to contradict the written contract as to who were the parties to it and entitled to its benefits and privileges." The real rights of the parties could be extended equally well by an agreement stating that the time for performing the conditions in an existing or previously executed agreement were extended for a certain period or by executing a new contract in similar terms to run for that period. In the negotiations "extensions" were asked for before the old contracts expired, and new contracts were obtained as "extensions" and treated as such. Whether considered an extension or a new and independent contract, the time allowed for acquiring the property would be extended and the benefits resulting would be substantially the same. If after the lapse of one of the agreements a new one in similar terms with different dates had been given to a different party, who was not standing in a fiduciary relation or acting with one of the co-owners to defraud, it would belong to him exclusively; but when a new contract is obtained by one standing in a fiduciary relation, or for the purpose of defrauding real owners, it is immaterial whether it be considered a separate and independent contract or an extension, for it inures to the benefit of the equitable owners of the agreement anyway.

Appellants' contention that the option was for the entire property is correct. The contracts were and were intended to be assignable, and Gamble from the beginning, and the other parties who acquired an interest later, were at liberty to sell at will a part or all of their interests; but no party having less than the whole could compel the Silver Peak Mines to convey to him his proportion on the payment of his share of the expense, because the Silver Peak Mines had agreed to convey the whole property, and not any fractional part thereof, and could not be compelled to convey a part only when they had not agreed to convey less than the whole. This is consistent with the principle of law which allows one of the co-owners to recover the whole. As contended, the court cannot make a new agreement with conditions different from the one made by the parties.

As the agreement for the option carried the right to enter into possession, prospect the mines, and work the ore, it was to a certain extent in the nature of a lease or term ownership of real property, and the co-owners in



the contract were in effect tenants in common. Under the rule long recognized in this state, any one of them could bring an action in his own name for the benefit of himself and his co-owners to recover the whole property. *Sharon v. Davidson*, 4 Nev. 416; *Brown v. Warren*, 16 Nev. 228; *Nesbitt v. Delamar's Gold Mining Co.*, 24 Nev. 273, 52 Pac. 609, 53 Pac. 178, 77 Am. St. Rep. 807; *Union M. & M. Co. v. Dangberg (C. C.)* 81 Fed. 87; note, 7 Ann. Cas. 999. The law in allowing one tenant in common to bring an action to recover for the benefit of all does not deprive any one of his rights without his day in court. In an action by all or any of them against the Silver Peak Mines, the latter is not concerned regarding the particular part or the amount of the fractional interest held by Gamble, the original plaintiff, or the other parties to the option or contract. As soon as it appeared that any one of them had an interest in the contract, however small, he became entitled to demand and have possession and to exercise the option upon payment of the full amount and compliance with the terms of the agreement. Payment or performance of the conditions of the contract by any one of the parties ought to be satisfactory to the Silver Peak Mines, which should not complain if there was not compliance by Hanchett when it was refusing to allow compliance by Gamble. The particular portion the other parties might be entitled to in case of dispute would be determinable in an action to which they were parties, or would at least require interpleading by them.

Partnership property may stand or be acquired in the name of any partner. *Whitmore v. Shiverick*, 3 Nev. 288; *Hogle v. Lowe*, 12 Nev. 286; *Shanks v. Klein*, 104 U. S. 18, 26 L. Ed. 635; *Riddle v. Whitehill*, 135 U. S. 621, 10 Sup. Ct. 924, 34 L. Ed. 282; *Schlichter Jute Cordage Co. v. Mulqueen (C. C.)* 142 Fed. 587. Although the transactions by Gamble and his associates may not have constituted a partnership, they were in the nature of a joint adventure, or indicated ownership in common which should be controlled by the rules relating to partnership. *Botsford v. Van Riper*, 33 Nev. 196, 110 Pac. 705, and cases cited. 23 Cyc. 453. Gamble and Chadbourne continued to own their proportionate interest in the contract and extension in the name of Hanchett. Whether Wright continued to own a one-third interest for which he agreed with Gamble and Chadbourne, or whether he would own 20 per cent. under his agreement with Hanchett, or whether he could recover anything after entering into such a transaction with Hanchett, does not affect the right of recovery against the Silver Peak Mines. After the agreement was changed to the name of Hanchett with the intention of depriving Gamble and Chadbourne of their interest, Hanchett held as trustee for them. If this were not

so, the law would aid him in defrauding them.

Questions regarding division or accounting between Gamble and his co-owners are not property in this case as against the defendants-appellants, for they have no legal interest therein. *Nesbitt v. Delamar's M. Co.*, 24 Nev. 285, 52 Pac. 609, 53 Pac. 178, 77 Am. St. Rep. 807. Gamble ought not to be deprived of his rights by the defendants' refusal to let him in under the agreement, when they were informed through the knowledge of Canda, who represented John I. Blair and the Silver Peak Mines, of all the circumstances, which showed that Gamble had an interest in the agreement notwithstanding it had been changed to the name of Hanchett. Being denied the right to enter into the possession and explore the mines under the agreement to which he was a partner or part owner, and having brought suit in due time, Gamble ought not to be deprived of his rights by any action or delays of his joint owners, or by long litigation with the defendants.

As Gamble was seeking to obtain possession and the right to prospect the mines and to proceed under the option, and brought suit to obtain his rights before the option expired, and has been long delayed in that suit by the conduct of the defendants in taking the case to the federal courts, and in other ways, the fact that the Silver Peak Gold Mining Company, long after the commencement of this action, took possession of and began working the mines, is no reason why the plaintiffs should be deprived of their previously acquired rights. With the lis pendens on file, which under the statute operated as a notice and warning to all persons, and the notoriety given to the case through the public press, the company before attempting to purchase the property may have taken measures to protect itself from loss in any event. If not, it has no right in law or equity against the plaintiffs. Canda wrote to Wright in July, 1894, in regard to possible litigation over the mines, saying: "We will, of course, defend them until you are satisfied to pay for them." It may be assumed that the Silver Peak Gold Mining Company, in purchasing the property for \$500,000 and giving a mortgage to secure \$400,000 of the purchase price, has been able to reimburse itself and be part paid by working the ores if the mines are of great value, and that the Silver Peak Mines guaranteed the title to the Silver Peak Gold Mining Company, as Canda had offered to have done in his letter to Wright.

Gamble acted in due time and brought this action in the proper state district court before the expiration of the period for prospecting, developing, and purchasing the mines under the final agreement and extension in the name of Hanchett, and in which equitably Gamble, Chadbourne, and Wright were owners. No sufficient reason appears for holding that the plaintiffs should lose



their rights by reason of the long delay since the filing of the complaint in this action on March 2, 1896. After the institution of the suit the mines were long idle, except as worked by Hanchett without expense to the Silver Peak Mines; one of the attorneys for the Silver Peak Mines became the district judge, so that the case could not be tried before him, and the plaintiffs obtained a writ of mandamus from this court to compel him to transfer the action to another judicial district. *B. A. Gamble and F. S. Chadbourne v. First Judicial District Court*, 27 Nev. 233, 74 Pac. 530. There were demurrers, amendments, amended and supplemental complaints filed. The Silver Peak Mines had the case transferred to and held in the federal court, making it impossible for Gamble to proceed in the state court, until it finally became apparent by the decision of the Supreme Court of the United States in the *Wisner Case*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, that the action had been erroneously transferred to or held in the federal court, because it was without jurisdiction in a case started in a court of this state between citizens of different states when none of them were residents of this state so as to be favored by local prejudice, and the case was remanded to the state court. The delay while the case was in the federal court was caused by the defendant the Silver Peak Mines, and if there was any blame on the part of the plaintiffs for the delay prior to that time it was waived by the defendant when it moved to have the case transferred to the federal court and went to trial without moving to have it dismissed for lack of prosecution. It is not shown whether any undue delay before the removal of the case to the federal court or since it was remanded to the state court has been occasioned by the plaintiffs or the defendants, or the court, or circumstances which the parties could not avoid, or whether it has been for the convenience and by the acquiescence of all the parties, or whether it has been to the detriment of any one of them, or that the plaintiffs unduly delayed the progress of the case in any way which should cause a forfeiture of their rights. As the defendants could have proceeded at will, and are not shown to have been hindered by the plaintiffs from proceeding, the defendants ought not to complain of long delays which they did not try to avoid and in which they acquiesced, and a large part of which they directly and unnecessarily caused. After the trial in the district court, the Silver Peak Mines went again to the federal court to obtain a temporary order to restrain and delay proceedings, and besides moving for a new trial and appealing came to this court for a writ of prohibition. These proceedings were in addition to the three suits against Hanchett and the two of Blair against the Silver Peak Mines.

It does not appear that the plaintiffs are to blame for the period of five years intervening since the trial in the district court, nor that the defendants have been hindered at any time from pressing the case to a final determination as rapidly as they desired and action could be secured by the court. The decision was not rendered by the district court until February, 1909. Since that time there has been a motion for a new trial and appeal argued and determined, a petition for rehearing denied after reply thereto, with delays in preparing the thousands of type-written and printed pages in the statements on motion for a new trial and on appeal and in the briefs and transcript.

In the statement on motion for a new trial there was a specification that "the evidence shows that whatever rights the parties claimed had been forfeited by their own negligence, laches, and delay long prior to the commencement of the action." Apparently this was made on the theory that all rights of Gamble and Chadbourne had lapsed when they failed to exercise their option under the original contracts to Gamble, and that Gamble and Chadbourne had no interest in the agreement in the name of Hanchett. If any delay in pressing the action to trial could possibly be sufficient to cause a forfeiture of the substantial rights of the plaintiffs, by moving the case to the federal court, by going to trial in the state court, incurring the expense resulting therefrom, taking the chances on a favorable decision, and by appealing, without making any objection to delay by the respondents, and without showing that any unnecessary delay was caused by the respondents in which the appellants did not acquiesce, and by failing to show that the appellants were in any way injured by the delay, and by failing to take any exception or make any specification of error in regard to delay, objection was waived to any undue delay on the part of the plaintiffs in pressing the action to trial, if there was any such delay, which is not shown. As there is no specification of error in regard thereto, the question of undue delay is not in the case, except as it is injected and considered in the majority opinion as one of the grounds for reversal of the judgment.

The decisions of the Supreme Court of the United States relating to laches, cited to sustain the opinion of the majority of the court, have no application to the facts in this case, which bears no resemblance to those actions, in that there were good reasons for dismissal which do not appear in this suit. In the case of *Johnston v. Standard Mining Co.*, 148 U. S. 360, 13 Sup. Ct. 585, 37 L. Ed. 480, after more than four years two actions were brought, one of which was dismissed for lack of jurisdiction and the other because of defective summons, and the case which was finally brought and held to be too long delayed was not started for over five years



and was for the recovery of an interest in a mining claim.

In the case of *Willard v. Wood*, 164 U. S. 525, 17 Sup. Ct. 176, 41 L. Ed. 531, the process was issued and served nearly 16 years after the making of the agreement and over eight years after the filing of the bill. The delay in both of these cases was beyond our statute of limitations, which is five years for real estate and two years for mining claims. How very different are the circumstances in this case, where the action was brought promptly and long before the expiration of the time for the fulfillment of the agreement or the exercise of the option, and where, as far as appears, the delay was caused by the disqualification of the district judge and by the time taken by the courts to prepare, hear, consider, and determine the motions, removals, and proceedings involved, including the trial, motion for new trial, appeal, and applications for writs. If there had been any such delay in bringing this action as in those cases, it would, if properly asserted, constitute good ground for denying relief to the plaintiffs. The Supreme Court of the United States has not held, and it is safe to assume never will hold, that a litigant loses his right by laches when he is denied the rights under his option and commences action to recover before the option expires and the delay is caused by the conduct of the opposite party or by the court. If Gamble had not brought suit until after the option had expired, and it were shown by proper allegation and proof that the defendants, without notice of his claims or that he intended to bring suit, had been lulled into making large expenditures and had opened up valuable bodies of ore and greatly enhanced the value of the mines before he commenced suit, instead of devoting their activities for many years to resisting the plaintiffs, and he had then sought to enforce the agreement, there would have been good reason for holding that the suit was brought too late.

The federal courts, under a different practice and in a few isolated cases, may have arbitrarily dismissed actions when the facts stated in the bill or complaint indicated laches or unjustifiable delay on the part of the plaintiff; but no case is found where relief is denied to the plaintiff under circumstances in any wise similar to those existing in this action. It would be the better rule, and especially under our Code (section 4943, Rev. Laws), which provides that "there shall be in this state but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs," and that the answer should contain denials and "a statement of any new matter constituting a defense or counterclaim," that, in order to secure the benefit of the defense of laches, advantage of it must be taken by some appropriate pleading, or

at least not without some showing that the plaintiff is guilty of laches, and not until after he has had an opportunity to refute such defense unless it is shown conclusively by the allegations of his bill. The Supreme Court of Illinois has said that the reason for the rule requiring the defendant to set up the complainant's laches is to give him an opportunity to amend his bill by inserting allegations accounting for the delay. *Williams v. Rhodes*, 81 Ill. 571; *School Trustees v. Wright*, 12 Ill. 432; *Hall v. Fullerton*, 69 Ill. 451.

It has been held that laches is a defense which may be made by demurrer or answer; and some of the cases hold, following by analogy the rule in regard to the statute of limitations, when the facts alleged in the complaint do not show that the action is barred, that it should be made by answer. In *Zebley v. F. L. & T. Co.*, 139 N. Y. 468, 34 N. E. 1069, the court said: "Under our system of procedure, even where the complaint upon its face discloses a cause of action barred by the statute of limitations, the question cannot be raised by demurrer, but by answer, and certainly a party ought not to be permitted to avail himself of the objection that the demand is stale, in consequence of facts not constituting a statutory bar, on easier terms than he could avail himself of the statute of limitations. A court of equity undoubtedly may, under proper circumstances, in the exercise of discretion, decline to aid a party in the enforcement of a stale demand; but it is believed that such a result can seldom, if ever, be reached upon a demurrer to the bill, and without full examination of all the facts and circumstances of the case."

And in *Sage v. Culver*, 147 N. Y. 247, 41 N. E. 514, the court said: "It is also urged that since the complaint shows upon its face that the transactions stated were had many years ago, the plaintiffs are chargeable with such laches, and their cause of action, if any, is so stale that equity will decline to interfere. The answer to this point is that, if the claim or cause of action is barred by lapse of time, that defense must be presented by answer, and the mere fact that it is old is not an objection that can ordinarily be presented by demurrer."

In *Darst v. Murphy*, 119 Ill. 352, 9 N. E. 891, the court said: "We do not understand that laches in the complainant in asserting his equities is relied upon as a defense. It is not set up in the answer, as it should have been if relied upon as a defense, and is only incidentally, as it seems to us, referred to in the brief of plaintiff in error, and we refrain from further discussion of that question."

Other cases hold that, if laches is not apparent from the plaintiffs' allegations in the bill, the defense cannot be raised by demurrer, but must be set up by plea or answer.



*Snow v. Boston Blank Book Mfg. Co.*, 153 Mass. 456, 26 N. E. 1116; *Warren v. Providence Tool Co.*, 19 R. I. 360, 33 Atl. 876; *Scruggs v. Decatur Mineral, etc., Co.*, 86 Ala. 173, 5 South. 440.

Under the prior decisions of this court and of other courts the defense of laches, if not asserted in the lower court, will be considered waived and cannot be urged in the appellate court. *Humphreys v. Butler*, 51 Ark. 351, 11 S. W. 479; *Dawson v. Vickery*, 150 Ill. 398, 37 N. E. 910; *Walker v. Denison*, 86 Ill. 142.

In *Collins v. Insurance Co.*, 91 Tenn. 432, 19 S. W. 525, it was held that the defense that a suit in equity had been abandoned by delay in its prosecution was waived by answering to the merits. This is in harmony with the opinions of this court rendered prior to the decision in this case.

In *Iowa Mining Co. v. Bonanza Mining Co.*, 16 Nev. 64, a number of the earlier opinions of this court relating to waiver were reviewed with approval, and in the course of a carefully prepared decision it was said: "The question first presented for our consideration, then, is this: Conceding that appellant did not prosecute the action with reasonable diligence, as required by section 2326, Rev. Stats. U. S., and that the action ought to have been dismissed, if respondent had taken the proper steps therefor before demurring and answering, was it error to enter a judgment of dismissal under the circumstances detailed above? By raising issues of law or fact, or both, did respondent waive its right to move for a dismissal of the action? Respondent claimed the mining ground described in the complaint adversely to appellant, and under the statute above referred to it was required, 'within thirty days after filing its adverse claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment.' The same section also provided that 'a failure so to do shall be a waiver of his adverse claim.' \* \* \* In other words, answering as respondent did was a complete waiver of previous delay, if the same act would have been so, had no leave to move for a dismissal been granted. \* \* \* Demurring and answering were tantamount to saying to the court and appellant that it was ready and willing to try those issues, and that it did not desire to take advantage of the irregularity subsequently made the ground of a motion to dismiss. They were challenges to trial notwithstanding the delay. \* \* \* The failure to prosecute this action with reasonable diligence consisted entirely in an unwarrantable delay in obtaining service upon the respondent; and, being such, it was, we think, only an irregularity in the time of proceeding. If the statute provided that a summons should be served

within one month or one year after issuance and that a failure to make such service should be deemed a waiver of the claim set up in the complaint, service thereafter would be irregular, but nothing more; and if seasonably sought, relief could be had; but should a defendant appear generally and answer the allegations of the complaint, without any reservation of his right to move to dismiss, such action would undoubtedly be a waiver, and he would thereafter seek in vain to take advantage of the irregularity. Filing an answer under such circumstances would be taking a step in the cause, which from its nature would assume the propriety of trying instead of dismissing it, and would be a waiver of any objections to going to trial upon the issues raised. If, without service of summons, respondent had appeared and answered, denying all the material allegations of the complaint, and after so doing had moved to dismiss, there can be no doubt that the motion would have been too late. Its answer would have been a notice, voluntarily given, of a willingness to proceed with the trial. We are satisfied that the same result follows from demurring and answering, as was done in this case. The following authorities sustain the conclusion arrived at upon this branch of the case: *Pearson v. Rawlings*, 1 East, 77, wherein Lord Kenyon said: 'It is the universal practice of the court that where there has been an irregularity, if the party overlook it and take subsequent steps in the cause, he cannot afterwards revert back to the irregularity and object to it.' See, also, *D'Argent v. Vivant*, Id. 330; *Mayor, etc., v. Lyons*, 24 How. Prac. [N. Y.] 282; *Higley v. Lant et al.*, 3 Mich. 612; *Buel v. Dewey*, 22 How. Prac. [N. Y.] 344; *Warren v. Glynn*, 37 N. H. 343; *Dale v. Radcliffe*, 25 Barb. [N. Y.] 334; *Barber v. Hubbard*, 3 Code Rep. [N. Y.] 171; *Baker v. Curtis*, 7 How. Prac. [N. Y.] 480; *Belt v. Blackburn*, 28 Md. 240; *Crull et al. v. Keener*, 18 Ill. 66; *Pryce v. Security Ins. Co.*, 29 Wis. 274; *Upper Miss. Trans. Co. v. Whittaker*, 16 Wis. 222; 4 Waite's Prac. 629 et seq."

In that case there was a delay of about 3½ years in making service of the summons. It was properly held that by filing an answer the right to object to the delay was waived, notwithstanding the provisions of the United States statute requiring the plaintiff to commence proceedings within 30 days and to prosecute the same with reasonable diligence to final judgment, and that "a failure to do so shall be a waiver of his adverse claim." There is no statute, state or federal, with any such provision or penalty relating to the pending action. Penalties and forfeitures are not favored in law unless plainly prescribed, so that litigants or persons may be forewarned. Immeasurably stronger are the reasons for holding in this case, without any statute requiring diligence or prescribing a



penalty for delay, that if there was any undue delay occasioned by the plaintiffs, which is not shown, it was waived by the defendants by demurring, answering, making motions, going to trial, appealing, and by making long and persistent defense on the merits without alleging or moving to dismiss because of undue delay on the part of the plaintiffs, than holding that filing an answer waived an objection as in that case, in which the delay in making service of summons was nearly twice the period of limitation which bars an action for recovery of mines, and to its extent, more than any unnecessary delay shown to have been caused by Gamble, the plaintiff in this case, although the principle is the same.

The disastrous effects resulting to the plaintiffs from the delay, trouble, and expense of litigation, by holding that there was no waiver, and that any rights of the plaintiffs were lost by delay, are far greater here than they would have been if the court had held that there was no waiver and that any rights of the plaintiff were lost in that case. It appears that there has been no undue delay on the part of the plaintiffs since the trial in the district court, and if there was any undue delay on the part of the plaintiffs before the trial, which is not shown, it was waived.

In the opinion in *Botsford v. Van Riper*, 32 Nev. 225, 106 Pac. 442, it is stated: "We think, also, that the point raised by counsel for appellant that the respondents, by entering into numerous stipulations heretofore referred to, which reserved no right to object or except to the sufficiency of the record, waived the right to move to dismiss, or to strike upon any grounds that were not jurisdictional. *Henningsen v. Tonopah & Goldfield R. R. Co.*, 32 Nev. 51 [104 Pac. 223]; *Smith v. Wells Co.*, 29 Nev. 416 [91 Pac. 315]; *Bliss v. Grayson*, 24 Nev. 432 [56 Pac. 231]; *State ex rel. Curtis v. McCullough*, 3 Nev. 213."

Among the other cases in this state supporting the doctrine of waiver are *Killip v. Empire Mill Co.*, 2 Nev. 44; *White v. White*, 6 Nev. 25; *McWilliams v. Herschman*, 5 Nev. 265; *Lonkey v. Wells*, 16 Nev. 271; *Hammersmith v. Avery*, 18 Nev. 225, 2 Pac. 55; *Truckee Lodge v. Wood*, 14 Nev. 293.

The doctrine of waiver, as established by numerous decisions of this court, including the one in the *Botsford* Case, and supported by the learned members of this court who have written the majority opinion in this case, is a just one, and for the reasons indicated I feel in duty bound to emphatically dissent from any conclusion which may affect this action or stand as a precedent for the future, that cases may be determined and the rights of parties may be lost or judgment summarily rendered against them because of dilatoriness or long delays in the courts, or without any allegations or evidence to show

any undue delay by the parties long seeking to obtain their rights. If any person seeking to obtain his rights starts an action, and after delay for many years, or nearly a generation as in this case, resulting as far as shown from the fact that defendants are non-residents, making service more difficult, from the disqualification of the district judge of the court in which the action is brought, from the removal of the case to the federal court by the defendants, remanding and trial in the state court, motion for a new trial and other motions, appeal, proceedings in other courts brought by able lawyers apparently for the purpose of preventing or delaying the final determination on the merits of the case in the state court, may have the case arbitrarily dismissed in this court without warning, pleading, or showing, on the ground that he is guilty of laches, notwithstanding all his efforts to obtain a judgment establishing his rights, no litigant need feel assured that he can obtain protection from the courts when he may be strenuously opposed and delayed by the arts known to the legal craft and counsel employed by a wealthy defendant.

When an action is brought within the time prescribed by the statute of limitations, and service of process is made on the defendant within the time required by the act of the Legislature, and the defendant has thereby been brought into court and is as free to press the litigation to a final determination as the plaintiff, under many well-reasoned decisions the defendant acquiesces in and cannot take advantage of the delay. There is no case to be found in the books since equity courts were established to award justice to men, in which the circumstances are similar, or which approaches this one, in which a complainant has been denied relief by reason of laches or delay. In justice to the district court, as well as to the plaintiffs, any objection to delay in that court should have been made there, where the circumstances could be better known and determined, and before waived by answering or going to trial. When not shown by the complaint, the defendant should at least be required to allege in some appropriate way, and prove, that there was undue delay for which the plaintiff was blamable, and the latter should have an opportunity to meet and disprove the claim before equitable relief is denied by any court on that ground.

Although it is now conceded that the federal court properly remanded this action to the state court and that the federal court has no jurisdiction over Gamble and the plaintiffs in this case, to which they are parties, it is claimed that his rights, if any, under the option and questions regarding them, have been determined conclusively against him in later suits brought by the Silver Peak Mines against Hanchett in the federal court, to which the plaintiffs were not parties. In



support of this contention the United States circuit judge has temporarily enjoined the state district court of Washoe county from proceeding with this case. But with the admission and order made by the federal court in obedience to the decision of the highest tribunal in the Wisner Case, how can it be claimed that the rights of the plaintiffs here were finally adjudicated against them in an action in the federal court in which they were not parties, and in which no issue relating to their claims or their right to a decree allowing them to comply with the conditions of the agreement and to exercise the option it carried was presented or considered?

Notwithstanding the high regard we have for the opinions of the federal courts, and especially for the decisions of that eminent jurist who wrote the recent opinion for the Circuit Court of the United States in the proceeding brought there to enjoin the district court in the enforcement of the judgment in this case, this court should not feel constrained to follow any decision which is obviously erroneous and in conflict with the opinions of other federal courts, including the Supreme Court of the United States, when it would result in denial of justice to litigants in this court pertaining to matters over which the jurisdiction is exclusively in the courts of this state and not in the federal court. However, the opinion on the temporary injunction should be regarded as only temporary, and, as usual in granting a temporary injunction, made without full hearing and knowledge of all the facts or deliberative consideration, and intended to hold proceedings in abeyance until such time as a final hearing and fuller investigation and proper determination may be had. It need not be assumed that the distinguished judge of the intermediate federal court who granted the temporary injunction against the district court, which is under the supervision and deserving of the protection of this court, will finally order that the temporary injunction be made permanent, nor that the Supreme Court of the United States would fail to restrain the enforcement of such an injunction on the ground that the federal courts are without jurisdiction, because the jurisdiction over the parties is in the state courts, as heretofore held by the federal court.

There are important questions in the case which may not have been presented to or considered by the learned judge who reached these conclusions. If the federal court in a state in which neither of the parties were inhabitants had any jurisdiction in the case against Hanchett, and if he were the only necessary defendant party to determine the rights under the contract, and the plaintiffs in this action were claiming anything under Hanchett, the conclusion reached would undoubtedly be correct. If the judgment is good against Hanchett, it is good against every one claiming under him. But no one is claiming under Hanchett. The plaintiffs

are seeking a decree for their previously initiated rights under an agreement which was fraudulently shifted to the name of Hanchett. Under the decisions of the federal and state courts, Gamble and Chadbourne were part owners of the option or agreement in the name of Hanchett. The Silver Peak Mines had notice of the facts which in law made Gamble and Chadbourne such owners in the contract. Their rights in the contract were as complete as if they had been named as parties to it. They were as necessary parties in an action by the Silver Peak Mines to terminate the contract as if they had been named as parties to the contract, or as if Hanchett had assigned them an interest in the contract before the institution of the suit and they had given notice of the assignment. As the others were owners in the contract and were necessary parties in any suit to foreclose it, even Hanchett's interest was not terminated by the judgment against him if the federal court had jurisdiction. To finally hold that Gamble and Chadbourne are bound by the judgment against Hanchett would deprive them of their rights in derogation of the constitutional guaranties known to every lawyer, under which no person is to be deprived of property without due process of law or an opportunity to have his day in court. As the Silver Peak Mines had knowledge of the facts and notice of the claims of Gamble, Chadbourne, and Wright, if it desired to have them bound by the judgment in the action it brought against Hanchett alone, it should have made them parties to that suit and given them an opportunity to defend or to assert that the jurisdiction was in this action, which was the first to be instituted.

If under the act of Congress of March 3, 1887 (section 1, c. 373, 24 Stat. 552 [U. S. Comp. St. 1901, p. 508]), providing that actions between citizens of different states should not be brought in any other district than that whereof one of them was an inhabitant, and under the decision in the Wisner Case, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, the federal courts of New York and Nevada had any jurisdiction in the action brought by the Silver Peak Mines, a corporation organized under the laws of New York, against Hanchett, a resident of California, the rights and claims of Gamble, Chadbourne, and Wright could not be curtailed or affected in a suit to which they were not made parties. More than a year prior to the institution of that action the complaint had been filed by Gamble in this suit against Hanchett, Wright, Chadbourne, George Crocker, and the Silver Peak Mines, and the lis pendens filed, giving notice to the world that Gamble asked to be decreed the owner and entitled to the possession of a one-third interest in the contract, and that he was entitled with the defendants holding the contract, upon the fulfillment of the terms of the agreement with the Silver Peak Mines, to a



conveyance of the property mentioned in the agreement. This was in addition to the notice personally given by Gamble to the Silver Peak Mines that he, Chadbourne, and Wright were the owners of the agreement executed in the name of Hanchett.

The assumption that the rights of Gamble and others were cut off under the judgment against Hanchett is erroneous, not only because Gamble and the others known to have an interest in the option were not made parties to the suit and had no opportunity to defend, but because no issue as to whether Gamble, Chadbourne, and Wright had an interest in the option was presented or determined in the federal court, and because the federal court in this state had no jurisdiction in an action against him by a resident of New York or New Jersey when he was a resident of California and was not made a party and did not appear. If instead of having a right antagonistic to Hanchett, Gamble and Chadbourne held in privity to Hanchett, or had been made parties to the suit brought by the Silver Peak Mines against him, the judgment in that case would not affect the rights they assert here; not only because their claims were not in issue in the pleadings in that action, but because the jurisdiction would be in this case, for the reason that it was the first one commenced.

If the federal court ever had or has any jurisdiction over these plaintiffs, necessarily it is in this action and not in the one brought by the Silver Peak Mines against Hanchett, because this case was the first one brought, because it is the only one in which the plaintiffs were parties, because it is the only one in which the issues involved here were presented or determined, and because this case was removed to the federal court in due time if that court has jurisdiction. As against these salient reasons, none appear for holding that the rights of these plaintiffs were lost clandestinely in an action to which they were not made parties and in which their claims were not presented or considered.

It is elementary that parties in interest must be made parties before their rights can be adjudicated in an action by a party having knowledge of their interest and notice of their claims. The judgment is not binding on persons who were not made parties to the action, and not even on parties to the action if others who were not included were necessary parties. *Keller v. Blasdel*, 1 Nev. 491; *Hollingsworth v. Barbour*, 4 Pet. 406, 7 L. Ed. 922; *St. Clair v. Cox*, 106 U. S. 353, 1 Snp. Ct. 354, 27 L. Ed. 222; *Cockburn v. Thompson*, 16 Ves. 321, 326; *Adair v. New River Co.*, 11 Ves. 429; *Wendell v. Van Rensselaer*, 1 Johns. Ch. (N. Y.) 349; *Wiser v. Blachly*, 1 Johns. Ch. (N. Y.) 437; *Brasher v. Van Cortlandt*, 2 Johns. Ch. (N. Y.) 245, 247; *West v. Randall*, 2 Mason, 190, Fed. Cas. No. 17,424; *Hallett v. Hallett*, 2 Paige (N. Y.) 15; *Joy v. Wirtz*, 1 Wash. C. C. 517, Fed.

Cas. No. 7,554; *Elmendorf v. Taylor*, 10 Wheat. 152, 6 L. Ed. 289; *Crocker v. Higgins*, 7 Conn. 342; *Robinson v. Howe*, 35 Fla. 81, 17 South. 370; *Con. Water Co. v. San Diego*, 93 Fed. 851, 35 C. C. A. 631, and cases cited.

In his work on Judgments (volume 1, § 220), Mr. Black says: "A personal judgment rendered against a defendant without notice to him, or an appearance by him, is without jurisdiction and is utterly and entirely void."

In *Gregory v. Stetson*, 133 U. S. 579, 10 Sup. Ct. 422, 33 L. Ed. 792, the complainant sought to obtain a decree declaring a note to be held in trust and adjudging him to be the owner thereof. The Supreme Court of the United States held that in equity all persons materially interested either legally or beneficially in the subject-matter of the suit must be made parties, and that a court cannot adjudicate directly upon a person's right without having him either actually or constructively before it.

The doctrine of res judicata applies only to matters in issue. *Deal v. Schlomberg*, 20 Nev. 330, 22 Pac. 155; *House v. Lockwood*, 137 N. Y. 259, 33 N. E. 595; *Neilson v. Pennsylvania Coal & Oil Co.*, 78 Minn. 113, 80 N. W. 859.

In *Union M. & M. Co. v. Dangberg* (C. C.) 81 Fed. 74, it was held that: "Former decrees which are final and unreversed are res judicata of the subject-matter of the suits as then decided between the parties thereto and their successors in interest. \* \* \* They are not conclusive as to matters which might have been decided therein, but only as to such matters as were in fact decided within the issues raised by the pleadings."

In *Smith v. Town of Ontario* (C. C.) 4 Fed. 386, it was held that: "The former adjudication is an estoppel only as to the matters in issue or points in controversy, upon the determination of which the finding or verdict was rendered. The matter in issue or point in controversy is that ultimate fact or state of facts in dispute upon which the verdict or finding is predicated."

At section 614, volume 2, of Black on Judgments, it is said: "We have now seen that the estoppel of a judgment does not extend to such matters as come only incidentally or collaterally into the controversy, but only to points actually and necessarily adjudicated. In other words, that a former judgment is conclusive only as to the matters in issue or points in controversy, upon the determination of which the finding or verdict was rendered."

The judgments against Hanchett in actions in the federal courts regarding matters in dispute between him and the Silver Peak Mines, pertaining to whether he had complied with the agreement, or had failed to account for royalties, or had injured the property, cannot properly be held to be a determination of the issues involved in this case between



different parties and concerning different matters. The controlling questions here as to whether Gamble, Chadbourne, and Wright were parties to the joint venture, and as such entitled to an interest in the agreement and extension fraudulently obtained by Wright and Hanchett in the name of Hanchett for the purpose of eliminating Gamble and avoiding an agreement to carry his interest without expense, and with the knowledge and assistance of the Silver Peak Mines, and whether the Silver Peak Mines has wrongfully deprived Gamble of the opportunity of exercising his rights under the agreement and option, were not presented, considered, or determined in the actions brought in the federal courts, and consequently any judgment determining these issues in the state court is not in conflict with the judgments in the federal courts. If the same issues had been presented, tried, and determined in the case of the Silver Peak Mines against Hanchett which are involved in this action, their determination in that case would not have been binding upon the plaintiffs here, because there was no privity between the plaintiffs here and Hanchett, who was acting in hostility to them and was endeavoring to deprive and defraud them of their rights, and because the plaintiffs here would have been necessary parties in determining these issues, which are hostile to the claims of Hanchett.

It would be dangerous indeed to hold that in every or any case where an unfaithful partner, agent, or trustee takes a deed in his own name, or in the name of some one acting fraudulently with him, for property or rights paid for with the funds or belonging to his principal or others, the agent, partner, or trustee, or party acting with one of the partners to defraud the others, could by collusive or other suit against parties having notice of the claims of the real owner, but in which he is not a party and has no opportunity to present his claims or litigate his rights, secure a judgment which would be binding on the owner. Although Hanchett acted as agent for Chadbourne and Wright in securing the agreement or extension in the name of Wright which was for the benefit of Gamble, Chadbourne, and Wright, he did not act as agent when, in collusion with his son-in-law, Wright, he secured the agreement or extension in his own name for the purpose of depriving and defrauding Gamble and Chadbourne of their interest.

If plaintiffs here claimed anything by assignment or privity from Hanchett after a judgment against him in a court of competent jurisdiction, rendered when the necessary parties were before the court, they could be prevented from enforcing such claim. What plaintiffs demand is not from Hanchett, but an interest in an option or venture which belonged to them before Hanchett was connected in any way with the enterprise. Although they were interested in the contract, they

were not parties nor in privity under any judgment obtained against Hanchett in a suit on the contract. They were not grantees of Hanchett. Their rights did not come from him, and consequently they could not be bound by any judgment against him in an action to which they were not made parties. As there is no question regarding a silent partner or party to the venture, or undisclosed agent, and as Canda and the Silver Peak Mines had knowledge of the facts and participated in the transactions which in law gave the interests to Gamble, Chadbourne, and Wright, and were informed of Gamble's claims by letters and by the *lis pendens* filed by him in this action long before the commencement of the suit by the Silver Peak Mines against Hanchett, Gamble and Chadbourne were as necessary parties to the suit of the Silver Peak Mines against Hanchett as if they had been directly named as parties in the contract given in the name of Hanchett, or as if they had held assignments each of a one-third interest from Hanchett in that contract and had given notice to the Silver Peak Mines of such assignment.

If the opinion granting the temporary injunction were made final, inconsistency would result from the fact that after this action in which Gamble is plaintiff was taken into the federal court Judge Hawley refused to remand to the state court, but after the decision in the United States Supreme Court in the Wisner Case and by the United States Circuit Court of Appeals in the Cucciarre Case, 163 Fed. 38, 90 C. C. A. 220, Judge Farrington remanded this case to the state court because the federal court had no jurisdiction in an action in which Gamble was a party against the Silver Peak Mines. The result would follow that, after the federal court had held that it had no jurisdiction over Gamble in an action in which he was a party, another federal court would hold that it had jurisdiction over him because of an action against Hanchett in which Gamble was not a party. In other words, the federal court would hold jurisdiction over Gamble and Chadbourne in an action in which they are not parties, but cannot have jurisdiction over them in a previously instituted action in which they are parties, when if there is any jurisdiction in the federal court over Gamble and Chadbourne it would be in this action to which they are parties.

A further reason why a special writ should not be issued to restrain the state court is that, after it had been determined by the federal court on remanding the case that the state court had jurisdiction to proceed, there was no appeal from that order, and it ought to be treated as final, unless void because the jurisdiction is still in the federal court. *Mo. P. R. Co. v. Fitzgerald*, 160 U. S. 580, 16 Sup. Ct. 389, 40 L. Ed. 542. We have the decision standing as final of



one federal court that it has no jurisdiction over the controversy and parties in an action in which they are named and appear, and later of another federal court that the federal court which finally held that it is without jurisdiction did have jurisdiction and conclusively adjudicated the controversy and cut off the rights of the plaintiffs in an action in which they were not named, did not appear, and had no opportunity to assert their rights or defend.

If the act of Congress limits the jurisdiction of the federal court to the district in which one of the parties is an inhabitant, it may be questioned whether the foreclosure suit by Blair, a resident of New Jersey, against the Silver Peak Mines, a corporation, resident of New York, and Hanchett, a resident of California, ought not to have been brought in the state court instead of in the federal court. If under later decisions jurisdiction may be conferred by consent, this could be so only as to parties to the action. Gamble and the plaintiffs, not having been made parties to the foreclosure or other suits, all started after this action and the filing of its pendens, are not in any way bound by the judgments in them. Although the mortgage to Blair was prior to the options given to Gamble, Wright, and Hanchett, their right to take the property over under the option could not be terminated without making them parties to the foreclosure suit and giving them an opportunity to pay off or to redeem from the mortgage, or to plead that their option gave them the right to purchase the property clear of the mortgage.

If the agreement had provided only for an option, and payment or tender had not been made within the time allowed by its terms or by extension, any right to purchase the property by Gamble, Chadbourne, or parties to the agreement would have expired on the date specified. It is because the contract provided for taking possession, prospecting the mines, and working the ore so that the value of the property might be better determined before exercising the option that equity ought to enforce a compliance with these provisions and give the opportunity for prospecting and examination of the mines as provided in the contract before denying the right to exercise the option.

As Gamble, Chadbourne, and Wright agreed to enter into a joint venture regarding the exploration and purchase of the Silver Peak Mines, considered equitably it ought to make no difference whether the property, option, agreement, or purpose sought was acquired through a natural person or corporation or by assignment and delivery of all the stock of a corporation owning the property. As the first agreement was with Blair, the owner of the corporation that owned the property, later agreements secured in the name of any party to the venture, or of any

agent, should be regarded as for the benefit of all the parties to the contract. As the options were assignable and not personal, no good reason appears why the Silver Peak Mines, if willing to fulfill the agreements on its part, should object to having the conditions of the contract performed by Gamble or any of the other parties having an interest in it, or why their money or fulfillment of the agreement should not be as acceptable to the Silver Peak Mines as by any one else, except that it may have been believed that by joining with Wright and Hanchett they would be more likely to obtain and pay the desired money if Gamble were thrown out and they could avoid accounting to him for his share of any profits in the promotion or venture which had been brought about by him.

Notwithstanding notice and a knowledge of the facts which made the parties to the venture part owners in law and gave the right to any one of them as such to take over the whole property upon compliance with the contract, the Silver Peak Mines, since it adopted the course of ignoring Gamble after he had been used to interest parties who were believed to command more means for improving and making payment on the property, has persistently, in court and out, for 17 years, sought to prevent Gamble from securing any benefit under the contract. His right to enter and prospect the property and determine whether he would exercise the option, which if not denied and opposed by the Silver Peak Mines would have extended only to the date provided in the agreement for purchasing the property under the option, has been delayed during all these years by the action of the company in refusing to recognize his interest in the agreement, and equity should now give him the time and opportunity to which he is entitled under the agreement and which he has been prevented from exercising by the continued resistance of the Silver Peak Mines. No blame can attach to Gamble or the plaintiffs because Hanchett failed to comply with the conditions of the option, make payment, and take over the property while the Silver Peak Mines would not recognize Gamble's or plaintiffs' rights or allow them the privileges awarded by the contract or the opportunity to fulfill its conditions. The claim that Gamble is not entitled to a decree because the time for him to act under the agreement and exercise the option has expired should not avail the defendants, for it would allow them to take advantage of their own wrong in preventing Gamble from exercising his rights under the agreement.

Notwithstanding the performance of the contract fraudulently obtained in the name of Hanchett was not limited to him, as he was merely holding the legal title to it as trustee, and any of the owners in that contract were entitled to comply with its terms or have its requirements fulfilled so as to



protect their interests, the Silver Peak Mines, while at first allowing Hanchett the privileges conferred by the agreement, and later while suing him for lack of fulfillment of the agreement, were refusing to recognize Gamble or give him or parties he might induce to join him an opportunity to comply with the contract or to prospect, work, or purchase the property. If the Silver Peak Mines had not repudiated Gamble, he would have been required to perform the conditions of the agreement and pay for the property within the time allowed by its terms or lose all rights under the agreement. By repudiating Gamble and Chadbourne and resisting and delaying this suit since it was brought by Gamble, defendants have prevented him from having the opportunity to exercise the rights under the agreement. Defendants ought not to complain that he did not exercise his rights within the time stated in the agreement when they have made it impossible for him to so exercise them, and they should not be allowed to deprive him of his rights by their own conduct in preventing him from exercising them. They should not complain of the delay they have caused, and should be required to give the plaintiffs its equivalent in time for performing the conditions of the agreement, for otherwise they would be allowed to take advantage of their own breach of the contract and the delay they have caused. If a court of equity is to grant relief and require compliance with the terms of such a contract, necessarily it would be after breach by the defendants, and after the time fixed by its terms for compliance has expired, when the defendants have refused to allow compliance within that time.

As equity regards that as done which ought to be done, and will require that to be done which ought to be done, and as heretofore Gamble and the plaintiffs have been prevented by the Silver Peak Mines from entering into possession or prospecting the property or from exercising the right to buy it under the agreement in the name of Hanchett, the time for the performance of the agreement should be considered as extended, and the plaintiffs should be allowed a reasonable time, at least as much as the period intervening between the commencement of this suit and the termination of the option, or as much as the time intervening between the refusal of Canda and the Silver Peak Mines to longer acknowledge the rights of Gamble and the final date allowed by the extension, in which he or the plaintiffs may exercise the privileges which were to be allowed under the terms of the agreement.

Although Gamble did not bring this suit for over a year after Hanchett secured the contract in his own name, he brought it a long time before the statute of limitations had cut off his right to sue and before the extension secured in the name of Hanchett had expired, and before suit promptly endeavored

to obtain recognition of his rights when he became aware that Wright and Hanchett were endeavoring to defraud him of his interest by shifting the contract and option to the name of Hanchett after Wright and Chadbourne had agreed to carry Gamble's one-third proportion without expense. In the meantime, Hanchett was making large expenditures in prospecting and working the property and an effort to comply with the agreement, evidently expecting to reap all the benefits therefrom for himself and his son-in-law, Wright, and any delay of Gamble in bringing suit could not have prejudiced the defendants, because they were not spending money upon or attempting to work the property during any part of that period, and it was in the possession of Hanchett, claiming under the agreement in his name.

If it be admitted that Gamble, Chadbourne, and Wright were trying to promote a mining enterprise by the money of others, and that they spent only a limited amount of time and money in examining the property, having it experted, and going to and negotiating with men of means and influence, there is nothing illegal or wrong in such transactions; and as long as they complied with the terms of the contracts in which they were interested, and which had been obtained through them, in law, equity, and justice they should be as fully protected in their rights under the terms of the contracts as if they had expended or possessed millions of money. The defendants and the court cannot properly deny in advance their rights under the agreement because it may be believed that eventually they will not have or be able to obtain the means with which to purchase the property. The law is no respecter of persons, and should deny no right to the poor which it confers upon the wealthy suitor.

Our government, and every other modern, progressive government which has passed its barbaric or despotic state, is based on the principle that its citizens are equal before the law. The fourteenth amendment to the federal Constitution provides that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Section 1 of article 1 of the state Constitution declares that: "All men are, by nature free and equal and have certain inalienable rights among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and pursuing and obtaining safety and happiness." And section 8 of article 1 that "no person shall be deprived of life, liberty or property without due process of law." Judge Hawley, speaking for this court in *State v. Overton*, 16 Nev. 152, properly expounded the law when he said: "Courts cannot make any distinction in this respect, as to



the nature of the transaction or the character of the persons engaged in it. It is their bounden duty to declare the law. 'The law knows no person; it is not made for the individual man, but for men. As the dew of heaven falls, so it bears alike upon the just and unjust.' State v. Pierce, 8 Nev. 304. It smiles and frowns upon all alike. It makes no distinctions."

I especially dissent from the reasons and conclusions assigned for the majority opinion, which are based on matters which are not in the record, or which are contrary to the undisputed facts or the decisions of this court and well-settled principles of law:

Such as that it is not shown that the Silver Peak Mines had notice that Gamble was an owner in the option, when the written evidence is direct and undisputed in the transcript that the Silver Peak Mines, in addition to having knowledge of the facts, actually had such notice long before the commencement of any of the suits and before the execution of the contracts and extensions in the names of Wright and Hanchett, and had not only actual but constructive, and by statute conclusive, notice by the filing of the *lis pendens* in this case long before the suits against Hanchett were started by the Silver Peak Mines; and when this suit, the first one commenced, was notice, and a failure to give notice before suit would affect only costs,

Such as that "there is nothing in the evidence warranting any conclusion of fraud or bad faith upon the part of the Silver Peak Mines toward Gamble or his associates," and such as that it cannot be said to be established with any degree of certainty that Canda was informed of the alleged partnership relations entered into by Gamble, Chadbourne, and Wright as such partnership is sought to be established in this suit, when the evidence shows clearly, conclusively, and without dispute that Canda, as agent and secretary of the Silver Peak Mines, was fully aware of conditions which in law made them partners or parties to a joint venture, and that he and the Silver Peak Mines by shifting the agreement to the name of Hanchett and by resisting the claims of Gamble have long endeavored, and the Silver Peak Mines are still endeavoring, to deprive and defraud him of his rights.

Such as that there is no proof of fraud committed by the Silver Peak Mines, while under the undisputed facts, of which the Silver Peak Mines had knowledge, and under the decisions of this court applicable to those facts, it would be the sanctioning of fraud by the court if the Silver Peak Mines is allowed to succeed in the effort which it has made for so many years to prevent Gamble from exercising his rights under the agreement executed in the name of Hanchett.

Such as that Gamble and Chadbourne had no interest in the agreement or extension in

the name of Hanchett because Hanchett and Canda may have so stated, when their statements were hearsay and self-serving and not properly in the case, and could not overcome or affect the undisputed facts, which under the decisions of this court show that Gamble and Chadbourne and Wright did have an interest, and when Hanchett and Canda should not be allowed to make the finding and conclusion for this court in support of their own fraudulent acts, contrary to the undisputed evidence in the case, the finding of the district court, and these decisions.

Such as that Gamble, Chadbourne, and Wright were trying to promote a mining enterprise upon the money of others, when it was entirely legitimate for them to do so and the Silver Peak Mines was informed from the beginning of the transactions that such was their intention.

Such as "that Gamble, Chadbourne, and Wright either did not have the money themselves to put into the venture, or did not propose to risk any considerable amount thereof to carry out the options," when, regardless of whether they had much or little money, they were entitled to have the agreement complied with and to be allowed to enter into possession, prospect and examine the property, and determine its value before buying it or before the denial of their right to induce others to buy it.

Such as that "the Silver Peak Gold Mining Company, the present owner of the property, is shown to have purchased it upon the faith of certain judgments rendered by the Circuit Court and the Circuit Court of Appeals," when the suits in which these judgments were rendered could not in any way properly affect the rights of Gamble, Chadbourne, or Wright, because they were not parties to those judgments, and previous to the commencement of the suits in which they were rendered this action had been commenced and *lis pendens* filed, which gave notice to the world and under the statute warned the Silver Peak Gold Mining Company and its successors that they could not purchase the property except subject to the rights of the plaintiffs.

Or such as that Gamble lost his rights by delay, when there is no issue or evidence in the lower court, nor in this court, showing any undue delay on the part of Gamble in bringing or pressing the suit, and no exception or assignment of error in that regard, and no showing that the delay was not caused or acquiesced in by the defendants, or that it was not incidental to the courts and the strong defense and resistance made by the defendants and beyond the control of Gamble, or that the defendants were damaged by any delay which they had not caused or in which they had not acquiesced, and when it appears that if there was any undue delay objection to it was waived by the defendants going to trial without objection, and



when it is apparent that the plaintiffs are not responsible for the long delays in the district court since the trial and on the appeal, and that this action would not have been brought if the Silver Peak Mines had allowed Gamble the opportunity of exercising his rights under the agreement and option within the time provided by the final extension.

As said through Massey, C. J., in the opinion in *Schwartz v. Stock*, 26 Nev. 143, 65 Pac. 352: "This court will not indulge in presumptions against the regularity of the proceedings of the trial court. It has repeatedly held that all presumptions favor the regularity of the proceedings of that court, and that where error is alleged it must be affirmatively shown by the record before this court will reverse an order or judgment of the lower court. *Champion v. Sessions*, 2 Nev. 271; *Nosler v. Haynes*, 2 Nev. 53; *Lady Bryan Gold & Silver Min. Co. v. Lady Bryan Min. Co.*, 4 Nev. 414; *Mitchell v. Bromberger*, 2 Nev. 345 [90 Am. Dec. 550]; *Allison v. Hagan*, 12 Nev. 38; *Nesbitt v. Chisholm*, 16 Nev. 39; *Leete v. Sutherland*, 20 Nev. 71, 15 Pac. 472."

I concur in the order of this court reversing the judgment from which the appeal is taken; but believing that a rehearing ought to have been granted so that the views of all the different members of this court, as expressed in the opinions, and new questions suggested which ought to control in determining the controversy, might be considered and argued by opposing counsel, I dissent from the order denying the petition for rehearing. The learned district judge, now deceased, was right in his conclusion that the plaintiffs ought to recover; but the judgment being for the fractional interest claimed by the plaintiffs, instead of for the whole property, cannot be sustained upon an agreement which was entire and did not provide for an option on or the sale of any fractional interest. As the allegations of the complaint and the undisputed evidence show that the plaintiffs are entitled to enforce the contract as to the whole property, and the parties are before the court, it would be proper under the usual practice and the provision of the statute for the liberal allowance of amendments to permit the plaintiffs to amend the prayer of the complaint and ask for a decree declaring the agreement and extension in the name of Hanchett to be in trust for their benefit, awarding them the right to prospect and work the mines and exercise the option to purchase the whole property, and to have judgment accordingly if the proofs upon a new trial show the same state of facts as are now disclosed by the record; the plaintiffs to be allowed as much time for examining and prospecting the property and exercising the option to purchase as they would have had under the contract if the Silver

Peak Mines had not denied them these privileges, to which they were entitled as part owners under the contract, or at least as much time as intervened between the filing of the complaint in this action and the expiration of the last extension of the agreement in the name of Hanchett.

#### DEMING INV. CO. v. BRUNER OIL CO. et al.

(Supreme Court of Oklahoma. June 24, 1913.)

On petition for rehearing. Rehearing denied.

For former opinion, see 130 Pac. 1157.

PER CURIAM. The petition for rehearing, filed in this cause by the defendants in error in January, 1913, after due consideration by the court, is overruled and denied, and the former written opinion of this court filed on the ——— day of February, 1913, is herewith this day refiled, with an additional opinion, overruling the motion of the defendants in error for a rehearing, as the opinion in this cause.

Wherefore, it is ordered, adjudged, considered, and decreed by this court that this cause be reversed, with costs, and the same is hereby remanded to the district court in and for the county of Tulsa, state of Oklahoma, with directions to said district court of Tulsa county to enter a judgment and decree upon the pleadings, agreed statement of facts, and the record, in favor of plaintiff in error, and against the defendants in error, denying all the cross-relief asked and prayed for by the defendants in error, and said court is directed to enter a judgment and decree in favor of the plaintiff in error, decreeing that the defendants in error have no estate or interest or title of any kind or character in and to the land in controversy, or any part thereof, and quieting and decreeing the title in the plaintiff in error, and perpetually enjoining the defendants in error from asserting any claim to the premises and land adverse to the plaintiff in error, and tax the defendants in error with all the costs in this action. And the written opinion of the court heretofore rendered, and now refiled, is to be considered amended in accordance herewith.

(47 Mont. 574)

#### FARWELL v. FARWELL.

(Supreme Court of Montana. June 26, 1913.)

#### 1. DIVORCE (§ 150\*) — SPECIAL FINDINGS — REQUESTS.

Where defendant failed to request special findings of fact, as required by Rev. Codes, § 6766, she could not object on appeal that the trial court failed to make them as required by section 6763.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 499-508; Dec. Dig. § 150.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



## 2. DIVORCE (§ 45\*)—DEFENSES—"CONNIVANCE"—ADULTERY.

"Connivance" being defined by Rev. Codes, § 3659, as the corrupt consent of one party to the commission of the acts of the other, constituting ground for divorce, the fact that a husband, suspecting his wife of adultery, laid a trap for her and caught her *flagrante delicto*, thereby securing evidence to be used by him in a divorce proceeding, is not sufficient to charge him with connivance, so long as he was not in any manner responsible for her act.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 162-165; Dec. Dig. § 45.\*]

For other definitions, see Words and Phrases, vol. 2, p. 1435.]

## 3. DIVORCE (§ 184\*)—FINDINGS—REVIEW.

A finding by the trial court, in an action for divorce in favor of the husband on the wife's recriminatory charges of extreme cruelty and adultery, based on sharply conflicting evidence, would not be set aside on appeal.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 570-573; Dec. Dig. § 184.\*]

## 4. DIVORCE (§ 31\*)—"WILLFUL NEGLECT"—EVIDENCE.

"Willful neglect," as ground for divorce, being defined by Rev. Codes, § 3654, as the neglect of a husband to provide for his wife the common necessities of life, he having ability to do so, proof that a husband, earning \$200 a month for a short time before the commencement of this action, contributed toward the support of his wife and child \$45 or \$50 per month, then \$35 a month for a short time, and \$30 a month for the remainder of the period, together with certain other small sums paid to her, was insufficient to show willful neglect, where it was fairly inferable from the evidence that the amounts were either agreed on by the parties, or fixed by the court in a separate proceeding to compel the husband to furnish support.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 95, 96; Dec. Dig. § 31.\*]

For other definitions, see Words and Phrases, vol. 8, p. 7453.]

## 5. DIVORCE (§ 37\*)—GROUNDS—"WILLFUL DESERTION"—EVIDENCE.

Rev. Codes, § 3646, defining willful desertion as the voluntary separation of one of married parties from the other with intent to desert, implies that the separation is without justification; and hence, where plaintiff left his wife because she drank to excess, came home intoxicated, spent nights away from home, and he detected her visiting houses of prostitution, and she admitted to him that she was committing adultery, he was not guilty of a willful desertion.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 27, 107-134, 136-138; Dec. Dig. § 37.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7481-7482.]

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

Action by Frank E. Farwell against Mabel Farwell, for divorce. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, she appeals. Affirmed.

Edward F. O'Flynn and H. A. Tyvand, both of Butte, for appellant. Kremer, Sanders & Kremer and J. A. Poore, all of Butte, for respondent.

HOLLOWAY, J. This action was brought to obtain a decree of divorce on the ground of adultery, and for the custody of the minor child, the issue of the marriage. The defendant answered, denied the allegations of the complaint, and set forth affirmatively charges against the plaintiff of extreme cruelty, willful neglect, desertion, and adultery, and asked for a decree of separate maintenance and for the custody of the child. The affirmative allegations were put in issue by reply. The trial was had to the court without a jury, and resulted in a judgment in favor of the plaintiff. From that judgment, and from an order denying her a new trial, the defendant appealed.

[1] 1. There is complaint that the trial court failed to make special findings, as required by section 6763, Revised Codes, but this complaint is unavailing because appellant failed to request special findings, as required by section 6766, Revised Codes. *Gans & Klein Inv. Co. v. Sanford*, 35 Mont. 295, 88 Pac. 955. In *Bordeaux v. Bordeaux*, 43 Mont. 102, 115 Pac. 25, this court said: "A party failing to make such request cannot allege error because of the omission to obey the command of the statute. Every finding necessary to support the judgment will then be implied."

[2] 2. It is contended that the prayer of plaintiff's complaint should have been denied because of his connivance; but, aside from the fact that this defense is not pleaded, there is little, if any, evidence tending to support the charge. "Connivance" is defined by section 3659, Revised Codes, as "the corrupt consent of one party to the commission of the acts of the other, constituting the cause of divorce." It is little less than a crime generally, and may constitute a crime under certain circumstances. The idea that a husband willingly submits to his wife's illicit intercourse is so repulsive and so odious that the law wisely requires that the consent to adultery must be established by clear and convincing proof. 2 *Bishop on Marriage, Divorce & Separation*, § 223. The fact that the plaintiff, suspecting his wife of adultery, laid a trap and caught her *flagrante delicto*, thereby securing evidence to be used by him in his divorce proceeding, is not sufficient to charge him with connivance so long as he was not in any respect responsible for her adulterous act. 14 Cyc. 643.

In *Robbins v. Robbins*, 140 Mass. 531, 5 N. E. 839, 54 Am. Rep. 488, the court said: "There is a manifest distinction between the desire and intent of a husband that his wife, whom he believes to be chaste, should commit adultery, and his desire and intent to obtain evidence against his wife, whom he believes already to have committed adultery, and to persist in her adulterous practices whenever she has opportunity."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



In *Wilson v. Wilson*, 154 Mass. 194, 28 N. E. 167, 12 L. R. A. 524, 26 Am. St. Rep. 237, the rule is stated as follows: "Merely suffering in a single case a wife, whom he already suspects of having been guilty of adultery, to avail herself to the full extent of an opportunity to indulge her adulterous disposition, which she has arranged without his knowledge, does not constitute connivance on the part of the husband, even though he hopes he may obtain proof which will entitle him to a divorce, and purposely refrains from warning her for that reason. He may properly watch his wife, whom he suspects of adultery, in order to obtain proof of that fact. \* \* \* The law does not compel a husband to remain always bound to a wife whom he suspects, and it allows him, as it does other parties who think they are being wronged, reasonable scope in their efforts to discover whether the suspected party is or is not guilty, without themselves being adjudged guilty of conniving at the crime which they are seeking to detect." The same doctrine is announced by the Iowa court as follows: "It seems to be well settled that a husband may watch his wife, whom he suspects, and may even leave open the opportunities which he finds, so long as he does not make new ones, or invite the wrong." *Puth v. Zimbleman*, 99 Iowa, 641, 68 N. W. 895. See, also, *Lee v. Hand*, 114 Wis. 550, 90 N. W. 1073.

[3] 3. Upon the recriminatory charges of extreme cruelty and adultery the evidence is sharply conflicting, consisting in the main of the testimony of the wife in support, and of the husband in denial, of each of these charges. The trial court, having the advantage of seeing the witnesses upon the stand, hearing them testify, and observing their demeanor, resolved the questions raised upon these charges in favor of the plaintiff, and with that conclusion we are not justified in interfering. The appellant has the burden of showing that the evidence preponderates against the trial court's findings. *Reld v. Hennessy Merc. Co.*, 45 Mont. 383, 123 Pac. 397.

[4] 4. With respect to the charges of willful desertion and willful neglect, there is not any substantial conflict in the evidence. For a short time before the commencement of this action plaintiff contributed towards the support of his wife and eight year old son \$45 or \$50 per month; \$35 per month for a short time, and \$30 per month for the remainder of the period during which the parties lived apart. There is also evidence that he paid some doctor bills, and probably gave to his wife small sums in addition to the amounts named above. There is not any question of the husband's ability. At the time of the trial he was earning \$200 per month. In the December previous he was earning \$175 per month. What his earnings were during the remainder of the time does not appear. "Willful neglect" is defined in

section 3654, Revised Codes, as "the neglect of the husband to provide for his wife the common necessities of life, he having the ability to do so, or it is the failure to do so by reason of idleness, profligacy or dissipation." At first blush it would seem that the amounts paid by this plaintiff to his wife for the support of herself and child were altogether inadequate for that purpose, and out of proportion to his earnings; but it is fairly inferable from the evidence that the amounts were either agreed upon by the parties, or fixed by the court in a separate proceeding instituted for the purpose of compelling him to furnish support. In our consideration of this matter we are embarrassed somewhat by the meagerness of facts disclosed and by the attitude of counsel in proceeding upon assumptions not entirely warranted by the record. Apparently the cause was tried upon a well-defined theory, and it is our duty to review alleged errors in the light of that theory so far as it is disclosed. With respect to this particular charge of willful neglect we are simply unable to say from the record before us whether or not it was made out. It was relied upon as an affirmative defense, and the burden of proof was upon the defendant. The trial court determined the issue in favor of the plaintiff, and there is not sufficient in the record before us to warrant a reversal of that conclusion.

[5] With respect to the charge of willful desertion, the evidence discloses that while these parties were living in Lincoln, Neb., the plaintiff left his wife, notifying her that he did not intend to live with her longer, and came to Montana with the intention that he would not resume the marital relation with her; that the defendant soon afterwards followed him to this state, and that they resided in Butte, but continued to live separate and apart. Assuming that these facts make out a prima facie case of desertion in the absence of any explanation, the question then arises, Has plaintiff brought himself within any well-recognized exception to the general rule, which requires the husband to live with his wife and perform the duties imposed by the marital relation? In explanation of his conduct and as excusatory thereof, the plaintiff testified that while they were living together in Lincoln, Neb., his wife drank to excess, came home intoxicated, and spent the nights away from home, that he detected her visiting houses of bad repute, and that she admitted to him that she was committing adultery. The wife did not deny any of these matters, and the trial court's general finding is a finding that these statements are true. These facts constitute the plaintiff's excuse for his failure to live and cohabit with his wife, and that they are sufficient to warrant him in leaving her there is not any substantial disagreement in the authorities.

"Willful desertion" is defined by section



3646, Revised Codes, as "the voluntary separation of one of the married parties from the other with intent to desert." The definition implies that the separation is without justification. 14 Cyc. 611; *Luper v. Luper* (Or.) 96 Pac. 1099. In 1 Bishop on Marriage, Divorce & Separation, § 1742, a general rule is stated as follows: "Where there is no consent, acquiescence, or estoppel, as just explained, no ill arising out of the marriage, or ill conduct of one party to the other will so justify the breaking off of the cohabitation as to prevent its being desertion, except ill conduct of the sort and degree which the law has made foundation for divorce." In *Stocking v. Stocking*, 76 Minn. 292, 79 N. W. 172, 668, the Supreme Court of Minnesota criticises the rule announced by Bishop and says: "On principle, and what seems to be the weight of authority, we hold that the misconduct of one of the parties to the contract of marriage, which will so far justify the injured party in leaving that the separation will not constitute willful desertion, need not necessarily be such as to entitle the injured party to a divorce. It is sufficient if the party withdrawing from the cohabitation has reasonable grounds for believing, and does honestly believe, that, by reason of the actual misconduct of the other, it cannot be longer continued with health, safety, or self-respect." We are inclined to agree with the Minnesota court; but, even if the more rigid rule announced by Bishop should govern, the excuse offered by this plaintiff is sufficient. At the time he left his wife he could have maintained an action against her for divorce for her misconduct, and therefore the separation did not constitute desertion on his part.

There is not any reversible error in the record. The judgment and order are affirmed.

Affirmed.

BRANTLY, C. J., and SANNER, J., concur.

(47 Mont. 570)

STATE ex rel. DANAHER v. RAY, Register of State Lands (EDGERTON et al., Interveners).

(Supreme Court of Montana. June 26, 1913.)

MANDAMUS (§ 16\*)—GROUNDS—MANDAMUS INEFFECTUAL OR NOT BENEFICIAL.

Sess. Laws 1909, c. 147, by section 1 constitutes the Board of Land Commissioners, consisting of a Governor, Secretary of State and others, and vests in it exclusive control of all lands belonging to the state, and by section 2 designates the Governor as president of the board, by section 19 creates a contest board, making the Register the chief officer thereof, and by section 43 provides that whenever any purchaser of state lands has paid 15 per cent. of the purchase price and delivered to the Register the bond required by law, the Register shall make out and deliver a certificate of purchase. In mandamus against the Register it

appeared that at a sale by him the relatrix became the purchaser of the land and paid 15 per cent. of the price in cash, and that on demand the Register refused to issue a certificate. Held, that as the duty of issuing the certificate was the joint duty of the Register and the Governor, and as neither could act effectually without the other, and as there had been no demand upon the Governor, the issuance of the writ would have been ineffectual as against the Governor, who was not a party defendant, and would have given the relatrix no substantial benefit, and hence that it would be denied.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 48, 59, 60; Dec. Dig. § 16.\*]

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

Mandamus by the State of Montana, on the relation of Mary M. Danaher, against F. H. Ray, as Register of State Lands, John Edgerton and others, interveners. Judgment for defendant and for the interveners, and relatrix appeals. Affirmed.

Wight & Pew, of Helena, for appellant. John B. Clayberg, of San Francisco, Cal., and Walsh, Nolan & Scallon, of Helena, for respondents.

BRANTLY, C. J. Application to the district court of Lewis and Clark county for mandamus to compel the defendant, as Register of Lands for the State of Montana, to issue and deliver to the relatrix a certificate of sale of certain lands described in the affidavit, the same being a portion of the lands granted to the state by the federal government in aid of the common schools, under the act approved February 22, 1889, commonly called the "Enabling Act" (c. 180, 25 Stat. 676). It appears from the affidavit that at a sale held by the defendant on June 27, 1911, under authority conferred upon him by the statute (Session Laws 1909, c. 147), and in conformity with the requirements thereof, the relatrix became the purchaser of the lands in question at the price of \$10 per acre, paying to the defendant in cash 15 per cent. of the gross price. On July 11, 1911, the sale was approved by the Board of Land Commissioners. The relatrix thereupon became entitled to receive a certificate of purchase. On August 18, 1911, she made demand for the certificate, but the defendant refused to issue it, basing his refusal upon the ground that the sale had been made through inadvertence and mistake, in that one John Edgerton and other persons had acquired a prior interest in the lands, and that they were for this reason not subject to sale. After the defendant had filed his answer, Edgerton and his associates were permitted to intervene by answer and set up their alleged rights. Thereafter the controversy was submitted to the court upon an agreed statement of facts. The court held that the relatrix was not entitled to relief, and rendered judgment accordingly. The relatrix has appealed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 133 P.—61



The agreed statement sets forth in detail the facts upon which the parties base their respective claims. It appears therefrom that there was at the time the application was heard a contest pending before the State Contest Board; the issue being whether the relatrix has a prior right. Her counsel argue that, having become the purchaser at a sale which was in all respects regular, she is entitled to a certificate without regard to any supposed rights Edgerton and his associates may have acquired in the lands prior to her purchase. In other words, upon the completion of the sale and receipt of payment, it is insisted it became the ministerial duty of defendant to issue the certificate, leaving Edgerton and his associates to have determined, in an appropriate action, any rights which they may have. No appearance has been made in this court by the defendant. Counsel for the interveners argue that under the provisions of the statute, supra, the authorities of the state, consisting of the Board of Land Commissioners, the Contest Board, and other state officers, are under the statute clothed with exclusive jurisdiction to try all controversies involving disputed rights to land purchased from the state, and that there proceedings are not, directly or indirectly, subject to control by the courts prior to issuance of patent. Which of these contentions ought to be sustained we shall not undertake to determine. Upon the facts stated the action of the district court in denying the writ was correct.

Section 1 of the act constitutes the Board of Land Commissioners, consisting of the Governor, Superintendent of Public Instruction, Secretary of State, and Attorney General, and vests in it exclusive control and management of all lands belonging to the state. Section 2 designates the Governor as president of the board. Section 19 creates a contest board. The register is made the chief officer of this board. Section 43 provides: "Whenever any purchaser of the state lands has paid fifteen per cent. of the purchase price of the land bought, and delivered to the Register of State Lands the bond herein required to be given, the Register will make out a certificate of purchase and deliver the same to the purchaser, which certificate shall contain a description of the land purchased, the sum paid, the amount remaining due, the date at which each of the deferred payments falls due, and the amount of each, and shall be signed by the Governor, as the president of the State Board of Land Commissioners, and by the Register, and a record of the same shall be kept in a suitable book." It will be observed that while this section enjoins upon the Register the duty to issue the certificate, it must be signed by the Governor as president of the Board of Land Commissioners. If it does not bear the signature of this officer, it is not com-

plete, nor is it effective for any purpose. In effect, therefore, the duty enjoined by this section is made the joint duty of the Register and the Governor as president of the Board of Land Commissioners. Neither can act effectively without the other. Now it does not appear from the statement of facts, or otherwise from the record, that the certificate has been executed, ready for delivery by the Register. It is stipulated merely that on August 18, 1911, the relatrix made written demand upon the Register for the issuance and delivery of the certificate, and that he then and there refused to issue and deliver it. It does not appear that any demand was ever made upon the Governor. The issuance of the writ would therefore not have given the relatrix any effective relief, for though the register were compelled to perform the duty enjoined upon him so far as he might, the Governor would be under no compulsion to act with him, and would be free to refuse to add his signature. Thus the relatrix would have gained no substantial benefit.

The rule is well settled that when the writ will accomplish no beneficial result it will be denied. *Gay v. Torrance*, 145 Cal. 144, 78 Pac. 540; *Boyne v. Ryan*, 100 Cal. 265, 34 Pac. 707; *Lamar v. Wilkins*, 28 Ark. 34; *State v. Towers*, 71 Conn. 657, 42 Atl. 1083; *State v. Internal Imp. Fund et al.*, 20 Fla. 402; *Stacy v. Hammond*, 96 Ga. 125, 23 S. E. 77; *People v. Cook County*, 176 Ill. 576, 52 N. E. 834; *Com'rs of Taxing District v. Loague*, 129 U. S. 493, 9 Sup. Ct. 327, 32 L. Ed. 780; 26 Cyc. 167; *Bailey on Habeas Corpus*, 781. The same rule applies where the official act to be performed depends upon the act, approval, or co-operation of a third person not a party, even though it is clearly the duty of the defendant to act. *State v. Cavanac*, 30 La. Ann. 237; *High on Extraordinary Remedies* (3d Ed.), § 14.

Nothing said herein is to be understood as a recognition of the right of third parties to intervene in this character of proceeding. The question whether this right is accorded under the statute on this subject will be determined when a case is presented requiring such determination.

The judgment is affirmed.

Affirmed.

HOLLOWAY and SANNER, JJ., concur.

(47 Mont. 548)

STATE ex rel. WILSON v. WILLIS, City Clerk, et al.

(Supreme Court of Montana. June 20, 1913.)

1. MUNICIPAL CORPORATIONS (§ 149\*)—ELECTION OF ALDERMEN—NUMBER OF VOTES—"MAJORITY OF THE WHOLE NUMBER OF THE MEMBERS ELECTED"—"MAJORITY VOTE OF THE MEMBERS."

Rev. Codes, § 3263, provides that "a majority of the whole number of the members elected" to the city council is requisite to elect a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



municipal officer, and section 3236 provides that when any vacancy occurs in any elective municipal office the council by "a majority vote of the members" may fill it for the unexpired term. One of the 16 aldermen of defendant city resigned and at a meeting of the city council to fill the vacancy one R. received eight votes and another candidate received six, and, on the mayor's declaration that there had been no election for the reason that nine votes were necessary, R. obtained a peremptory mandamus that the city clerk issue to him a certificate of election. Thereafter another alderman died, and at a meeting of the city council relator received eight votes, including that of R., and another candidate 7, whereupon the mayor refused to recognize R.'s vote, announced a tie, and gave his vote for the other candidate. *Held*, on mandamus to compel the record of R.'s vote for relator and the issuance of a certificate of election to relator, that the term "a majority of the whole number of the members elected," as used in section 3263, meant a majority of the full membership of the council, which, the council consisting of 16, would be nine, but that section 3236 applied, and that "a majority of the members," as used therein, meant a majority of those constituting the actual membership of the body at the time, so that where there were but 15 members present the eight votes for R. and for relator were a majority.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 327-332; Dec. Dig. § 149.\*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4286-4292; vol. 8, p. 7712.]

## 2. MUNICIPAL CORPORATIONS (§ 84\*) — ALDERMEN — RIGHT TO VOTE — CERTIFICATE OF ELECTION.

The only office a certificate of election as alderman performs is to officially inform the council, but where they have elected a member by their own official action the issuance of a certificate to such member was not necessary to entitle him to vote at the election of another member, nor does his right to vote depend upon recognition by the mayor, but on whether he had been in fact elected, and where that was the fact, when he had taken the oath, there was no obstacle to his vote.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 189-191; Dec. Dig. § 84.\*]

## 3. MANDAMUS (§ 74\*)—ELECTION OF ALDERMEN—RECORD.

Under Rev. Codes, § 3248, requiring an alderman to take and subscribe to an oath in writing, and section 3253 requiring the city clerk to file and keep all city records and to record the proceedings of the council, the city clerk might be compelled by mandamus to record the vote of an alderman for relator as alderman and to file record of the written oath taken and subscribed by relator.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 150-157; Dec. Dig. § 74.\*]

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

Mandamus by the State of Montana, on the relation of John D. Wilson, against W. A. Willis, as city clerk of Butte, and the City of Butte. Peremptory writ awarded, and defendants appeal. Affirmed.

Alex Mackel, W. F. Davis, N. A. Rotering, and John A. Smith, all of Butte, for appellants. L. O. Evans, of Butte, W. B. Rodgers, of Anaconda, and John E. Corette, of Butte, for respondent.

SANNER, J. The city of Butte is composed of eight wards and its full complement of aldermen is 16. On April 16, 1913, John C. Smith, one of the aldermen for the third ward, resigned, and on April 23d a meeting of the city council was held for the purpose of filling the vacancy thus created. At this meeting one W. E. Rowan received the votes of eight aldermen and one James Walsh received the votes of six, whereupon the mayor declared that no election had resulted for the reason that the votes of nine aldermen were necessary. On May 1st Rowan tendered his oath of office to the city clerk for filing and demanded of the city clerk that he file said oath and issue a certificate of election, but the city clerk refused to do either, and thereupon Rowan instituted proceedings in mandamus, which culminated on May 7th in the issuance by the district court of Silver Bow county of a peremptory writ requiring the city clerk to file the oath and issue the certificate, and Rowan received his certificate on that day.

In the meantime, and on April 30th, John Hawke, an alderman of the fourth ward, died, and on May 5th a regular meeting of the city council was held at which all the living aldermen of the city (including said Rowan) were present, together with the mayor. The matter of filling the vacancy caused by the death of Alderman Hawke was taken up, and the respondent Wilson and one John C. Driscoll were nominated, and it is alleged in the petition that Wilson received the votes of eight aldermen (including Rowan), and Driscoll received the votes of seven, whereupon the mayor, refusing to recognize the right of Rowan to vote, announced a tie vote of seven to seven and cast his own vote for Driscoll. It is further alleged in the petition that at the time of said election, and before the vote was recorded, said Rowan demanded that his vote be recorded for Wilson, but this the city clerk refused to do. On May 14th Wilson tendered his oath of office to the city clerk for filing and demanded that the city clerk file the same and issue a certificate of election, which the city clerk refused to do. On May 15th Wilson commenced this proceeding to compel the city clerk by judicial mandamus to record Rowan's vote for Wilson in the minutes of May 5, 1913, to file the oath of office of Wilson as an alderman of the fourth ward and to issue to Wilson a certificate of election. An alternative writ was issued, and, after a motion to quash had been filed by the city clerk and denied by the court, answer was made and a reply filed. Upon the issues thus framed the cause was heard, and upon the testimony taken the only issues of fact, viz., whether Rowan had voted for Wilson at the meeting of May 5th and whether he had demanded that his vote be so recorded, were found for the relator Wilson. Judgment resulted awarding a peremp-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



tory writ commanding the clerk to record Rowan's vote for plaintiff and to file Wilson's oath of office. This appeal is from that judgment.

1. There is nothing before us upon which the correctness of the finding that Rowan voted for Wilson and demanded that his vote be so recorded can be assailed.

[1, 2] The question then is whether he was a member of the council at the time. The appellant contends in the negative, asserting that under section 3263, Revised Codes, the votes of nine members were necessary to elect Rowan, which confessedly he did not have. Section 3263 forms part of a chapter of the political Code especially devoted to the legislative powers of cities. It was brought forward from the Political Code of 1895, where it appeared as section 4803, and its language is as follows: "The ayes and noes must be called and recorded on the final passage of any ordinance, by-law, or resolution, or making any contract, and the voting on the election or appointment of any officer must be *viva voce*, and a majority of the whole number of the members elected is requisite to appoint or elect an officer, and such vote must be recorded." If the selection, by the council, of an alderman to fill a vacancy existing in its membership is within the purview of this section, then there cannot be the slightest doubt that the contention of appellant must be upheld, for nothing can be clearer than that the phrase "a majority of the whole number of the members elected" means a majority of the entire number necessary to constitute the full membership of the council, and this, in the case of Butte, would be nine. *Wood v. Gordon*, 58 W. Va. 321, 52 S. E. 261; *Pollasky v. Schmid*, 128 Mich. 699, 87 N. W. 1030, 55 L. R. A. 614, 92 Am. St. Rep. 560; *Pimental v. San Francisco*, 21 Cal. 351.

But there are excellent reasons for the belief that section 3263 is not the provision to be applied to the case of an election by the council to fill vacancies in its own body caused by resignation or death. In article 2, c. 3, tit. 3, pt. 4, of the Political Code, which is devoted to the general subject of municipal officers and elections, we find section 3236: "When any vacancy occurs in any elective office, the council, by a majority vote of the members, may fill the same for the unexpired term, and until the qualification of the successor. A vacancy in the office of alderman must be filled from the ward in which the vacancy exists, but if the council shall fail to fill such vacancy before the time for the next election the qualified electors of such city or ward may nominate and elect a successor to such office. The council, upon written charges, to be entered upon their journal, after notice to the party and after trial by the council, by vote of two-thirds of all the members elect, may remove any officer." This section was enacted in 1903 and,

being the later legislative utterance upon the subject, must control if any substantial conflict exists between its provisions and those of section 3263. It is to be observed that by section 3236 "a majority vote of the members" is required to fill a vacancy, whereas the "vote of two-thirds of all the members elect" is required to remove from office. Both of these phrases are designed as bases upon which to determine the sufficiency of the vote, and it must be presumed that in the enactment of this statute the Legislature had in mind a distinction as real as the language, under settled construction, expresses. No case called to our attention or revealed by our own researches, nor any analysis of the language independent of authority, suggests that the phrase "a majority of the members" could mean more than a majority of those constituting the actual membership of the body at the time, so that, if the full membership is 16 but at a given time has been in fact reduced by the resignation of one, there are but 15 members. *State v. Orr*, 61 Ohio St. 384, 56 N. E. 14; *People ex rel. Funk v. Wright*, 30 Colo. 439, 71 Pac. 365; *Board of Commissioners v. Wachovia L. & T. Co.*, 143 N. C. 110, 55 S. E. 442. Hence, as long as there is a quorum present, a majority of 15, or 8, will elect to fill a vacancy. *Nalle v. City of Austin*, 41 Tex. Civ. App. 423, 93 S. W. 141; *People ex rel. Funk v. Wright*, *supra*. We are not called upon to determine whether a majority of a bare quorum will suffice, as suggested by the respondent, nor what might be the situation if 10 of the aldermen were killed at one time, as suggested by the appellant; happily neither situation is presented, and we confine ourselves to a determination of the case as made by the record.

2. It is next contended that, even if Rowan was in fact elected as alderman prior to the meeting of May 5th, still no certificate of election had been issued to him, no recognition had been accorded him by the mayor, and no final decision had been rendered as to his status by the court in which the matter was pending, and therefore he was not entitled to vote. The only office a certificate of election could have performed was to officially inform the council of the election of Mr. Rowan; but they required no such information. Having elected Mr. Rowan by their own official action, they had official cognizance of it and the certificate was not necessary. Neither did the right of Rowan to participate in the meeting of May 5th depend upon recognition by the mayor or the decision of the district court. It depended upon whether he had been in fact chosen by the council and whether he had taken and subscribed the constitutional oath; both conditions having been met, there was no legal obstacle to the exercise by him, on May 5th, of all rights and privileges of the office. Since Rowan was properly present and par-



icipating in the meeting of May 5th, and since he then voted and demanded that his vote be recorded for the respondent Wilson, it follows that Wilson had 8 votes. By the death of Hawke, the actual membership of the council at the time was 15, and 8 was sufficient. Wilson was therefore duly elected alderman and is entitled to be seated as such.

[3] 3. Then, if this is so, appellant argues that a reversal of the case should follow because no right of Wilson's was invaded by the omissions complained of, and because the statute does not require the clerk to file the oath. We do not appreciate the argument. Doubtless the present form of action was employed primarily to ascertain whether Wilson had been elected; but, having been elected, he was required not merely to take, but to subscribe, the constitutional oath (Rev. Codes, § 3248). This means that the oath must be in writing, and it cannot be supposed that, having subscribed the written oath, the officer should then throw it away or carry it about upon his person. Clearly the oath, when taken and subscribed, was intended to become a record of the city. Again, the vote of Rowan for Wilson was part of the proceedings of the council at the meeting of May 5th and it constituted evidence of Wilson's right to the office, which, together with the vote of the other members, it was necessary should be recorded fully and accurately. By section 3253, Revised Codes, it is made the duty of the clerk to file and keep all records, books, and papers belonging to the city, and also to record the proceedings of the council. We see no reason why he should not be compelled by mandate to perform either duty when he has failed therein.

The judgment appealed from is affirmed. Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

(47 Mont. 459)

O'ROURKE v. GRAND OPERA HOUSE CO.  
(Supreme Court of Montana. June 7, 1913.)

1. APPEAL AND ERROR (§ 867\*)—QUESTIONS REVIEWABLE—SUFFICIENCY OF COMPLAINT.

Where the sufficiency of the complaint was not challenged during the trial by objection to evidence or otherwise, there was no ruling during the trial on the sufficiency of the complaint which can be regarded as error of law occurring during the trial within Rev. Codes, § 6794, and the question of the sufficiency of the complaint can be examined only on appeal from the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476-3486; Dec. Dig. § 867.\*]

2. ACCOUNT STATED (§ 18\*)—COMPLAINT—SUFFICIENCY.

A complaint which alleges that between designated dates plaintiff paid for the use of defendant, a corporation, various sums of mon-

ey aggregating a specified sum, and that at a meeting of the board of directors the corporation approved the payments, and allowed them as a valid debt against it in favor of plaintiff, alleges a cause of action on an account stated.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 85-90; Dec. Dig. § 18.\*]

3. CORPORATIONS (§ 298\*)—SPECIAL MEETINGS OF BOARD OF DIRECTORS—NOTICE.

Where a corporation organized under the statute in force prior to Civ. Code 1895, section 449 (Rev. Codes, § 3848) of which requires written notice of special meetings of the board of directors, did not enact by-laws, but adopted the custom of holding special meetings on informal notice, a special meeting called at the instance of the president on verbal notice to all the directors was valid, all the directors attending and no one objecting to the holding of the meeting.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1292-1317, 1319; Dec. Dig. § 298.\*]

4. CORPORATIONS (§ 298\*)—SPECIAL MEETINGS OF BOARD OF DIRECTORS—NOTICE.

Where all the directors of a corporation attended a special meeting and participated therein without objection, the statute prescribing written notice of special meetings did not invalidate the meeting.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1292-1317, 1319; Dec. Dig. § 298.\*]

5. CORPORATIONS (§ 298\*)—OFFICERS—STOCK-HOLDERS.

Though it be conceded that under Rev. Codes, § 3833, one to be a director of a corporation must be a stockholder, and that a sale of his stock ipso facto vacates the office, the office is not vacated until a sale is actually completed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1258-1262; Dec. Dig. § 293.\*]

6. CORPORATIONS (§ 513\*)—PLEADING—CONCLUSIVENESS OF ALLEGATIONS—ESTOPPEL.

A corporation which, when sued on an account stated for money expended by plaintiff for its use, alleged in its answer that between designated dates plaintiff was president of the corporation, could not urge that plaintiff's connection with the corporation was not legitimate.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2017-2027, 2031-2034, 2036-2045; Dec. Dig. § 513.\*]

7. CORPORATIONS (§ 309\*)—TRANSACTIONS WITH OFFICERS—VALIDITY.

A director of a corporation who presents a claim against it is disqualified from voting to approve it; but, where he takes no part in the proceedings resulting in its approval by a vote of the other directors constituting a quorum, the approval is binding on the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1366-1373; Dec. Dig. § 309.\*]

8. CORPORATIONS (§ 316\*)—TRANSACTIONS BY OFFICERS.

The officers of a corporation may lend money to it for legal purposes and receive security therefor, and enforce their claims for repayment, provided they act in good faith, and do not obtain an advantage to the detriment of other stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1401, 1402, 1404-1406, 1408, 1409, 1412-1414; Dec. Dig. § 316.\*]

9. CORPORATIONS (§ 545\*)—CLAIMS OF OFFICERS—PREFERENCES—RIGHT OF CORPORATION.

That a corporation is insolvent does not affect the right of a creditor who is an officer to reduce his claim to judgment, and the corpora-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.



tion may not defend on the ground that the judgment will result in a preference.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2170-2175; Dec. Dig. § 545.\*]

**10. WITNESSES (§ 255\*)—TESTIMONY OF WITNESSES ON FORMER TRIAL.**

Under Rev. Codes, § 8020, authorizing a witness to refresh his recollection by anything written by himself, a stenographer reporting the testimony on the former trial of a case and making a transcript thereof may rehearse the testimony on the second trial of a deceased witness either by using the transcript as a memorandum to refresh his memory or in case he has no independent recollection to testify from the transcript which he shows is an accurate translation of the testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 874-890; Dec. Dig. § 255.\*]

**11. APPEAL AND ERROR (§ 1048\*)—HARMLESS ERROR—ERRORS NOT AFFECTING RESULT.**

Where, in an action tried by the court without a jury, there was ample competent evidence to sustain the findings of the court, the error in permitting a witness to testify from a writing made by him without showing that he had no independent recollection was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.\*]

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

Action by John O'Rourke, prosecuted after his death by Mary E. O'Rourke, executrix, against the Grand Opera House Company. From an order denying a new trial, defendant appeals. Affirmed.

Charles O'Donnell, James E. Murray, and Alex Mackel, all of Butte, for appellant. L. O. Evans and John E. Coretta, both of Butte, for respondent.

BRANTLY, C. J. This action was brought by John O'Rourke to recover of the defendant corporation on two counts, the first upon a promissory note executed by the defendant to O'Rourke, and the second upon an account stated for money expended by him for the use and benefit of the defendant. Subsequently, upon a suggestion of the death of O'Rourke by counsel for defendant, Mary E. O'Rourke, executrix of his will, was substituted as plaintiff. In its original answer defendant admitted its liability for the amount of the promissory note. Judgment was thereupon entered for the plaintiff upon the first count, and the action proceeded upon issues presented by an amended answer to the second count. The complaint alleges that between the 7th day of February, 1895, and the 15th day of October, 1896, the plaintiff paid for the use of the defendant various sums of money aggregating \$585, and that at a meeting of the board of trustees (directors) of the defendant held on the latter date the defendant approved the payments and settled, and allowed them as a valid debt against it in favor of O'Rourke. The answer denies generally all the allegations of the complaint, except the corporate capacity of the defendant. It then alleges affirmatively

that from January 4, 1895, until and including January 4, 1897, O'Rourke was the president of the defendant, and that on February 1, 1895, and ever since that time the defendant has been, and now is, insolvent and unable to pay its debts. The reply denies that it is insolvent. The court, sitting without a jury, found the issues for the plaintiff, and ordered judgment entered accordingly. The cause is before this court upon an appeal from the order denying defendant's motion for a new trial; its appeal from the judgment having heretofore been dismissed.

[1, 2] 1. Counsel for defendant have devoted a considerable portion of their brief to a discussion of the question whether the complaint states facts sufficient to constitute a cause of action. This question cannot be agitated on this appeal. The sufficiency of the pleading was not challenged during the trial by objection to the introduction of evidence or otherwise, on the ground of a lack of material allegation therein; therefore there was no ruling during the trial with reference to its sufficiency which can be regarded as an "error of law occurring during the trial," within the meaning of section 6794, Revised Codes, designating the grounds upon which a motion for a new trial may be made. When such is the condition, the question of the sufficiency of the complaint can be examined only on appeal from the judgment. *Charles Schatzlein Paint Co. v. Passmore*, 26 Mont. 500, 68 Pac. 1113; *Campbell v. Great Falls*, 27 Mont. 37, 69 Pac. 114. We may remark, however, that while the pleading is not a model it alleges a cause of action upon an account stated.

2. It is argued that the evidence is insufficient to show defendant's liability, for the reason (1) that it appears that, when the resolution was adopted by the board of directors approving O'Rourke's account, the board was not regularly assembled; (2) that it appears that O'Rourke was in collusion with the other directors after he had sold and disposed of all his stock in the corporation, and that his participation in the meeting of the board under these circumstances rendered its action in adopting the resolution void. The board of directors consisted of O'Rourke, W. R. Kenyon, and M. J. Connell. O'Rourke was president, Kenyon vice president, and Connell secretary. Prior to October 15, 1896, the company was engaged in litigation in an endeavor to foreclose a mortgage held by it upon real property in Butte, and to defeat claims for liens against the same property by others, including James A. Murray. It was without ready money with which to pay the expenses of litigation and to meet the charges for taxes, insurance, etc. From time to time O'Rourke advanced money to pay these charges. On February 7, 1895, the amount of his advancements aggregated \$762. At a meeting of the board of



directors on that date, which was attended only by O'Rourke and Kenyon, the president and secretary were by resolution authorized to execute to O'Rourke a promissory note of the corporation for this amount, to bear interest from date. At a meeting held on October 16th of the same year, all the directors being present, a resolution was adopted authorizing the vice president and secretary to execute the note, to bear date February 7, 1895, the reason for this action, as appears from the resolution, being that since O'Rourke's presence was necessary to make a quorum of the board at the meeting held on February 7, 1895, and no business could be transacted without his vote, the resolution adopted at that time was not a valid act of the corporation. The resolution adopted at the later meeting contained this recital: "There being other payments in the sum of \$585 made by John O'Rourke for the use and benefit of the Grand Opera House Co., upon motion of W. R. Kenyon the said payments were approved by the board of trustees." It appears from the evidence that the advancements by O'Rourke were made by authority of the board of directors, and that they were necessary to protect the interests of the company and to preserve its property. That this was the case is not seriously controverted by counsel for defendant, who introduced no evidence tending to impugn the honesty of O'Rourke or any of his associates. It may be noted just here that the note authorized at the later meeting of the board was the basis of the first cause of action, and that the defendant permitted judgment to go for the amount of it, without offering any defense.

[3, 4] Counsel seriously contend, however, that since the meeting was not called by written notice as prescribed by section 449 of the Civil Code of 1895 (Rev. Codes, § 3848), the board of directors was not duly assembled, and hence that none of its proceedings were binding upon the company. This contention is without merit. The corporation was organized under the provisions of the statute in force prior to the adoption of the Codes of 1895. While the directors (or trustees, as these officers were then designated) had the power to enact by-laws for the government of the corporation and the management of its business affairs (Compiled Statutes 1887, Fifth Div. § 454), they were not required to do so. It was left to them, at their option, to establish their own custom and method of doing this. They had adopted the custom of holding special meetings upon informal notice. The meeting was called at the instance of the president; verbal notice being given by the attorney of the corporation to all of the directors. It was held at the usual place of meeting. This was the custom which had always been observed, except that formal notice by publication was given of annual meetings. If the provisions of the Code of 1895

were not applicable, as counsel for plaintiff contend, because the corporation had not elected to continue its existence under them, the notice was sufficient. If the provisions of section 449 of that Code were applicable, nevertheless the necessity of formal notice in conformity therewith was obviated, because all of the directors attended and no one objected to the holding of the meeting because of the want of notice or for any other reason. While ordinarily the requirements of the statute cannot be dispensed with, formal notice is not necessary when all the directors attend and participate without objection in the dispatch of the business in hand. "The only object of the notice is that the directors have an opportunity of being present at the meeting and taking part in its proceedings." *Minneapolis Times Co. v. Nimocks*, 53 Minn. 381, 55 N. W. 546. See, also, *Stobo v. Davis Provision Co.*, 54 Ill. App. 440; *State v. Manhattan Rubber Co.*, 149 Mo. 181, 50 S. W. 321; *Troy Mining Co. v. White*, 10 S. D. 475, 74 N. W. 236, 42 L. R. A. 549; 2 *Thompson on Corporations*, § 1142; 10 *Cyc.* 786. Counsel for plaintiff cite many cases in support of their contention, but they fail to note that in the cases cited a part of the directors did not attend the meeting and take part in the proceedings, but were either absent or, being present, protested against the proposed action. *Smith v. Dorn*, 96 Cal. 73, 30 Pac. 1024, and *Thompson v. Williams*, 76 Cal. 153, 18 Pac. 153, 9 Am. St. Rep. 187, are illustrative examples.

[5-7] The record does not sustain the contention of counsel that at the time of the meeting O'Rourke had sold his stock and thus disqualified himself to act as a director of the corporation. In fact, he did sell his stock to James A. Murray, but the evidence does not go further than to show that at the time the meeting was held, negotiations for the sale were pending, but not yet completed; for the stock was at the time in the hands of Mr. A. J. Davis, who had authority to complete the transaction. It does not appear how long it was afterwards before the sale was actually made and the stock transferred. If it be conceded, therefore, that, in order to act as director, O'Rourke must have been a stockholder (Rev. Codes, § 3833; Civil Code 1895, § 434), and that the sale of his stock ipso facto vacated his office as director, this result was not accomplished until the sale was completed. Under the allegations of the answer, however, the defendant is not in position to insist that O'Rourke's connection with the company was not legitimate. Upon the record, therefore, O'Rourke was a director at the time the meeting was held, and was qualified to act in any matter in which his interest was not adverse to that of the corporation. We are not required to determine definitely what his relations with the company were. He was preferring a claim against it. He was pro hac vice disqualified



to vote. He took no part in the proceedings looking to the approval of the account. It was approved by a vote of both of the other directors who constituted a quorum of the board, and their action was binding upon the corporation.

[8] Counsel question the validity of the action of the board on the ground that, if it be conceded that O'Rourke was a director of the corporation, he could not deal for himself and the corporation at the same time; and since it appears from the evidence that all the members of the board were antagonistic to Mr. Murray, the prospective purchaser of the O'Rourke stock, the result of the resolution was in any event to give O'Rourke an unfair advantage by reason of his position as director. The rule is well settled that the officers of a corporation may lend money to the corporation for legal purposes and hold and enforce their claims for repayment, provided, however, they act in good faith, and do not obtain an advantage to the detriment of the other stockholders. It is frequently the case, as here, that a corporation is temporarily in distressed circumstances; and, if the officers were not permitted under such conditions to assist it by advancing the funds necessary to relieve its distress, the result would be disaster to its business and loss to its stockholders. *Coombs v. Barker*, 31 Mont. 526, 79 Pac. 1; *Tatem v. Eglanol Minn. Co.*, 42 Mont. 475, 113 Pac. 295. An officer lending money to the corporation may even demand and receive security for his advancements. So long as he has acquired by the transaction no advantage which might not be accorded to any other creditor under the same circumstances, his claim will be upheld and enforced. The record does not justify the assertion that there was enmity between Mr. Murray and the directors; but were this the fact, and were it also the fact that Mr. Murray had become the purchaser of the O'Rourke stock at the time the meeting was held, nevertheless the propriety of the action of the majority of the board of directors is not to be condemned for this reason alone. The evidence tends to show that the advancements had actually been made to the amount claimed. The admission by the board of the justness of the claim as a charge against the corporation could not wrong the stockholders.

[9] It is argued that the directors put O'Rourke in a position to gain a preference over the other creditors of the corporation, and that his preference will be made good unless the judgment be set aside. This is a matter about which the corporation is not concerned. Whether O'Rourke's estate is entitled to a preference is a question to be determined upon an issue made between the executrix and the other creditors, if there are any, in a proceeding instituted to adjust

their respective rights. The fact that the corporation is insolvent does not affect in any wise the right of one of its creditors, whether an officer of the corporation or a stranger, to reduce his claim to judgment.

[10, 11] 3. Error is predicated upon the action of the court in admitting certain evidence over the objection of the defendant. On a former trial of this case O'Rourke was alive and testified fully as to his relations to the corporation and the circumstances out of which his claim arose. His testimony given at that time was reported and a transcript of it made by the official stenographer at the request of the attorneys. Subsequently the person who was then stenographer went out of office. At the trial he was produced as a witness and sworn. After stating that his original notes embodied an accurate report of O'Rourke's testimony, that the transcript was a correct translation thereof, and that the original notes filed with the clerk had been lost or destroyed, he was permitted to rehearse the testimony by reading from the transcript. It was objected that the evidence was incompetent, and it is argued that the court erred to the prejudice of the defendant in admitting it. It having been made to appear that O'Rourke was dead, his testimony given on the former trial was admissible. *Rev. Codes*, § 7887; *Reynolds v. Fitzpatrick*, 28 Mont. 172, 72 Pac. 510. Since the stenographer who reported it and made a transcript of it had testified that the transcript was an accurate translation of the original report, it was competent for him to rehearse the evidence, either by using the transcript as a memorandum to refresh his memory, or, in case he had no independent recollection of the testimony, to testify from the transcript. *Rev. Codes*, § 8020; *Marron v. Great Northern Ry. Co.*, 46 Mont. 593, 129 Pac. 1055. In permitting the witness to testify from the transcript without showing that he had no independent recollection of the testimony, the court was technically in error, under the rule declared in *Marron v. Great Northern Ry. Co.*, *supra*. Under the circumstances of this case, however, we do not think the error prejudicial. The case was tried without a jury. The other evidence submitted to establish the plaintiff's claim was amply sufficient to sustain the court's finding. Another trial could not accomplish any result other than to enable the court to require compliance with the statute (section 8020, *supra*) as to the technical method to be observed in order to render the evidence available to the plaintiff. We do not think a new trial should be ordered to accomplish this purpose.

The order is affirmed.

Affirmed.

HOLLOWAY and SANNER, JJ., concur.



(17 N. M. 619)

**BATEMAN et al. v. GITTS et al.**

(Supreme Court of New Mexico. April 10, 1918. Rehearing Denied July 23, 1918.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 80\*) — FINAL DECREE.**

A decree, which provides that A. shall have a first lien upon certain shares of stock of a bank, and that B. shall have a second lien upon such stock, but which requires A. to comply with certain conditions imposed within 60 days, and provides that in the event of A.'s failure to so comply B. shall have a first lien, and A.'s lien shall be inferior and second to B.'s lien, and which decree further provides for the sale of said collateral, by a receiver appointed, under further orders of the court to be made, and directs said receiver to hold the proceeds so realized "subject to the further orders of the court," is not a final decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 429, 432, 433, 450, 456, 457, 494-509; Dec. Dig. § 80.\*]

**2. APPEAL AND ERROR (§ 80\*)—"INTERLOCUTORY DECREE."**

Where further action of the court is necessary, in a cause, to give completely the relief contemplated by the court, the decree upon which the question arises is interlocutory, and not final.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 429, 432, 433, 450, 456, 457, 494-509; Dec. Dig. § 80.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3712-3715; vol. 8, p. 7692.]

**3. JUDGMENT (§ 217\*)—FINAL JUDGMENT—CONDITIONS OF INTERLOCUTORY DECREE.**

The trial court has the right, upon entering final judgment in a cause, to disregard the requirements and conditions imposed in an interlocutory decree theretofore entered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 394; Dec. Dig. § 217.\*]

Appeal from District Court, Chaves County; McClure, Judge.

Action by Ursinus Sidney Bateman and others against Julius J. Gitts and others. From a decree for defendants, plaintiffs appeal. Affirmed.

U. S. Bateman, of Roswell, for appellants. Nisbet & Nisbet, of Roswell, for appellees.

ROBERTS, C. J. [1] On the 25th day of October, 1909, the district court of Chaves county, N. M., entered a decree in this case by which the appellee was given a first lien on 16 shares of stock of the American National Bank of Roswell, owned by one Julius J. Gitts, and the intervener, the American National Bank of Roswell, was given a lien on said shares of stock, which lien, however, was declared to be a second lien to the lien of the First National Bank of Marshall, Minn. The decree provided further as follows: "But that said lien given to said First National Bank of Marshall is upon the condition that, within 60 days from date hereof, it causes said note now held by said Weaver to be indorsed, transferred, and delivered for collection to the receiver hereinafter named,

and that said bank within said time also indorse and deliver to said receiver said two certificates of stock now in its possession, and that within said time said bank also truly reports in writing, to be filed in this action, what collateral, if any, other than said certificates of stock, it has to protect it against the payment of said renewal note, and also what became of said insurance policies and the amounts thereof, by what companies issued, and to whose favor the same were issued; (d) that in the event of the failure of said First National Bank of Marshall to comply with any one or more of the provisions above mentioned within the time above mentioned, unless extension thereof be granted by this court upon written applications by said bank therefor, said lien given to said bank shall be inferior and second to the lien hereinbefore given to the intervener; (e) that Alexander J. Nisbett, Esq., of Roswell, Chaves county, N. M., is hereby appointed receiver of this court, and is hereby authorized, empowered and directed to take possession of said note now held by said Weaver upon the same being transferred and indorsed to him, and also to take possession of said certificate of stock and all other collateral, if any, held by the First National Bank of Marshall to protect it as guarantor of said renewal note, including said two insurance policies; and said receiver is hereby empowered and directed to proceed to collect said note by suit or otherwise and to sell said shares of stock and other collateral, including said two insurance policies, under the orders of the court hereafter to be made, and to hold the proceeds derived from such collection and sale subject to the further orders of the court."

From this decree an appeal was taken to the Supreme Court of the then territory of New Mexico, and the judgment of the lower court was affirmed in an opinion which will be found reported in 16 N. M. 441, 120 Pac. 307. Thereafter, and upon receipt of the mandate of the Supreme Court, on the 31st day of July, 1912, the district court of Chaves county entered the following final decree: "This cause coming on for further hearing herein and for affirmation on the final decree herein upon the judgment of the Supreme Court on affirmation in all things of the judgment of this court made herein on October 19, 1909, the court being fully advised in the premises and having heretofore, on February 19, 1912, ordered the 16 shares of the capital stock of the Roswell National Bank held by Alexander J. Nisbett, special master in this cause, sold at private sale, and the same having been so sold on said day and date to H. P. Saunders, of Roswell, N. M., for the sum of \$2,800, and this court having heretofore, on October 19, 1909, duly adjudged and decreed that the First National Bank of Marshall, Minn., one

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



of the defendants herein, and the Supreme Court herein in all things having affirmed said judgment, that said bank had a first and prior lien on said 16 shares of stock aforesaid, by reason of the same having been duly hypothecated and pledged to said First National Bank of Marshall, Minn., as security for a certain promissory note given by J. J. Gitts & Co., J. J. Gitts, Francis Gitts, Ed Gitts, Paul Gitts, and V. B. Gitts, for the sum of \$5,000, and it further appearing to the court that the only and all the available proceeds and assets obtainable by said special master, and now in his hands as such master, is the sum of \$2,800 aforesaid, received by him for the sale of said stock. It is therefore ordered, adjudged, and decreed by the court that the said special master pay over to the said First National Bank of Marshall, Minn., pledgee of said stock, the said sum of \$2,800, and upon his filing its receipt therefor with the clerk of this court he is hereby discharged from any and all further duties herein as special master aforesaid."

Thereafter, on the 2d day of August, 1912, the appellant filed with the clerk of the district court a motion to set aside said final decree upon various grounds, one of which was that the appellant had no notice of the fact that application had been made by the appellee, the First National Bank of Marshall, Minn., for the entry of said final decree, or that the same had been entered, or was to be entered. Later, however, appellant withdrew this motion and prayed an appeal to this court from said final decree. For reversal of the judgment of the lower court, it is urged here that the final decree was erroneous, because it disregarded the conditions imposed by the decree of October 25, 1909, which required the First National Bank of Marshall, Minn., to do certain things within a limited time, and upon default in complying therewith the intervener should have a first lien. The error in appellants' contention lies in the fact that they treat the said decree of October 25, 1909, as being a final judgment. It is true an appeal was taken from this judgment to the territorial Supreme Court; and the judgment was there affirmed; but the fact that the judgment was not final, but merely interlocutory, does not appear to have been called to the court's attention, or to have been considered. In that case appellee filed no brief, and the matter was determined upon the record and brief filed by appellant. Had the matter received the attention of the court, the appeal would undoubtedly have been dismissed, as the judgment from which the appeal was taken was not final. A reading of the decree, or of that portion of it involved in this discussion, will demonstrate the fact that further action of the court in the case was necessary to give the relief contemplated by the court. It was not a final judgment in favor of the First National Bank of Marshall, Minn., nor, on the other hand, was it

final as to the intervener, the American National Bank of Roswell. The First National Bank of Marshall, Minn., was to have a first lien upon the shares of stock upon conditions which were to be complied with within 60 days. Now whether said bank was to have a first lien was dependent upon compliance with the conditions prescribed, and who but the court could determine whether or not these conditions had been complied with?

[2] Again, the decree appointed a receiver and directed him to take possession of the note and of said certificates of stock and other collateral, and he was directed to sell the stock and other collateral under orders of the court thereafter to be made, and to hold the proceeds derived from such collection and sale "subject to the further orders of the court." It will be seen, therefore, that further action upon the part of the court was necessary to give the relief contemplated by the court, thus bringing the judgment clearly within the rule laid down by Judge Baldwin, for the Supreme Court of Appeals of Virginia, in the case of *Cocke's Administrator v. Gilpin*, 40 Va. 20, where he says: "Where the further action of the court in the cause is necessary to give completely the relief contemplated by the court, there the decree upon which the question arises is to be regarded, not as final, but interlocutory. I say the further action of the court in the cause, to distinguish it from that action of the court which is common to both final and interlocutory decrees, to wit, those measures which are necessary for the execution of a decree that has been pronounced, and which are properly to be regarded as adopted, not in, but beyond, the cause, and as found on the decree itself, or mandate of the court, without respect to the relief to which the party was previously entitled upon the merits of his case. Any other criterion than this seems to me liable to the objection of ambiguity or uncertainty."

A judgment somewhat similar to the decree of October 25, 1909, rendered in this case, was considered by the Supreme Court of the United States in the case of *Jones v. Craig*, reported in 127 U. S. 213, 8 Sup. Ct. 1175, 32 L. Ed. 147. The decree there was conditional, and provided: "It is ordered that if within 15 days the plaintiff bring into court the amount of the note and mortgage set forth in the bill of complaint [and do certain other things] \* \* \* then the defendant be restrained from the further prosecution of the cause in ejectment set forth in said bill of complaint; \* \* \* but if the plaintiff shall fail so to do within the time mentioned, the said demurrer to said bill be sustained and the said bill of complaint be dismissed, and the defendant herein be allowed to proceed with the prosecution of his said action at law." Speaking of this order, Mr. Justice Miller, for the court, said: "This court, however, has no jurisdiction of the case as it stands, because



the order just cited is not a final decree. Something yet remains to be done in order to make it such, and that action depends upon whether or not the complainants will comply with the order to bring in the sum due on the mortgage. If that order is complied with, then a decree should be made, upon the hypothesis on which the order was made, in favor of the complainants in the bill, and quieting their title. If, however, the money is not brought into court, then, according to the theory of the order, the bill of complaint should be dismissed. But, even assuming the right of the court to make the order, as well as its validity, the circumstances under which the bill of complaint is to be dismissed or the relief granted to the complainants named therein, and the sum to be paid, are matters which are yet to be determined, which may turn out either one way or the other, and which, when ascertained, will be the foundation for a final decree. There is no final decree as the matter now stands."

Thus in this case, if the First National Bank of Marshall, Minn., complied with the conditions prescribed in the decree of October 25, 1909, within the time limited, a decree was then necessary directing the payment of the money to said bank. If, however, said bank failed to comply with the order, then, according to the theory of the order made, judgment should have gone for the intervenor. The question as to which of the parties was entitled to the first lien upon the shares of stock in question was dependent upon certain acts on the part of one of the parties to be performed, and necessarily further action on the part of the court was required before either party could enforce the judgment. See, also, *Stratton v. Dewey*, 79 Fed. 32, 24 C. C. A. 435, and also 16 Cyc. 472, where the rule is stated as follows: "It is interlocutory if it leaves an amount to be paid to be ascertained in the future, or if its finality is conditioned upon the performance of some act in the future." While the first decree was interlocutory, and properly not appealable, the matter not having been called to the attention of the territorial Supreme Court in the case of *Bateman v. Gitts*, supra, that court considered the case on its merits, and the principles of law therein announced are sound and meet with the approval of this court.

[3] It yet remains for us to determine the effect of the final decree entered July 31, 1912, and the question suggests itself as to whether or not the court had the right to enter in this case a final judgment, and by said judgment disregard the requirements and conditions imposed in the interlocutory order or decree theretofore entered. If the court had the power so to do, then the judgment must be affirmed, as the only objection here urged is that such final judgment disre-

garded the conditions imposed by the first decree. 16 Cyc. 503, in speaking of the power of the court over interlocutory decrees, states the rule thus: "An interlocutory decree remains subject to the control of the court throughout the remainder of the proceedings, and may at any time be amended or vacated. This power of revision may be exercised on motion or petition, or by rendering, on final hearing, a different decree."

In the case of *Fourinquet et al. v. Perkins*, 16 How. 82, 14 L. Ed. 854, the Supreme Court of the United States had under review a case which had theretofore been appealed to that court and dismissed because the decree was held to be interlocutory, and upon being remanded to the court below the Circuit Court proceeded to take the account upon the principles stated in its interlocutory order, and when the report of the master came in exceptions were taken to it on both sides. At the argument of these exceptions it appears that the court reconsidered the opinion it had expressed on the merits in the interlocutory order, and, believing that opinion to be incorrect, dismissed complainant's appeal. From that decree an appeal was taken, and counsel for appellant objected to the decree of dismissal because it was contrary to the opinion on the merits expressed by the court in its interlocutory order. Chief Justice Taney, speaking for the court, said: "But this objection cannot be maintained. The case was at final hearing at the argument upon the exceptions; and all of the previous interlocutory orders in relation to the merits were open for revision, and under the control of the court. \* \* \* And if the court below, upon further reflection or examination, changed its opinion, after passing the order, or found that it was in conflict with the decision of this court, it was its duty to correct the error."

This case is quoted with approval by the territorial Supreme Court in the case of *Bent v. Miranda*, 8 N. M. 78, 42 Pac. 91, where the court say: "We do not understand that the court, in directing the final judgment, is confined to the interlocutory decree or is foreclosed by it." See, also, *Hebblethwaite v. Flint et al.*, 83 App. Div. 163, 82 N. Y. Supp. 471. This being true, the district court of Chaves county had the power, when it made its final decree, to disregard the conditions imposed in the interlocutory decree of October 25, 1909.

Appellants having withdrawn their motion to set aside this final decree, this court, of course, cannot consider any question raised by such motion.

Finding no available error in the record, the judgment of the lower court is affirmed; and it is so ordered.

HANNA and PARKER, JJ., concur.



(18 N. M., 53)

**BECK v. CHAMBERS.**

(Supreme Court of New Mexico. June 20, 1913.)

*(Syllabus by the Court.)***EXCHANGE OF PROPERTY (§ 5\*) — CONTRACT — CONSTRUCTION—FORFEITURE.**

A contract for the exchange of land provided: "In the event that the party of the first part shall fail to comply with the terms thereof, within the time herein limited, the said second party may at his option declare this contract void, in which event all rights and liabilities hereunder shall cease and determine." *Held*, that the forfeiture of the contract was made optional with the second party, and if he did not see fit to exercise his option and declare the forfeiture the contract continued in full force and effect.

*Held*, further that a declaration of the fact that the party had elected to exercise his option to cancel the contract should have been made to the first party, and until it was made the option was not exercised and the contract continued in full force and effect.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 5, 6, 8-10; Dec. Dig. § 5.\*]

Appeal from District Court, San Juan County; before Justice John R. McFie.

Action by Larkin Beck against E. R. Chambers. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This suit was instituted in the district court of San Juan county to cancel a contract for the exchange of real estate, entered into by the parties to this action on the 12th day of February, 1909, by the terms of which appellee was to convey to appellant certain real estate, situate in San Juan county, N. M., in exchange for real estate owned by appellant in the state of Colorado, which was to be conveyed to appellee. By the contract it was provided:

"Abstracts of title showing title in fee, subject merely to the incumbrances aforesaid, shall be furnished the respective parties hereto to patented land within 30 days from date, and to the pasture land within 6 months from date, within which time the said exchange shall be completed, when each of the parties shall, by good and proper deeds, convey the aforesaid properties belonging to him unto the other as hereinbefore agreed. In the event that the party of the first part shall fail to comply with the terms thereof, within the time herein limited, the said second party may at his option declare this contract void, in which event all right and liabilities hereunder shall cease and determine."

Appellant, under the contract, was to have immediate possession of the land to be conveyed to him, and he entered thereon and expended more than \$1,000 in permanent improvements. Appellee was not to have possession of the real estate to be conveyed to him, nor to receive the rents and profits thereof, until March 1, 1910. On August 7th thereafter, neither party having complied

with the terms of the contract, relative to furnishing abstracts of title, the following agreement was indorsed upon the contract:

"Aug. 7, '09. It is hereby agreed between the parties to this contract the time is hereby extended 60 days from date of same.

"[Signed] E. R. Chambers.

"[Signed] Larkin Beck."

The extended time for compliance, it will be observed, expired on October 6th. On October 11th, however, appellee orally agreed that appellant should have a further extension of time to November 1st. From the evidence it appears that on November 1st appellant submitted to appellee an abstract of title to the lands which he was to convey; that appellee, after examination, pointed out three or four alleged defects in the title. Thereupon appellant agreed that he would go to Pagosa Springs, Colo., at once, and have the abstract corrected in the particulars named. There was some conflict in the evidence as to the exact conversation between the parties at this time—appellant testifying that appellee told him to go ahead and have the corrections made, but to be in a hurry; while appellee testified, "I told him I did not believe it would go through and he oughtn't to go." Appellant, however, went to Pagosa Springs and had the corrections made, and on the 11th of November deposited with the escrow holder, designated in the contract, the abstract of title and deeds of conveyance and other papers. On the 29th of the same month appellee and his attorney called at the bank where the papers were deposited, examined them, and on the next day appellee served upon the appellant the following notice, viz.:

"Farmington, N. M., Nov. 30th, 1909.

"Ernest R. Chambers, Esq., Fruitland, N. M.

"Sir: You are hereby notified that you have defaulted in the terms of the contract dated February 12th, 1909, in the matter of our exchange of lands, and you are now given written notice of my intention to declare the said contract void. You are hereby further notified to remove from my land in Fruitland, N. M., and deliver possession of the same to me, or I will take immediate legal proceedings to regain possession thereof. I claim no rights under the contract over any lands of yours therein named.

"[Signed] Larkin Beck."

Appellant refused to vacate the land, possession of which he had taken under the contract, and insisted that the contract be performed by appellee, and this suit was instituted by appellee to cancel the contract and for a mandatory injunction against appellant to oust him from the land. After hearing had, the court made findings of fact and stated conclusions of law, and entered judgment for appellee, canceling said contract. From such judgment this appeal is taken.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Renehan & Wright of Santa Fé, for appellant. J. R. McFie, of Santa Fé, and J. M. Palmer, of Farmington, for appellee.

ROBERTS, C. J. (after stating the facts as above). This is a suit in equity to forfeit and cancel a contract for the exchange of land, where the defendant in the court below, appellant here, in apparent good faith, entered into possession of the land, which he was to obtain title to under the contract, as was his right thereunder, and made valuable and lasting improvements. The general rule is that a court of equity will not enforce a forfeiture, if by any reasonable rule of construction it can avoid it. Where, however, time of performance is of the essence of the contract and a forfeiture is provided for by the contract, either expressly or by necessary implication, a default in performance within or at the time specified entitled the party for whose benefit the provision was inserted to a forfeiture of the contract, in accordance with the terms of the contract.

In this case, the trial court, by its finding of fact numbered 2, found that time was of the essence of the contract, and that, as the contract remained unperformed, on the 1st day of November, 1909, it was discharged. By its third finding it found "that the said contract became, by operation of law and the exercise of the option of the said Larkin Beck, fully discharged null and void, and that all rights and liabilities arising thereunder ceased and determined before the commencement of this action."

It would appear that the above so-called findings are in reality mixed findings of fact and conclusions of law, and that there is an apparent conflict between them, because the first stated finds that time is of the essence of the contract, and, as said contract was not performed on the 1st day of November, 1909, it became ipso facto null and void, while the third finding or conclusion is that the contract became null, void, and discharged because of the exercise by appellee of his option to forfeit the same. It must be conceded, however, that if the conclusion drawn in either finding be correct the judgment canceling the contract must be sustained, for on either assumption the appellee would be entitled to recover.

Conceding, without deciding, that time was of the essence of the contract, as stated in the second finding, does it follow that, because the contract remained unperformed on the 1st day of November, it was discharged? The contract did not provide for its nullification by the mere failure of performance on the part of appellee within the time stipulated. Its forfeiture was made optional with the appellee, and if he did not see fit to exercise his option and declare the forfeiture, the contract continued in full force and effect. *Van Dyke & Draw v. Cole*, 81 Vt. 379, 70 Atl. 593, 1103. And a declara-

tion of the fact that appellee had elected to exercise his option should have been made to the appellant, and until it was made the option was not exercised and the contract was not annulled, but continued in force. *Coles v. Shepard*, 30 Minn. 446, 16 N. W. 153. This being true, the contract was not terminated on the 1st day of November by its own force, and as the appellee did not elect to declare a forfeiture until the 30th day of the month it necessarily follows that during the intervening time the contract was valid and binding upon both parties. The undisputed evidence shows that prior to the 30th of the month the appellant deposited with the designated escrow holder the papers called for by the original contract, and, having so deposited said papers prior to the forfeiture of the contract, appellant had complied with his part of the contract. This being true, appellee could not forfeit the contract, but necessarily was required to comply on his part.

It could hardly be contended that the conversation which occurred on the 1st of the month between the parties, even if appellee's version of it be admittedly correct, would be sufficient to effect a forfeiture of the contract. He testified: "I told him I did not believe it would go through and he oughtn't to go." It would certainly require a positive and specific declaration that appellee did not intend to be further bound by the contract; and the language used could not reasonably be construed as the exercise of appellee's option to declare the contract void; nor does appellee insist, as we understand his contention, that this language amounted to the exercise of his option, for his counsel say, in their brief: "It may be and doubtless is true that when appellant showed appellee his abstract of title November 1st, and Beck called his attention to the defects in it, and Chambers admitted the defects and said he would have them corrected, that in some loose conversation between them Beck may have given Chambers to understand that, if he deposited in the bank perfect abstracts of title and deeds conveying a fee simple title, he would still carry out the trade."

Another principle, supported by numerous adjudicated cases, might be invoked, were it necessary, in support of appellant's insistence that the contract was valid and in full force and effect at the time he deposited his papers in escrow, viz.: If the stipulation which makes the time of payment essential be not absolute that the contract shall be ipso facto void upon default in payment at the time, but its object and language are to give to the vendor his election and power to put an end to the agreement upon the vendee's failure in paying or performing at the appointed day, then the vendor, if he intends to avail himself of the provision, must give the purchaser a timely and reasonable notice of his intention to



avoid the contract, or must do some unequivocal act which unmistakably shows that intention, for the vendor cannot treat the default alone as terminating the agreement. *Pomeroy on Contracts*, § 393. The principle is supported by adjudicated cases in Iowa, Minnesota, and Illinois, which will be found cited in the note to the above section.

Again, should we assume that the contract was to become ipso facto null and void, upon failure to perform within the time stated, it might reasonably be held that appellee had waived strict compliance as to time, by his repeated extensions and subsequent conduct. *Boone v. Templeman*, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 128. And the right may be waived by extensions of time or indulgences granted the purchaser. *Douglas v. Hanbury*, 56 Wash. 63, 104 Pac. 1110, 134 Am. St. Rep. 1096.

Appellee, according to his own testimony, on the 29th of November went to the bank and examined the papers deposited there by appellant, and further said that he would have carried out the contract had he found the papers correct and in proper form. This conduct, coupled with appellant's statement that appellee told him to go to Pagosa Springs and secure the correction of his title papers, clearly evidences that appellee did not intend to rely upon the forfeiture of the contract because of appellant's failure to perform on the 1st day of November. This being true, he could not set up the delay or default as creating a forfeiture without giving appellant notice of his intention and allowing him a reasonable time within which to perform. *Boone v. Templeman*, supra; 39 Cyc. 1384.

Therefore, upon either view, it will be seen that the findings of fact and conclusions of law were erroneous. Counsel for appellee suggest in their brief that the abstract of title presented by appellant and the deeds executed by him were deficient, that the abstracts failed to show a perfect title in fee simple in appellant, and that he had failed to prepare the deed in conformity with the contract. It is a sufficient answer to this contention to point out that the findings do not show such facts. The facts found were that the contract remained unperformed on November 1st, that no further legal extension of the contract was made, and not that the abstract submitted and deeds tendered were deficient. The findings of fact made by the trial court "must be of the ultimate facts which the evidence is intended to establish, sufficient in themselves, without inference or comparison, or the weighing of evidence, to justify the application of legal principles which must determine the case." *Luna v. Coal R. R. Co.*, 16 N. M. 71, 113 Pac. 831, and cases cited. Should this court consider the question suggested by appellee, as to the defects in the abstract of title and deeds

of conveyance, we would be required to search the record and decide a question which was not considered by the trial court.

Other grounds for reversal are urged by appellant, but in the view we take of the case it is not necessary for us to consider them.

For the reasons stated the judgment of the lower court is reversed, and the cause is remanded, with directions to set aside the judgment and to proceed in accordance with this opinion; and it is so ordered.

HANNA and PARKER, JJ., concur.

(18 N. M. 70)

**DEAL v. WESTERN CLAY & GYPSUM PRODUCTS CO.**

(Supreme Court of New Mexico. June 20, 1913.)

(Syllabus by the Court.)

**1. APPEAL AND ERROR (§ 798\*)—FAILURE TO FILE BRIEFS—DISPOSITION OF CAUSE—NOTICE.**

Where an appellant fails to file briefs within the time limited by subdivision 4 of rule 13 (133 Pac. x), the order of dismissal or of affirmance goes as a matter of course, upon motion of the appellee, and no notice need be given the appellant, or his attorney.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3155-3157; Dec. Dig. § 798.\*]

**2. APPEAL AND ERROR (§ 771\*)—AFFIRMANCE FOR FAILURE TO FILE BRIEFS—REINSTATEMENT.**

A cause affirmed, upon motion of appellee, for failure of appellant to file and serve briefs within the time required by rule of court 13 (133 Pac. x), will not be reinstated upon the docket, and the affirmance vacated, where the only showing made excusing such default and failure to apply for an extension of time within which to file briefs was that appellant's local attorney in this state sent the brief to its general counsel for examination and approval. Appellant should have applied for an extension of time, within the time limited for filing briefs, when it became apparent that it would not be able to comply with the rule.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3105; Dec. Dig. § 771.\*]

Appeal from District Court, Lincoln County; E. L. Medler, Judge.

Action by F. M. Deal against the Western Clay & Gypsum Products Company. From judgment for plaintiff, defendant appeals, and, the judgment having been affirmed, he now moves to set aside the affirmance. Motion denied.

H. B. Hamilton, of Carrizozo, for appellant. Prichard & Howard, of Santa Fé, for appellee.

ROBERTS, C. J. The transcript in this case was filed in the clerk's office March 1, 1913. On April 14th, thereafter, appellee filed a motion to affirm the judgment of the trial court, because of appellant's failure to file briefs within 30 days after filing the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



transcript, as required by subdivision 4 of rule 13 (133 Pac. x) of this court. It appearing from the record of the case in this court that appellant had not filed his briefs within the time limited, and had failed to apply for or receive an extension of time for such purpose, the court sustained appellee's motion and affirmed the case. Thereafter appellant moved the court to set aside and vacate the order of affirmance and reinstate the cause upon the docket.

[1, 2] The grounds upon which it relies in the motion may be stated briefly as follows: (1) That its attorney was not served with a copy of the motion for affirmance; and (2) that the delay in filing the brief was occasioned by its local attorney at Carrizozo sending to its general attorney at Des Moines, Iowa, copies of the brief prepared in the cause, for examination, and that the delay was caused thereby.

Neither ground stated in the motion is well taken. In the case of Hillard v. Insurance Co., 132 Pac. 249, decided at the present term of this court, and not yet officially reported, we held that no notice of a motion to dismiss a cause for failure to file briefs need be given. We say: "Where a party is in default, the order of dismissal goes as a matter of course, upon motion of the other party. It is somewhat in the nature of a default judgment, and no notice need be given to the party in default."

The case cited supra is also decisive of the insufficiency of the second ground relied upon. The facts set forth do not justify the failure on the part of appellant to apply for an extension of time within which to file its briefs. No such application was made.

The motion will be denied; and it is so ordered.

HANNA and PARKER, JJ., concur.

(18 N. M. 44)

FEDER SILBERBERG CO. v. McNEIL et al.  
(Supreme Court of New Mexico. June 16, 1913.)

(Syllabus by the Court.)

1. PRINCIPAL AND SURETY (§ 161\*) — ACTION ON BOND—PROOF OF DEMAND.

Proof that "demand was made by mail" implies a prepayment of postage and a deposit of the demand in a United States post office; but that the letter was properly addressed to the addressee at the place where he resides or receives his mail is not thereby implied, and proof of that fact must be had before the receipt of the letter by the addressee will be inferred.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 85, 439-441; Dec. Dig. § 161.\*]

2. PRINCIPAL AND SURETY (§ 139\*)—RECOVERY ON BOND—CONDITION PRECEDENT—DEMAND.

Where a surety on a fidelity bond undertakes to respond upon condition that demand

be first made upon the principal, such demand is a part of the contract, and must be alleged and proved.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 388; Dec. Dig. § 139.\*]

Error to District Court, Santa Fé County; before Justice Abbott.

Action by the Feder Silberberg Company against Le Mar McNeil and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Wilson, Bowman & Dunlavy, of Santa Fé, for plaintiff in error. Renehan & Wright, of Santa Fé, for defendants in error.

PARKER, J. This is an action brought by plaintiff in error against defendants in error to recover the penalty of a bond executed by them to the plaintiff to secure the fidelity of Le Mar McNeil as an employé of the plaintiff. The provisions of the bond in so far as they are deemed pertinent to this inquiry, are as follows:

"The condition of the above obligation is such that, whereas the said Le Mar McNeil is about to enter into the employment of said Feder Silberberg Company, and while in such employment will be intrusted by them with merchandise to be used by him as samples in the course of his said employment as salesman for the said Feder Silberberg Company:

"Now, if the said Le Mar McNeil shall account for all samples intrusted to him as aforesaid and deliver same in good condition to the said Feder Silberberg Company upon their demand, except such as may have been destroyed by fire, then this obligation shall be void and of no effect," etc.

At the conclusion of the evidence for plaintiff, defendants demurred to the evidence and moved for an instruction, and the court directed a verdict for defendants. In announcing his decision the court said:

"I do not believe that there is legal or sufficient proof in this case of the execution of the bond, the delivery of the bond, the demand upon this party, or the question of the corporate capacity, to sustain a verdict. I think this deposition falls in many respects to be as convincing and clear as it ought to be, and, that being the only testimony in the case, I feel obliged to sustain the motion."

[1] Counsel for defendants rely, in support of the judgment, principally upon the proposition that there was a failure of proof of the demand upon said Le Mar McNeil for the return of the samples delivered into his custody. The evidence upon the subject is contained in a deposition, the same being the only evidence upon the subject, and is as follows:

"Interrogatory 16. If your answer to interrogatory 14 was in the negative, state whether or not demand was ever at any time made upon said Le Mar McNeil by the plain-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



tiff herein for an accounting or return of any samples or merchandise furnished by said plaintiff to said McNeil and the result of said demands.

"Answer. A demand was made by mail upon Mr. McNeil by plaintiff herein for an accounting and for return of the samples and merchandise furnished him by said plaintiff, but no response was made by Mr. Le Mar McNeil to any such demand. No letters of the plaintiff were ever answered by the said McNeil since shortly before May 1, 1905, when he requested that we advance him \$25 on account of commission."

Objection to this evidence was interposed on the ground that the answer failed to show that the demand was securely inclosed in a postpaid envelope addressed to the last-known address of McNeil. In the motion for an instruction the object of this evidence is stated as follows:

"That there is no sufficient or legal proof that demand was made upon the defendant Le Mar McNeil for any accounting or return of samples, as required in the bond."

It thus appears that the objection to the evidence is not because it is not the best evidence, but because of a faulty showing as to the mailing of the demand.

Counsel for plaintiffs in error argued that from the statement, "a demand was made by mail" upon said McNeil for a return of the samples, there is implied the performance of all of the acts necessary to effectuate that result, including the inclosing of the demand in a properly addressed and stamped envelope and posting the same in a post office of the United States.

They cite a number of cases, among which are the following: *Bank v. De Groot*, 43 N. Y. Super. Ct. 341, 344; *Pier v. Henrichshoffen*, 67 Mo. 163, 169, 29 Am. Rep. 501; *Bank v. Pezoldt*, 95 Mo. App. 404, 69 S. W. 51; *Ward v. Storage Co.*, 119 Mo. App. 83, 95 S. W. 964; *Faulkner v. Faulkner*, 73 Mo. 327; *Provident Savings, etc., Soc. v. Nixon*, 73 Fed. 144, 19 C. C. A. 414; *Oregon Steamship Co. v. Otis*, 100 N. Y. 446, 450, 3 N. E. 485, 53 Am. Rep. 221; *Schutz v. Jordan*, 141 U. S. 213, 11 Sup. Ct. 906, 35 L. Ed. 705; *Rosenthal v. Walker*, 111 U. S. 185, 4 Sup. Ct. 382, 28 L. Ed. 395; *Williamsen v. Seely*, 22 App. Div. 633, 48 N. Y. Supp. 196.

An examination of these cases will disclose that they fail to support the doctrine claimed for them by plaintiff. They hold with a single exception, to be hereafter noticed, that the word "mailed" implies a preparation of a notice or demand for carriage by the United States mail authorities; but none of them, with the exception noted, hold that a proper address of the letter is implied from the allegation of mailing. The exception to the general rule, heretofore mentioned, is the case of *Ward v. Storage Co.*, 119 Mo. App. 83, 95 S. W. 964.

In that case the doctrine announced is

broader than the question involved therein. The plaintiff testified that she "sent" defendant her address, and it did not appear whether it was sent by messenger conveying words, or carrying a written communication, or whether it was by letter duly mailed. In that case the court said:

"It will be observed that the evidence of notice to defendant of plaintiff's address is not direct or positive evidence; it is rather made to depend upon a presumption that in regular course letters are received by addressees. In order to lay a foundation for such presumption, it should be shown that the letter was duly addressed, stamped, and deposited in the post office or place for the receipt of letters. That, however, is made to appear sufficiently by evidence that it was 'mailed' to the addressee; that a letter, to be properly 'mailed' to a person, must be addressed, stamped, and deposited in a proper place for the receipt of mail, and therefore the general statement that a letter was mailed will be sufficient."

It thus appears that the court of Missouri was not called upon to define what was meant by and included in the word "mailed."

In all of the other cases cited the word "mailed" is held to include only the proper stamping and depositing in a United States post office of the letter. The true rule seems to be stated by Mr. Chamberlayne as follows: "That the inference of receipt from mailing should arise it is essential that the mail matter should be properly posted. This, in turn, involves compliance with certain familiar conditions: (a) The letter or article must be mailable matter and properly addressed; (b) the postage must be prepaid, so far as required by the postal regulations; and (c) it must be actually deposited in the mail. Accordingly, no inference of receipt arises from mailing, unless the letter or other article is shown to have been properly addressed to the person for whom it was intended, at the place of his residence and at the post office where he customarily receives his mail." 2 *Modern Law of Evidence*, § 1058.

Mr. Wigmore states the rule as follows: "The fixed methods and systematic operations of this government's postal service have been long considered to be evidence of the due delivery to the addressee of mail matter placed for that purpose in the custody of the authorities. The conditions are that the mail matter shall appear to have conformed to the chief regulations of the service, namely, that it shall have been sufficiently prepaid in stamps, correctly addressed, and placed in the appropriate receptacle." 1 *Wigmore on Evidence*, § 95.

The rule is otherwise stated as follows: "Before the presumption of delivery or receipt of a letter arises it must appear that it was properly stamped, directed to the regular address of the addressee, and mailed. All of these facts must be shown, but a state-



ment that a letter was mailed has been held to sufficiently show the prepayment of postage; the latter fact being included in the former." 9 Ency. Ev. 900.

In *Henderson v. Carbondale, etc., Co.*, 140 U. S. 25, 11 Sup. Ct. 691, 35 L. Ed. 332, it is said (Mr. Justice Brewer speaking for the court): "This presumption, which is not a presumption of law, but one of fact, is based on the proposition that the post office is a public agency charged with the duty of transmitting letters, and on the assumption that what ordinarily results from the transmission of a letter through the post office probably resulted in the given case. It is a probability resting on the custom of business and the presumption that the officers of the postal system discharged their duty. But no such presumption arises unless it appears that the person addressed resided in the city or town to which the letter was addressed. \* \* \*"

In *Equitable Life Assurance Society v. Trommhold*, 75 Ill. App. 43, the court refused to give the following instruction asked for by the defendant: "The jury are instructed that the placing in the mail of an envelope properly stamped is not even presumptive evidence of the receipt of the same, unless the same was properly addressed, and even if the jury believe from the evidence that a notice was placed in an envelope properly stamped and placed in the mail, yet, unless the jury further believe from the evidence that the envelope was properly addressed to the person for whom it was intended, it is not even constructive notice, and may be wholly disregarded." The court in considering this request for instruction said: "This instruction should have been given, and the refusal to give it was error."

On principle and in accordance with common experience it is perfectly apparent that the statement that a letter was mailed to a certain person necessarily includes only such acts as are required by the postal authorities of the United States, namely, that a letter have some address and that it be properly stamped. Whether the letter is properly addressed so as to reach the addressee is a matter of no concern of the postal authorities, nor have they any information or interest in the matter. But in order to establish a set of facts from which an inference or a presumption shall arise that a given letter was received by a given addressee, it must not only appear that a letter was "mailed," but that it was properly addressed to the addressee at the place where he resides or receives his mail.

In the case at bar the record is entirely silent as to how the demand was addressed. So far as anything appears in the record, the demand may have been addressed to any of the thousands of post offices in the United States, and McNeil, the principal in the bond sued on, may have never received the same. It therefore appears that there was no evi-

dence of a demand upon him for a return of the samples of merchandise sufficient to support a verdict, and the court was correct in directing a verdict for the defendants in error.

[2] 2. Plaintiff in error argues that no demand was necessary in order to recover in this case, and cites numerous cases in support of the contention. None of these cases support the doctrine for which they are cited. The cases cited by plaintiff in error are to the effect that when the principal debtor discloses by his answer that he denies his obligation, or where the principal debtor has absconded so that no demand can be made upon him, and where no damage to the surety is shown by failure to notify him of the default of his principal, the necessity of a demand or notice prior to suit is dispensed with. In most, if not all, of the cases cited, the undertaking of the surety was unconditional. But that is not this case. The defendants in error in this case are sureties upon a fidelity bond, and undertook to pay only upon condition that demand be made upon their principal and that he fail to return the samples of merchandise intrusted to him. In such case a demand is a part of the cause of action of the plaintiff and must be pleaded and shown. 32 Cyc. 176, note 62; *Folsom v. Squire*, 72 N. J. Law, 430, 60 Atl. 1102; *Nelson v. Bostwick*, 5 Hill (N. Y.) 37, 40 Am. Dec. 310.

In *Nelson v. Bostwick*, supra, it is said, per *Bronson, J.*: "When a party agrees to pay his own debt on request it is regarded as an undertaking to pay generally and no special request need be alleged. But it is otherwise when he undertakes for a collateral matter, or as a surety for a third person. There, if the agreement be that he will pay on request, the request is parcel of the contract, and must be specially alleged and proved. [Citations.] Here there was no precedent debt or duty upon Nelson. He was a surety, and becoming so he had a right to make his own terms. The condition of the bond is that Shumway, the principal debtor, shall pay on demand. The demand is parcel of the contract, and is in the nature of a condition precedent to a right of action on the bond. As no demand of the costs from Shumway was proved there was no breach of the condition, and no right of action had accrued on the bond."

Numerous other points are argued by plaintiff in error, but the one already discussed lies at the foundation of its cause of action, and the failure of proof in that regard is fatal to its recovery. The other propositions advanced will therefore not be considered.

The judgment of the court below will, accordingly, be affirmed; and it is so ordered.

ROBERTS, C. J., and LEAHY, District Judge, concur. HANNA, J., did not participate in this decision.



(18 N. M. 68)

**HUBBELL v. ARMIJO.**

(Supreme Court of New Mexico. June 20, 1913.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 776\*) — RIGHT TO DISMISS.**

The appellant has no right to dismiss his appeal in the face of a motion for affirmance well taken.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3115-3119; Dec. Dig. § 776.\*]

**2. APPEAL AND ERROR (§ 753\*)—ASSIGNMENT OF ERROR—FAILURE TO FILE AND SERVE—"GOOD CAUSE."**

The fact that appellant's attorney has been busily engaged with other matters does not constitute "good cause" for failure to file and serve assignment of error, as required by section 21, c. 57, Sess. Laws 1907.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3086-3089; Dec. Dig. § 753.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3112-3114; vol. 8, p. 7672.]

Appeal from District Court, Bernalillo County; H. F. Raynolds, Judge.

Action by Frank A. Hubbell against Justo R. Armijo. From judgment for plaintiff, defendant appeals. Affirmed.

Frank W. Clancy, of Santa Fé, for appellant. Marron & Wood, of Albuquerque, for appellee.

ROBERTS, C. J. [1] Appellant failed to assign error, and serve a copy of such assignment of error on the appellee, and also failed to file a copy of such assignment of error with the clerk of the Supreme Court on or before the return day of this appeal, as required by section 21, c. 57, S. L. 1907. Appellee, on the 24th day of April, 1913, filed a motion to dismiss the appeal and affirm the judgment of the lower court, because of such failure. Four days thereafter appellant filed a written dismissal of the appeal. The question presented is: Has the appellant the right to dismiss his appeal in the face of a motion for affirmance well taken? This question was answered in the negative by this court in the case of Acequia Madre v. Myers, 128 Pac. 68.

[2] Appellant contends, however, that the motion for affirmance was not well taken, because of a showing made by his attorney excusing the default. The statute (section 21, c. 57, supra) provides: "In default of such assignment of error and filing the same the appeal or writ of error may be dismissed and the judgment affirmed, unless good cause for failure be shown."

In the case of Acequia Madre v. Myers, supra, this court said: "Our territorial Supreme Court has held repeatedly that upon failure to file and serve the assignment of error, as required, and within the time limited, the appellee or defendant in error is entitled to a dismissal and affirmance, if ad-

vantage be taken of such default before it is cured, in the absence of a showing of good cause for such failure." Here the only showing made is that appellant's attorney is the Attorney General of the state, and has been busily engaged with other matters of importance, and overlooked filing the assignment of error. The pressure of other business does not constitute "good cause" within the meaning of the statute.

In the case of Hillard v. Insurance Co., 132 Pac. 249, decided at the present term of this court, and not yet officially reported, we say: "It has been held that the fact that an attorney had 'so much to do' is not a sufficient excuse for his failure to file his abstract and briefs as required by the rules of the court." In that case the rule is laid down that a showing of "good cause," excusing a default in failing to file and serve copies of briefs within the time required by rule of court, requires a showing that such default occurred by reason of facts and circumstances not within the control of the defaulting party.

The rule announced is applicable to this case, and under it the showing made is not sufficient to excuse the defendant.

The motion for affirmance is therefore well taken, and will be granted.

HANNA and PARKER, JJ., concur.

(22 Cal. App. 167)

**HAMMOND v. OCEAN SHORE DEVELOPMENT CO. (Civ. 1,071.)**

(District Court of Appeal, Third District, California. May 31, 1913. Rehearing Denied by Supreme Court July 30, 1913.)

**1. CORPORATIONS (§ 503\*)—ACTIONS AGAINST CORPORATION—PLACE OF SUIT—CONSTITUTIONAL PROVISIONS.**

Under the express provisions of Const. art. 12, § 16, plaintiff may sue a corporation in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs, or in the county of the corporation's principal place of business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1835-1939, 1942-1946; Dec. Dig. § 503.\*]

**2. CORPORATIONS (§ 503\*)—ACTIONS AGAINST CORPORATION—VENUE—BURDEN OF PROOF.**

Where, on an application by a corporation defendant to change the venue, it appears that the corporation's principal place of business is in another county, the burden is on plaintiff in an action for false representations, inducing plaintiff to enter into a contract, to show that the contract was made or was to be performed, or that the obligation or liability arose or the breach occurred in the county where the suit was brought.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1835-1939, 1942-1946; Dec. Dig. § 503.\*]

**3. CONTRACTS (§ 175\*)—PLACE—"DATE."**

Where a contract for the sale of real property, alleged to have been obtained by defendant's false representations, was dated at San Francisco, it would be presumed that it was truly dated and that such prima facie was the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



place where the contract was made; the word "date" meaning the designation or indication in an instrument of writing of the time and place when and where the instrument was made.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 766, 978, 1010, 1067-1069, 1786, 1803, 1810; Dec. Dig. § 175.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1890, 1831.]

**4. VENUE (§ 14\*)—CAUSE OF ACTION—PLACE OF ACCRUAL—RESCISSION OF CONTRACT—TENDER.**

Plaintiff sued to recover the amount paid on a contract for the sale of real property, alleged to have been obtained from plaintiff by defendant's false representations. The contract was dated at San Francisco, and there was no allegation that it was to be performed in M. county where the action was brought. No breach of the contract was alleged; plaintiff's action being to recover the amount paid for fraud. Plaintiff elected to rescind February 5, 1912, on which date he gave defendant notice of his election and tendered to defendant a quitclaim deed of the property and demanded the return of the amount paid. *Held*, that defendant's duty to return such sum did not accrue until plaintiff's election to rescind and place defendant in statu quo, which act occurred at defendant's office in San Francisco; that plaintiff's cause of action arose there; and that defendant was entitled to be sued in that county.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 21, 27; Dec. Dig. § 14.\*]

**5. VENDOR AND PURCHASER (§ 120\*)—RESCISSION—PLACE.**

Civ. Code, § 1489, provides that an offer of rescission may be made at any place appointed by the creditor or wherever the person to whom the offer ought to be made can be found. *Held* that, where plaintiff purchased land from a corporation whose only place of business was in San Francisco, and plaintiff elected to rescind for alleged fraud, and the corporation had appointed no other place for notice than its office, his offer to rescind could only be made in San Francisco.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 215-217; Dec. Dig. § 120.\*]

**6. CORPORATIONS (§ 503\*)—ACTION—VENUE.**

Where plaintiff sued a corporation in M. county, which only had a place of business in San Francisco, to recover the amount paid for certain land alleged to have been sold to plaintiff by false representations, a count in assumpsit for money received, alleging that defendant was indebted in M. county, did not amount to an allegation that the debt originated in M. county, so as to entitle plaintiff to maintain the suit there.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1835-1939, 1942-1946; Dec. Dig. § 503.\*]

Appeal from Superior Court, Mono County; J. D. Murphy, Judge.

Action by J. P. Hammond against the Ocean Shore Development Company. From an order granting defendant's motion to change the venue to the City and County of San Francisco, plaintiff appeals. Affirmed.

Joseph K. Hutchinson, of San Francisco (Walter Slack, of San Francisco, of counsel), for appellant. Byrne & Lamson, of San Francisco, for respondent.

BURNETT, J. Plaintiff brought the action to recover the sum of \$335 which, it is

alleged, he was induced, by false and fraudulent representations, to pay to defendant as a part of the purchase price of certain lots of land in San Mateo county. Defendant appeared and in proper form moved for a change of venue to the city and county of San Francisco, supporting the motion by an affidavit of the president of the corporation in which it was set out: That said defendant has now, and did have at the time of the commencement of this action, its principal place of business in the city and county of San Francisco, and does not now and never did maintain any office of any character in the county of Mono; that the contract referred to in the complaint on file herein and attached thereto was made at and was to be performed in the said city and county of San Francisco; that, if there was any breach of said contract, it occurred in said city and county; and concluding with the usual averment of meritorious defense. The motion was heard upon this affidavit and the complaint in the action and duly granted, and the appeal is from said order.

Article 12, § 16, of the state Constitution, provides: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial, as in other cases."

[1] It is thus made plain that the plaintiff has the right to elect to sue the corporation in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs, or in the county where the principal place of business of the corporation is situated. *Trezevant v. Strong Company*, 102 Cal. 47, 36 Pac. 395.

[2] In applying the said constitutional provision, the rule is that, when the corporation has shown that its principal place of business, which is its residence, is in another county, to defeat the motion for a change of venue the burden of proof is upon plaintiff, in an action like this, to show that the contract was made or was to be performed, or that the obligation or liability arose or the breach occurred, in the county where the action is brought. *Brady v. Times-Mirror Co.*, 106 Cal. 56, 39 Pac. 209; *Griffin & Skelly Co. v. Magnolia & Healdsburg Fruit Cannery Co.*, 107 Cal. 378, 40 Pac. 495.

As to the contract, from the showing made, the court was not compelled to find that it was either made or to be performed in Mono county, but it was justified in the conclusion that the contract was made and ultimately to be performed in the city and county of San Francisco. This position is supported by the following considerations: It is not alleged in the complaint that the con-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



tract was either made or to be performed in Mono county. The complaint as to this is at most vague and uncertain. It would have been a simple matter to conclude the question by a plain and direct averment, but the pleader seems studiously to have avoided taking an unequivocal stand in the premises. He has fallen short of the requirement of the rule of evidence upon the subject. On the contrary, it appears from the complaint that the contract was dated at San Francisco, and the presumption is that a writing is truly dated. Subd. 23, § 1963, Code Civ. Proc.

[3] The word "date" is defined in Bouvier's Law Dictionary as: "The designation or indication in an instrument of writing of the time and place when and where it was made." The place at which a contract bears date is held to be *prima facie* the place where the contract was made. *Bronte v. Leslie*, 30 Ill. App. 288; *Hoppins v. Miller*, 17 N. J. Law, 185; *Heffebower v. Detrick*, 27 W. Va. 16. And of course it would be a fair deduction that the contract was to be entirely performed at the place where it was made and where the defendant resides and where it was expressly provided that the payments by plaintiff should be made.

The complaint, indeed, contains an allegation that plaintiff, at the date of the execution of the contract, was a resident of and was in the county of Mono, but this is not inconsistent with the view that plaintiff may have signed the contract in said county and then sent it to San Francisco where it was signed by defendant and there delivered to plaintiff's agent; the time and place for the consummation of a contract being when and where the last act necessary for its validity has been performed. Regardless, then, of the positive averment in respondent's affidavit to that effect, the court was justified in holding that said contract was made and to be performed in San Francisco.

[4] No breach of the contract was alleged, and the only remaining question is, therefore: *Where* did the obligation of the defendant arise to pay back the money received under said contract? The answer to this depends upon the answer to the further question: *When* did said obligation arise? It is the contention of respondent that under no possible theory could this obligation arise at the time the false representations were made in Mono county, and not until, at least, the fraud was consummated. This is in accordance with the rule stated in 20 Cyc. p. 90, that: "Aside from matters involving the statute of limitations, a cause of action in deceit accrues immediately upon the successful consummation of the fraud, provided that the fraud results in injury to plaintiff."

When was the fraud consummated? The allegations of the complaint permit only three possible answers to this question: (1) When the contract was executed; (2) when the plaintiff paid the money pursuant

to the terms of the contract; and (3) when plaintiff rescinded the contract. As to the first, we have already seen that the contract appears to have been executed in San Francisco. The conclusion is equally satisfactory that the money was paid at the same place. The contract acknowledges, at San Francisco, the receipt of \$300 and provides for the payment of the balance in that city. The \$35 additional is alleged to have been paid to defendant "under and pursuant to the terms of said contract." This is equivalent to stating that it was paid in San Francisco. But it is quite clear that the complaint is framed upon and requires the adoption of the theory that the cause of action accrued when the plaintiff performed the last act in the rescission of the contract. Until then it can hardly be said that the obligation of defendant arose to repay the money received from plaintiff.

The doctrine is, of course, quite familiar and need not be elaborately restated here as to the choice of remedies open to the defrauded party between an affirmation of the contract followed by a suit for damages and the absolute rescission of the contract with the appropriate and corresponding action to recover the consideration parted with. In the case at bar there can be no mistake as to the election of plaintiff.

The representations which induced the agreement to purchase are set out, the other essential elements of fraud and the payment of this money clearly appear, and then it is alleged that, on the 5th day of February, 1912, "plaintiff promptly rescinded said contract and gave to defendant due and proper notice in writing of such rescission; that on said 5th day of February, 1912, plaintiff tendered to defendant \* \* \* a quitclaim deed covering said property; that said plaintiff, on said 5th day of February, 1912, further offered to restore to defendant each and every and all benefits which defendant might claim that plaintiff had received under the terms of said contract." Then follow the allegations of the demand for the return of the \$335 and defendant's refusal to return or to repay any portion of the same.

The action is thus clearly brought under the terms of section 1691 of the Civil Code, and the allegation of the offer to restore what was received from defendant is essential to the statement of a cause of action, and without said allegation the liability of defendant to return the money would not be shown. This arises from the consideration that the contract was voidable at the option of the vendee on the discovery of the fraud. It is no doubt true that plaintiff might have waived the fraud and ratified the contract either expressly or by implication; but, having chosen to rescind, his cause of action became complete and the liability of defendant accrued when the offer was made to restore the parties to statu quo.

The question then arises: *Where* did this



culminating act of rescission take place? As to this the complaint is silent. The place of tender should have been pleaded. 38 Cyc. 168; *Trabue v. Kay*, 4 Bibb (Ky.) 226; *Harding v. York Knitting Mills* (C. C.) 142 Fed. 228. Not having pleaded it, the presumption, of course, could not be in favor of plaintiff as to the place where it occurred. Indeed, the principle already announced requiring the plaintiff to show that he has brought himself within an exception to the general rule that an action must be brought in the county of the residence of the defendant would require an allegation that the tender was made in another county than San Francisco in order to defeat the motion for a change of venue.

[5] There is another view that leads to the same result. In other states it has been held that it is the duty of the rescinding party to return the goods or make the tender at the place where the trade was consummated. *Young v. Arntze*, 86 Ala. 116, 5 South. 253; *Tyler v. Augusta*, 88 Me. 504, 34 Atl. 406; *Milliken v. Skillings*, 89 Me. 180, 36 Atl. 77; *Mundt v. Simpkins*, 81 Neb. 1, 115 N. W. 325, 129 Am. St. Rep. 670. It has been modified by statute in this state (section 1489, Civ. Code). Here the offer can be made: "(1) At any place appointed by the creditor; or (2) wherever the person to whom the offer ought to be made can be found." No place was appointed by the creditor; and since respondent could be found only in San Francisco, as that was its place of business, we must assume, of course, that the tender was made in that place. In this particular the case is analogous to *Bank of Yolo v. Sperry Flour Co.*, 141 Cal. 314, 74 Pac. 855, 65 L. R. A. 90, wherein it was said: "Plaintiff is a banking corporation doing business at Woodland, the county seat of Yolo, and a promise to repay money advanced by it (no other place of payment being stipulated) must be deemed a promise to pay at its bank, the only place where it can be found. This, we think, is a reasonable deduction from the provisions of the Civil Code (sections 1488, 1489) in regard to the place where an offer of performance may be made."

[6] A fair consideration of the second count of the complaint does not, we think, affect the soundness of the foregoing views. It is a count for money had and received in the usual form. Therein is an allegation that defendant *was indebted* in Mono county, but this manifestly is quite different from an allegation that *defendant became indebted*. The producing cause of the relation of debtor and creditor and not the condition of indebtedness is the pertinent object of inquiry. We are not concerned with the question where it *existed* but where it *originated*. Of course the debt existed everywhere if it existed at all.

There is also the formal allegation in said second count: "That said defendant, being so indebted to said plaintiff, then and there in the county of Mono promised to pay the said sum \* \* \* in the county and state aforesaid upon his request." However, as pointed out by respondent, this promise is but a mere fiction in a count for money had and received and it may be disregarded. It was not necessary to allege it. *McFarland v. Holcomb*, 123 Cal. 84, 55 Pac. 761; *Aydellotte v. Billing*, 8 Cal. App. 673, 97 Pac. 698. Besides, that this is the mere conclusion of the pleader is shown by the allegation: "That the claim hereinabove set forth in the second count of this complaint arose and arises out of the same transaction out of which arises the claim hereinabove set forth in the first count of this complaint." In other words, the entire transaction is set out in the first count, and the plaintiff attempts in the second count to set out the same cause of action in the convenient form for money had and received for his use and benefit.

We deem it unnecessary to consider the contention of respondent that the bill of exceptions should be disregarded for the reason that it was not presented in time, as we think upon the record the order should be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

(22 Cal. App. 179)

#### SOUZA v. JOSEPH. (Civ. 1,044.)

(District Court of Appeal, Third District, California. June 2, 1913. Rehearing Denied by Supreme Court Aug. 1, 1913.)

#### 1. LANDLORD AND TENANT (§ 154\*)—REMEDIES FOR FAILURE TO MAKE IMPROVEMENTS—EVIDENCE.

In an action for breach of the conditions of a lease requiring the lessor to make improvements upon the premises to fit it as a dairy farm, evidence *held* sufficient to warrant findings that there had been such an unreasonable delay by the lessor in making the improvements as to justify the lessee in leaving the premises, even though at the time of the abandonment the lessor was willing to comply with the lease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 553-566; Dec. Dig. § 154.\*]

#### 2. APPEAL AND ERROR (§ 1008\*)—FINDINGS OF FACT—CONCLUSIVENESS.

In such a case, it was a question for the trial court to determine whether, under all the circumstances, the lessor acted with reasonable promptness in carrying out the terms of the lease, and whether the lessee was justified in abandoning the premises.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. § 1008.\*]

#### 3. LANDLORD AND TENANT (§ 49\*)—CONSTRUCTION OF LEASE—LIQUIDATED DAMAGES.

A lease, which stipulated for liquidated damages to the lessor "if from any cause" it became impossible for the lessee to fulfill his covenant, did not require the payment of dam-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ages where the nonperformance by the lessee was caused by the lessor's fault.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 117-119; Dec. Dig. § 49.\*]

**4. WITNESSES (§ 256\*)—REFRESHING RECOLLECTION—INSPECTION OF WRITING BY ADVERSE PARTY.**

Under Code Civ. Proc. § 2047, requiring the writing used by a witness to refresh his recollection to be produced for inspection by the adverse party, who might cross-examine upon it, it was error to refuse to allow the adverse party to examine the writing, and cross-examine concerning it, before the witness used it.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 891; Dec. Dig. § 256.\*]

**5. APPEAL AND ERROR (§ 1048\*)—HARMLESS ERROR—INSPECTION OF BOOK USED TO REFRESH RECOLLECTION.**

The error was harmless, where the adverse party thereafter had full opportunity, of which he availed himself, to inspect the book and cross-examine regarding it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.\*]

**6. LANDLORD AND TENANT (§ 154\*)—FAILURE TO MAKE IMPROVEMENTS—ACTIONS—EVIDENCE.**

In an action by a lessee for the lessor's failure to construct a barn and make other improvements necessary to fit the premises for dairy purposes, where it appeared that the lessor had not constructed the barn, and that a barn already on the premises was occupied by hay at the time the lessee desired to put up hay, a question asked the lessee on cross-examination, whether the lessor did not offer to give lessee the hay in the barn in exchange for a similar amount to be stacked outside by the lessee was immaterial.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 558-560; Dec. Dig. § 154.\*]

**7. LANDLORD AND TENANT (§ 154\*)—FAILURE TO MAKE IMPROVEMENTS—ACTIONS—EVIDENCE.**

In such an action, a question asked the lessee on cross-examination as to his previous experience in the dairy business was immaterial.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 558-566; Dec. Dig. § 154.\*]

**8. APPEAL AND ERROR (§ 1056\*)—HARMLESS ERROR—EXCLUDING EVIDENCE.**

In such an action there was no prejudice in sustaining an objection to a question, asked the lessee, whether he insisted, at the time the lease was made, on having the improvements constructed at once, since the question called for a "Yes" or "No" answer, neither of which would have helped the lessor's case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.\*]

**9. WITNESSES (§ 275\*)—CROSS-EXAMINATION—FAILURE TO MAKE IMPROVEMENTS.**

In such an action, where the lessor did not claim that the delay was due to a difference as to the cost of improvements, it was not error to limit the number of questions asked the lessee on cross-examination as to his knowledge of the cost.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 924, 926, 967-975; Dec. Dig. § 275.\*]

**10. WITNESSES (§ 291\*)—CROSS-EXAMINATION—DISCRETION OF COURT.**

It is within the discretion of the court to refuse a right to re-examine an adverse witness as to a matter once fully gone into on cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1006, 1007; Dec. Dig. § 291.\*]

**11. APPEAL AND ERROR (§ 1078\*)—WAIVER OF ERROR—FAILURE TO ARGUE.**

Errors assigned in the specifications, but not mentioned in the brief, need not be considered by the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.\*]

Appeal from Superior Court, Siskiyou County; Jas. F. Lodge, Judge.

Action by George M. Souza against Antone Joseph. Judgment for plaintiff, and defendant appeals. Affirmed.

James F. Farragher and James R. Tapscott, both of Yreka, for appellant. Taylor & Tebbe, of Yreka, for respondent.

CHIPMAN, P. J. Plaintiff brings the action to recover damages for the alleged breach by defendant, of a written contract between plaintiff and defendant, dated February 1, 1910. Plaintiff had judgment for \$1,245.10; from which, and from the order denying his motion for a new trial, defendant appeals.

The contract is a lease by defendant (named as first party) to plaintiff (second party) for the term of four years from its date, of defendant's farm of 1,720 acres of land situated in Siskiyou county, together with the live stock and other personal property particularly described in an inventory attached to the contract. In addition to the personal property covered by the inventory, first party was to procure and deliver to second party 80 milch cows "to be mutually selected by the parties." It was also provided that, "in addition to the buildings now upon said farm said first party is to have constructed thereon at a suitable site and as soon as practicable a dairy building to consist of cement flooring and walls and suitable roofing, and is to convey water to same through pipes from a gravity source, and is also to construct thereon at suitable site a barn to consist of a main building for hay, with sheds on each length side thereof for eighty dairy cows, affording three feet frontage space for each cow, and to place therein suitable stanchions and flooring. Said barn is to be equipped for Jackson forks." First party was also to construct a bunkhouse for housing "from eight to ten workmen and to fit the same with proper flue and warming stove"; he was also "to furnish a separator with steam facilities for the operation thereof at a cost not to exceed \$350.00," second party to install the same. First party also was to "furnish all material proper and necessary for the repair of the existing fences and material for such new fences as the parties

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



may elect to construct." First party was to furnish "such new farming implements as may be necessary for the proper conducting of said farm." The foregoing are the principal covenants on the part of defendant the alleged violation of which was the burden of plaintiff's complaint.

The agreement of plaintiff was "to enter at once into possession of the farm and personal property and conduct therewith a general farming and dairying business"; he was "to do the necessary excavating for the construction of said dairy and for the carrying of the pipes to convey the water to same," and "supervise and assist in constructing said dairy and conveying said water thereto," and also to "assist in the construction of said cow barn"; he also agreed to take proper care of all said property and to so farm said lands "as to make them profitably productive to the parties"; to replant the hay land where necessary and to conduct said business "in a first-class and dairyman-like way," dispose of the surplus product and collect the proceeds, and pay over to defendant one-half thereof, retaining for himself the remaining one-half. To insure the faithful performance of the contract by plaintiff he further agreed that "if from any cause it becomes impossible for him to fulfill his covenants hereunder that he will pay to first party the sum of \$2,000.00, as liquidated damages for his failure in said regard, and thereupon this agreement shall become canceled and void." It was also provided that, upon the termination of the agreement, plaintiff should "deliver back" to defendant said personal property "in number, kind and quality and condition as nearly as possible, \* \* \* subject to such deterioration as shall result from reasonable use thereof"; also that plaintiff "will devote his best energies and abilities towards handling, conducting and operating said property as mutually profitable and advantageous as possible," and he agrees "to act towards" defendant "with the utmost good faith to the end that the enterprise shall be mutually profitable." It was further provided that "teams and wagons to convey the material for construction of said new buildings on said farm are to be furnished therefrom by said second party, but the drivers therefor are to be furnished and paid by said first party. All other material and appliances to be furnished by said first party are to be conveyed to said farm from store, railway station or mill by said second party."

The foregoing covenants on plaintiff's part, which defendant alleges were violated by plaintiff, furnish the basis of defendant's defense and the ground for his cross-complaint, in which he claims \$2,000, under the clause for liquidated damages, and also \$500, which he alleges is one-half the proceeds of sales of farm products made by plaintiff. Defendant denied specifically the alleged breaches of the contract on his part.

The cause was tried by the court without a jury, and the findings of fact were: That plaintiff had performed the obligations of the contract on his part; that defendant, "though often requested by plaintiff to erect said dairy building and the said barn and said sheds for said dairy cows as contemplated in said contract, refused and neglected to perform his said contract in that respect"; that, on May 27, 1910, "defendant had not made any arrangements to build any barn upon said place, as contemplated in said contract"; that there was a barn on the place capable of storing about 400 tons of loose hay; that the annual crop of hay was at that time ready to be cut; that defendant occupied said barn with hay belonging to himself to the amount of 200 tons, and though often requested to remove said hay to make room for said new crop, defendant refused to remove said hay; that the farm produced about 500 tons of hay, and said barn was necessary for the housing of the same, and "it was also necessary for the erection of a new barn, as contemplated in said contract for the housing of said hay for the year 1910"; that defendant furnished said separator and engine and boiler to run the same, but defendant "never did build, nor cause to be built, any building in which said separator and boiler and engine were to be placed, and thereafter removed said boiler and engine and disposed of said separator, and did not begin the erection of said creamery building, as contemplated by the terms of said contract," and "that said dairy building and said facilities for running the same should have been supplied long prior to the month of May, 1910"; that defendant, though often requested to furnish material for the repair of fences and for new fences, refused and neglected to do so; that he also failed to furnish the necessary farming implements. It was further found: That, in April, 1910, there were purchased 80 cows, which were delivered to plaintiff, and that "it was necessary, in order to care for said cows and to run the creamery as contemplated in said contract, that facilities for taking care of said cows, and the milk and cream, the product of said cows, that there should be a building that could be used as a creamery and a barn, with stalls for each of said cows, \* \* \* and said facilities should have been provided by defendant without any delay. That disregarding his said contract, defendant refused to take any steps, though repeatedly and constantly urged by plaintiff, to make the necessary provision for taking care of said product. That there was no place upon said farm where the said cows could be properly taken care of; nor any place that could serve as a creamery to take care of the said milk and cream, the product of said cows; that by reason of the said acts of defendant in refusing and neglecting to carry out his said contract, it was impossible for plaintiff to carry out the said con-



tract on his part." It is further found: "That plaintiff expended four months of labor in preparing to operate said farm under said contract, and in working upon said farm; that plaintiff expended in the purchase of material and hiring of men under said contract, in excess of the receipts for produce sold, the sum of \$795.10; that it cost plaintiff to move his family upon said farm the sum of \$50; that plaintiff was an experienced dairyman and the value of his services for the four months he was engaged on said farm, under said contract, was of the value of \$400; that the acts of defendant caused plaintiff damage in the sum of \$1,245.10, no part of which has been paid to plaintiff; that plaintiff kept a true and correct account of all his expenditures and receipts in conducting said farm, and was ready and willing at all times to account to defendant; and never refused to account to defendant; that none of the acts of plaintiff herein has caused defendant any damage whatever." "As conclusions of law from the foregoing facts, the court holds that plaintiff is entitled to judgment against defendant, and to recover of defendant the sum of \$1,245.10, together with costs of suit."

The provisions of the contract and the findings of fact will sufficiently suggest the issues without stating the averments of the pleadings.

[1] 1. Numerous errors of law are assigned in the rulings of the court at the trial, but the principal ground urged for a reversal of the judgment is the insufficiency of the evidence to support the findings of fact. It appears that plaintiff moved to the farm with his family on February 9, 1910, and at once entered upon the farming operations devolving upon him under the contract. He continued so to do until May 27, 1910, when he abandoned his lease and the possession of the farm. Whether he was justified in this course is the main issue in the case. While there were some other provoking causes of some importance, the ones chiefly put forward by plaintiff were defendant's failure to build the cow and hay barn and the dairy building. The contract provided that defendant was "to construct thereon (upon said farm) at suitable site a barn to consist of a main building for hay, with sheds on each length side thereof for eighty dairy cows, affording three feet frontage space for each cow, and to place therein suitable stanchions and flooring." Plaintiff's duty, as provided by the contract, was "to supervise and assist in the construction of said cow barn." The farm hitherto had been conducted as a grain, hay, and stock farm. The contract contemplated turning it into a dairy farm, and provided that plaintiff was to receive from defendant, "on or before May 1, 1910, eighty milch cows." Plaintiff testified that 40 cows were bought in March, and the balance, it appeared, were delivered in April. Plaintiff testified that he started to ship cream

April the 10th, and shipped till May 27th. There was evidence that the hay crops usually amounted to about 500 tons. There was a hay barn on the place of about 300 tons storage capacity. Defendant had in it about 200 tons of hay which had not been removed at the time plaintiff gave up the farm. The evidence showed the alfalfa hay was ready to be cut, but the wild grass hay was not yet fit to cut. There was evidence that plaintiff had frequently and urgently insisted upon the completion of the new hay and dairy barn in time for its convenient use in handling the cows, and to store hay, and also that defendant should remove his hay from the old barn in time to receive the new hay crop, and should complete the dairy building. The contract provided that defendant was to construct "at a suitable site and as soon as practicable a dairy building to consist of cement flooring and walls and suitable roofing, and is to convey water to same through pipes from a gravity source." Plaintiff was "to do the necessary excavating for the construction of said dairy and for laying of the pipes to the same to convey the water to same at his own cost and expense and is to supervise and assist in constructing said dairy and conveying said water thereto."

It is quite apparent that the parties regarded these buildings as necessary to the proper and economical operation of the dairy branch of the farm, which was to be its chief source of income. The contract itself implies as much, and the evidence confirms this implication. It is not contended by defendant that less than full compliance with his covenants would have given plaintiff the equipment required to profitably and satisfactorily perform his part of the contract. Defendant's contention is that a reasonable time was implied in which to do the things he had agreed to do, and in this contention he is doubtless correct. Defendant testified that he did not give an order for the lumber to build the hay and dairy barn until two weeks before plaintiff left the place, and about the same time he sent a man into the woods to cut timbers for the barn. He bought cement for the dairy building on March 26, 1910, but he did not commence to build until a few days before plaintiff gave up his lease, and after he had been notified by plaintiff that he intended doing so. Plaintiff testified that he had many times urged defendant to erect these buildings, but could get no satisfactory answer as to when he would commence work.

Witness Perry went to work for plaintiff on April 21st, and remained until plaintiff left. He was asked to state what kind of a place they had for milking the cows. He testified: "There was an old corral there—it used to be the lassoing corral—made out of rails and old boards. That was the only corral there, they made it a little bigger, throwed the fence out a little further, made it a little bigger so they could get the cows



in it. It was in pretty bad shape to milk cows in. That was the only corral there, and the only place they had to milk cows in. There was no dairy barn there when I left, and none started. There was an old barn there; there was two barns there. The stable, horse barn—and there was that big barn where they kept hay—it was two-thirds full of hay. \* \* \* Q. What kind of a place did they have to take care of the cream there? A. Had an old shed there along the barn; they told me it was a barn they used to put a stallion they had there before they had the old shed alongside of that; where they had the separator it was in pretty bad shape. It wasn't a fit place to take care of milk, it didn't have a good floor on; the old boards were muddy all the time there. It was right close to the dirt there; it was always muddy in there."

Witness Silva went to work on the place March 5, 1910, and remained there until May 26th. He had worked in a dairy, and was a milker. He testified: "Q. Now, how about a place to take care of the cream and milk? A. Why, it was a pretty bad place. It was a little shed—there was a little barn there and a shed on one side of it where they had the separator. It was in a pretty dirty condition. Awful poor place to have a separator in. It wasn't any place in my judgment to take care of milk and cream. That continued all the time while I was there. Q. In your judgment as a dairyman you wouldn't want to continue in business any longer than you could possibly help? A. No, sir. It was an awful warm place, and caused milk and cream to get sour—couldn't keep it clean because there were holes in the roof, and the wind would blow there, blow dust in the milk. The building was dirty inside. There was no new cow barn built while I was there, nor was there any lumber brought there to build any such barn when I was there."

Plaintiff testified: "When we bought first cows I told him, 'Bargain them cows; don't take them before I got machinery up and dairy building'—what we done was took cows in before that machinery put in. \* \* \* Q. Did you kick at the proposition—did you tell Antone not to do that? A. Not to take cows, I didn't like it—I don't kick then on that, but I want him to have dairy up that time. I tell Antone Joseph—I heard him make the agreement—not to get the cows before the 1st of April to the 15th." There was no evidence that the delay in erecting the dairy building or the hay and cow barn was caused by any failure on plaintiff's part, and the evidence warranted the finding of the court that the "dairy building and said facilities for running the same should have been supplied long prior to the month of May, 1910; that the same were necessary and essential for the carrying out of said contract by the plaintiff upon his behalf, and said buildings and machinery should

have been finished long prior to the month of May, 1910."

There was evidence justifying the court in finding that defendant failed and refused to furnish such new farming implements as were necessary for the proper conduct of the farm, "though often requested by plaintiff to buy said farming implements." So, also, was there evidence warranting the finding "that there was no place upon said farm where said cows could be properly taken care of; nor any place that could serve as a creamery to take care of said milk and cream, the product of said cows." There was also evidence tending to show that defendant had not kept his agreement in the matter of furnishing lumber to repair the fences and to make the necessary new fences.

[2] Plaintiff was asked, on cross-examination, why he quit on May 26th, "What happened on that day that caused you to quit the lease? A. Because I was entirely satisfied that he (defendant) won't put up what he promised me, because it has been long enough he promised to do it, telling me going to do it, and he never did—I told him lots of times, and he never did." We think the findings of fact necessary to support the judgment are sufficiently justified by the evidence. After so long an unnecessary delay in providing plaintiff with the facilities for properly carrying on the enterprise, he was not bound to remain even though at the time he quit defendant was manifesting a willingness to do the things he had agreed to do. It was for the court to decide from all the facts whether defendant had acted with reasonable promptness in keeping his covenants, and whether, under all the circumstances, plaintiff was justified in abandoning the contract.

[3] 2. It is contended that the court erred in not awarding defendant liquidated damages, as provided for in the contract by which plaintiff agreed "that if from any cause it becomes impossible for him to continue to fulfill his covenants hereunder he will pay to said first party the sum of \$2,000.00 as liquidated damages." It cannot, for a moment, be supposed that where the impossibility of performance by plaintiff was created by defendant himself, he was to be paid this sum. The covenant was "to insure the faithful performance" of the contract by plaintiff; but, if his failure was due to defendant's default, as the court found, plaintiff would be relieved from this particular obligation.

[4, 5] 3. When plaintiff was testifying he was asked to state the amount of money he had expended in running the farm, and the amount received from the proceeds of the farm. It appeared that he could not answer without referring to his memorandum book and bills which he had with him. Counsel for defendant objected to the witness using the book to refresh his memory, claiming that the book itself was the best evidence, and counsel also asked leave to examine the



witness as to this book and its entries before he should be permitted to refresh his memory from it, or read from it. "The Court: Mr. Souza, did you make these entries in this book when the facts stated were fresh in your memory, when you remembered them clearly and distinctly, or did you write them after it happened? A. Why, sure, I figure them all up when I get the bills. Q. You made these entries when you got the bills? A. Yes; every day I used to mark it down." It appeared that this book showed all his receipts and expenses, and from it he was able to arrive at the exact amount expended and the amount received, which showed that his expenses amounted to \$1,036.39, and his receipts amounted to \$841.29. The court ruled that counsel for defendant was not entitled to examine the witness before being permitted to refer to this memorandum book, nor were they entitled to examine the book. The court remarked: "I think the rights of defendant will be protected on cross-examination." This book was not offered in evidence, and the use made of it was to refresh the memory of the witness. It was shown, in reply to questions put by the court, that the entries were written by plaintiff, partly in the Portuguese language, "at the time when the fact occurred and when \* \* \* fresh in his memory," but in such case, section 2047, Code of Civil Procedure, required that "the writing must be produced and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it." The purpose of these provisions is to give every opportunity to the adverse party to test the important fact that the writing conformed to the requirements of section 2047. It was error to deprive the adverse party of the right thus given; but, as defendant had full opportunity to examine the memorandum book and to cross-examine the witness on the matter, and availed himself of such opportunity, the error was not prejudicial. Nor did the cross-examination disclose facts which would have justified the court in granting defendant's motion to strike out all of plaintiff's testimony on the point.

[8] 4. On cross-examination plaintiff was asked if a proposition was not made to him to treat defendant's hay that was in the barn as plaintiff's hay and stack a like amount outside for defendant. The court sustained an objection to the question. We cannot see that the question was material. There was no evidence or offer to show that the hay was of equal value ton for ton, nor that plaintiff agreed to any such exchange. He was under no obligation to accept such offer.

[7] 5. Some questions were asked the plaintiff on cross-examination about his experience in running a dairy in Yreka, to which plaintiff objected as irrelevant and immaterial. We cannot say that the court erred in sustaining the objection.

[8] 6. Plaintiff was asked, on cross-examination, some questions as to what was said at the time the contract was being prepared. One question was, "Did you insist at that time on having a barn with stanchions for your cows constructed at once?" The court sustained plaintiff's objection to the question. Defendant claims that, inasmuch as the contract fixed no time within which the barn was to be finished, the question was a proper one. Had plaintiff answered, either "Yes," or "No," it would not have helped defendant's case in the slightest degree, and hence there was no prejudice in the ruling. The point urged as ground for error would have arisen had the witness been asked to state the conversation, if there was any, as to the time to be given for erecting the barn.

[9] 7. There was no error in limiting the number of questions put to plaintiff on cross-examination as to his knowledge of the cost of the barn. He had said he did not know what the cost would be. It was not claimed by defendant that the delay in building the barn arose from any difference of opinion between the parties as to the cost.

8. Some complaint is made of the rulings of the court in allowing plaintiff to testify to the quantity of hay the farm would produce, on the ground that his competency had not been shown. Plaintiff's experience as a farmer sufficiently appeared. The court remarked: "I think it would be a matter of observation and would go more to the weight of his testimony than to its admissibility; he is giving what he thinks." We discover no error in the ruling.

[10] 9. On cross-examination plaintiff was asked to state what the \$841.24 of receipts from produce included. An objection was sustained, on the ground that it had been "all gone over," and was beyond the limit given in allowing the cross-examination to be reopened. Defendant had previously examined the witness concerning his statement of receipts and expenses, and had access to the bills and memorandum book. It was within the discretion of the court to refuse a re-examination of matters once fully gone into.

[11] Our attention is called to numerous errors assigned in the specifications; but, as appellant makes no further mention of them in his brief, we do not feel called upon to give them further notice.

Appellant makes no objection to the items entering into the damages awarded plaintiff by the court. They consisted of the difference between the receipts and expenses of the farm, of the value of plaintiff's time, and the expense incurred in moving his family to the farm.

The reversal of the judgment is asked on the ground that the evidence fails to show defendant's breach of the contract as found by the court. It may be that all the findings of fact are not fully supported, but we think



there was evidence quite sufficient to justify enough of the findings to support the judgment.

The judgment and order are therefore affirmed.

We concur: HART, J.; BURNETT, J.

(22 Cal. App. 162)

**HUPP v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.** (Civ. 1,366.)

(District Court of Appeal, Second District, California. May 31, 1913. On Rehearing, June 25, 1913.)

**1. CONTEMPT (§ 13\*)—REFUSAL TO PRODUCE EVIDENCE.**

In an action by the president and manager of a business corporation to enjoin members of the corporation from interfering with its management and from carrying out a threat to destroy its credit and business, the representative of a house which had theretofore supplied merchandise to the corporation testified to certain statements of one of the defendants, and that he thereupon stopped selling goods to plaintiff. It appeared that he wrote certain letters to his employers, one of which was received by the employers after the institution of the injunction suit, and after they had stopped selling goods to plaintiff, which was in the possession of defendant's counsel. *Held*, that defendant's counsel could not be punished for a contempt for his refusal to produce such letter, as it could have had no influence in determining the actions of the witness' employers, and hence was not shown to have any material bearing upon the issues, even assuming that a letter written by a stranger to the suit could be used as evidence.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 30-35; Dec. Dig. § 13.\*]

**2. CONTEMPT (§ 13\*)—REFUSAL TO PRODUCE EVIDENCE.**

Before a party can be held in contempt for refusal to furnish or produce evidence at a trial, it must appear that such evidence, if produced, would be material to some of the issues of the case.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 30-35; Dec. Dig. § 13.\*]

On Rehearing.

**3. COSTS (§ 230\*)—ON APPEAL—RIGHT OF PREVAILING PARTY.**

Ordinarily, the prevailing party in a Court of Appeal is entitled to costs as a matter of course, and they are included in the remittitur without any order of the court, under Code Civ. Proc. § 1022, providing that costs are allowed of course, to the plaintiff upon a judgment in his favor in the cases specified therein.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 869-876; Dec. Dig. § 230.\*]

**4. CONTEMPT (§ 68\*)—COSTS—PERSONS LIABLE—CERTIORARI PROCEEDING.**

In a certiorari proceeding to review an order adjudging the petitioner guilty of contempt in refusing to produce certain evidence on a trial of an action, in which proceeding only the lower court and judge were before the appellate court, costs would be denied as against the court and judge, without prejudice to any rights of the real parties in interest, should a future controversy arise as to the right to recover on account thereof.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 238-241; Dec. Dig. § 68.\*]

Certiorari by George S. Hupp against the Superior Court in and for the County of Los Angeles, and others, to review the action of such court in adjudging petitioner guilty of contempt. Order annulled.

Frank C. Hill and George S. Hupp, both of Los Angeles, for petitioner. William A. Bowen and Flint, Gray & Barker, all of Los Angeles, for respondents.

**JAMES, J.** Certiorari to review the action of the superior court in adjudging petitioner guilty of contempt.

[1] Petitioner is an attorney at law, and as such appeared as counsel for defendants in an action brought by one W. C. McEvilly against J. J. Haggarty, J. C. Haggarty, and Frank C. Hill in the Superior Court of Los Angeles county. The action was commenced on or about the 20th day of February, 1912. The plaintiff in that action sought to secure an injunction to restrain defendants from interfering with his management of a mercantile institution in the city of Los Angeles, and to restrain them from refusing to accept merchandise purchased by him for the business conducted under his management, and to restrain them from carrying out an alleged threat to close the doors of such mercantile establishment and destroy the credit and business thereof. It was set out in the complaint that the plaintiff purchased from defendant J. J. Haggarty an interest in a certain cloak, suit, and millinery business, for which he agreed to pay a large sum of money, that this business was managed as a corporation, and that after making the purchase referred to McEvilly was appointed president and general manager of the corporation, and entered upon the discharge of his duties as such, which included the purchasing of merchandise from time to time for the purpose of keeping up the stock of the establishment. It was further alleged in the complaint filed in the injunction suit that, while J. J. Haggarty was conducting a business similar to that in which McEvilly was engaged, he became jealous of the success attained by McEvilly, and thereupon entered into a conspiracy with a majority of the members of the board of directors of the corporation of which McEvilly was the president and general manager, which conspiracy had for its object the destruction of the business of that corporation; that the conspirators slandered the credit of the corporation, and refused to accept merchandise purchased by McEvilly as manager, and refused and threatened to refuse to pay for any merchandise ordered by McEvilly, and threatened to close the doors of the business house of the corporation and destroy its credit. An answer being filed, the action came on for trial, and for the purpose of proving the facts alleged as to the conspiracy, plaintiff called one Silk as a witness. Silk was the local representative of a San



Francisco house which had theretofore supplied merchandise to the corporation hereinbefore referred to, and which had extended to the corporation credit. This witness was asked as to statements made to him by J. J. Haggarty, and he testified that Mr. Haggarty had asked him if he was selling goods to McEvilly's house, and, receiving a reply in the affirmative, Haggarty said: "Well, go right on if you want to; go right ahead." The witness then stated that he had stopped selling goods to McEvilly, and that early in February, 1912, he told McEvilly that, owing to the unsettled condition of his (McEvilly's) store, he would not sell them goods for a while; that this conversation with McEvilly took place a few days after he had had the conversation with Haggarty. He was then asked this question: "And then you thereupon wrote to Lezinsky Bros. (they being his employers) about the Paris Cloak, Suit & Millinery House? A. Yes; I wrote Lezinsky Bros." The witness testified that he had had no conversation respecting the business referred to with either of the other defendants in the injunction suit who constituted a majority of the board of directors of the McEvilly corporation. With the purpose of proving what communication Silk, the selling agent, made to his employers, witness Lezinsky, one of the latter, was called, and in answer to questions propounded to him testified that he did receive letters from Silk, and that one letter in particular he received after the date of the commencement of the injunction suit. Counsel for plaintiff demanded the production of this letter, and it was finally admitted to be in the hands of petitioner, who refused to produce it for inspection, on the ground that it had not been shown to contain any matter material to the issues on trial, or that it would furnish competent or material evidence in the case. The court sustained the demand of counsel for the plaintiff, and, upon the continued refusal of petitioner to produce the letter, adjudged petitioner guilty of a contempt, and directed that he be imprisoned until he obey the order of the court and deliver up this letter at the trial.

[2] The elementary proposition is not disputed that, before a party can be held in contempt for refusing to furnish or produce evidence at a trial, it must appear that such evidence, if produced, would be material to some of the issues of the case. In the action which was being tried, with petitioner as one of the counsel, the witness Silk had testified fully as to what had been said to him by J. J. Haggarty, the only one of the alleged conspirators with whom he had talked regarding the plaintiff's business, and he testified in effect that because of the statement made to him by J. J. Haggarty, and other rumors and talk which he had heard, his firm had refused to sell goods to McEvilly. Plaintiff's purpose in requiring the production of the par-

ticular letter which the court directed petitioner to produce was undoubtedly to show that the statement of Haggarty had been communicated to the supply house represented by Silk, and that such statement had been effective in destroying the credit of McEvilly. It appeared in evidence that early in February, 1912, Silk told McEvilly that he could furnish them no more goods, but it further appeared that the particular letter production of which was sought to be compelled was not received by Silk's employers until a date subsequent, and some time after the injunction suit had been commenced. Assuming, without deciding, that a letter written by a stranger to the suit could be used as evidence tending to establish the construction which such stranger gave to the language of Haggarty, and that influenced by such construction, notice of which was imparted by the letter, the employers of the writer of the letter refused to sell merchandise to plaintiff, nevertheless such state of facts is not shown by the record, as the communication from Silk to his employers did not reach the latter's hands until after this action was commenced, hence could have had no influence in determining the action of the employers, which determination is shown to have been made before the receipt of the letter. It is difficult to see how, under this state of the case, the letter could have had any material bearing upon the issues which had been framed prior to the time that the letter reached the hands of Silk's employers. The witness Lezinsky testified that the letter had been forwarded to him from New York, and reached his hands in San Francisco a few days only before service was made upon him of subpoena to attend and give his deposition, which was intended to be used at the trial of the action in question.

It not appearing, therefore, that the letter, for the refusal to produce which petitioner was adjudged to be in contempt of court, contained evidence pertinent and material to the issues on trial, the trial judge was without jurisdiction to make the judgment and order complained of, and the same is annulled.

I concur: ALLEN, P. J.

SHAW, J. I concur in the judgment, not only for the reasons stated in the opinion, but upon the further ground that one not a party to an action, receiving a letter from another who is a stranger to the suit, should not be required to produce it at the trial of such an action, save and except upon clear and unequivocal evidence, and such is not disclosed by the record, showing that it is material to the issues involved. Kullman, etc., Co. v. Superior Court, 15 Cal. App. 276, 114 Pac. 589. Moreover, since the witness Silk testified that the only thing said to him by Haggarty was to ask if he was selling



goods to McEvilly, and upon receiving an affirmative answer said: "Well, go right on, if you want to; go right ahead"—anything which he might have stated to Lezinsky in the letter other than this could, in no event, bind Haggarty. Assuming that it was material to show whether or not Silk communicated to Lezinsky the remark so made by Haggarty, such fact could have been ascertained by interrogating him as to what he did with reference to the matter.

#### On Rehearing.

**PER CURIAM.** [3, 4] No order as to costs was made upon the original hearing, nor is such order ordinarily made, because of section 1022 of the Code of Civil Procedure, which is controlling, and under the provisions of which costs follow to the prevailing party as a matter of course and are included in the remittitur. In the case at bar, however, the defendants in interest are not parties, the court and judge thereof only being before the court, neither of whom has any interest in the controversy (Matter of De Lucca, 146 Cal. 113, 79 Pac. 853), and should not be subject to costs in a proceeding of this character, which is but a review of a judicial act. Such omission to award costs is not intended to affect any rights between the real parties in interest should a future controversy arise as to the right to recover on account thereof.

The judgment is modified by adding thereto the following: "Without costs as against the Superior Court, or the judge, thereof." Rehearing denied.

(22 Cal. App. 205)

#### KNEISER v. BELASCO-BLACKWOOD CO. (Civ. 1335.)

(District Court of Appeal, Second District, California. June 3, 1913.)

#### LANDLORD AND TENANT (§ 167\*)—INJURIES FROM DEFECTIVE CONDITION—LANDLORD'S LIABILITY—LICENSEE.

Where a lessor covenanted to keep a certain stairway in a saloon in repair for the use of the lessees and their patrons, he is not liable for injuries received from the defective condition of the stairway by a licensee, who entered the premises, not as a customer, but simply to sit down and rest, in the absence of evidence showing willful injury or gross negligence.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 668-674, 676-679; Dec. Dig. § 167.\*]

Appeal from Superior Court, Los Angeles County; N. D. Arnot, Judge.

Action by Gus F. Kneiser against the Belasco-Blackwood Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Geo. M. Harker and Fred J. Spring, both of Los Angeles, for appellant. Scarborough & Bowen, of Los Angeles, for respondent.

**JAMES, J.** Respondent, as assignor of a certain lease covering a theater and business building located in the city of Los Angeles, was sued in this action for damages alleged to have been sustained by plaintiff because of respondent's negligence in failing to keep in repair a certain stairway, leading from the ground floor of the building in question to the basement thereof. This stairway was located at the rear of a room in the building, which was used by subtenants under respondent as a saloon, adjoining the portion of the building used as a theater, and the stairway led to a toilet room in the basement. Under the terms of the sublease to the saloon proprietors, respondent was under the obligation of keeping the stairway open and in repair for the use of the sublessees and their patrons. There was a doorway leading from the theater lobby into the rear portion of the saloon which, at times when theatrical performances were given, was kept open for the benefit of the saloonkeepers, as well as the proprietors of the theater, respondent herein. In October, 1910, appellant entered the saloon from the street, desiring, as he said, to sit down and rest and to visit the toilet, which he knew to be located in the basement. He had not intended to patronize the bar as a customer, but was induced, by invitation of some persons who were already in the place, to partake of one or more drinks of liquor, which, however, it does not appear were sufficient in quantity to intoxicate him in any appreciable degree. He proceeded to the rear of the place, intending to go to the toilet in the basement, and while traveling down the stairs leading thereto, his foot caught on a protruding nail or worn place on the footboards, and he was precipitated to the bottom of the stairs, suffering many severe bruises. When plaintiff had introduced all of his evidence which illustrated the foregoing facts, a motion was made on behalf of respondent that a judgment of nonsuit be entered, and this motion was by the court granted. Plaintiff appealed from the judgment.

Passing over other contentions of appellant, the main and deciding question involved in the case may at once be considered. That is, was the plaintiff a mere licensee, whose presence upon the premises was brought about through motives affecting his own convenience alone, or was he invited there on particular business, by reason of which the duty was cast upon respondent to use ordinary care to protect him from injury? If he was a mere licensee, intending by permission only to make use of the toilet located on the premises, then respondent, under no circumstances which are shown by the evidence, would be required to exercise any care toward him; its obligation only being to refrain from causing him injury through a willful act. The rule is stated in Shearman

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



and Redfield on Negligence, vol. 2, par. 705, as follows: "A mere passive acquiescence, on the part of the owner or occupant, in the use of real property by others, does not involve him in any liability to them for its unfitness for such use. They take all risks upon themselves. \* \* \*" See, also, Barrows on Negligence, p. 304. A case bearing many points of similarity in its condition of facts is that of Herzog v. Hemphill, 7 Cal. App. 116, 93 Pac. 899, as is also the case of Schmidt v. Bauer, 80 Cal. 565, 22 Pac. 256, 5 L. R. A. 580. At the time the ruling was made on the motion for judgment of nonsuit, no evidence had been offered tending to show, either that respondent had caused any injury to be inflicted upon plaintiff such as might be denominated "willful," or that it had been guilty of any gross negligence. Under the rule announced in the cases cited, no liability could therefore have resulted, and for this reason alone the trial judge very properly granted the motion to nonsuit the plaintiff.

This conclusion having been reached, the alleged errors complained of, arising upon the refusal to admit certain testimony offered by the plaintiff, need not be considered. Neither is it necessary to pass upon the objections made by respondent to the settling of the bill of exceptions, which bill was presented to the judge who tried the cause out of the county in which the trial was had.

The judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

(22 Cal. App. 156)

**MOORE et al. v. SUPERIOR COURT IN AND FOR SACRAMENTO COUNTY et al.** (Civ. 1,097.)

(District Court of Appeal, Third District, California. May 29, 1913. On Petition for Rehearing, June 28, 1913.)

**1. INFANTS (§ 16\*)—JUVENILE COURT PROCEEDINGS—PETITION—DECREES—JURISDICTION.**

Where a verified petition to obtain an adjudication of dependency of minor children failed to state any specific acts in support of petitioners' conclusion that the children were dependent, it was insufficient to confer jurisdiction and should therefore be ignored in subsequent proceedings for the same relief.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 16; Dec. Dig. § 16.\*]

**2. INFANTS (§ 16\*)—DEPENDENCY—VOID PETITION—AMENDMENT.**

Where an original petition to obtain an adjudication of dependency against minors was insufficient to confer jurisdiction, a subsequent petition for the same relief, which was sufficient, was not objectionable because it was designated "an amended or supplemental petition" and recited that it was made by permission of the court and was indorsed and filed under the same number as the original petition.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 16; Dec. Dig. § 16.\*]

**3. PLEADING (§ 252\*)—AMENDMENT.**

Where an original petition is insufficient to confer jurisdiction, it is not material to the validity of a new petition stating a cause of action, whether the first petition was susceptible of amendment or whether the second be considered as an amendment to the first or as an entirely independent step in the inquiry.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 736-743; Dec. Dig. § 252.\*]

**4. JUDGES (§ 51\*)—PREJUDICE OF JUDGE—PROHIBITION.**

Where affidavits of prejudice were filed against a juvenile court judge in dependency proceedings against minor children, but an issue was made on the question of prejudice and counter affidavits filed, the judge had jurisdiction to determine the question of his own bias, and, he having determined that he was qualified to sit, his prejudice could not be made a ground for a writ of prohibition to restrain him from hearing the proceeding.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224-231; Dec. Dig. § 51.\*]

**5. PROHIBITION (§ 5\*)—GROUNDS—PREJUDICE OF JUDGE.**

Before prohibition will issue on the ground that the trial judge is disqualified by prejudice, it must appear not only that the objection was made in the trial court on that ground, supported by affidavit, but it must also affirmatively appear that no affidavit was filed presenting an issue of fact as to the judge's qualification.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 20-30; Dec. Dig. § 5.\*]

Petition for writ of prohibition by Edith Moore and others to restrain the superior court in and for Sacramento County and J. W. Hughes, judge thereof, from taking jurisdiction of juvenile court proceedings. Writ denied.

R. Platnauer, of Sacramento, for petitioners. J. Q. Brown, of Sacramento, for respondents.

**BURNETT, J.** The question to be determined grows out of a proceeding in the juvenile court of Sacramento county involving the adjudication of the dependency of certain minor children. A verified petition, as required by the "juvenile court law," was filed with the clerk of said court and a citation issued thereon. Subsequently another verified petition was filed with the clerk of said court, entitled "an amended or supplemental petition," and the jurisdiction of said court to proceed to the hearing on either petition is challenged here by an application for the writ of prohibition.

[1] In response to the order to show cause issued herein, respondents have answered and a demurrer by petitioners to this answer presents the case for our determination. It may be admitted that the first petition filed as aforesaid was fatally defective in accordance with the rule enunciated in Henley v. Superior Court, 162 Cal. 239, 121 Pac. 921, and in Re Mundell, 3 Cal. App. 472, 86 Pac. 833, and gave the court no jurisdiction of the cause. The result is the same as though no proceeding whatever had been taken in the court below. The petition was so much waste



effort and could be ignored as a devitalized incident in the judicial proceeding, or by a formal dismissal removed from the record entirely. The important point is that by the filing of said petition the machinery of the court was not even put in motion for the achievement of the contemplated purpose. Said attempt, therefore, to invoke the aid of the law in behalf of said minors must be eliminated from consideration as futile and abortive.

[2] While the filing of said petition, then, did not confer jurisdiction upon the court to proceed in the matter, it did not, of course, deprive it of jurisdiction to proceed upon a proper petition filed as the statute demands. At least this must be so in the absence of any law limiting the authority of the court in that particular. There is no such limitation presented and the proper course was taken to secure the adjudication by the said juvenile court of the dependency of said minors.

To specify more particularly, another verified petition was filed as provided by section 3 of said juvenile court law. There can be no question (indeed, it is admitted by counsel for petitioners here) that said second petition contains a sufficient statement of facts to justify the court in making an inquiry as to the dependency of said minor children. It also contains the name and residence of the only living parent of said minors. Indeed, it meets every requirement of the law, and, being such petition as the statute contemplates and having been filed as provided, the next step in orderly sequence was for the court to set a day for the hearing and direct a citation to issue in pursuance of section 4 of said juvenile court law. Stats. of 1911, p. 660. This is exactly what the court did, as shown by said return. It is true that it does not appear that said citation was served, but that is to be expected from the fact that the hearing was set for March 5th and the answer herein was verified on February 28th. The statute requires that the service of the citation must be made "at least twenty-four hours before the time stated therein for such appearance." We may assume that it was so made after said answer herein was so verified. But no point is made as to this, and, at any rate, the continuance of the hearing, made necessary by the application in this court for this writ, will afford ample time for said service, if not already made.

We have, then, simply this situation: A purported verified petition amounting to a mere nullity was filed. The court thereby acquired no jurisdiction to proceed to the hearing. Subsequently a petition, valid under the law, was filed with the proper officer and the proper order was made looking to the regular determination by the court of the issues therein tendered.

The only possible objections to the method pursued are that the second petition is des-

ignated "an amended or supplemental petition," it contains the recital that it was made by permission of the court and it was indorsed and filed under the same number as the first so-called petition. But these are matters so obviously of procedural regularity and not of judicial authority that extended discussion seems hardly required.

It is not what it was called but what it is that fixes the character of the pleading. We are not concerned with the terminology used but rather with what was done. It might have been called an amendment to the ten commandments and the circumstance would not have affected the jurisdiction of the court. So it was probably not necessary for the court to make an order to allow it to be filed, as the statute itself is sufficient authority; but the court's permission to do something that the law already permits cannot, of course, invalidate the act, although it may add nothing to its efficacy. No one probably would contend that the clerk's designation by number of a pleading can have any substantial bearing upon the question of the court's authority to consider and act upon said pleading. The number is used as a convenient method of identification, and whether a mistake is made or not in thus designating the paper can be of no moment as far as the jurisdiction of the court is concerned.

[3] The conclusion of the whole matter is that it makes no kind of difference whether said first petition was susceptible to amendment or whether the second be considered as an amendment to the first or regarded as an entirely separate and independent step in the inquiry; the court was clothed with ample authority to proceed to the invited investigation. One other question ought to be noticed.

[4] In the amended petition filed in this court it is alleged "that the said J. W. Hughes is a party interested in said proceeding in said juvenile court of the county of Sacramento and is disqualified to act as judge of said court in said proceeding," and also "that there is on file in the superior court of the state of California, in and for the county of Sacramento, in the matter of the petition of said M. J. Sullivan, the affidavit of R. Plataner, a copy of which affidavit is hereto annexed and marked Exhibit A and made a part hereof. There is also on file in said court in said matter the affidavit of Robert J. Moore, a copy of which affidavit is hereunto annexed and marked Exhibit B and made a part hereof." Without setting out the contents of these affidavits it may be said that they tend to show that by reason of bias and prejudice the trial judge was and is not in a proper frame of mind to try the question before him fairly, impartially, and justly.

It is proper to say, however, that in the answer filed herein there is a sufficient counter showing to justify this court in the conclusion that the trial judge is not at all disqualified from acting in the matter as every



judge should act in a solemn judicial proceeding. But, aside from that, another circumstance exists which renders improper a reference to take testimony on the subject and eliminates the question of bias or prejudice from consideration as a ground for the issuance of the writ of prohibition.

[5] Before this writ will issue upon that ground, it must appear not only that objection was made in the lower court and supported by an affidavit or affidavits, but it must also affirmatively appear that no counter affidavit was filed presenting an issue of fact as to the qualification of the judge. The reason is plain and is stated clearly in *Talbot v. Pirkey*, 139 Cal. 327, 73 Pac. 858. It is substantially this: The intendments are in favor of the jurisdiction of the trial court, and we must presume, therefore, there being no showing to the contrary, that counter affidavits were filed supporting the view that the judge is entirely qualified to try the cause. There was thus presented an issue of fact, and the judge had jurisdiction to determine the question of his own bias, and we must presume that he concluded that the charge against him was unfounded and that he was not disqualified. Of course he then had jurisdiction to proceed to trial.

We think it is unquestionable therefore, that on neither of the grounds mentioned can the contention of petitioners be sustained.

The demurrer to the answer is overruled, and the peremptory writ denied.

We concur: CHIPMAN, P. J.; HART, J.

#### On Petition for Rehearing.

BURNETT, J. In the petition for rehearing it is stated that in the opinion hereinbefore filed an inaccuracy is found in the declaration that a citation followed the filing of said "amended" petition. It is true that the answer of respondents contains no specific allegation that such citation was issued, but nothing to the contrary appears in the pleadings, and we must presume that the course pointed out by the statute was pursued. But the matter is of no consequence in this application, as the jurisdiction of the lower court is not attacked upon that ground. When the case comes on for hearing in the superior court, if the parties have not been properly served, advantage can be taken, of course, of the omission. Petitioners are entirely mistaken in the assertion that we *inadvertently* passed upon the merits of the application.

Only two jurisdictional questions were argued and presented for determination; one relating to the insufficiency of the original petition in the court below and the want of authority to allow it to be amended, and the other related to the disqualification of the trial judge. As to the first of these, no issue of fact is presented in the pleadings, and we think it perfectly clear that the course that

was taken does not involve any excess of jurisdiction.

As to the disqualification of the judge on the ground of bias or prejudice, the rule recognized by the Supreme Court (and it is a salutary one) is that before prohibition will issue it must appear that affidavits were filed showing the disqualification and that no counter affidavits were presented. In that particular the petition herein is defective, as pointed out in the original opinion. It does not even appear that the moving party filed any affidavit until after the hearing of the motion; the allegation of the amended petition herein being "that there is on file in the superior court \* \* \* the affidavit of R. Platnauer," etc. It may be said that the question of disqualification really resolves itself into one of bias or prejudice, as no facts appear to show that the trial judge is an *interested* party in the sense of the statute.

But, conceding that on this application it would be proper for this court to determine the question of the disqualification of the judge, we think, in view of the verified return and the affidavit in its support, that respondents have shown sufficient reason why the writ should not issue, and that no demand of substantial justice requires any further hearing in this proceeding.

The petition for rehearing is denied.

We concur: CHIPMAN, P. J.; HART, J.

(22 Cal. App. 174)

TEMESCAL WATER CO. v. NIEMANN, Tax Collector. (Civ. 1,344.)

(District Court of Appeal, Second District, California. June 2, 1913.)

#### 1. MUNICIPAL CORPORATIONS (§ 966\*)—TAXATION—PROPERTY TAXABLE.

A municipality has the right to assess for taxation all real estate located within its limits.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2045-2061; Dec. Dig. § 966.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 966\*)—CORPORATE PROPERTY—MUTUAL IRRIGATION COMPANY.

A municipal corporation can assess for taxation, under Const. art. 13, § 10, providing that all property shall be assessed in the city in which it is situated, and Pol. Code, § 3663, providing that water ditches shall be assessed the same as real estate by the assessor of the county at a rate per mile for that portion which lies within his county, the canal, pipe line, and rights of way within its limits which belong to a mutual irrigation company supplying water for domestic and irrigation purposes for 4,500 acres of land, even though the land-owners owned the water company and the water rights are appurtenant to the land and a portion of the lands irrigated are in another city but none in the city levying the assessment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2045-2061; Dec. Dig. § 966.\*]

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Action by the Temescal Water Company against H. H. Niemann, as Tax Collector for the City of Elsinore. Judgment for defendant, and plaintiff appeals. Affirmed.

Purington & Adair, of Riverside, for appellant. Collier & Craig, of Riverside, for respondent.

JAMES, J. Plaintiff, a California corporation, alleged in its complaint that at all times mentioned therein it was, as trustee for the use and benefit of its stockholders, the owner of certain real property in the county of Riverside, consisting of canals, pipe lines, ditches, and conduits, for the conveyance and distribution of water for irrigating and domestic purposes to and over a body of land in the county of Riverside and comprising about 4,500 acres; that this land was planted with various kinds of fruit trees and severally owned in different sized pieces and parcels by individuals; and that the land for more than ten years had been supplied with water for the purposes mentioned from the system of plaintiff. It was alleged further that a portion of the lands was included within the boundaries of the city of Corona; that the owners of the land were the owners of the water system and the water which was delivered therethrough, such rights and system being appurtenant to the acreage described; that the assessor of the county of Riverside had regularly each year assessed the lands to the owners thereof who were stockholders of the plaintiff; that the lands situated in the city of Corona were likewise assessed each year; that none of the lands, but certain portions of the canal and pipe line and rights of way for the same, were located within the municipal limits of the city of Elsinore; that the assessor of the latter city had levied a tax of \$143.06 against such property of plaintiff; that such assessor had advertised for sale and threatened to sell such canal and pipe line and rights of way for the purpose of satisfying the amount of the assessment, because of which threatened act an injunction was prayed for. Defendant demurred to this complaint on the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was sustained by the court, and, plaintiff declining to amend, judgment was entered against it accordingly. This appeal followed.

The contention of the plaintiff is that, as all of the water rights and the system of works, canals, pipe lines, and rights of way were appurtenant to the lands referred to in the complaint, the assessor of Elsinore was without authority to tax any part of the water system. One of the contentions made in support of the main argument is that, as the assessment of the lands by the assessor of Riverside county, and also by the assessor of the city of Corona, included the value of the lands themselves, together with all their appurtenances, to allow the city of Elsinore

to also levy a tax upon any part of the distributive system would result in a double taxation of plaintiff's property. Under the facts as alleged, however, it does not follow that such would be the legal result of the act of the assessor of Elsinore. If technical fault were to be taken to the allegations of plaintiff's complaint, it may be said that it does not appear therefrom that the city of Corona as a municipality levied any tax whatsoever against any part of plaintiff's property, but only that a tax was levied upon all of the lands of the plaintiff by the assessor of the county of Riverside. No advantage in argument, however, need be accorded to respondent because of this evident omission in the allegations of plaintiff's complaint.

[1] It is conceded, and indeed that matter is not the subject of question, that a municipality has the right to assess all real property found within its limits for the purpose of maintaining the municipal revenues, and that the county taxing officials have the right to levy upon the same property for county purposes.

[2] The one question which seems to be presented is as to whether or not the appurtenances such as those described in plaintiff's complaint may be the subject of separate assessment from the lands themselves; in other words, whether for the purposes of taxation the entire water system with its pipe lines, conduits, and right of way must not be considered as having its situs upon the land itself. Attention may be called to an expression of our Supreme Court touching the policy of the tax law, as it appears in the case of *San Francisco, etc., Railway Co. v. Scott*, 142 Cal. 222, 45 Pac. 575, where it is said: "It is plainly the general policy of the law that property situated in one county or city should be taxable in that county or city for local purposes for its actual value, and that that local subdivision alone should have the benefit of this value for the purpose of raising its revenue. This, indeed, is the basis of all local taxation, and it is recognized \* \* \* that the property which receives the benefit of local government shall pay its proportion of the expenses thereof, apportioned according to actual value."

Section 10 of article 13 of the Constitution provides: "All property, except as hereinafter in this section provided, shall be assessed in the county, city, and county, town, township, or district in which it is situated, in the manner prescribed by law."

And by section 3663 of the Political Code it is provided that: "Water ditches constructed for mining, manufacturing, or irrigating purposes, and wagon and turnpike toll roads must be assessed the same as real estate by the assessor of the county, at a rate per mile for that portion of such property, as lies within his county."

In making application of these provisions



to a tax case involving the manner of the assessment of water ditches, it is said in *Kern Valley Water Co. v. County of Kern*, 137 Cal. 511, 70 Pac. 476: "From the foregoing provisions of the statute and Constitution it appears that water ditches for irrigating purposes must be assessed the same as real estate in the county. \* \* \* Section 3663 directs the assessment as to ditches to be at a rate per mile for that portion within the county, but this does not prevent the assessor from separately assessing the portion of the ditch in each district separately. Each district is entitled to know the number of miles therein as determinative of its proportion of the tax. The same rule holds both as to land and as to a ditch for irrigating purposes. Any other view would not be in harmony with the Constitution. \* \* \*"

It is urged, however, by counsel for appellant that section 3663 of the Political Code does not apply where the water and the system used for its transportation are appurtenant to land which lies wholly without the limits of the municipality levying the tax.

The case of *Coonradt v. Hill*, 79 Cal. 587, 21 Pac. 1099, is cited. In that case the facts were different, as will appear by what was therein said by Chief Justice Beatty: "We do not think it by any means clear that defendant was required, under a proper construction of the revenue law, to include his ditch and water right as a separate item in his return to the assessor. This is not the sort of ditch to which section 3663 of the Political Code seems to refer. It is a small ditch supplying water for domestic purposes, watering stock, and irrigating a small and definite tract of land. It is used solely in connection with, is appurtenant to, and passes by conveyance of that tract of land. Civ. Code, § 662; *Farmer v. Uklah Water Co.*, 56 Cal. 11. It would seem that the ditches referred to in the above-cited section of the Political Code are those which are constructed on a large and extensive scale, not appurtenant to any particular land, but held in gross and operated for the supply of communities and neighborhoods for mining, manufacturing, irrigating, and other purposes." The specifications used by the Chief Justice in defining what kind of a ditch should be separately assessed, and what not, seem to argue rather against than in favor of appellant's contention.

The canals and pipe lines here involved were constructed on a large scale and were apparently held in gross and operated for the supply of a large community. It reasonably appears from the allegations of the complaint that the entire town site of the city of Corona was made up of a portion of the 4,500 acres of land, and that a large body of the land extended without the limits of

that municipality. It may be said also that in the case just quoted from, the particular point discussed was not considered necessary to the decision of the case. *Coonradt v. Hill* was again referred to in *Frederick v. Dickey*, 91 Cal. 358, 27 Pac. 742, where a water ditch appurtenant to a certain mill was held to be included in the assessment of the latter.

Appellant has also cited the case of *Appeal of the Des Moines Water Co.*, 48 Iowa, 324. In that case the holding of the court was that where within a municipality which contains two townships, and where the law directed the assessment for city purposes to allot to the several townships the property assessed as being located therein, and where the assessor included in the assessment of a waterworks situated in one township a tax upon its pipe lines which extended into another township, such assessment was not invalid. The assessment there considered was one for municipal purposes, and no question was presented as to a conflict between taxing powers. However, in so far as that case may seem to furnish authority for the position claimed by appellant, it must be answered that the statutes and Constitution of this state contemplate a procedure different from that which was held to be a proper one under the facts considered by the Iowa court. Here the canals, pipe lines, and rights of way attempted to be assessed by the city of Elsinore all had their physical existence within the municipal limits and were entitled to whatever protection that the city afforded for their preservation. It could hardly be contended that if an extensive water producing or pumping plant, with its buildings, pipes, and wells, had been located within the limits of the city of Elsinore, although used to supply land to which the water rights were appurtenant lying wholly without the limits of the city, the municipality of Elsinore would have no right to collect a tax upon that property in aid of the support of the city government; and yet that is precisely the contention made by appellant.

It is not made to appear by the complaint of plaintiff that respondent's act in assessing the property of plaintiff found within his jurisdiction will result in a double assessment being made thereon, or that respondent was without authority to make any assessment against such property because it was an appurtenance of lands lying outside of the limits of his city. The theory of the tax law seems to contemplate that the assessment shall be made as it was made by this assessor, and his demurrer to plaintiff's complaint was therefore properly sustained.

The judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.



(22 Cal. App. 191)

VAN DAMME v. MCGILVRAY STONE CO.  
(Civ. 1,143.)

(District Court of Appeal, First District, California. June 3, 1913.)

TRIAL (§ 426\*)—VERDICT—SPECIAL INTERROGATORIES—JURY'S FAILURE TO ANSWER—WAIVER.

Where the jury returned a general verdict for plaintiff without answering a special interrogatory, the foreman stating in open court that the jury declined to answer the question, and the court asked defendant's counsel whether he desired that the jury should find on the question, offering to send the jury back for that purpose, but counsel only replied, "The record shows that they declined to find upon it," whereupon the jury was discharged, defendant's right to have the jury answer the question was waived.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 973; Dec. Dig. § 426.\*]

Appeal from Superior Court, City and County of San Francisco; B. V. Sargent, Judge.

Action by C. F. Van Damme against the McGilvray Stone Company. Judgment for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Affirmed.

Gavin McNab, B. M. Aikins, and A. H. Jarman, all of San Francisco, for appellant. Lynch & Drury, James M. Oliver, and Henry A. Jacobs, all of San Francisco, for respondent.

MURPHEY, Judge pro tem. This is an appeal from an order of the superior court of the state of California, in and for the city and county of San Francisco, denying the defendant's motion for a new trial. The action is for the recovery of damages resulting from the killing of three horses of the respondent, alleged to have been caused by the reckless, negligent, and careless operation of a derrick, whereby a high voltage trolley wire was struck and broken by the derrick, and in falling came in contact with respondent's horses, instantly killing them.

At the conclusion of the trial, which was had with a jury, and in submitting the case the court concluded its charge as follows: "If you return a general verdict in favor of plaintiff, you will also return your verdict on the special issue which I now submit to you as follows: At the time when the trolley wire broke on the 19th of August, 1907, were defendant's employes operating the derrick negligently, recklessly, and carelessly?" Upon returning into court with the verdict, the following proceedings were had (quoting from the bill of exceptions as prepared by the appellant and settled by the trial judge): "The Clerk: Gentlemen of the jury, have you agreed upon a verdict? (Clerk receiving verdict from foreman and handing it to the court.) The Court: That is the only verdict you brought in? Mr. Morris (the foreman): The jury declined to answer the other

question. The Clerk: Gentlemen of the jury, listen to your verdict as it now stands recorded: 'We, the jury in the above-entitled cause, find a verdict for the plaintiff for the sum of \$900.' Mr. Jarman: I would like to have the jury polled. The Court: Poll the jury. (All the jurors answer that the above verdict is his verdict.) Mr. Jarman: Q. Was there any finding upon the special issue? The Court: They declined to find upon that question. Do you desire that they should find on it? If so, will send them back. Mr. Jarman: The record shows that they declined to find upon it. The Court: Let the record show that the jury declined to find upon that subject. (Jury discharged.)"

In addition to the above, affidavits were filed by the respective counsel as to this matter. These were filed and used on the motion for a new trial; but as we view the matter they shed no additional light on the question and serve no useful purpose in determining the real point in controversy.

For the sole reason that the jury "declined to find on the special interrogatory submitted by the court, the appellant contends that it is entitled to a new trial. We are unable to agree with this contention. On the face of the record, argument seems superfluous. It creates an abiding conviction that the matter was permitted to stand as originally returned by the jury with a view of thereafter reaping any technical advantage that might result by reason of the situation. The parties should be compelled to resort to a new trial only after all the resources of the court administered within the law have been exhausted in a conscientious effort to finally determine all the questions at issue in any pending litigation. A fair interpretation of the proceedings above set out leads inevitably to the conclusion, as it appears to us, that the appellant waived the right to have the jury pass upon the particular interrogatory submitted to it. Certainly the widest latitude of construction would not warrant us in holding that the conduct and language of appellant's counsel amounted to an objection to the course pursued by the trial court. To resolve either of these alternatives against the appellant is to sustain the verdict of the jury and affirm the action of the trial court in refusing another trial.

If the defendant's counsel waived by his conduct or language the right to insist upon an answer to the question, or if he failed at the opportune time to object to the acceptance and recordation of the verdict, he cannot at this time be heard to complain. He contends that he had no knowledge prior to the recordation of the verdict that the jury had not found upon the particular interrogatory submitted. The record not only does not substantiate this position but is directly contradictory thereof. Upon receiving the verdict from the foreman, the court ques-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



tioned, "That is the only verdict you brought in?" to which question, and before the verdict was returned to the clerk to be recorded in the minutes, the foreman replied, "The jury declined to answer the other question." We are of the opinion that it would be immaterial whether he received this information before or after the announcement by the clerk of the formal recordation of the verdict. We are fully satisfied that the court retains entire control of the proceedings up to the time that the jury is finally discharged from further consideration of the case, and that had the jury been returned to the jury room for further deliberation, as suggested by the court, after the formal announcement by the clerk that the verdict was recorded, no substantial error would have resulted, and neither side thereafter could have successfully predicated error on the action of the court.

While our attention has been called to no case wherein the courts of last resort in this state have passed upon the direct question in controversy here, there is an abundance of authority in other jurisdictions involving identically the same principle, and they in our judgment are controllingly sound.

In the case of *City of Guthrie v. Thistle*, 5 Okl. 517, 49 Pac. 1003, the court says: "If the plaintiff in error proposed to avail himself of the failure of the jury to make a finding on the twenty-third interrogatory, it should have been done at the time that the special findings of fact were returned by the jury. A failure to object to the return of special findings of fact and to permit the jury to be discharged without specifically answering the inquiries which they had neglected or failed to answer, or had overlooked, is the waiver of the right to an answer. The application should have been made to the court to require an answer, and an exception taken at the time of the application had been overruled."

In the case of *Vater v. Lewis*, 36 Ind. 288, 10 Am. Rep. 29, the court says: "The jury were directed, if they found a general verdict, to return answers to certain interrogatories propounded by the defendant. They found a general verdict and returned answers to the interrogatories, but the answers were not signed by the jury or the foreman, and the jury were discharged without objection. Afterward the defendant moved for a venire de novo because the jury had not signed the answer to the interrogatories, but the motion was properly overruled. The defendant should have objected to the discharge of the jury until the answers were signed, and, failing to do so, he cannot object that answers were not returned to the interrogatories. He should have insisted that the jury be required to return answers properly signed before being discharged."

And in *Bradley v. Bradley*, 45 Ind. 67, 72, the court says: "If the answers to the in-

terrogatories were not full and responsive, the appellant should have objected to the discharge of the jury and insisted that the jury should be sent out and required to answer further. Neither of these things was done, and the appellant cannot be heard to complain."

The authorities relied upon by appellant are not in point and do not assist the court in the determination of the vital question involved here.

In the case of *Plyler v. Pacific Portland Cement Co.*, 152 Cal. 125, 92 Pac. 56, the question under consideration involved the right of the trial court to refuse to submit certain special findings when properly requested in accordance with the provisions of section 625 of the Code of Civil Procedure, as amended in 1905.

In *O'Connell v. United Railroads*, 19 Cal. App. 36, 124 Pac. 1022, the jury returned that it was unable to agree upon answers to certain particular questions of fact submitted, and the court was required to determine the effect of such disagreement; and in the case of *Stein v. United Railroads*, 159 Cal. 363, 113 Pac. 663, the question turned on the erroneous conclusion of the trial court that certain proposed particular questions of fact were immaterial. Other citations of appellant but confirm the views herein entertained and expressed that error can be predicated only when the trial court refuses, in the face of proper objection and in the absence of waiver, to exercise its powers to effect a complete determination by the jury by either answering or expressing its inability to agree upon an answer to questions submitted to it for determination.

The cases of *Duesterberg et al. v. State*, 116 Ind. 144, 17 N. E. 624, *Doom v. Walker*, 15 Neb. 339, 18 N. W. 138, *Sandwich Enterprise Co. v. West*, 42 Neb. 722, 60 N. W. 1012, and *Nichols, Shepard & Co. v. Wadsworth*, 40 Minn. 547, 42 N. W. 541, cited by appellant, are illustrative of this point. In these cases the defeated party made timely objection to the acceptance by the court of the general verdict in the absence of proper answers to special interrogatories submitted to them for determination. It is earnestly contended by appellant that where there is a "willful refusing" on the part of the jury to follow the plain instructions of the court, and where it has been "finally determined that a jury will not answer an interrogatory," then in that case it will be a wholly idle, useless, and silly demand to ask the court to require an intelligent jury, acting conscientiously, to return to the jury room for the purpose of answering the interrogatories. The fallacy of this argument lies in the unwarranted assumption that the jury had "willfully refused" to answer or had "finally determined" not to answer. We have no doubt but that had the suggestion of the court been accepted and acted upon, and the jury returned for



further deliberation, the entire controversy would have been speedily and finally determined. It is conceded by the appellant that the gist of the action was contained in the special interrogatories; and if we were to indulge in speculation we would say that an intelligent jury, having found in the general verdict the real issue made by the pleadings that the defendant had "negligently, recklessly, and carelessly" operated the derrick to the plaintiff's damage, considered it a wholly idle and useless act to find the same fact again in the form of the special interrogatory. This probably rather than the illogical situation and embarrassing position that would result from a request to resubmit is the real solution of the difficulty and the controlling reason actuating counsel in refraining from making an immediate demand that the jury finally pass upon all the issues submitted to them by the court. Such embarrassment, if it exists, as the situation engendered is but an incident of the jury system and must be assumed when occasion demands in order that litigation may be terminated without unnecessary and needless further proceedings.

The order is affirmed.

We concur. LENNON, P. J.; HALL, J.

(23 Cal. App. 153)

RALPHS v. BRUNS et al. (Civ. 1,029.)

(District Court of Appeal, Second District, California. May 29, 1913.)

**1. ATTACHMENT (§ 267\*)—WRIT—AMENDMENT OF COMPLAINT.**

Where a sufficient affidavit is filed in an action upon an express or implied contract for the payment of money, even though the complaint be insufficient to state a cause of action, a subsequent amendment of the complaint, not changing the character of the action, may be allowed without affecting the order of attachment previously issued.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 948-952; Dec. Dig. § 267.\*]

**2. ATTACHMENT (§ 151\*)—WRIT—STATEMENT OF AMOUNT—CONFORMITY TO COMPLAINT.**

The writ of attachment must state the amount of the demand in conformity with the complaint.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 422-424; Dec. Dig. § 151.\*]

**3. ATTACHMENT (§ 124\*)—ACTIONS IN WHICH AUTHORIZED.**

A complaint by the guardian of an incompetent alleged that defendants by fraud procured the incompetent to convey to them certain real estate and to assign a certain mortgage, that they paid \$590 in cash and executed five promissory notes, each for \$378.20, and also borrowed from him \$275, for which they gave another note. It prayed the cancellation of the deed and assignment and such other relief as might be deemed proper. By an amendment it was alleged that the incompetent paid \$37.50 for a certificate of title and record of deeds. Plaintiff procured a writ of attachment upon an affidavit alleging that defendants were indebted to her, as guardian, in the sum of \$3,150 upon an implied contract for the return of

money and property on rescission of a contract of sale; the writ being issued for the amount specified in the affidavit. *Held*, that the writ was improperly granted, since the complaint did not seek a recovery on an implied contract but sought a rescission and cancellation of the deed and a restoration of the property conveyed, especially as, conceding that it sought a recovery on the notes, such contract was express and not implied.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 338-343; Dec. Dig. § 124.\*]

**4. ATTACHMENT (§ 124\*)—ACTIONS IN WHICH AUTHORIZED.**

Assuming that such complaint stated a cause of action on an implied contract for the payment of the amount of the notes and the amount paid by the incompetent for the certificate of title and record of deeds, the writ was nevertheless improperly issued as the amount stated in the affidavit and writ far exceeded the amount demanded in the complaint, if any demand be assumed.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 338-343; Dec. Dig. § 124.\*]

Appeal from Superior Court, Los Angeles County, Gavin W. Craig, Judge.

Action by Barbara Caroline Ralphs, Guardian of Viktor Dreher, an incompetent, against Arnd D. Bruns and another. For an order denying a motion to dissolve an attachment, defendants appeal. Reversed.

Willis S. Mitchell, of Los Angeles, for appellants. MacGowen & Haas, of Los Angeles, for respondent.

ALLEN, P. J. The amended complaint filed in this proceeding alleged the incompetency of Dreher at all times mentioned therein, an adjudication thereof, and the regular appointment of plaintiff as guardian. Further that in August, 1910, defendants procured Dreher to convey to them certain real estate described in the complaint at an agreed price of \$2,634.50, and in addition to assign and transfer a certain mortgage, the amount of which is not disclosed, for the consideration of \$200; that defendants paid to Dreher \$590 in cash and executed to him five promissory notes each for \$387.20, neither of which notes had matured at the commencement of the action. It is further averred that, as a part of the same transaction, defendants borrowed from Dreher \$275, executing a promissory note therefor, which note appears to have matured at the commencement of the action. It is alleged that this conveyance and assignment was procured by fraud; the fraud alleged being a statement made by defendants and believed by Dreher, and upon the faith of which the conveyance and assignment were made, that the personal notes of the purchasers were security for the deferred payments. This is alleged to be false; that the notes had no value whatever. The prayer of the complaint was for the cancellation of the deed and assignment of mortgage, and such other relief as the court might deem proper in the premises. Plaintiff, upon the filing of such

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



amended complaint, made an affidavit that the defendants were indebted to her, as guardian, in the sum of \$3,150 over and above all legal set-offs and counterclaims, upon an implied contract for the direct payment of money, to wit, the return of money and property, on rescission of contract of sale obtained fraudulently, and no security was held therefor, etc. A writ of attachment was accordingly issued for the amount specified in the affidavit, which was levied upon the property of defendants. Defendants moved the court to dissolve the attachment for the reason that the cause of action under which plaintiff seeks relief does not come under the provisions of section 537 of the Code of Civil Procedure. This motion was denied, from which order denying the motion defendants appeal.

[1, 2] While it is true that where a sufficient affidavit is filed in an action upon an express or implied contract for the direct payment of money, even though the complaint be insufficient to state a cause of action, a subsequent amendment of the complaint not changing the character of the action may be allowed without affecting the order of attachment previously issued; yet the writ must state the amount of the demand in conformity with the complaint.

[3, 4] The action in this case is not one for damages but, on the contrary, only seeks to avoid the effect of the conveyance and assignment, and the only relief sought is equitable in its nature. Assuming that plaintiff was entitled to the relief sought, the only implied agreement or contract which could serve as a basis for a money judgment would be the \$37.50 alleged to have been paid for a certificate of title and record of deeds, and this only through appropriate amendments to the complaint. The writ specified the amount demanded in the complaint to be \$3,150. This variance, being such a material departure from the requirements of the statute, vitiates the proceedings and renders the writ utterly void. *Kennedy v. Cal. Savings Bank*, 97 Cal. 99, 31 Pac. 846, 33 Am. St. Rep. 163. This rule, however, has been said not to apply where the amount stated in the writ is less than that demanded in the complaint. *De Leonis v. Etchepare*, 120 Cal. 414, 52 Pac. 718. There is a statement in the complaint that a note was executed to the incompetent for the money borrowed. Its nonpayment is not averred, nor is there any demand for judgment on account thereof, and, if considered at all, it is an express and not an implied contract; the latter character being by the affidavit alleged as to the existence of the indebtedness. But were we even to assume that the allegations of the complaint with reference to this note and the repayment of the amount paid by the incompetent for certificate of title and record of deeds

were so attempted to be alleged as to entitle it to consideration as an independent cause of action for money, and that the total brought the amount within the jurisdiction of the superior court, still we are confronted with the fact that the affidavit and writ stated an amount far in excess of the amount demanded in the complaint, if any demand be assumed.

Respondent bases her right to the writ upon the theory that, the consideration for the transfer having wholly failed, she could recover the amount of the purchase money upon an implied contract. This is true in instances where parties stand upon the contract and seek to recover by action an amount of money paid for that which possesses no value. In this case, however, plaintiff seeks a rescission and the cancellation of the deed, seeks to avoid the contract, and a complete restoration of the property conveyed, retaining the \$590 in cash received. It is not such an action as would permit a recovery of judgment for the value or the agreed consideration, but an election to pursue an entirely different remedy. Had there been appropriate allegations of a transfer of the property received by defendants to innocent parties, and the action was one to recover the value, based upon fraudulent representations, the authorities cited by respondent would be in point.

We are of opinion that the court erred in refusing to dissolve the attachment.

The order appealed from is therefore reversed.

We concur: JAMES, J.; SHAW, J.

(22 Cal. App. 197)

HAINES v. WOOSTER. (Civ. 1,247.)

(District Court of Appeal, First District, California. June 3, 1913.)

1. APPEAL AND ERROR (§ 1011\*)—FINDINGS—CONFLICTING EVIDENCE—REVIEW.

A finding by the trial court on conflicting evidence will not be set aside on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

2. BROKERS (§ 56\*)—RIGHT TO COMMISSIONS—FAILURE TO COMPLETE SALE.

When a broker opens negotiations but fails to bring the customer to the owner's terms and then abandons further negotiations, the owner may sell the property to the broker's customer without being liable to pay commissions to the broker.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 85-89; Dec. Dig. § 56.\*]

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by George W. Haines against C. M. Wooster. Judgment for defendant, and plaintiff appeals. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indices



Lucius M. Fall, of Los Angeles, and J. A. Fairchild, of San Francisco, for appellant. Frank H. Gould and Vincent Surr, both of San Francisco, for respondent.

**KERRIGAN, J.** This is an action to recover commissions, alleged to have been earned by the plaintiff as a broker in selling a certain piece of real property. Several points are discussed in the briefs. It is necessary, however, for us to pass upon one of them only.

Some time about the middle of the year 1910 the plaintiff, believing that he had a purchaser for the property in question, which was owned by the defendant, sought and obtained from the latter authority to sell the same. Negotiations for the sale were immediately commenced between the parties to this suit and John Wilson. Plaintiff's authorization to find a purchaser for the property was oral only until early in November, when, in answer to a letter from him, defendant sent him a telegram stating that he would allow 2½ per cent. commission on consummation of sale to Wilson. A little more than 60 days after the sending and receipt of this telegram the defendant himself effected a sale of said property to Wilson and another. After trial the court found all the material issues in favor of the defendant and against plaintiff. This appeal is from the judgment.

The contract between the parties does not limit the time of plaintiff's employment, and plaintiff contends that the transfer of the property having taken place within a little more than 60 days after he was authorized in writing to make the sale, and the sale having occurred within a reasonable time thereafter, he is entitled to a commission of 2½ on the selling price, having brought the parties together. Defendant on the other hand claims that the sale made by himself was effected after the plaintiff had abandoned his contract of employment; and hence plaintiff is not entitled to a commission.

[1] It is sufficient to say that there is a substantial conflict in the evidence upon this issue, which in fact is admitted by the plaintiff. In view of this conflict, under the familiar rule in this state, we cannot interfere with the conclusion reached upon the point by the trial court. *Rimpau v. Baldwin*, 163 Cal. 225, 124 Pac. 1002; *Oldershaw v. Matteson*, 19 Cal. App. 179, 125 Pac. 263. True, plaintiff makes a very good argument why the evidence of the defendant should be disbelieved, but this was a matter for the trial court.

[2] It is not disputed, nor can it be, that when a broker opens negotiations but fails to bring the customer to the owner's terms, and then abandons further negotiations, the owner may subsequently sell the property to the same person without being liable for the

payment of a commission to the broker. *Cone v. Kell*, 18 Cal. App. 675, 124 Pac. 548; *Hill v. McCoy*, 1 Cal. App. 159, 81 Pac. 1015; 19 Cyc. 22; *Everett v. Farrell*, 11 Ind. App. 185, 38 N. E. 872.

The judgment is affirmed.

We concur: **LENNON, P. J.; HALL, J.**

(22 Cal. App. 35)

**LYTLE v. ALLISON.** (Civ. 1,245.)

(District Court of Appeal, Second District, California. May 8, 1913. Rehearing Denied by Supreme Court July 8, 1913.)

**1. EVIDENCE (§ 450\*)—PAROL EVIDENCE AFFECTING WRITING—INTENT—UNAMBIGUOUS GUARANTY.**

The defendant signed a contract consisting of a printed form which guaranteed the payment of all amounts now due or which might thereafter be contracted by a certain corporation, immediately following which was a written clause "to cover" a certain described shipment made to another company in Mexico. *Held*, that the contract was unambiguous, and it was error to admit oral evidence that it was the intent of the parties to guarantee only the payment for the shipment mentioned.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2066-2082, 2084; Dec. Dig. § 450.\*]

**2. GUARANTY (§ 36\*)—CONSTRUCTION—EXTENT OF LIABILITY.**

The guaranty included all debts then owing, even though they were not payable until later.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. §§ 38-45; Dec. Dig. § 36.\*]

**3. GUARANTY (§ 36\*)—CONSTRUCTION—EXTENT OF LIABILITY—WRITTEN CLAUSE IN PRINTED FORM.**

The fact that the guaranty of the particular shipment was in writing, while the rest was in printing, does not restrict the agreement to that shipment; the obvious purpose being to include that shipment in the guaranty, even though it was made to the Mexican corporation and not to the debtor company.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. §§ 38-45; Dec. Dig. § 36.\*]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by A. L. Lytle against A. B. Allison. Judgment for the defendant, and plaintiff appeals. Reversed and remanded.

For memorandum decision of Supreme Court denying rehearing, see 133 Pac. 1000.

Stutsman & Stutsman, of Los Angeles, for appellant. W. S. Allen and George E. Overmyer, both of Los Angeles, for respondent.

**ALLEN, P. J.** The action was based upon the following contract entered into between plaintiff's assignor and defendant:

"Fairbanks, Morse & Company, Los Angeles, Cal., Oct. 8, 1910. For and in consideration of one dollar, to me or us in hand paid, the receipt of which is hereby acknowledged, and the further consideration that Fairbanks, Morse & Company extend credit to Weber-Duller Co., I, or we, the undersigned do hereby guarantee and agree to pay to Fair-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



banks, Morse & Co. any and all amounts that may be owing to it by Weber-Duller Co., including amounts now due from and hereafter contracted by Weber-Duller Co., together with all interest that may accrue on the same, to cover shipment 2 Ransome mixers complete to the Mexican Petroleum Co., Ebano, Mexico. In witness whereof, I or we, have set my or our hand and seal. A. B. Allison.

"For and in consideration of value received, we hereby sell, assign and set over unto A. L. Lytle all our right, title and interest in and to the above guaranty. Fairbanks, Morse & Co., Per C. Knagenhelm, Agt."

The answer does not deny the execution of the contract, but simply its legal effect. It does, however, deny the assignment. The court found, after admitting oral evidence of the intention of the parties, that by the terms of the contract the defendant promised only to pay for the Ransome mixers, and that, the contract price thereof having been paid before suit, no sum was due from defendant, and rendered judgment against plaintiff for costs. A new trial was denied, and from the judgment and the order denying a new trial plaintiff appeals upon a statement of the case.

[1] We are of opinion that the court erred in its construction of the contract in the admission of oral evidence of intent and in its finding that thereby nothing was guaranteed except payment for the mixers.

[2] There is certainly no ambiguity in relation to the promise to pay the indebtedness existing between the parties at the date of the contract. The court finds that the indebtedness existing between plaintiff's assignor and the Weber-Duller Company at such date was \$39. The uncontradicted evidence is to the effect that the amount owing on such date was \$900, all of which, except \$39, was payable October 15th following. The contract covers amounts owing whenever payable.

[3] The goods previously and subsequently sold to Weber-Duller Company under the guaranty, other than the mixers, amounted to \$1,295.27, of which amount only \$323.82 had been paid, leaving a balance on account of goods sold by plaintiff's assignor to Weber-Duller Company, outside of the mixers, of \$971.45. As we read the contract, we do not regard it as ambiguous in relation to matters of subsequent indebtedness. The mere fact that the words, "to cover shipment 2 Ransome mixers complete to the Mexican Petroleum Co., Ebano, Mexico," are written in the contract, while the other portions outside of the names of the parties were printed, does not to our minds restrict the terms of the agreement; the obvious purpose thereof being only to evidence the fact that the shipment to third parties named was intended to be included in the guaranty and to be recog-

nized by all parties as a sale to Weber-Duller Company, although delivered to such third parties. The assignment to plaintiff was found to have been actually made and has support. In our opinion, therefore, there was no proper denial of the indebtedness alleged in the complaint, and no evidence tending to support the finding of the court as to the indebtedness existing at the date of the contract, and that, properly construing the agreement, judgment should have been given plaintiff for \$971.45, the full amount unpaid on account of goods sold by plaintiff's assignor to Weber-Duller Company both before and after the date of the guaranty.

Judgment and order reversed, and cause remanded.

We concur: JAMES, J.; SHAW, J.

(22 Cal. App. 35)

LYTLE v. ALLISON. (Civ. 1,245, L. A. 3,554.)

(Supreme Court of California. July 8, 1913.)

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by A. L. Lytle against A. B. Allison. Judgment for defendant was reversed by the Court of Appeals (133 Pac. 999). Rehearing denied.

Stutsman & Stutsman, of Los Angeles, for appellant. W. S. Allen and George E. Overmyer, both of Los Angeles, for respondent.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing. I think the words written in the printed form of guaranty before it was executed by Mr. Allison ("to cover shipments 2 Ransome mixers to Mexican Petroleum Co., etc.") ought to be allowed some effect, and controlling effect, in construing his obligation, especially when it appears that it was given to secure credit for the shipment to which those words refer and for no other consideration except the merely nominal consideration of one dollar.

The full price of the mixers having been paid, I do not think the defendant is liable for the general indebtedness of the Weber-Duller Company to plaintiff's assignor.

(74 Wash. 462)

HAGEN et ux. v. BOLCOM MILLS, Inc.

(Supreme Court of Washington. July 26, 1913.)

1. DEEDS (§ 117\*)—PROPERTY CONVEYED—APURTENANCES.

The owner of blocks 162 and 165 in an addition to a city and of the vacated street lying between such blocks conveyed such property describing it as blocks 162 and 165 and that portion of what was formerly platted as a public street lying between those blocks. The grantee conveyed lots 2 and 3 in block 162 without mentioning the vacated street and subsequently conveyed block 165, parts of block 162, and the portion of the vacated street lying between such blocks. *Held*, that the description in the first conveyance of the vacated street as such was notice to subsequent purchasers that the owner treated the vacated street as a quantity of land separate from the abutting property.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



and the purchaser of lots 2 and 3 therefore acquired no interest in the vacated street.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 336-341; Dec. Dig. § 117.\*]

## 2. MUNICIPAL CORPORATIONS (§ 663\*) — STREETS—VACATION—EFFECT.

An order of county commissioners vacating a street in an addition to a city was in legal effect an amendment of the plat of such addition, and all who bought thereafter took with notice of the vacation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1438-1440; Dec. Dig. § 663.\*]

## 8. MUNICIPAL CORPORATIONS (§ 663\*) — STREETS—VACATION—EFFECT.

Under Rem. & Bal. Code, § 7846, providing that where a street or alley is vacated it shall be attached to the lots or ground bordering on such street or alley, upon the vacation of a street a party owning the lots on both sides of the street became the owner in fee simple of the intervening vacated space.

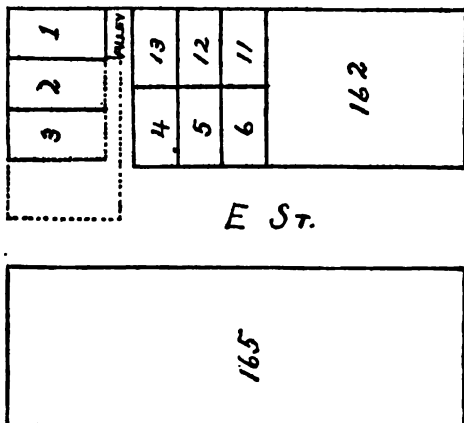
[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1438-1440; Dec. Dig. § 663.\*]

Department 1. Appeal from Superior Court, King County; King Dykeman, Judge.

Action by William Hagen and wife against the Bolcom Mills, Incorporated. Judgment for plaintiffs, and defendant appeals. Reversed and remanded, with instructions.

Myers & Johnstone, of Seattle, for appellant. Carkeek, McDonald & Kapp and Wm. S. Bell, all of Seattle, for respondents.

CHADWICK, J. [1] The parties to this action are contending over the ownership of a vacated street lying between lot 3, in blocks 162 and 165, in Gilman Park addition to the city of Seattle. That our statement of the facts may be the better understood, we have caused a plat to be reproduced for present reference.



Blocks 162 and 165 were acquired by the Seattle Iron & Steel Manufacturing Company, a corporation, on the 27th day of August, 1889. On the 7th day of October, 1889, the county commissioners of King county granted the petition of the Seattle Iron & Steel Manufacturing Company, and by an

order then entered vacated all of the alleys in certain blocks owned by the steel company, including blocks 162 and 165, and also ordered "that so much of E street in Gilman Park as lies between said blocks 162 and 165 (that is to say, so much of E street as lies between the west boundary line of First avenue east and the east boundary of Railroad avenue in said Gilman Park) be, and the same is hereby, vacated and hereafter ceases to be a public street." The law governing vacations of streets at the time this order was entered was the original act passed in 1858, with possibly some minor amendments, and which has been carried into Rem. & Bal. Code as section 7846. On February 1, 1900, the steel company conveyed to Lester Turner "blocks \* \* \* 162, 165, \* \* \* and that portion of what was formerly platted as public streets lying between said blocks as follows, to wit, \* \* \* of E street between blocks 162 and 165. \* \* \*" On June 13, 1902, the steel company quitclaimed to Turner "the land platted as alleyways through blocks \* \* \* 162, 165. \* \* \*" On February 25, 1905, Lester Turner conveyed lots 2 and 3, block 162, to C. E. Lawson. Lawson conveyed to one Dahlberg. In these conveyances the property is described as lots 2 and 3, in block 162. No mention is made of the vacated street. On July 3, 1905, Turner conveyed to defendants' predecessor all of block 165 and "the alleyway running through said block, heretofore platted, but now vacated." On December 24, 1906, Turner deeded to defendant certain lots in block 162 "and that portion of E street (vacated) lying between blocks 162 and 165," and on November 20, 1908, by like conveyance, the "vacated alley in block 162." On December 22, 1911, Dahlberg conveyed lots 2 and 3, in block 162, to Hagen, the plaintiff. On March 11, 1912, Turner gave Hagen an option to purchase "that portion of E street lying south of lot 3, block 162, \* \* \* and contiguous to said lot 3."

Defendant has used and has put some improvements in the way of a lumber shed on the disputed property. Plaintiff and his predecessors have since 1905 paid taxes on lots 2 and 3 "with portion of vacated alley and E street," and defendant has paid taxes on block 165 and "vacated alley and vacated E street adjoining." Plaintiff prayed for a recovery of the possession of the disputed land; for the value of the rents and profits for the time the property was occupied by the defendant; and for general relief. From a decree quieting title in plaintiff, defendant has appealed.

Respondent relies on the statutes (section 7842, Rem. & Bal. Code) and upon certain decisions of this court to sustain the decree. The statute, which is the act of 1901, is as follows: "When any street, alley or public way in any incorporated city or town in this state has heretofore been or may

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



hereafter be vacated by the council or legislative body of said city or town, the property within the limits of any such street, alley or public way so vacated shall belong to the abutting property owners, one-half to each, unless within six months after the taking effect of this act, any person or corporation, who may feel himself or itself aggrieved by such a division, may commence an action in the proper courts of this state to determine the title to any such street, alley or public way so vacated." And the decisions are: *Norton v. Gross*, 52 Wash. 341, 100 Pac. 734; *Rowe v. James*, 128 Pac. 540; *Burmester v. Howard*, 1 Wash. T. 208, and *Milton v. Crawford*, 65 Wash. 151, 118 Pac. 32. These cases recognize the general rule that upon the vacation of a street or alley the land thus relieved of the public easement therein becomes attached to and passed by deed under a description of the abutting property. We shall refer to them later in this opinion.

The general rule is qualified when the circumstances of the particular case demand it; as, for instance, if the conduct of the parties and their intent as manifested in the deeds or other instruments occurring in the chain of title show that the property has not been treated as a part of the abutting lots.

The reversion in the present case occurred under section 7846 of the Code. This section, and the others attending it, were held to be repealed by the act of 1901, which we have quoted above, in *Rowe v. James*, supra, but that act expressly provided that "no vested rights shall be effected by the provisions of this act." Section 7846 is as follows: "The part so vacated, if it be a lot or lots, shall vest in the rightful owner, who may have the title thereof according to law; and if the same be a street or alley, the same shall be attached to the lots or ground bordering on such street or alley; and all right or title thereto shall vest in the person or persons owning the property on each side thereof, in equal proportions: Provided, the lots or grounds so bordering on such street or alley have been sold by the original owner or owners of the soil; if, however, said original owner or owners possess such title to the lots or ground bordering said street or alley on one side only, the title to the same shall vest in the said owner or owners if the said court shall judge the same to be just and proper."

[2] The order of vacation of the streets in Gilman Park, being a public record, was in legal effect an amendment of the plat, and all who bought thereafter took with notice of the change. All of the land on both sides of the street being in one ownership, the title to the vacated street passed in fee simple.

"A conveyance according to a plat is a conveyance by recorded metes and bounds, except where the lots front on a street.  
\* \* \*

The metes and bounds on the plat

it is conceded would have been sufficient if the lot had been in the center instead of the corner of the block. That was the legal situation when the street was vacated." *White v. Jefferson*, 110 Minn. 281, 124 N. W. 374, 32 L. R. A. (N. S.) 778, 784.

The reason supporting title to vacated streets by reversion to abutting owners is that the law will presume that they have paid an enhanced value therefor in consequence of the prospective use of the street.

"The proprietor of premises platted as a town site, by reason of dedicating a part for use as street, enhances the value of the lots to which access may be had by means of such streets. His grantees pay this enhanced value and the proprietor thus receives a consideration, not only for the precise amount of land described in each lot, but also that embraced in the streets upon which the lots abut; and he who has already been once paid for his land cannot, in equity, be heard to assert title thereto as against one who has paid him the consideration therefor." *Olin v. Denver*, etc., R. Co. [25 Colo. 177] 53 Pac. 454.

"Easements of this character may cease to exist like all other burdens upon land, and when they do the land is freed from the incumbrance as completely as though it had never existed, and the owner of the soil has an absolute title to the same. Angell on Highways, § 326, says: 'From the principles already declared it necessarily results that, when the public easement is relinquished or vacated, the owner of the soil is restored to his original dominion over the same.'" *Benham v. Potter*, 52 Conn. 248.

[3] At the time the street was vacated the steel company was the sole owner of blocks 162 and 165 and became the owner of the intervening vacated space called E street. Unquestionably the common owner could have conveyed that space without reference to the adjoining lots just as an abutting owner could convey the reverted one-half of the street apart from the lot. To hold otherwise would be to hold that a reverted street could never be conveyed except as a part of an abutting lot. Instead of conveying the vacated street alone, the steel company defendant conveyed the whole property, not by lots and blocks, but with an apt description of the vacated property, thus injecting into the chain of title, common to both parties to this suit, a notice that the owner treated the vacated property as a separate quantity of land. Turner, by like conveyance, deeded the vacated land to the defendant. His deed to plaintiff purported to convey lots 2 and 3 in block 162. It cannot be held that plaintiff bought with reference to a platted street because there was no such street at the time he or any of his immediate grantors bought the property.

*White v. Jefferson*, to which we have referred, is a case in many respects like the one at bar. There had been a vacation of



a street before the lots, which it was insisted carried the vacated street, had been sold. Mr. Justice Jaggard, after stating the general rule of reversion, said: "It is true that in cases presenting the question whether a grant according to a recorded plat of premises abutting on a street conveyed only the land described in the plat by metes and bounds, or also the fee to the middle of the street subject to easement of public use, the opinions of the courts have often contained utterances to the effect that the fee title to the middle of the street was a necessary or integral part of the lot indicated by the plat; that interest was part and parcel of the lot conveyed; that the center line of the street is a boundary line of abutting lots; that the grantor is estopped from denying a conveyance of the fee subject to the easement, and the like. Such general statements must, of course, be limited to the particular facts involved and are not at all inconsistent with the application of another rule to a substantially different state of facts. Where the street had been vacated before the granting, are the facts substantially different? The rule in such a case can be determined only by a consideration of relevant principles. \* \* \* The owner of the land platted usually becomes entirely disassociated with the title to the land sold and has neither a proximate interest in nor a practical use for the qualified fee in the street. The interest of the vendee therein is immediate. It has direct and substantial value to him. Indeed as *Cole, J.*, said in *Kimball v. City*, 4 Wis. 321, 331, the lots would be 'comparatively useless' without the implication of conveyance to the middle of the street. He is logically entitled to improve the property as he chooses. It conduces to the best use of the premises to allow him to do so in reliance on access to the street on the ground itself and for light and air above. So long as the land is used as a street, these rights would be protected, irrespective of who owned the fee. But upon vacation of the street these rights would be legally destroyed unless the vendee had the fee. It is much more reasonable to vest that fee in him than in the usually remote party who originally platted the land. To allow the vendor to retain the fee would be a serious embarrassment to alienation and improvement of property which it consists with public policy to favor. \* \* \* Where, however, the street has been vacated while the original proprietor owns the lots in question, the situation is substantially different. On vacation of a street in a case like the one at bar, he owns lots 23 and 24 and the space between in fee simple. He can transfer the whole tract, or any part of it, or transfer lot 23 to any person, and lot 24 to another person, and the space between the two to a third person. It is immaterial in what order of time such transfers were

made. If the strip was granted before the lots, the intention would be certain; if afterwards, equally clear. What had been a street would be mere land. It would be taxable as land and so descend. Its transfer would be subject to the appropriate section of the statute of frauds. That it was not numbered nor properly named on the plat would be wholly insignificant. The case would be the same as if no street had ever existed, and, instead of being designated as 'street,' the tract had been marked 'sand hole,' or 'mound,' or any other name, or had had no name. The land which had been a street assumed exactly the same legal status as any other land which had not been impressed with a public easement. There is neither mystery nor magic in the word 'street.' The easement of use is the significant fact. When the easement ceases, there is no occasion nor justification for any imputation of intention. The parties would contract with reference to a record showing that no street existed, where the vacation proceedings are required to be recorded. Neither alienation nor improvement would be jeopardized by selling lots without the strip; merely less land would be sold to any one person. What had been a possible creator of local improvement assessments would become a possible subject of such public charge. When the reason for the rule ceases, the rule itself should cease. The courts do not indulge in unnecessary, artificial assumptions nor make new contracts for parties who have definitely agreed upon its terms. This they would do if in such cases they should construe a deed to pass title to a parcel of land distinct and different from what that contract accurately described. In the instant case before the transfer to either plaintiff or defendants there were on record in the office of the register of deeds two recorded plats of this addition, namely, the plat originally filed and the plat required to be there filed, together with a transcript of the resolution canceling and vacating the street, which was required by section 117, pp. 24, 25 (3d Ed.) charter of St. Paul, as a necessary condition to the validity of the ordinance. And it is here stipulated that the ordinance was valid. The defendants, therefore, had notice that there was no La Salle street and contracted with reference to a record showing that the strip did not adjoin a street." The learned justice then reviews the authorities from which he extracted the governing principle in this class of cases "that land is never appurtenant to land," or, as we may put it, a fee may carry an easement or a lesser estate as an incident or an accretion, but the conveyance of the fee-simple title to one piece of land will not carry as an incident or an accretion a fee of equal or greater degree and quality.

*Brown v. Taber*, 103 Iowa, 1, 72 N. W. 416, is a case in point. The dedication of streets



under the Iowa statute vested the fee in the public, and, had the dedication in that case been accepted, the general rule would have been applied. The case involved the title to a vacated street and the court found that the dedication had not been accepted, and applied the principle to which we have adverted. There, as here, the original owner had made a conveyance to a first vendee of certain lots and a later conveyance to a second vendee of lots including the vacated street. The court held that a conveyance of the lots did not include the vacated street, saying: "The only effect of vacating [the street] was to withdraw it from the public use. In words of Lowe, C. J., in *Milburn v. City of Cedar Rapids*, 12 Iowa, 246, the lots are 'designated by numbers, and it is simply by these numbers that they are conveyed, as they are known to represent the particular lot, with its specific boundary as represented on the map. Under such circumstances, there is no room to indulge in the presumption that the purchaser takes any more land than is contained within the defined lines of the lot.' Referring to the lots by number in the deed had the effect identical with describing them by metes and bounds as delineated on the plat. Their boundary lines were those of the vacated street, and, the deed conveyed to King only the land included within such lines. See *Chicago Lumber Co. v. Des Moines Driving Park*, 97 Iowa, 25 [65 N. W. 1017]; *Burbach v. Schweinler*, 56 Wis. 386, 14 N. W. 449. As the vacated street was a distinct parcel of land, it seems hardly necessary to say that it did not pass as incident or appurtenant to the lots. *Jackson v. Hathaway* [15 Johns. (N. Y.) 447] 8 Am. Dec. 263; *Mendel v. Whiting*, 142 Ill. 348, 31 N. E. 431; *Harris v. Elliott*, 10 Pet. 25 [9 L. Ed. 333]; *Van O'Linda v. Lothrop*, 21 Pick. 296 [32 Am. Dec. 261]; *Ammidown v. Bank*, 8 Allen [Mass.] 285."

In *Overland M. Co. v. Alpenfels*, 30 Colo. 163, 69 Pac. 574, the court said: "Much argument pro and con is devoted to the proposition that a deed describing property by lot and block number operates as a conveyance of contiguous property which was at one time, but is no longer, included within the limits of a public street. \* \* \* That the original owner who has the fee both in the streets and lots abutting thereon has the right to retain his estate in the former when he sells the latter that he may separate the two estates or titles and treat them as distinct and separate tracts or parcels is too clear for argument. *Jackson v. Hathaway*, 15 Johns. [N. Y.] 447 [8 Am. Dec. 263]. \* \* \* Let us then carefully look to the language of the description in the deed of March 17, 1871, from Ebert to Case. Ebert then owned all of block 12 and all of Depot street opposite the same. The deed reads: 'All block numbered twelve (12) in Case and Ebert's addition to the city of Denver; also doth quitclaim all title in

being and reversion, to the land now occupied by Depot street, \* \* \* lying contiguous to and adjoining said block.' Clearly, then, Ebert treated block 12 and Depot street as separate and distinct tracts and by the conveyance of block 12 did not intend to extend the grant so as to include any part of the adjacent street. For, after conveying the block by reference to its number as shown on the recorded plat, he quitclaims all title to the 'land now occupied by Depot street \* \* \* lying contiguous to and adjoining said block.' We must not disregard this additional description as surplusage; on the contrary, we are bound to assume, if we can, that the parties meant something by it. If, as contended by the plaintiffs, by this deed Ebert intended to convey to Case the portion of Depot street contiguous to block 12 as appurtenant to, or as part of, that block, he would have stopped after describing block 12; but by the use of the word 'also,' which, in a case of this sort, means something in addition to that previously described, he proceeds to include in the grant something not theretofore embraced in a previous description. And when he adds Depot street to the grant he says, in effect, that he intends to pass a parcel of land distinct and different from what he has already described. *Devlin on Deeds*, § 864; *Panton v. Tefft*, 22 Ill. 366, 375, 376. Not only Ebert, as grantor, was bound by this description; so also was Case, as grantee. Both of them, the grantor in conveying, and the grantee in accepting, the deed, must have intended that the conveyance of block 12 by its appropriate number with reference to the plat extended only to the nearest side and not to the center of Depot street and by describing with particularity as one of the parcels of the grant that portion of Depot street lying adjacent to block 12 the parties intended to include such portion as a separate and distinct parcel. It is this deed which in our judgment clearly shows the intention of the parties to restrict block 12 to the southeasterly side of Depot street. \* \* \* Indeed when once there has been a conveyance excluding a highway from the grant as was done by Ebert in his deed to Case neither Case nor any subsequent grantee can include it for he would be conveying something as a part of the specific thing granted which was distinct from it. 4 Enc. of Law (2d Ed.) 817. Case then, in 1878, being the owner of all block 12 and also the title of Depot street adjacent thereto, certainly had the right to continue as separate the two titles and two tracts of ground which he held, just as Ebert did when title passed from him to Case. The parties concerned, therefore, having severed the two estates, having by their deed in effect manifested their intention to vacate Depot street, and having limited block 12 to the southeasterly side of that street, it was beyond the power of their subsequent



grantees to reunite them in one tract or to convey the street as appurtenant to the lots in the block without the consent of all the parties concerned."

In *Plumber v. Johnston*, 63 Mich. 165, 29 N. W. 687, the court said: "The doctrine is well established that the grantee of a lot bounded upon a street or other highway takes to the center of such street, subject only to the public easement, unless something appears upon the plat or in the terms of the conveyance excluding the title from passing under a boundary so described. But this doctrine is limited and is applied to actual highways and not to mere paper highways. *Hopkinson v. McKnight*, 31 N. J. Law, 422."

In *Sanchez v. Grace M. E. Church*, 114 Cal. 295, 46 Pac. 2, the court raised the question relied on by respondent, saying: "A more serious question is whether the land in Messer's lane to the middle of it did not become, when the lane was vacated, by a sort of accretion, parcel of the abutting lots so as to pass with them by the deed to Leonis without further designation. See *Challiss v. Depot, etc., Co.*, 45 Kan. 898 [25 Pac. 894]; *Atchison, etc., R. R. Co. v. Patch*, 28 Kan. 470—cases turning upon a peculiar statute. We think no such rule can obtain in this case; the conveyance of land bounded by a highway is presumed to carry title to the median line of the way, but there is no reason in a like presumption to include land which has formed, but forms no longer, part of a highway; in 1875, when the deed was made to Leonis, the soil of the former lane, together with the strip off the Mott & Johnson tract, formed a body of land some 70 feet in width lying between lots 23, 24, and First street, and wholly free from the legal incidents which pertain to the soil of a highway; there is therefore no more reason to say that any part thereof passed under the designation of those lots in the deed than for extending the scope of that description to adjacent land, if such there had been, which never was impressed with the highway use; more especially since neither party claims that plaintiff owned the fee in any part of said lane before its vacation as a highway. *Harris v. Elliott*, 10 Pet. 25, 54 [9 L. Ed. 333]."

Nothing will be gained by pursuing the authorities. Under a similar state of facts it is uniformly held that deeds are controlled by the intent of the parties as expressed therein, and that subsequent grantees are bound by the patent intent of the common grantor.

We find that E street, by the process of vacation, became a separate tract and the property of the owner of blocks 162 and 165. Rem. & Bal. Code, § 7846. That its future status depended upon the attitude of its then owner; that it was conveyed as a distinct parcel; and that such conveyance was notice to all subsequent grantees in the chain

of title. "The original owner who lays out an addition to a city and has the fee both in the streets and the abutting lots may separate the two estates or titles and treat them as distinct and separate tracts or parcels. He may sell the lots and retain his estate in the adjacent street." Syllabus, *Overland M. Co. v. Alpenfels*, supra; 4 A. & E. Encl. Law, 817. Nor has this court held to the contrary of the doctrine here announced. The exact question has never been before the court. The case of *Norton v. Gross*, supra, the case most relied on, was correctly decided and rests upon two principles: The general rule of reversion and estoppel. The question of a sole ownership at the time of the vacation was not involved. So, too, in the case of *Rowe v. James*. The street vacated abutted on lots owned by different parties. The lots had long since passed out of the common grantor. The vacated street reverted under section 7842 of the Code. In *Burmester v. Howard*, the vacation was granted upon the petition of abutting lot owners, and the general rule of reversion was recognized, subject, however, to an estoppel. There is nothing in the case of *Milton v. Crawford* that pertains in any way to the present issue. Nor do we understand the payment of the taxes by the plaintiff and their predecessors in interest on one-half of the vacated street will defeat the true title. Payment of taxes is proper evidence in support of a claim of title. 1 Enc. of L. 680. It is not conclusive unless made so by the statute. Our statute (section 786) provides that payment of taxes for seven years under color of title will support a claim of title. There is no color of title in plaintiff to the land in controversy, and in the light of the record and the law, as we have found it to be, no right has ripened in the plaintiffs by reason thereof. This conclusion makes it unnecessary to inquire whether plaintiffs are estopped by their conduct to claim title to vacated E street.

Reversed and remanded, with instructions to dismiss.

MOUNT, PARKER, and GOSE, JJ., concur.

(74 Wash. 438)

STATE ex rel. GRANT SMITH & CO. v.  
CITY OF SEATTLE.

(Supreme Court of Washington. July 23,  
1913.)

1. MUNICIPAL CORPORATIONS (§ 950\*) — IMPROVEMENTS — CONTRACT — PAYMENT — BONDS — ACCRUED INTEREST.

Where a contract for the regrading of streets in a city provided for payment to the contractors, from time to time as the work progressed, by delivery of bonds, but that no claim should be made for any portion of the contract price until, in pursuance of law, charter, or ordinance, the bonds should be legally issued, and the contractors assumed the financing of the improvement up to such time, receiving warrants for the accrued percentages of the work, and such warrants as were not

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



redeemed from the collection of the assessment roll were exchanged for bonds, which the city was only authorized to sell at par, the contractors were not entitled to receive interest coupons, attached to the bonds representing interest accrued between the date of the bonds and their delivery.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 902-910; Dec. Dig. § 950.\*]

**2. MUNICIPAL CORPORATIONS (§ 950\*) — PAYMENT BY MUNICIPAL CORPORATION — AUTHORITY.**

Where the delivery by a city of improvement bonds to contractors without detaching coupons for accrued interest between the date the bonds were issued and the date they were delivered was without authority and void, and not merely a mistake of law, the city was not estopped to recover the value of such coupons from the contractors.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 902-910; Dec. Dig. § 950.\*]

**3. MUNICIPAL CORPORATIONS (§ 950\*) — IMPROVEMENT CONTRACT—BONDS—DELIVERY TO CONTRACTOR—ACCRUED INTEREST.**

Failure of a city to deduct accrued interest at the time of the delivery of bonds to a contractor in payment for his work did not vest any right to such accrued interest in the contractor, nor estop the city from asserting the unlawfulness of such payment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 902-910; Dec. Dig. § 950.\*]

**4. JUDGMENT (§ 735\*)—RES JUDICATA.**

A judgment in favor of municipal contractors in a mandamus proceeding, affirming the contractor's right to an allowance of \$76,112.19 for additional yardage in the removal of earth resulting from a change in the specifications of the work, no other question having been submitted to the court nor referred to in the pleadings, did not bar the city's right to claim, as a set-off in a subsequent proceeding to compel the levy of an additional assessment, the amount of accrued interest on bonds delivered to the contractors in payment for the work, which had been illegally paid to and received by them.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1551; Dec. Dig. § 735.\*]

Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Mandamus by the State, on relation of Grant Smith & Co., against the City of Seattle, to compel the city to make a supplemental or reassessment on private property for a public improvement. Decree for relator, and defendant appeals. Reversed and remanded, with directions.

Jas. E. Bradford, Howard A. Hanson, and James Klefer, all of Seattle, for appellant. Preston & Thorgrimson and Turner & Hartge, all of Seattle, for respondents.

MORRIS, J. In this action respondents, the contractors in the local improvement known as the Denny Hill regrade, sought to compel the city to levy supplemental reassessments upon private property in the amount of \$76,112.19. To this demand the city pleaded an offset of \$47,696.11, accrued interest on certain bonds delivered to the contractors,

and offered to levy further assessments to make up the difference between these two amounts. This offer was rejected by the court below, and judgment went for the respondents as prayed for.

The facts material to the inquiry here are about as follows: The city, having determined upon the improvement, which consisted in the regrading of portions of several parallel avenues, and comprising locally what is known as the Denny Hill regrade, called for bids under which the contract was let to the respondents. This contract provided that the contractors should slope back upon private property to the extent of one to one and remove the earth involved in such slope as part of the cost and expense of the regrading. The regrade involved various deep cuts, and the removal of the remaining earth upon the private property to the approximate new level of the streets. To this end a provision was inserted in the contract, by which the contractors bound themselves to excavate the earth from any private property in the district when so requested by the property owner at the same rate per cubic yard as was involved in the contract with the city. Under this provision the contractors, in a large number of cases, entered into contracts with various owners of abutting property to remove the earth on such private property "so as to bring the level thereof to an even grade with the street or streets abutting the same, as established by city ordinance." After commencing work upon this contract, and when approximately 26 per cent. of the work had been completed, the city confirmed an assessment roll for the estimated cost and the expense of the improvement, and paid to the contractors upon this roll in March, 1909, about \$62,000. On May 10, 1909, bonds in the principal sum of \$741,757.01 were drawn up and dated by the city comptroller for delivery to the contractors, from time to time, in various amounts as called for by monthly estimates. These bonds, which under the law were obligations against the local improvement district, but not against the city as a whole, were payable 10 years from and after the date of their issue, with interest at the rate of 6 per cent. per annum; each bond having attached thereto 10 coupons representing each year's interest on the bond. Under the terms of the contract, it was provided that no claim should be made for any portion of the contract price until, in pursuance of law, charter, and ordinance, the bonds could legally be issued. The contractors thereafter assumed the financing of the improvement, up to such time as under this provision of the contract the bonds could be legally issued. Each month after the commencement of the work a monthly engineer's estimate was made up of the work during the preceding calendar month. Upon this estimate the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



contractor received a warrant for 70 per cent. of the work; some of these warrants being redeemed in March, 1909, from the first proceeds of collection upon the assessment roll amounting to the cash payment of \$62,000. Those warrants not redeemed in this manner were exchanged for bonds later. It was further provided in the contract that after the confirmation of the assessment roll, there should be delivered to the contractors' bonds in the face amount of 70 per cent. of the work done during the preceding calendar month, as shown by the monthly estimate. This amount was due and payable on or about the 25th of each month. To these bonds, so delivered from time to time, were attached all interest coupons, and at the time of the several monthly deliveries certain interest had accrued from the date of the bonds, May 10, 1909. It was further provided that 30 per cent. of the cost and expense of the amount should be reserved by the city for the protection of lien claimants. This reserve was withheld from each monthly payment, and under the contract did not become payable until 30 days after official notification to the city comptroller that the contract had been completed and accepted. This 30 per cent. reserve became payable to the contractors on April 25, 1911, and bonds therefor were delivered to the contractors on April 29, 1911. The accrued interest upon these bonds so delivered amounted to \$31,090.44. This item, together with the accrued interest upon the several monthly estimates subsequent to May 10, 1909, amounted to \$47,696.11. It is the accrued interest in this latter amount that the city urged as an offset to the demand of the contractors that the city take necessary steps to levy assessments in the full sum of \$76,112.19. In considering the payment of the various monthly estimates, the city council passed a monthly budget ordinance, ordering payments to the various local improvement contractors operating under the several contracts throughout the city. This ordinance directed the payments to the contractor of bonds in the principal sum of 70 per cent. of the monthly estimate, and provided for the payment of such additional sum as "may be required to pay all interest that may legally accrue on the warrants and bonds under this ordinance."

Our attention has not been called to any other provision of statute, charter, ordinance, or contract for the delivery to the contractors of coupons representing the interest which had accrued between the date of the bonds and their delivery. It is the city's position now that such delivery was without authority, and that the contractors have already received, on account of the improvement, this sum of \$47,696.11, representing the accrued interest, to which they were not entitled, and that such payment is in excess of the cost and expense of the improvement,

and that the city is without power to assess private property for more than the cost and expense of the improvement, and therefore the city is entitled, in this proceeding, to offset the amount of such accrued interest. Other material facts necessary to a proper understanding of the situation here involved may be referred to.

In *Schuchard v. Seattle*, 51 Wash. 41, 97 Pac. 1106, it was held that property, receiving damages in condemnation proceedings under the old law, where damages were offset against all benefits and a verdict returned for the excess, was exempt from special assessments, either upon the condemnation assessment roll or upon the local improvement assessment roll. This holding had a direct effect upon a number of assessments in the Denny Hill local improvement assessment roll, and apparently involved approximately \$70,000 of such assessments. The city, seeking to relieve itself from this situation, directed the contractors to slope back upon private property only to the extent of three-fourths to one, instead of one to one, as provided for in the original contract, leaving the wedge thus created to be removed at the cost of the property owner. Under this modification of the contract, the contractors proceeded with the improvement, and sought to, and in many cases did, collect from the several property owners who had signed private agreements for the removal of the earth upon their lots an amount representing the cost of removing this additional wedge. About this time an action was brought against the contractors by one of the owners of abutting property who had signed such an agreement, claiming that such modification of the contract was void, and that under the original contract he could only be held to pay for the removal of the earth involved in the one to one slope. This contention, reaching this court, was sustained in *Atwood v. Grant Smith & Co.*, 64 Wash. 470, 117 Pac. 393. The contractors were thus deprived from enforcing their agreements with the private property owners for the recovery of any part of the earth not involved in the slope of one to one. On the other hand, the city, having modified the contract, had been allowing monthly estimates, which had been accepted by the contractor on the basis of the yardage removed in the street and the yardage moved from private property back to the slope of three-fourths to one, and unless, therefore, the contractors could, by some means, procure the payment of the cost of excavating this additional wedge from the city, they would be unable to receive payment for the work so done. An action in the nature of mandamus was thereupon brought against the city to compel it to include, as an item for which the contractors were entitled to receive compensation, the various monthly estimates of yardage removed in this ad-



ditional wedge subsequent to October, 1908. The total yardage involved in this wedge was 281,897 cubic yards which at the price provided for in the original contract amounted to \$76,112.19. The contractors were successful in this proceeding, and the court below issued its writ as prayed for. The city thereupon, following the mandate of the writ, passed an ordinance directing the reassessment of an amount sufficient to pay the contractors this sum of \$76,112.19, with interest thereon from the respective dates when such monthly payments would have become due, and payable if they had originally been allowed by the city upon the original monthly estimate. When this roll came on for hearing before the city council, objections were interposed to its confirmation by numerous property owners, upon the ground that there was no authority in law for charging private property with this item of \$47,696.11 accrued interest. The city thereupon notified the contractors that it would confirm the assessment roll in an amount less this accrued interest item, and the contractors, refusing to accept this reduction, brought this action, in which it is sought to compel the city to levy a supplemental or reassessment sufficient to raise the entire sum of \$76,112.19. Upon the trial the lower court refused to permit the city to offset the accrued interest paid. The city has appealed.

[1] The question submitted by the appeal is the correctness of this contention: That the contractors should be charged with the interest earned or accrued upon the bonds from their date to the time of their respective delivery. It seems plain to us that under the contract the contractors were to receive, in payment for their work, bonds at their face or par value, and not bonds with accrued interest amounting to \$47,696.11, which would mean, if the later plan of payment is permitted, that the contractors would take the bonds, not at their face or par value, but at a discount of \$47,696.11. It is not questioned, as we understand the position of respective counsel, but that the contractors in accepting these bonds in payment for the work were to receive them at their face or par value. Section 8020, Rem. & Bal. Code, provides that local improvement bonds may be issued to contractors in payment for their work, or that the bonds may be sold at not less than their par value and accrued interest, and the proceeds thereof applied in payment of the amount due the contractor. If, under this section, the contractor takes the bonds in payment for his work, we think the only reasonable construction to be placed upon it is that he shall, as is the case when the bonds are sold to third parties, accept them at not less than par and accrued interest. It was not contemplated by the statute that there would be any difference in the amount paid the contractor whether he accepts bonds in payment for his work, or whether bonds were sold to others and the contractor paid

in cash. These bonds were in the principal sum of \$100, and if the contractor is to accept them, he must accept them at their par or face value, to the same extent that he accepts currency or gold at its face value. If, at the time of its delivery to the contractor, \$5 had been earned as interest on each bond, then the par or face value of that bond at that time would be \$105, and we know of no reason why the contractor should give credit for the payment of \$100 only and retain the \$5 as a premium or bonus any more than, if paid in cash, he should have the right to demand a bonus or premium of the same amount upon every \$100 bond. *Hunt v. Fawcett*, 8 Wash. 396, 36 Pac. 318; *Delafield v. Illinois*, 26 Wend. (N. Y.) 192; *Ft. Edward v. Fish*, 156 N. Y. 363, 50 N. E. 973; *Jones Co. v. Board of Education*, 30 App. Div. 429, 51 N. Y. Supp. 950; *People v. Miller*, 84 App. Div. 168, 82 N. Y. Supp. 623; *Whelen's Appeal*, 108 Pa. 162, 1 Atl. 88. So far as authority has been called to our attention, the cases generally hold that in these local improvement contracts providing for payments at certain times the contractor is not entitled to interest for any period prior to the time of such payment. *Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786; *Booth v. Pittsburgh*, 154 Pa. 482, 25 Atl. 803; *Cratty v. Chicago*, 217 Ill. 453, 75 N. E. 343.

[2] Respondent contends that the city, having voluntarily paid this interest, cannot now recover it back, and that the mistake, if any, was one of law and not of fact—citing cases like *Cincinnati v. Cincinnati Gas L. & C. Co.*, 53 Ohio St. 278, 41 N. E. 239, to the effect that a payment, made by reason of a wrongful construction of the terms of a contract, is not made under a mistake of fact, but under a mistake of law, and, if voluntarily made, cannot be recovered back. While it has been held that the rule that payments made under a mistake of law cannot be recovered back extends to a municipal corporation, there seems to be a distinction between the wrongful reading of the terms of a contract when the power of the city is not questioned and a mistake of law as to the legal effect and scope of the contract where the power is lacking, and where it appears that payments have been made, not only unauthorized, but in violation of law. So far as we know, this rule has never been applied to prevent recovery of money paid out by city officials without authority, or in violation of law. If, under the correct reading of the statute the contractor must accept bonds at their par or face value, then the payment by the city of bonds at a discount, or of bonds with earned interest added as a premium, is a payment made without authority and in violation of law, and is in effect a void payment. Such a payment is not to be considered as one voluntarily made by the municipality itself, but as made by those assuming to act for it without authority, and does not estop the municipality from recovering such



payment. *Heath v. Albrook*, 123 Iowa, 559, 98 N. W. 619; *Ada County v. Gess*, 4 Idaho, 611, 43 Pac. 71; *State v. Young*, 134 Iowa, 505, 110 N. W. 292, 13 Ann. Cas. 345; *Bayne v. U. S.*, 93 U. S. 642, 23 L. Ed. 997; *Duluth v. McDonnell*, 61 Minn. 288, 63 N. W. 727; *Allegheny v. Grier*, 179 Pa. 639, 36 Atl. 353; *Com. v. Haupt*, 10 Allen (Mass.) 38.

[3] Nor does the failure of the city to deduct the accrued interest at the time of the delivery of the bonds vest any right in the contractor to this accrued interest, or estop the city from asserting the unlawfulness of such procedure. *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. 1063; *Million v. Soule*, 15 Wash. 261, 46 Pac. 234; *State ex rel. Spring Water Co. v. Monroe*, 40 Wash. 545, 82 Pac. 888; *Paul v. Seattle*, 40 Wash. 294, 82 Pac. 601. In support of its contention that the payment of this accrued interest was a voluntary payment, and cannot now be recovered by the city, respondents cite *Seattle v. Stirrat*, 55 Wash. 560, 104 Pac. 834, 24 L. R. A. (N. S.) 1275. Without attempting to point them out, we think there are so many distinctions between that case and this that nothing there said should be accepted as preventing the city from asserting its right to recover this interest.

[4] The next question to be determined is the effect of the judgment in the mandamus proceeding, in which the city was directed to allow the respondent \$76,112.19 for the yardage in removing the dirt between the 1 to 1½ and 1 to 1 slope. The only matter determined in that proceeding was the right of the contractor to receive this additional yardage as a proper item or allowance under the contract. No other question was submitted to the court, nor referred to in the pleadings. The contractor asserted his right to be allowed this added yardage as a proper allowance under the contract. The city denied it, and the judgment affirmed it. No one now questions that right, nor is anything here sought to be litigated which limits the extent or binding force of that decree. The claim of the city in this case is that, admitting the correctness of that decree that respondent is entitled to the additional yardage, the city cannot now be required to levy an assessment upon the property in the improvement district in the full amount allowed for that yardage, because the respondents now have in their possession certain moneys which they should of right apply upon such payment, and the city be directed to levy an assessment only for the remainder. If the city now desired to interpose matter by virtue of which it sought to lessen or defeat respondents' allowance for yardage, that decree would defeat such an attempt, as it in legal effect negatives any defense that might and should have been raised against respondents' then contention. Respondents, however, in that action did

not seek an adjudication that the city should levy an assessment upon private property for the purpose of raising the full amount of their claim, nor did they in any way seek to litigate their right to such a direction. Not having done so, they cannot now, when for the first time they come into court and seek such relief, say that the city is, because of the former decree, debarred from setting forth reasons why such relief should be denied. Respondents can hardly be heard to say that they are entitled to the relief now sought because they did not seek or obtain it in the former action, but the city is now precluded from asserting its claim against such relief because the former action was the proper one in which to litigate such claim.

We are therefore of the opinion that the lower court was in error in rejecting the offset offered by the city, and the judgment is reversed, and the cause remanded, with instructions to allow the offset in the sum of \$47,696.11, and for further proceedings in accordance with the views here expressed.

ELLIS, FULLERTON, and MAIN, JJ., concur.

(74 Wash. 529)

#### BOYLE v. BOYLE

(Supreme Court of Washington. July 31, 1913.)

DIVORCE (§ 269\*)—ALIMONY—ENFORCEMENT OF DECREE—CONTEMPT PROCEEDINGS—DEFENSES.

Where it appears by clear and satisfactory evidence that a divorced husband has neither the means nor ability to pay alimony allowed the wife by the divorce decree, and that his disobedience to the decree is therefore not willful, his failure to pay is not a contempt of court.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 756-763; Dec. Dig. § 269.\*]

Department 2. Appeal from Superior Court, King County; A. W. Frater, Judge.

Proceeding by Catherine Boyle against F. J. Boyle to have defendant adjudged in contempt of court. From an order adjudging defendant in contempt of court and committing him to the county jail, he appeals. Reversed.

Chas. H. Miller, of San Francisco, Cal., for appellant. Herbert W. Meyers, and Charles A. Enslow, both of Seattle, for respondent.

MAIN, J. This is a proceeding wherein the plaintiff seeks to have the defendant adjudged to be in contempt of court for his failure to pay alimony.

On the 19th day of October, 1909, by decree of court the bonds of matrimony theretofore existing between the plaintiff and the defendant were dissolved. By the decree the defendant was ordered to pay to the plaintiff as alimony the sum of \$25 per month. This decree not being conformed to by the defendant, on May 27, 1912, the plaintiff

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 133 P.—64



made an application to the superior court for an order directed to the defendant requiring him to show cause on the 10th day of June, 1912, why he should not be adjudged guilty of contempt for failure to conform to the court's decree. On June 11, 1912, the matter came on for hearing upon the show cause order. Thereupon the court adjudged the defendant to be in contempt of court and suspended sentence providing the defendant would on or before July 1, 1912, pay to plaintiff the sum of \$10 and every 30 days thereafter the sum of \$15. The order provided further that, if the defendant should fail to make these payments as indicated, he would be subject to arrest on the charge of contempt. Thereafter no payments were made as required in the order of June 11, 1912. On October 21, 1912, the defendant was arrested and appeared before the court to answer the charge of contempt. The matter was heard on November 23, 1912, and on November 26, 1912, the court signed an order permitting the defendant to file affidavits in his defense as of the date of the hearing. On December 7, 1912, an order was entered adjudging the defendant in contempt of court for failure to obey the order made on June 11, 1912, and committing the defendant to the county jail until he should purge himself of such contempt. The defendant appeals.

The cause is before us upon the affidavits filed by the respondent and her counsel in support of her application for the show cause order and the affidavits filed on behalf of the appellant in support of his defense. The certificate of the trial judge to the bill of exceptions states that these affidavits contain all the facts and all the evidence and proofs submitted by the respective parties upon the hearing.

The affidavits of the respondent are to the effect: That the alimony awarded in the divorce decree has not been paid; that the appellant was able to pay; and that the respondent was ill and very much in need of the financial support which the payment of the alimony would furnish.

The appellant's affidavits, and one of these is by his physician, are to the effect: That the respondent has not the means and is unable to pay the alimony; that he is an old man and is suffering with diseases known as creeping paralysis of the arms, muscular atrophy, and a severe inguinal hernia; that if he is incarcerated in the county jail it will be deleterious to his health; that he is not in a condition to perform manual labor; that he owes his physician \$125; that he owes his counsel for services rendered in these proceedings and his counsel is appearing for him without hope of compensation; that all of his property has been conveyed to the respondent; that one C. El. Preston has rendered appellant financial assistance without

hope of reward in order to save him from becoming a public charge, and appellant is now indebted to him in the sum of several hundred dollars. Appellant's affidavits stand undenied.

The one question to be determined is whether the decree is warranted by the facts as contained in these affidavits. The rule is that a defendant is not guilty of contempt of court for failure to pay alimony where it appears by clear and satisfactory evidence that he has neither the means nor the ability to do so, and that his disobedience, therefore, is not willful. In the case of *Holcomb v. Holcomb*, 53 Wash. 611, 102 Pac. 653, it was said: "The sole defense to the show cause order was that the appellant had neither the means nor the ability to comply with the terms of the decree. If this defense was established by clear and satisfactory proof, the judgment must be reversed, for it is always a defense to a proceeding of this kind to show that the disobedience was not willful but was the result of pecuniary inability or other misfortunes over which the accused had no control. *Walton v. Walton*, 54 N. J. Eq. 607, 35 Atl. 289; *Newhouse v. Newhouse*, 14 Or. 290, 12 Pac. 422; *Peel v. Peel*, 50 Iowa, 521; *Schuele v. Schuele*, 57 Ill. App. 189; 9 Cyc. 14." The present case comes directly within the rule there announced.

The judgment must therefore be reversed.

ELLIS, FULLERTON, and MORRIS, JJ., concur.

(74 Wash. 499)

#### RICHARDSON v. SEARS et al.

(Supreme Court of Washington. July 29, 1913.)

#### 1. CONTRACTS (§ 305\*)—CONSTRUCTION—PAYMENT—VENDEE'S DEFAULT—WAIVER.

Where complainant contracted to clear certain land of an estate and to receive a portion of the land at a specified valuation as his compensation, and those managing the estate, with knowledge of complainant's failure to perform the work within the time specified, acquiesced in his continuing the same until completed, with knowledge that complainant and those who were assisting him by way of advancements understood that if the land was cleared compensation would be made therefor, as provided in the contract, complainant's default was waived.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1398, 1399, 1400, 1463, 1464, 1467-1475; Dec. Dig. § 305.\*]

#### 2. LANDLORD AND TENANT (§ 108\*)—LEASE—TERMINATION—NOTICE.

In order to terminate a lease of land for a tenant's default in the payment of rent, it is necessary to serve statutory written notice on the tenant to pay rent or vacate the premises.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 333-335, 339; Dec. Dig. § 108.\*]

#### 3. CONTRACTS (§ 235\*)—MEDIUM OF PAYMENT—CONSTRUCTION.

Plaintiff contracted to clear certain land for \$125 per acre, payment to be made when the work was fully completed by a conveyance to him of an uncleared portion of the tract at a valuation of \$700 per acre, to be taken from

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes



certain described tracts. *Held*, that such contract did not authorize payment, either in land or money, but in lands only.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1101-1116; Dec. Dig. § 235.\*]

**4. SPECIFIC PERFORMANCE (§ 126\*)—DECREE—EXCESSIVE RELIEF.**

Where a contract only provided for the conveyance of certain land in a specified tract, a decree of specific performance, requiring the vendee to convey the shore lands in front of the tract, was erroneous.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 55, 401-405; Dec. Dig. § 126.\*]

**5. SPECIFIC PERFORMANCE (§ 100\*)—CONTRACT FOR SALE OF LAND—DELAY.**

Where complainant contracted to clear certain land, receiving in consideration for his services a conveyance of a portion of the land, and at all times prosecuted the work in good faith and with such means as were available, and the vendors not only acquiesced in the delay but urged completion of the work, and the delay caused no substantial prejudice to them, a decree of specific performance will not be denied, because the value of the property had greatly increased during the delay.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 305-310; Dec. Dig. § 100.\*]

Department 2. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Suit by P. C. Richardson against Sarah C. Sears and others. Judgment for plaintiff, and defendants appeal. Remanded, with directions to modify the decree.

Peters & Powell, of Seattle, for appellants. Charles P. Spooner, of Seattle, for respondent.

**MAIN, J.** This action was brought for the purpose of compelling a conveyance of real estate. On May 1, 1903, and for some time prior thereto, Joshua M. Sears and Sarah C. Sears, his wife, of Boston, Mass., were and had been the owners in fee of a tract of land containing approximately 106 acres in sections 23 and 26, township 24 N., range 4 E. W. M., lying about six miles south of the center of the city of Seattle, in King county, Wash., on the western shore of Lake Washington, near what is known as Brighton Beach. On June 5, 1905, Joshua M. Sears died. By the provisions of his last will and testament the estate was to be managed by certain trustees, residing at or near the city of Boston, Mass. On March 16, 1906, the will was admitted to probate in the superior court of King county, this state, and W. A. Peters was appointed administrator, with the will annexed for that portion of the estate which was then within the state of Washington. By written contract, dated April 13, 1904, Sears and wife leased the lands above described to the plaintiff for a term extending to the first day of May, 1909. The rent reserved was \$250 per annum from date until March 1, 1905, payable quarterly, and at the rate of \$925 per annum from the latter date until the end of the term, payable in

like manner. The contract provided that the plaintiff was to immediately commence work upon certain described portions of said lands, amounting to about 90 acres, and in a specified manner clear and seed the same. The work was to be diligently prosecuted and completed on or before May 1, 1905. The contract was entire. It provided that the plaintiff "shall not be deemed to have earned any of his compensation until he has wholly or substantially completed the improvement as above contemplated." The provision of the contract, with reference to the compensation that the plaintiff should receive for doing the work, is as follows: "As payment for which the party of the second part (Richardson) is to be compensated at the rate of \$125 per acre for the lands so improved being ninety (90) acres more or less, exclusive of the land to be conveyed to Richardson as herein provided; payment to be made when said work is fully completed to the satisfaction of the parties of the first part, by the conveyance to said second party, his heirs, executors, administrators, or assigns of a portion of the above described tract of land at a valuation of \$700 per acre, said land to be taken from the following described tracts." Then follows a particular description of the tracts mentioned in the contract as tract A and tract B, comprising about 16 acres, and, as the contract states, "said tracts together to make up the acreage so to be earned by the said party of the second part." The contract contained other provisions ordinarily contained in leases, which need not here be referred to.

Immediately after the execution of the contract, the plaintiff, being then in possession of the land, commenced the work of clearing. On May 1, 1905, that being the time specified in the contract, the work was not completed. The plaintiff, however, represented to the administrator that he could finish a portion of it by the fall of 1905, and the remainder in the spring of 1906. During the year 1905, representatives of the trustees were in Seattle, and went over the land and were informed by the administrator of the status of affairs. The administrator represented to them that the plaintiff was doing the best he could. Nothing was done towards interfering with the plaintiff in the progress of the work, and the matter drifted along until the spring of 1906. In March of that year it appears that, owing to the fact that the plaintiff had been disappointed in not receiving a substantial sum of money which he had expected, and owing to the further fact that the work was much more difficult to perform than had been anticipated, only about one-half of the clearing had been accomplished. No part of the rent due up to that time had been paid. At this time the plaintiff tendered to the administrator a check for the sum of \$1,335, being the amount

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



of the rent then due, and requested that the trustees accept an assignment of the lease from the plaintiff to one Everett Smith, who was furnishing the plaintiff money to pay the rent and was undertaking to finance the proposition for the plaintiff to the completion; the plaintiff stating that the work would be fully completed by the fall of 1906. The administrator refused to accept the rent, stating that the plaintiff was in default, and that he had no authority to make any waivers or changes in the contract. He stated, however, that he would submit the matter to the trustees, recommending that the plaintiff's request be complied with. The administrator forwarded the papers to the trustees with his recommendation that they be executed. On June 4, 1906, the extension agreement, properly executed, was mailed by the trustees from Boston to the administrator at Seattle. Before its receipt the administrator had received an offer of purchase of the lands in question at the price of \$100,000 for the 106 acres. On June 6, 1906, the administrator by letter communicated this offer to the trustees. He also referred to the extension agreement, advising that it would probably be well to execute it, if the trustees decided not to sell the property until some later date. The fair market value of the property at the date of the execution of the contract was probably less than \$700 an acre, the amount at which plaintiff agreed to take it in payment for the work. In 1906 the values had doubled, and in 1909 a further material increase had taken place. On October 27, 1906, the administrator again wrote the trustees concerning reinstating the plaintiff, and on November 22, 1906, the trustees wired and wrote the administrator, inquiring whether he had received the extension agreement that they had mailed on June 4th. It is evident from these communications and from the statements contained in the trustees' letter of October 13th that the trustees understood that the extension agreement had been delivered. On November 22d the administrator wired and wrote the trustees that the papers had been received, and in his letter stated that they had never been delivered, owing to the unexpected increase in the value of the property, and owing to the fact that he was awaiting the trustees' conclusion as to whether they were going to sell or hold the property. On November 30th the trustees acknowledged receipt of the administrator's letter of the 22d. This appears to be the last correspondence touching the delivery of the papers. The extension agreement was never delivered. The work had not been completed in the fall of 1906 as had been anticipated.

The plaintiff continued in possession, and in good faith and with all the means at his command prosecuted the work. The administrator at all times from the commencement of the work until the same was nearly completed urged the plaintiff to continue and to

complete it as speedily as possible, believing, however, as he testified, that the contract had been forfeited, but that at the completion of the work the trustees would make a fair settlement and compensation for the work done. During the progress of the work at different times the plaintiff made proposals, whereby he sought to secure a conveyance of a portion of the land he was to receive, in order that he might incur the same for the purpose of raising money to meet his obligations and to prosecute the work. None of these proposals met with the approval of the administrator. During the progress of the work, the plaintiff incurred debts which he was unable to pay, and liens were filed and a judgment entered against the property thereon amounting in all, including interest, to \$1,866.96, which the trustees were required to pay in order to avoid foreclosure. It appears that the plaintiff, in doing the work, incurred an indebtedness of something over \$18,000, not including his rent, of which sum over \$13,000 was borrowed money. During the time the work was in progress, the administrator visited the place several times and looked over the work. He and the plaintiff went over the ground together in the month of September, 1908. The administrator then had with him the contract and referred to it in ascertaining whether the work was being done in accordance with its terms. The work was then practically all completed except the plowing and seeding. Reference was made to some work that had not been done on tract B, but the plaintiff stated that he was not required to clear that tract as it came to him, to which assent was made. After looking over the ground the administrator designated certain work in addition to the plowing and seeding, which should be done in order to complete it to his satisfaction. Thereafter this work was performed, and the administrator was notified. On October 24, 1908, the plaintiff notified the administrator that the plowing and seeding was then being done. On November 7, 1908, the administrator gave plaintiff written notice that any work he did was at his own risk. This was the first and only formal and written notice from the administrator or the trustees that they did not expect to be bound by the terms of the contract in settling for the work. It is evident from the communications passing from the plaintiff to the administrator that he at all times considered the contract in force, and that settlement would be made according to its terms by conveying to him tracts A and B. On March 17, 1909, the plaintiff finished the work, according to the terms of the contract.

Settlement therefor not being made, in November, 1909, the present action was begun, seeking to compel a conveyance of tracts A and B and the shore lands in front of tract A. The cause was tried to the court



without a jury. The court found in favor of the plaintiff, and on April 6, 1912, entered a decree requiring the defendants to convey to the plaintiff tracts A and B and the shore lands in front of tract A, upon payment by the plaintiff to the defendants of certain sums due for rent, liens, taxes, and shore lands, and giving the plaintiff 90 days after the entry of the decree, or, in case of an appeal, 90 days after the filing of the remittitur in the superior court, to pay these sums. From this judgment the defendants have appealed.

The questions which are chiefly material upon this appeal are: (1) Had the rights of Richardson under the contract been forfeited? (2) Did the appellants have the option to pay either in money or land? (3) Did the trial court err in decreeing that the shore lands in front of tract A be conveyed? And (4) did the conditions and values so change during the delay as to render specific performance inequitable?

[1] I. It is contended by the appellants that because of the fact that the land was not cleared within the specified time that his right to claim compensation under the provisions of the contract had been forfeited. It is true that the administrator from time to time stated to Richardson that he was in default. It is also true that the administrator refused to accept the tendered payment of rent after the expiration of the period in which the clearing of the land was to have been completed. On the other hand, it is apparent that Richardson and those assisting him by way of advancements understood that if the land were cleared compensation would be made therefor as specified in the contract. The evidence makes it plain that the continuance of the work was with the acquiescence and approval of those managing the Sears estate. By the terms of the contract the rent was to be \$225 for the first year, payable in quarterly installments, and \$925 thereafter, payable in like installments. The increased rental is not made to depend upon the question whether the land had been cleared at the time it was specified to begin.

[2] In order to have terminated the lease it would have been necessary to serve written notice to pay rent or vacate the premises, as required by the statute. This was not done. Whether the appellants had the right to claim a forfeiture of that portion of the contract providing for the clearing, when the same had not been completed within the time specified, without forfeiting the lease is a question we need not determine. Considering only that portion of the contract pertaining to the clearing, under all the facts and circumstances there was not a legal forfeiture. The indulgences extended to Richardson were such as to waive the right to a forfeiture. In *Douglas v. Hanbury*, 56 Wash. 63, 104 Pac. 1110, 134 Am. St. Rep. 1096, it is said: "But the rule is equally well established that the right of forfeiture

must be clearly and unequivocally proved, and that the right may be waived by extending the time for payment, or by indulgences granted to the purchaser."

[3] II. On the question of the right to pay in money or land, it is contended that the contract is optional. In other words, that the Sears estate may elect whether it will convey the land specified in the contract or make the compensation in money at the price named per acre. The general rule is that where the contract provides for payment in either one of two mediums, that the debtor may elect within the time specified as to which he will make payment in. In 30 Cyc. p. 1219, the rule is stated thus: "Where the contract provides for payment in either of two or more mediums, a debtor may elect to make either mode of payment at the time fixed therefor. But where the debtor has the election, either to pay in a particular kind of money or in money or some other way, the right of election does not exist after the day when the payment becomes due, and if the promise is to pay in property or money the creditor is thereafter entitled to payment in money."

In the present case, however, this general rule does not apply. The excerpt from the contract above quoted makes it obvious that the payment was not to be made either in money or lands at the option of the Sears estate, but that the contract was to be performed by the conveyance of the tracts specified. The language in effect is that Richardson is to be compensated at the rate of \$125 per acre for the land improved by having conveyed to him a portion of the land at the valuation of \$700 per acre. That the parties did not intend the contract to be an optional one is manifest, not only from the language used in the excerpt quoted, but from other provisions of the contract. It is provided therein that as security for the prompt payment of the rent and the fulfillment of other covenants and conditions of the lease by Richardson that "said lessors shall have a first lien by way of mortgage upon the lands to be hereafter set apart and conveyed to the lessees as compensation for the clearing and improvement hereinbefore provided." And also another covenant which provides: "That the party of the second part (Richardson), neither as lessee nor as proprietor of the lands to be earned by him, will erect or permit to be erected upon said premises any structures \* \* \* which shall be a nuisance to the neighborhood. \* \* \*" The language used in the excerpt first above quoted, together with the other covenants to which reference has been made, makes it manifest that the intention of the parties was that the contract was to be performed by the conveyance of land, and was not intended to be in the alternative. In construing such contracts the intention of the parties is to be ascertained, and, when so ascertained, given effect. In *1 Parsons*



on Contracts (9th Ed.) p. 240, it is said: "The true question is whether it was intended that the promisor might elect to pay the money or deliver the articles; or, in other words, whether it was agreed only that he owed so much money and might pay it, either in cash or goods, as he saw fit. There might be something in the form of the promise, in the *res gestæ*, or in the circumstances of the case, which, by showing the intention of the parties, would decide the general question; but, in the absence of such a guide, and supposing the question to be presented merely on the note itself as above stated, we should say that the more reasonable construction would be that it was an agreement for the delivery of goods in such a quantity as named, and of such a quality as that price then indicated. And on a breach of this contract the promisor should be held to pay, as damages, the value of so much of such goods, at their increased or diminished price."

The appellants, in support of their position that the contract is in the alternative, cite numerous authorities. From an examination of these it appears that they are distinguishable from the present case, and that with one exception they fall within one of three classes: (1) Where the contract by its terms was in the alternative; (2) where no medium of value or exchange was expressed; and (3) where the contract was in the alternative, and the debtor did not tender the property called for by the contract within the time specified, and that therefore the creditor might elect to have it paid in money. The one authority cited, which does not fall within any of these classes, is the case of *Cock v. Blalock*, 1 Wash. T. 561. In that case the promise was to pay \$250 United States gold coin to be paid in good merchantable wheat at 50 cents per bushel. The court there, without giving reasons or citing authority, held that the contract was in the alternative; evidently being of the opinion that such construction gave effect to the intent of the parties. In deciding the present case it is not necessary, however, for us to either overrule or follow that case, for the reason that the contract we are now considering makes it plainly obvious that it was not the intention of the parties that it should be in the alternative.

[4] III. By the decree of the trial court the appellants were directed to convey, in addition to the lands described in the contract the shore lands in front of tract "A." This was error. The rights of the parties must be determined from the terms of the contract. There is nothing in the contract that justifies the inference that the parties thereto contemplated that it should cover shore lands.

[5] IV. It is finally argued that, owing to the long delay in the completion of the clearing and the increase in the value of

the property, it would be inequitable to decree a specific performance. But this position is not well founded. Richardson at all times prosecuted the work in good faith and with such means as were available. The appellants not only acquiesced in the delay but urged the completion of the work. The delay caused no substantial prejudice. The value of the property had greatly increased. But this alone is not sufficient to justify a denial of specific performance.

The cause will be remanded, with direction to the superior court to modify the judgment as to the shore lands in accordance with the views herein expressed. The appellants will recover costs in this court.

ELLIS, FULLERTON, and MORRIS, JJ., concur.

(74 Wash. 510)

### STATE v. PETTIT.

(Supreme Court of Washington. July 30, 1913.)

#### 1. INDICTMENT AND INFORMATION (§ 125\*)—REQUISITES—DUPLICITY.

Rem. & Bal. Code, § 2057, requires an information to be direct and certain as to the crime and parties charged. Section 2059 requires that it charge but one offense, and in one form only, except that where the crime may be committed by different means the information may charge the means in the alternative. Section 2601 defines larceny, and in its subdivisions specifies various means in which the crime may be committed, two of which are: (1) By color and aid of false and fraudulent representations, and (2) by a bailee or trustee. Held, that an information charging in one count larceny as having been committed in these two different means charges but a single crime and conforms to the statute.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.\*]

#### 2. INDICTMENT AND INFORMATION (§ 72\*)—JOINDER OF OFFENSES—DIFFERENT MODES.

Where a single offense may be committed by different means, it may be charged in the information to have been committed by more than one of the means, provided the means charged are not repugnant to each other.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 195-199; Dec. Dig. § 72.\*]

#### 3. INDICTMENT AND INFORMATION (§ 73\*)—JOINDER OF OFFENSES—VARYING MODES—REPUGNANCY.

The different means by which a crime may be committed are not repugnant, unless the proof of one will disprove the other; hence an information which charges larceny to have been committed in two modes, (1) by color and aid of false and fraudulent representations, and (2) by a bailee or trustee, does not charge repugnant means.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 200, 201; Dec. Dig. § 73.\*]

#### 4. INDICTMENT AND INFORMATION (§ 72\*)—REQUISITES—JOINDER OF OFFENSES—CONJUNCTIVE AVERMENTS.

Where a statute defines a crime and specifies different means by which it may be committed, using the disjunctive "or," the means may

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



be charged in the information in the conjunctive "and."

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 195-199; Dec. Dig. § 72.\*]

**5. CRIMINAL LAW (§ 783½\*)—TRIAL—WITHDRAWAL OF EVIDENCE.**

Where the information charged defendant with larceny as having been committed by two means, (1) by color and aid of false and fraudulent representations, and (2) by a bailee and trustee, and the prosecuting attorney in his closing argument stated that a conviction upon the first form charged was not expected, the court did not err in refusing to withdraw from a jury all evidence as to this means charged, as the court was not controlled by the attitude of the prosecuting attorney.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1879, 1986; Dec. Dig. § 783½.\*]

**6. CRIMINAL LAW (§ 422\*)—EVIDENCE—DECLARATIONS OF CONSPIRATOR.**

Where there is a prosecution of two persons, evidence of a conversation between the prosecuting witness and one of the defendants when the other was not present is admissible if the facts show concert of action and that both defendants were parties to the crime, though the defendants had elected to have separate trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 984-988; Dec. Dig. § 422.\*]

**7. CRIMINAL LAW (§ 423\*)—EVIDENCE—DECLARATIONS OF CONSPIRATOR.**

One who enters into a common purpose or design is deemed in law a party to every act which had before been done by the others and which may afterwards be done by any of the others in furtherance of such common design.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 989-1001; Dec. Dig. § 423.\*]

**8. CRIMINAL LAW (§ 351\*)—EVIDENCE—CONDUCT OF ACCUSED—FLIGHT.**

Evidence of flight, though insufficient in itself to establish guilt, may be considered with all the other circumstances in determining whether the person charged is guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 776, 778-785, 930-932; Dec. Dig. § 351.\*]

**9. CRIMINAL LAW (§ 351\*)—EVIDENCE—"FLIGHT."**

To constitute flight it is not necessary that there should be an escape from jail or from an officer, but it may consist in a departure from the place of the crime by one conscious of guilt even before suspected of the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 776, 778-785, 930-932; Dec. Dig. § 351.\*]

For other definitions, see Words and Phrases, vol. 3, p. 2849.]

Department 2. Appeal from Superior Court, Snohomish County; W. P. Bell, Judge.

C. M. Pettit was convicted of larceny, and he appeals. Affirmed.

Morris & Shipley, of Seattle, and Hulbert & Husted, of Everett, for appellant. Ralph C. Bell, of Everett, for the State.

MAIN, J. The defendant, together with Florence Pettit, his wife, was charged by information with the crime of grand larceny. The information, so far as material at present, was as follows: "On or about the 2d

day of January, 1912, in the county of Snohomish, state of Washington, the said defendant, C. M. Pettit, and the said defendant Florence Pettit, then and there being, did unlawfully and with intent to deprive and defraud the owner thereof, obtain from one Hattie Martin the sum of \$2,900 in lawful money of the United States of America of the value of \$2,900 in lawful money of the United States of America, the personal property of said Hattie Martin, then and there in the lawful care, custody, possession, and control of said Hattie Martin, by color and aid of the false representations and pretenses by said defendant, C. M. Pettit and said defendant Florence Pettit, then and there knowingly, intentionally, and fraudulently made; that creditors of one Oscar Martin were about to subject and seize and would subject and seize said personal property and money in satisfaction of claims against said Oscar Martin; and that it was essential and necessary in order to save, preserve and protect said personal property and money to said Hattie Martin that the same should be placed in the care, custody, possession, and control of them (said defendant C. M. Pettit and said defendant Florence Pettit), all of which false representations and pretenses so knowingly, intentionally, and fraudulently made by said defendant C. M. Pettit and said defendant Florence Pettit were believed by said Hattie Martin, who, relying thereon and being deceived thereby and induced thereby so to do, did then and there deliver, pay, and surrender said personal property and money aforesaid to said defendant C. M. Pettit and said defendant Florence Pettit, and the said defendant C. M. Pettit and said defendant Florence Pettit did then and there receive and obtain said personal property and money aforesaid, with the understanding and agreement then and there had between said Hattie Martin and said defendant C. M. Pettit and said defendant Florence Pettit; and they (the said defendant C. M. Pettit and the said defendant Florence Pettit) would safely hold, keep, and preserve said personal property and money for said owner thereof as bailees and trustees thereof; and they (the said defendant C. M. Pettit and said defendant Florence Pettit), having then and there received and obtained said personal property and money as aforesaid, did then and there, unlawfully and with intent to deprive and defraud the said owner thereof, secrete, withhold, and appropriate said personal property and money to their own use and to the use of some person or persons unknown to your informant other than the true owner thereof and the person entitled thereto, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Washington." To this information a demurrer was interposed upon various grounds, but chiefly upon the ground that two

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



crimes were charged. The demurrer was by the court overruled. The defendant pleaded not guilty. A separate trial being granted to C. M. Pettit on April 3, 1912, the cause was tried before the court and a jury. At the opening of the trial the defendant moved the court for an order requiring the state to elect upon which of the two offenses alleged to be charged in the information it would proceed; that is, whether the defendant was to be tried for the alleged crime of larceny by color or aid, etc., as defined in subdivision 2, § 2601, Rem. & Bal. Code, or for larceny by bailor or trustee, as defined in subdivision 3 of the same section. This motion was denied. During his closing argument to the jury, the prosecuting attorney stated that he did not expect a conviction under the first form of crime as charged in the information; it not being intended for that purpose. Thereupon the defendant moved the court for an order withdrawing from the consideration of the jury all the evidence admitted during the trial in support thereof, and that the jury be instructed to disregard the same. The motion was denied. The defendant was found guilty by the verdict of the jury. Motion for a new trial and motion in arrest of judgment being made in due time, both were overruled. Thereupon sentence was imposed. The defendant appeals.

The evidence in behalf of the state tends to prove substantially the following facts: During the month of August and September, in the year 1911, Hattie Martin, the complaining witness, and her husband, Oscar Martin, first became acquainted with the defendant, C. M. Pettit, and Florence Pettit, his wife. The Martins and the Pettits were at that time living in houses adjacent to each other in the city of Everett, Wash. Some time thereafter the Martins rented and moved into the upstairs rooms in the house then occupied by the Pettits. On December 4, 1911, the Martins sold the moving picture business which they for a year prior thereto had been operating. As a part of the proceeds of this transaction, there came into the possession of Mrs. Martin the sum of \$3,197. This she deposited in her own name in the Everett Trust & Savings Bank. About this time Mr. Martin was advised of court proceedings which had been begun against him in Minnesota to subject certain real estate which he there owned to the payment of a debt. Whether at this time there were creditors in Everett demanding payment of claims against the Martins was a disputed question upon the trial. On December 15, 1911, Mr. Martin departed from Everett for Minnesota. As soon as Mrs. Pettit knew that Mr. Martin was going East, she represented that Mr. Pettit and his father had said that Mrs. Martin should not leave her money in the bank. On account of the proceedings which had been instituted, it was not safe. Influenced

by what was said and the advice so received, she indorsed the draft which the bank had issued to her and delivered it to Mrs. Pettit who obtained the money from the bank and brought it to the house. The money when delivered to Mrs. Pettit was by the teller at the bank wrapped in a newspaper. Upon arriving at the house the money was not counted, but the unopened package was by Mrs. Pettit, in the presence of Mrs. Martin, deposited behind the bookcase for safe-keeping. The next morning, the two women being uneasy about the money, the question of its disposition was discussed, and Mrs. Martin said that she would put it back in the bank from whence it had been taken. Mrs. Pettit thereupon advised her that it would be unsafe to do so and stated that she would take the money and deposit it in her (Mrs. Pettit's) maiden name in the Bank of Commerce. After some protest, Mrs. Martin consented to this arrangement. When Mrs. Pettit returned from the bank she handed Mrs. Martin a draft for \$3,000, who protested that some mistake had been made by one of the banks, as the amount should have been \$3,197. She thereupon commenced to get ready to go to the bank in order to have the discrepancy rectified. While she was thus engaged, Mrs. Pettit departed from the room, but soon returned with a newspaper crumpled up which she pretended she was going to put into the stove. Before she did so, Mrs. Martin turned around and Mrs. Pettit gave the paper a little shake and bills to the amount of \$97 dropped upon the floor. Mrs. Pettit then pretended that she had been about to accidentally burn the money, and stated that if she had done so that Mrs. Martin would have thought that she had stolen it. Mrs. Martin, however, protested that this would not have been the case, and assured her that she would trust her with anything she had. Mrs. Martin took the \$97, and the discrepancy of the additional \$100 was apparently not then thought of. A few days later Mrs. Martin went to the bank, drew out \$55, and deposited the remaining \$2,945 in her own maiden name. Thereafter Mrs. Pettit asked her concerning whether she had left the money deposited in Mrs. Pettit's name, and upon being told that she had not Mrs. Pettit protested that she should have done so, and told her that it was a great risk to do as she had done, and that Mr. Pettit had said that she should not so keep the money. Mrs. Martin, however, assured Mrs. Pettit that she was not worried about the money; that she thought it as safe in her maiden name as in Mrs. Pettit's. The matter was not mentioned again for a few days, when Mrs. Pettit came in one morning and stated that she had a presentiment that the money was attached. Mrs. Martin assured Mrs. Pettit that she did not think there was any cause for alarm and that she would not pay any attention to it. A few



days later Mrs. Pettit again approached Mrs. Martin and told her that Mr. Pettit and she had devised a way to put the money so that it would be perfectly safe. Upon inquiry as to how this was to be done, Mrs. Pettit stated that they would put it in note form. Mrs. Martin then assured her that it would be only a few days until her husband would return from the East and that she thought that the money would be all right until then and until they got ready to leave for California shortly thereafter. Mrs. Pettit advised Mrs. Martin that she must not so leave it and further stated that she intended to see that the money was safe before she left on a contemplated visit which she had informed Mrs. Martin she was about to make. On the morning of January 2, 1912, Mrs. Pettit came into Mrs. Martin's room and stated that she and Mr. Pettit were going to put the money in the form of a note. After some protest on the part of Mrs. Martin, she stated that she knew nothing about notes but that if they insisted she would permit it to be put into note form. The defendant was thereupon sent after some blank forms of notes. In the meantime Mrs. Martin indorsed the deposit slip issued to her by the bank, and Mrs. Pettit took it to the bank and brought the money to the house. The defendant having returned with the blank forms, at the suggestion of Mrs. Pettit he sat down and filled out the note, which was the ordinary form, for the sum of \$2,900, dated January 2, 1912, payable ten days after date to the order of Hattie Martin, with interest at 6 per cent. from January 2, 1912, payable "semiyearly." At the bottom of the note on the due date line was filled in "Jan. 2, 1913." A line was struck through "6 per cent." and "Jan. 2, 1912" (the rate of interest and the date from when the interest was payable), in the body of the note. The defendant signed the note and at his request Mrs. Martin signed her name under his signature; he stating that this was necessary to show that the money belonged to her. Of the \$2,945 which had been brought from the bank, Mr. Pettit took \$2,900. He stated that Mrs. Martin might need the \$45 remaining, and insisted upon her keeping it, which she did. Mrs. Martin took the note, read it, and kept it. She asked the defendant where he was going to put the money, and he stated that he would put it in the First National Bank of Everett, and that all Mrs. Martin would have to do would be to take the note to the bank any day and her money would be there; that she could cash the note in California, or any place. That same day the defendant left Everett for Seattle, stating that he would return the following Saturday. His father received a letter from him written at Seattle in which he stated that he was going to Bremerton to see about getting some work there. After returning from Bremerton, he went to Kent, then returned

to Seattle, and on January 4, 1912, left by rail for San Diego, Cal., a few days later he went to Los Angeles. No communication of any kind was received from him by his wife or father advising them that he was going to San Diego. To Mrs. Martin Mrs. Pettit evinced great anxiety at not hearing from her husband; she stating that she feared he had met with foul play or that he had left her. On January 11, 1912, she left for Seattle, stating to Mrs. Martin that she expected to return the next day. She had, however, prior to leaving for Seattle, packed her trunks and engaged passage by boat for Los Angeles. She departed from Seattle on January 11, 1912, arriving in due course at Redondo, the harbor situated about 35 miles from Los Angeles. Here she was met by the defendant. Mrs. Pettit not returning from Seattle as she had stated that she would, Mrs. Martin talked with the father of defendant, who informed her that Mrs. Pettit had gone to California, and he expressed surprise that Mrs. Pettit had not informed her where she was in fact going. On January 8, 1912, Mrs. Martin took the note to the First National Bank, where the defendant had said he would leave the money, and left it with the collection teller, who asked her if she wished it put to her credit, to which she replied that she did. Upon being asked if she wanted any money, she replied, "No, not now." She inferred from the conversation had with the collection teller that the money was in the bank. On January 13, 1912, she presented the receipt which the teller had given her for the note and demanded some money, and it was then that she was informed that there was no money in the bank for her; that it had not been left there by the defendant. Thereafter, and on February 15, 1912, the defendant and his wife were taken into custody at Los Angeles, Cal., by the sheriff of Snohomish county; they having theretofore been arrested upon the charge contained in the information in this case. After their arrest, Mr. Pettit turned over to the sheriff \$2,400 of the identical money that he had received from Mrs. Martin; \$500 having been used by the defendant. The facts as above stated were in many particulars disputed by the defendant's evidence. The defendant also introduced evidence explanatory of the transactions, which, if true, were consistent with innocence and inconsistent with guilt. A further review of the evidence, however, would serve no useful purpose, for the reason that the jury evidently believed the facts to be as contended for by the state. These, then, upon this appeal must be accepted as the facts in the case.

The questions to be determined are: (1) Does the information charge more than one crime; (2) was it error to submit to the jury the two means by which the alleged crime might be committed; (3) did the instructions of the court submit to the jury false pre-



tenses other than those charged; (4) did the evidence show concert of action sufficient to charge the defendant with statements made by his wife; (5) did the court correctly instruct on the matter of flight; and (6) was error committed in ruling upon the admissibility of evidence.

[1] I. It is argued that the information charges more than one crime and therefore offends against the statutory mandates. Rem. & Bal. Code, § 2057, requires that the information be direct and certain as regards the party charged, the crime charged, and the particular circumstances of the crime when they are necessary to constitute a complete crime. Section 2059 requires that the information must charge but one crime and in one form only, except that, where the crime may be committed by the use of different means, the information may allege the means in the alternative. Section 2601, being a section of the Criminal Code of 1909, defines the crime of larceny and in its subdivisions specifies varying ways in which such crime may be committed. Giving consideration to the language of this statute, it appears that the Legislature therein intended to define but one crime, that of larceny, and to state the different ways in which the crime might be committed. The information charges the crime with which the defendant is charged with having been committed in two of the ways specified in the statute: (1) By color and aid of false and fraudulent representations, and (2) by a bailee or trustee. Does this manner of charging the crime conform to the legislative enactments?

[2] The general rule is that, where a single offense may be committed in different ways or by different means, it may be charged in the information to have been committed by more than one of the ways or means, provided the ways or means charged be not repugnant to each other. In *State v. O'Neil*, 51 Kan. 651, 33 Pac. 287, 24 L. R. A. 555, it is said (quoting from Bishop's Criminal Procedure): "We have seen that if an offense may be committed by different means, and the pleader doubts which was employed in the particular instance, he may in one count charge its commission by all, and proof of any one will sustain the allegation. The limit to this doctrine is that the means must not be repugnant." To the same effect see Cyc. vol. 22, p. 379, and cases there cited.

[3] The varying ways by which a crime may be committed are not repugnant to each other unless the proof of one will disprove the other. The defendant here was charged with having committed the crime of larceny by color and aid of false pretenses, and also as bailee or trustee. The proof that the crime was committed by color and aid would not necessarily be inconsistent with proof that under an agreement with the parties subsequently made the defendant became a bailee or trustee. Neither would proof that tended to establish that the al-

leged crime had been committed by a bailee or trustee necessarily disprove a charge that the possession of the property had been originally obtained by color and aid of false or fraudulent pretenses. The case of *People v. Kane*, 43 App. Div. 472, 61 N. Y. Supp. 195, cited and relied upon by the appellant, is distinguishable from the present case in that there there was a repugnancy, because the proof establishing one of the crimes charged disproved the possibility of the other.

[4] Some contention is made that, inasmuch as the statute connects the different means by which the crime may be committed with the disjunctive "or," they cannot be joined in the information by the conjunction "and." But this position does not appear to be sustained by the authorities. In Bishop's *New Criminal Procedure* (2d Ed.) § 436, it is said: "A statute often makes punishable the doing of one thing or another, or another, sometimes thus specifying a considerable number of things. Then, by proper and ordinary construction, a person who in one transaction does all violates the statute but once and incurs only one penalty. Yet he violates it equally by doing one of the things. Therefore the indictment on such a statute may allege, in a single count, that the defendant did as many of the forbidden things as the pleader chooses, employing the conjunction 'and' where the statute has 'or,' and it will not be double, and it will be established at the trial by proof of any one of them." We think the information is direct and certain and charges in ordinary and concise language but a single crime.

[5] II. The court in submitting the case to the jury defined the two means by which it was alleged that the crime had been committed, and the jury were told that, if they found either to be established by the evidence, they might return a verdict of guilty. It is argued that this was error because: (1) It was permitting the jury to deliberate upon either of two crimes and return a verdict according to their findings upon the evidence. The answer to this contention is found in what has previously been said, for, if the information were properly drawn, it was not error to cover it by the instructions. (2) There was no evidence that the crime had been committed in the first manner charged; that is, by color and aid. An examination of the record, however, discloses that there was sufficient evidence to carry this question to the jury. And (3) the court refused to withdraw from the consideration of the jury the first form of crime charged, after the prosecuting attorney in his closing argument had stated that a conviction upon that was not expected. In this we think that the court committed no error. If in his opinion there was sufficient evidence of that means of the commission of the crime to sustain a conviction, it was his duty to submit it to the jury. The court was not controlled by the attitude of the prosecuting attorney.



III. Our attention is called to two instructions of the court wherein it is claimed that, under the language there used, the jury were authorized to convict the defendant in the event that they should find that *any* false representations were made, whether they be those charged in the information or different from the ones charged. If the two instructions complained of stood alone, there might be merit in this contention. But, when these instructions are read in connection with the entire charge, it does not seem that the jury could have been misled thereby. When the instructions are read in their entirety, it appears clear that the court was submitting to the jury, not whether the defendant made *any* false representations, but whether he made those that were charged in the information.

[6] IV. Complaint is also made of the instructions wherein the jury were told that, if they believed the false representations made by Anna Florence Pettit, the wife of the defendant on trial, that they might return a verdict of guilty. But these instructions do not violate the well-settled rule in this state that, where there is a prosecution of two persons, evidence of a conversation between the prosecuting witness and one of the defendants when the other was not present is admissible if the facts show a concert of action and that both defendants were parties to the crime, even though the defendants had elected to have separate trials. *State v. Williams*, 62 Wash. 286, 113 Pac. 780; *State v. Baker*, 69 Wash. 589, 125 Pac. 1016; *State v. Andrews*, 127 Pac. 1102. There is sufficient evidence that the defendant and his wife were acting in concert with a common criminal design to make the declarations of the wife admissible in evidence as against her husband, the defendant.

[7] Where concert of action is shown, every party thereto becomes a party to the previous as well as the subsequent acts of others in furtherance of the common design. In 1 Greenleaf on Evidence (16th Ed.) § 184a, it is said: "Every one who does enter into a common purpose or design is generally deemed, in law, a party to every act which had before been done by the others and a party to every act which may afterwards be done by any of the others in furtherance of such common design."

[8] V. Error is predicated upon the instruction given upon the question of flight. This instruction was, in substance, as follows: That flight was a material fact and circumstance to be weighed and considered by the jury in connection with all the other facts and circumstances in determining the defendant's guilt or innocence; that the term "flight," as used in the instruction, meant that there had been a departure from the defendant's residence or abode at the time the crime was alleged to have been committed, which was due in some degree to fear of arrest or consciousness of guilt; that

the undisputed fact was that the defendant had departed from his residence in Snohomish county and was arrested at a later date in the state of California; that it was for the jury to determine from all the evidence whether such departure constituted flight, as that term was defined in the instruction; that, if the jury believed there was a flight on the part of the defendant, then such fact and circumstance tends to prove guilt and must be given such weight and effect in favor of guilt as the fair and honest judgment of the jury should believe it entitled to. The law is that evidence of flight is insufficient in itself to establish guilt, but may be taken into consideration with all the other facts and circumstances of the case in determining whether or not the person charged with crime is in fact guilty. *State v. Stentz*, 33 Wash. 444, 74 Pac. 588.

[9] To constitute flight it is not necessary that there should be an escape from jail or from an officer, but it may consist in a departure from the place of the crime by one conscious of guilt even before suspected of the crime. In *State v. Deatherage*, 35 Wash. 326, 77 Pac. 504, it is said: "It is not necessary, in order to prove the flight of one charged with crime, to show that he escaped from jail or from an officer having him in custody, for it often happens that persons conscious of guilt seek safety by flight, even before they are suspected of crime. 'The wicked flee when no man pursueth.'"

The concluding part of the instruction which in effect told the jury that, if they found there was a flight on the part of the defendant, such was a fact or circumstance that tended to prove guilt and should be given such weight and effect as the jury thought it fairly entitled to states a proposition which the authorities support. In *George v. State*, 61 Neb. 669, 85 N. W. 840, it is said: "Objection is further made because evidence was admitted as to the acts of the defendant in leaving the place where he had been staying soon after the commission of the alleged crime and going to another part of the state apparently to escape arrest and prosecution. This evidence was proper and to be considered by the jury, to be given such weight only as they thought it entitled to in view of all the other facts and circumstances of the case."

In the first part of the instruction it is stated that flight is a fact or circumstance which the jury may take into consideration in connection with all the other facts and circumstances in determining the defendant's guilt or innocence. It is true that the instruction in no place in express language tells the jury that evidence of flight is not sufficient in itself to establish guilt. But, when the instruction is read as a whole, it seems clear that the jury must have understood that flight was not sufficient in itself, but that it was to be taken into consideration with all the other facts and circum-



stances of the case, and given such weight as the jury might think it entitled to.

VI. Finally it is urged that the court erred in ruling upon the admissibility of evidence. But in this regard we think that the record discloses no prejudicial error.

The judgment will be affirmed.

ELLIS, FULLERTON, and MORRIS, JJ.,  
concur.

(74 Wash. 486)

BIRCH et ux. v. ABERCROMBIE et al.

(Supreme Court of Washington. July 29,  
1913.)

**1. MUNICIPAL CORPORATIONS (§ 706\*)—USE OF STREETS—ACTION FOR NEGLIGENT USE—EVIDENCE.**

In an action for injuries to a pedestrian, who was struck by an automobile while crossing a street, evidence *held* sufficient to take to the jury the question of the negligence of the driver of the machine and the contributory negligence of the pedestrian.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

**2. MASTER AND SERVANT (§ 330\*)—LIABILITY TO THIRD PERSONS—PRESUMPTION—OWNER OF AUTOMOBILE.**

The ownership of an automobile establishes *prima facie* that it was in the possession of the owner at the time of the accident, and that the driver was acting for the owner, and the burden is on the owner to overcome this presumption by competent evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1270-1272; Dec. Dig. § 330.\*]

**3. PARENT AND CHILD (§ 13\*)—TORTS OF CHILD—ACTIONS—EVIDENCE.**

In an action for injuries to a pedestrian, who was struck by an automobile, evidence *held* sufficient to warrant findings by the jury that the daughter of the owner was driving the machine with her parents' consent, and that they had not directed her not to drive it.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 145-151; Dec. Dig. § 13.\*]

**4. PARENT AND CHILD (§ 13\*)—TORTS OF CHILD.**

Mere advice from a parent to his daughter and expression of a preference that she should not drive an automobile are not sufficient, as a matter of law, to overcome the presumption that she was acting for her father in driving the car.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 145-151; Dec. Dig. § 13.\*]

**5. MUNICIPAL CORPORATIONS (§ 705\*)—USE OF STREETS—INJURIES BY AUTOMOBILE—LIABILITY OF OWNER.**

An automobile is not an agency so dangerous as to render the owner liable for injuries to travelers, inflicted thereby while it is being driven by another, irrespective of the relation of master and servant and of agency.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.\*]

**6. PARENT AND CHILD (§ 13\*)—TORTS OF CHILD—PARENT'S LIABILITY.**

A parent is not liable for the torts of his child solely on the ground of the relationship.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 145-151; Dec. Dig. § 13.\*]

**7. PARENT AND CHILD (§ 13\*)—TORTS OF CHILD—PARENT'S LIABILITY.**

Where a father has furnished an automobile for the customary conveyance of his family, and permits the various members of the family to drive it, his daughter, driving machine for her own pleasure, unaccompanied by any other member of the family, is nevertheless engaged in the business of her father, and he liable for her negligence.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 145-151; Dec. Dig. § 13.\*]

**8. PARENT AND CHILD (§ 13\*)—TORTS OF CHILD—PARENT'S LIABILITY.**

The fact that the agency was not a business agency, nor the service a remunerative one, does not affect the liability of the father in such a case.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 145-151; Dec. Dig. § 13.\*]

**9. APPEAL AND ERROR (§ 1053\*)—HARMLESS ERROR—RECEPTION OF EVIDENCE—REFERENCE TO LIABILITY INSURANCE.**

In an action for injuries to a pedestrian, who was struck by an automobile while crossing a street, where plaintiff deliberately brought before the jury, by answer to a question as to a conversation with the defendant, the fact that the defendant carried liability insurance, a judgment for the plaintiff must be reversed, even though the court instructed the jury not to consider the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.\*]

**10. APPEAL AND ERROR (§ 281\*)—MOTION FOR NEW TRIAL—MOTION TO DISCHARGE JURY—EFFECT.**

Where evidence that the owner of an automobile carried liability insurance was brought before the jury in action for injuries to a pedestrian, a motion to discharge the jury from further consideration of the case on that ground is equivalent to a motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1650-1661, 3024, 3281; Dec. Dig. § 281.\*]

**11. APPEAL AND ERROR (§ 281\*)—MOTION FOR A NEW TRIAL—NECESSITY.**

Where a trial court has had an opportunity to rule upon an alleged error, it may be reviewed on appeal, without a formal motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1650-1661, 3024, 3281; Dec. Dig. § 281.\*]

Department 2. Appeal from Superior Court, Spokane County; Joseph Sessions, Judge.

Action by C. A. Birch and wife against W. R. Abercrombie and others. Judgment for the plaintiffs, and defendants appeal. Reversed and remanded.

Cannan, Ferris & Swan and Walter A. White, all of Spokane, for appellants. Smith & Mack, of Spokane, for respondents.

ELLIS, J. This is an action to recover damages for injuries sustained by the plaintiff Julia M. Birch by being struck by an automobile owned by the defendants W. R. Abercrombie and wife, which was at the time being driven by their daughter, the defendant Frances Abercrombie. The trial resulted in a verdict and judgment in favor of the plaintiffs and against all of the defend-



ants for \$2,000 and costs. The evidence, so far as necessary, will be noticed in the discussion. At appropriate times the defendant Frances Abercrombie moved for a directed verdict, for a new trial, and for judgment notwithstanding the verdict. The defendants W. R. Abercrombie and wife moved for a directed verdict and for judgment notwithstanding the verdict. All of these motions were overruled, and each of the defendants appealed.

[1] I. It is first contended on behalf of all the appellants that the evidence was insufficient to establish any negligence on the part of Frances Abercrombie, and that, in any event, the respondent Julia M. Birch was guilty of contributory negligence as a matter of law. We shall not attempt an exhaustive review of the evidence. The following will suffice: It is admitted that the appellant Frances Abercrombie was driving the automobile north on Jefferson street in the city of Spokane, and that near the intersection of that street with First avenue the machine struck the respondent Julia M. Birch, who was crossing Jefferson street diagonally from west to east, that Jefferson street is 60 feet wide, and that Mrs. Birch was struck at a point about 12 feet from the east curb of that street. It seems to be admitted, also, that Mrs. Birch's hearing was slightly impaired prior to the accident. She testified that before leaving the curb on the west side of the street she looked south on Jefferson street and saw nothing, the street being perfectly clear for a distance of about a block; that she had no intimation of the approach of the automobile until the ringing of the bell the instant before she was struck. Another witness testified, in substance, that he heard the bell ring violently just at the time the woman was struck, but heard no other warning, and stated that if the bell had been sounded before that time, he thought he would have remembered it, as he was coming down the street in the same direction as the automobile. Evidence was introduced on behalf of the appellants to the effect that the automobile was running slowly at the time of the accident, and that the bell was sounded several times before Mrs. Birch was struck. Upon this conflict of evidence the questions of Miss Abercrombie's negligence in failing to sound the bell, and of Mrs. Birch's contributory negligence in failing to look south after leaving the west curb, were clearly for the jury. We have so held repeatedly on facts essentially parallel. *Ludwigs v. Dumas*, 129 Pac. 903; *Hillebrant v. Manz*, 128 Pac. 892; *Lewis v. Seattle Taxicab Co.*, 130 Pac. 341.

II. It is contended on behalf of appellants W. R. Abercrombie and wife that, even conceding that a case was made as against the daughter, the evidence exonerates them from liability, in that the automobile was at the time in use by the daughter for a purpose

of her own, and not as their servant or agent. The jury, in addition to the general verdict, found in answer to special interrogatories: (1) That Frances Abercrombie was at the time of the accident driving the machine for her own pleasure; (2) that she was not driving the machine without the knowledge or consent of her parents, express or implied; (3) that her parents had not, prior to the accident, ordered or directed her not to drive the machine.

[2] The appellants contend that the last two findings are without support in the evidence. This contention ignores the admitted ownership of the automobile by the appellants W. R. Abercrombie and wife. It is well established that in cases of this kind, where the vehicle doing the damage belonged to the defendants at the time of the injury, that fact establishes *prima facie* that the vehicle was then in the possession of the owner, and that whoever was driving it was doing so for the owner. We have repeatedly so held. *Knust v. Bullock*, 59 Wash. 141, 109 Pac. 329; *Kneff v. Sanford*, 63 Wash. 503, 115 Pac. 1040; *Burger v. Taxicab Motor Co.*, 66 Wash. 676, 120 Pac. 519. The burden was thus cast upon the appellants to overcome this presumption by competent evidence, and it was for the jury to say upon such evidence whether the burden has been sustained.

[3] There was evidence that the automobile was purchased by the appellant W. R. Abercrombie for the use of his family. He testified that it was sent in the morning of each day from the garage, where it was kept, to his home, for that purpose, and taken away in the evening. On June 5, 1912, both W. R. Abercrombie and his wife were away from home, and the daughter, the appellant Frances Abercrombie, entertained a number of friends at luncheon. She was taking them home in the automobile when the accident happened. Both W. R. Abercrombie and his wife testified that the daughter was not strong, and that running the machine was a tax on her nerves, and that for that reason some time before the accident they had advised her not to run the machine, and told her that they would rather she would not run it. Mr. Abercrombie testified that this was "emphatic and positive, in the shape of an order from parent to child." This last statement was obviously a conclusion, and hardly sustained by the words actually used, as testified to by him. In rebuttal the respondents introduced certain interrogatories propounded by them to the appellant W. R. Abercrombie and his answers thereto. Two of his answers read as follows: "Answering interrogatory No. 3, these defendants state that Frances Abercrombie was permitted to use the electric vehicle owned by them at different times. Answering interrogatory No. 4, these defendants state that Frances Abercrombie had used the electric vehicle owned by them on some occasions prior to June 5,



1912." In view of these answers to the written interrogatories, and in view of the fact that the automobile was being used for the very purpose for which it was purchased and kept, and in view of the presumption attending admitted ownership, we cannot say that the last two findings of the jury are not supported by competent evidence.

[4] The presumption attending ownership was not overcome as a matter of law by evidence of mere advice and an expression of preference on the part of the parents, some weeks before, that the daughter should not drive the machine, especially in view of the fact that antecedent knowledge and consent of the parents to her use of the machine were admitted by the answers to the interrogatories. There being competent evidence from which the jury might reasonably find as it did, we must assume that Frances Abercrombie had been permitted the use of the machine, and that she was, at the time of the accident, using it with the consent of her parents.

[5] This reduces the consideration of the appellant's contention under this head to answering a single question: If Frances Abercrombie was driving the automobile for her own pleasure, were the father and mother, notwithstanding that fact, liable for the injury to the respondent resulting from her negligence under the other evidence adduced? It is conceded that an automobile is not an agency so dangerous as to render the owner liable for injuries to travelers on the highway inflicted thereby while being driven by another, irrespective of the relation of master and servant or agency as between the driver and the owner, and we have so held. *Jones v. Hoge*, 47 Wash. 663, 92 Pac. 433, 14 L. R. A. (N. S.) 216, 125 Am. St. Rep. 915. This concession eliminates any necessity to review the following authorities, cited by the appellant, in which the driver was either not in any sense the agent or servant of the owner, or, though a servant, was acting for himself and obviously outside of the scope of his employment, and not in connection with the owner's business. These authorities are cited only to the point conceded: *Jones v. Hoge*, 47 Wash. 663, 92 Pac. 433, 14 L. R. A. (N. S.) 216, 125 Am. St. Rep. 915; *Robinson v. McNeill*, 18 Wash. 163, 51 Pac. 355; *Slater Advance Thresher Co.*, 97 Minn. 305, 107 N. W. 133, 5 L. R. A. (N. S.) 598; *Lotz v. Hanlon*, 217 Pa. 339, 66 Atl. 525, 10 L. R. A. (N. S.) 202, 118 Am. St. Rep. 922, 10 Ann. Cas. 731; *Huddy on Automobiles*, p. 95.

[6] It must also be conceded that a parent is not liable for the torts of his child solely on the ground of relationship. The liability, if any exists, must rest in the relation of agency or service. This eliminates any necessity for a review of the following authorities, cited by the appellant only in support of that point: *Mirick v. Suchy*, 74 Kan. 715, 87 Pac. 1141, 11 Ann. Cas. 306;

*Chastain v. Johns*, 120 Ga. 977, 48 S. E. 343, 66 L. R. A. 958; *Kumba v. Gilham*, 103 Wis. 312, 79 N. W. 325.

[7] This leaves only two cases, cited by the appellant under this head, for our consideration. They are *Reynolds v. Buck*, 127 Iowa, 601, 103 N. W. 946, and *Doran v. Thomsen*, 76 N. J. Law, 754, 71 Atl. 296, 19 L. R. A. (N. S.) 335, 131 Am. St. Rep. 677. The case of *Reynolds v. Buck* is clearly distinguishable from the case in hand on the facts. In that case the defendant, a dealer in automobiles, decorated one for use in a parade, and after the parade directed that the machine, which stood in front of the store, be taken inside, and he then left. His son, who was employed as a clerk, and who had been given a holiday, coming upon the machine where it stood, invited a lady friend to ride. While he was driving, the plaintiff's horse took fright at the machine, and the plaintiff was injured. It was held that the defendant was not liable, on the ground that the son was using the automobile for his own purpose, without the knowledge or consent of the father and in a matter wholly disconnected with the father's business. In the case before us the automobile was purchased and kept for the use of the family. It was customary for the members of the family to drive it at their pleasure. It was intended for no other purpose. At the time of the accident it was being so used, as the jury found on what we must hold competent evidence, with the knowledge and consent of the appellants W. R. Abercrombie and wife. The distinction from the *Buck* Case is plain.

The case of *Maier v. Benedict*, 123 App. Div. 579, 108 N. Y. Supp. 228, cited in *McNeal v. McKain*, 33 Okl. 449, 126 Pac. 742, 41 L. R. A. (N. S.) 775, seems to have been decided on the same ground, though the facts would hardly seem to justify it. The general rule of liability, however, as there stated distinctly sustains a liability in the case here. The court said: "Liability arises from the relationship of master and servant, and it must be determined by the inquiry whether the driving at the time was within the authority of the master, in the execution of his orders, or in the doing of his work."

[8] The New Jersey case, *Doran v. Thomsen*, is not distinguishable on the facts from the case before us. The father owned the automobile, kept it on his premises, and the daughter used it with his knowledge and consent at her pleasure. While heartily subscribing to the view there expressed "that the mere fact of the relationship of parent and child would not make the child the servant of the defendant," we think the opinion unsound in that it ignores the agency induced by the fact, independent of that relationship, that the daughter was using the machine for the very purpose for which the father owned it, kept it, and intended that it should be used. It was being used in fur-



therance of the very purpose of his ownership, and by one of the persons by whom he intended that purpose should be carried out. It was in every just sense being used in his business by his agent. There is no possible distinction, either in sound reason, sound morals, or sound law, between her legal relation to the parent and that of a chauffeur employed by him for the same purpose. The fact that the agency was not a business agency, nor the service a remunerative service, has no bearing upon the question of liability. *McNeal v. McKain*, 33 Okl. 449, 126 Pac. 742, 41 L. R. A. (N. S.) 775. In running his vehicle she was carrying out the general purpose for which he owned it and kept it. No other element is essential to invoke the rule respondent superior. We think that the instruction, which is criticized in the *Doran Case*, is in itself a complete answer to the opinion. It declared the use of the machine for the purpose for which it was owned, by the person authorized by the owner to so use it, a use in the owner's business. It seems too plain for cavil that a father, who furnishes a vehicle for the customary conveyance of the members of his family, makes their conveyance by that vehicle his affair—that is, his business—and any one driving the vehicle for that purpose with his consent, express or implied, whether a member of his family or another, is his agent. The fact that only one member of the family was in the vehicle at the time is in no sound sense a differentiating circumstance abrogating the agency. It was within the general purpose of the ownership that any member of the family should use it, and the agency is present in the use of it by one as well as by all. In this there is no similitude to a lending of a machine to another for such other's use and purpose unconnected with the general purpose for which the machine was owned and kept. An examination of the authorities cited, and an independent search, induces the belief that the *Doran Case* stands practically alone. Some courts have sought on slight circumstances to distinguish it. One has frankly criticized it. We have found none which followed it.

In *Stowe v. Morris*, 147 Ky. 386, 144 S. W. 52, 39 L. R. A. (N. S.) 224, the Supreme Court of Kentucky, holding a father liable on closely analogous facts, used the following language: "In the first place, it may be said that a considerable part of the discussion of counsel is addressed to the idea that, even though the son was generally the agent or servant of the father in the operation of the car, the father is not liable under the facts stated here, because the son was engaged at the time in an enterprise of his own—the seeking and giving of pleasure to himself, his sister, and their friends, upon an excursion of his own—in which the father had no interest, and which was not in the line or scope of the son's employment. The question

ordinarily is a vital one in cases of this character; but it is of no consequence here. For the only ground upon which the father can be held answerable for this act of his son excludes the idea of an independent venture, under the facts detailed. That ground is, as contended for by the appellee, that the machine was bought and operated for the pleasure of the family, that at the time of the accident the son was engaged in carrying out the general purpose for which the machine was bought and kept, and that, as he took it out at the time in pursuance of general authority from his father to take it when he pleased, for the pleasure of the family and himself as a member of it, the purpose for which it had been bought, he was engaged in the execution of his father's business; i. e., the supplying of recreation to the members of the father's family. \* \* \* So, in the case at bar, the father had provided his family with this car as a means of recreation and amusement; and the son, in the use of the car for that purpose, was not performing an independent service of his own, but was carrying out what, within the spirit of the matter, was the business of the father." Referring to the *Doran Case*, the court says: "It is true that there is authority of a most excellent character in direct conflict with the views which we have set out. Notable among the cases are those of *Doran v. Thomson*, 76 N. J. Law, 754, 71 Atl. 296, 19 L. R. A. (N. S.) 335, 131 Am. St. Rep. 677, and *Maher v. Benedict*, 123 App. Div. 579, 108 N. Y. Supp. 228; but the conclusion reached by us is sustained both by the case of *Lashbrook v. Patten*, from this court, and by what we believe to be the sounder argument."

In *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351, another case analogous to that in hand except in its reference to the minority of the offending child, which fact we deem immaterial, the court said: "The evidence discloses that the machine was devoted to the use of the family of which Earnest was a member. It was a pleasure vehicle, and, when used for the pleasure of one of the minor children of the owner, how can it be said that it was not being used on business of the owner?"

In *Marshall v. Taylor*, 168 Mo. App. 240, 153 S. W. 527, the same court, referring to the *Maxwell Case*, said: "But, further, we have held that the use of the car by the minor son for his own pleasure, and with the consent of his father, the owner, was one of the uses for which the vehicle was kept, and therefore was a part of the service for which the owner had authorized the boy to run the car as his servant. The only difference between that case and this is that here the young man had attained his majority, was sui juris, and his father owed him no duty of parentage, and, of course, was under no obligation to provide him with means of pleasure and recreation. We do not think



this fact is determinative of the question of defendant's liability. The real question at issue is not that of the legal duty defendant owed his son, but is whether or not the son was the agent of his father in running the car. Frequently fathers continue, not only to support their children after the latter have become sui juris, but to provide them, as members of the family, with the means of recreation and pleasure. This car was provided by defendant for the use of his immediate family. He contemplated and intended that his son should enjoy it in common with other members of the family. When in such use, it was as much in his service as it would have been had it been occupied by his wife, his daughter, his mother, or his guest. We conclude that the young man was not a mere servant using his master's vehicle for his own purpose, but was the agent of his father operating the car for one of the purposes of its intended use."

In *McNeal v. McKain*, 33 Okl. 449, 126 Pac. 742, 41 L. R. A. (N. S.) 775, another case of the same character, the court said: "Vehicles and motor cars may be used, not only for the business of the master for profit, but also in his business for pleasure. If Paul, the minor son of the plaintiff in error, had been driving his father's carriage (whilst he was a member of his family) in which were contained his sister and a guest of his father's house, the same being done by him with the express or implied consent of his father, the relation of master and servant would exist, and the father would be liable for the negligent acts of the minor son whilst engaged in the driving of the carriage, and the same rule is supported by authority as to motor cars." See, also, *Bourne v. Whitman*, 209 Mass. 155, 95 N. E. 404, 35 L. R. A. (N. S.) 701; *Moon v. Matthews*, 227 Pa. 448, 76 Atl. 219, 29 L. R. A. (N. S.) 856, 136 Am. St. Rep. 902.

We think that both on reason and authority the daughter in the present instance should be held the agent of her parents in the use of the automobile. Any other view would set a premium upon the failure of the owner to employ a competent chauffeur to drive an automobile kept for the use of the members of his family, even if he knew that they were grossly incompetent to operate it for themselves. The adoption of a doctrine so callously technical would be little short of calamitous.

[9] III. The appellants insist that the judgment must be reversed for the reason that upon the trial the respondents deliberately injected into the record evidence of a conversation between the respondent C. A. Birch and the appellant W. R. Abercrombie, in which the latter admitted that the appellants carried liability insurance, and hence could not settle for the injury, and referred Mr. Birch to appellants' counsel. While the trial court, upon motion of the appellants, struck this testimony, and instructed the ju-

ry to disregard it, he refused the appellants' request to discharge the jury from further consideration of the case. We think that this was error. In the nature of the case the striking of the evidence and the instruction to disregard it cannot cure the prejudicial effect of the fact being brought to the attention of the jury.

As said by the late Judge Dunbar in *Iverson v. McDonnell*, 36 Wash. 73, 73 Pac. 202, quoting with approval from *Manigold v. Black River Traction Co.*, 81 App. Div. 381, 80 N. Y. Supp. 861: "The law is well settled that it is improper to show, in an action of negligence, that the defendant is insured against loss in case of a recovery against it on account of its negligence. This was expressly held in the case of *Wildrick v. Moore*, 66 Hun, 630, 22 N. Y. Supp. 1119. It is not proper to inform the jury of such fact in any manner. It is not material to any issue involved in the trial of the action, and certainly plaintiff's counsel ought not to be permitted to do indirectly what he would not be permitted to do directly. The fact that the defendant in this action was insured was brought to the knowledge of the jury as conclusively by what occurred as if the question had been answered in the affirmative, and it is evident that the question was asked and the inquiry pressed, even after the ruling of the court that it was incompetent, for the very purpose of getting such fact before the jury. Immediately before the direct question was asked, the court had ruled that the inquiry as to who Dr. Rockwell represented was incompetent, and the objection to that question was sustained, and yet plaintiff's counsel then asked the direct question, which was, in effect, a statement that there was an insurance company back of the defendant. In order to protect the defendant, its counsel was forced to object to the question, and yet by doing so he, in effect, admitted the fact: otherwise no objection would have been made. It is true the learned trial court properly struck out the answer, and instructed the jury not to consider it; but plaintiff's counsel improperly got the fact before the jury—a fact which he knew he was not entitled to, and which the court had just excluded by its ruling. We think this constituted error which requires a reversal of the judgment." See, also, *Lowsit v. Seattle Lbr. Co.*, 38 Wash. 290, 80 Pac. 431; *Stratton v. Nichols Lbr. Co.*, 39 Wash. 323, 81 Pac. 831, 109 Am. St. Rep. 881.

[10] Moreover, even after this first evidence was stricken, the same witness was permitted to detail a second conversation, in which the appellant W. R. Abercrombie again refused to settle, and referred the witness to the appellants' counsel. Though in this connection no direct reference to the insurance was testified to, its only apparent purpose was to keep that matter before the jury. This last evidence the court refused to strike.



This also was error. While counsel for appellant in argument before this court expressed a doubt that the appellants W. R. Abercrombie and wife, having filed no motion for a new trial, could insist upon this error, we think the statement was clearly inadvertent. The request to discharge the jury at the very time when the error was committed was in itself equivalent to a motion for a new trial. It gave evidence of absolute good faith in the objection, since the appellants in making the demand at that time negatived any disposition to speculate upon securing a favorable verdict notwithstanding the error, while relying upon the error for a new trial on formal motion after verdict.

[11] Moreover, we have often held that, where the trial court has had an opportunity to rule upon an error claimed, it may be reviewed on appeal without a formal motion for a new trial. *Jones v. Jenkins*, 3 Wash. 17, 22, 27 Pac. 1022; *Burns v. Commencement Bay Land, etc., Co.*, 4 Wash. 558, 30 Pac. 668, 709; *Tingley v. Fairhaven Land Co.*, 9 Wash. 34, 35, 36 Pac. 1098; *Carter v. Seattle*, 21 Wash. 585, 588, 59 Pac. 500; *Sultan W. & P. Co. v. Weyerhaeuser T. Co.*, 31 Wash. 559, 560, 72 Pac. 114; *Dubcich v. Grand Lodge A. O. U. W.*, 33 Wash. 651, 654, 74 Pac. 832; *Crooker v. Pac. Lounge & Mattress Co.*, 34 Wash. 191, 193, 75 Pac. 632; *Rowe v. Northport Smelting Co.*, 35 Wash. 101, 103, 78 Pac. 529. While we are loath in any case to order a new trial where the verdict of a jury is sustained by competent evidence, we are equally loath to refuse a new trial where, through respondents' fault, incompetent and essentially prejudicial matter was deliberately placed before the jury.

The judgment is reversed, and the cause is remanded for a new trial.

MAIN and FULLERTON, JJ., concur.  
MORRIS, J., concurs in result.

(74 Wash. 481)

# EXCHANGE NAT. BANK OF SPOKANE v. PANTAGES.

(Supreme Court of Washington. July 28, 1913.)

## 1. GUARANTY (§ 27\*)—CONSTRUCTION.

In construing a written instrument to determine whether it constitutes a guaranty, the court should adopt the construction which, under all the circumstances of the case, ascribes the most reasonable, probable, and natural conduct of the parties.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 28; Dec. Dig. § 27.\*]

## 2. GUARANTY (§ 4\*)—TELEGRAM—CONSTRUCTION.

An amusement company borrowed \$2,500 from a bank, executing its note therefor. When the note became due, the bank refused to renew it unless it was indorsed or guaranteed by the president of the amusement company. The president, who knew that the bank

was not satisfied, telegraphed the manager of the amusement company who was negotiating the loan: "Tell bank I request them to renew the note. \* \* \* I will arrange things satisfactory to them upon my return to Seattle." Held, that the telegram, under the circumstances, constituted a guaranty.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. §§ 3-6; Dec. Dig. § 4.\*]

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by the Exchange National Bank of Spokane against Alex. Pantages. From a judgment sustaining a demurrer of defendant, plaintiff appeals. Reversed and remanded.

Nuzum & Nuzum, of Spokane, and Sullivan & Christian, of Tacoma, for appellant. John E. Ryan and Grover E. Desmond, both of Seattle, for respondent.

MOUNT, J. The lower court sustained a general demurrer to the plaintiff's complaint in this case and dismissed the action. The plaintiff has appealed. The complaint alleges in substance: That the plaintiff is a national bank doing business in the city of Spokane. That the Pantages Amusement Company is a corporation conducting a theater and amusement business in Spokane. The Pantages Theater Company is likewise a corporation doing a theater business. That the Pantages Amusement Company is one of a chain of theaters controlled by the defendant, beginning at Spokane and ending at Los Angeles, Cal.; theaters in Seattle and Tacoma being a part of the chain. That the Pantages Theater Company is also owned and controlled by the defendant. That at all times the defendant was a stockholder in and president of the Pantages Amusement Company. That on June 15, 1911, the amusement company executed to plaintiff its promissory note for \$2,500 due 90 days after date, with interest thereon at the rate of 8 per cent. per annum. That the note was renewed when due for a period of 90 days. That on December 12, 1911, when the renewal note became due, plaintiff demanded that the amusement company pay the same or secure the guaranty or indorsement thereof by the defendant. That the amusement company agreed to secure the guaranty of the note by the defendant, and at that time the amusement company executed to plaintiff a new note for the same amount, payable 90 days after December 12, 1911. That said note was not delivered or accepted as an obligation of the amusement company nor in satisfaction of the previous note; but that plaintiff took and held the same in accordance with the understanding with the amusement company until the amusement company should secure the guaranty of the note by the defendant. That on the 14th day of January, 1912, the defendant, for a good and valuable consideration, telegraphed Clark



Walker, who is the general manager of the amusement company, under the defendant's signature, a telegram of which the following is a copy, to wit:

"San Francisco, Calif., Jan. 14, 1912. Clark Walker, Pantages Theater, Spokane. Tell bank I request them to renew the note. Security just as good now as when loan was first made and they are collecting interest on their money. I will arrange things satisfactory to them upon my return to Seattle. Alex. Pantages." That, on account of said telegram and the assurances therein contained, the plaintiff accepted the new note and did not enforce the payment on the original indebtedness which, prior to that time, the bank had threatened to do, relying upon the assurances of the defendant that he would arrange things satisfactorily to the plaintiff; and but for these assurances the plaintiff would have proceeded with its remedy on the original indebtedness. That at or about the time of the execution of the original note, the defendant assured the officers of the plaintiff that the amusement company had ample resources to meet the payment of the note, and defendant was instrumental in securing the loan of the money represented by the note and the renewal thereof. That it was to the interest of the defendant that the plaintiff desist from bringing suit upon the note or upon the original indebtedness, for the reason that, if the plaintiff had commenced suit against the amusement company, it could and would have closed the theater in Spokane in which the companies were showing and in other theaters owned and managed by the defendant, broken up the circuit, and made it impossible for the defendant to have shown his attractions in Spokane. That on or about the 26th day of March, 1912, an action was commenced by Lois Pantages, the wife of the defendant, against the amusement company, in King county, on 16 promissory notes signed by the amusement company, in most cases payable to the Pantages Theater Company, owned and controlled by the defendant; said notes aggregating \$10,000. That a receiver was appointed, and all the property of the amusement company sold to the theater company for a nominal consideration. That there is no money or property of the amusement company out of which to satisfy the plaintiff's demands. That it was not true, as stated in the guaranty and telegram of the defendant, that the security held by the plaintiff was as good at the time as when the loan was first made; but that the assets of the amusement company were being decreased by the defendant wholly and solely for the purpose of absorbing all of the assets of the amusement company. That plaintiff, on account of the matters contained in the telegram, did not bring suit upon the original indebtedness, but accepted the new note executed December 12, 1911, lost what security it had by reason of the then existing assets of the amusement

company, and was prevented from realizing anything from the amusement company on account thereof. That no provision was made by the defendant for the payment of the note, no arrangement of any kind was made to secure the same by the defendant, and the note was never paid. The second cause of action was for a separate note for \$2,500, based upon substantially the same state of facts.

[1,2] The controlling question presented here is whether the telegram hereinbefore quoted constituted a guaranty by the defendant, Alex. Pantages, of the note sued upon. The trial court was evidently of the opinion that this telegram did not constitute a guaranty of the note, and therefore held that the complaint did not state a cause of action upon either note. It is conceded in the briefs that no particular form of words is necessary to constitute a guaranty. The rule seems to be that in order to constitute a guaranty the writing should be so construed as to determine the intention of the parties, or, as stated in *Bell v. Bruen*, 1 How. 169, 11 L. Ed. 89:

"We think the court should adopt the construction which, under all the circumstances of the case, ascribes the most reasonable, probable, and natural conduct to the parties. In the language of this court, in *Douglas v. Reynolds*, 7 Pet. 122 [8 L. Ed. 626]: 'Every instrument of this sort ought to receive a fair and reasonable interpretation, according to the true import of its terms. It being an engagement for the debt of another, there is certainly no reason for giving it an expanded signification, or liberal construction beyond the fair import of the terms.' Or it is 'to be construed according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical nicety'; as declared in *Lee v. Dick*, 10 Pet. 493 [9 L. Ed. 503]. The presumption is of course to be ascertained from the facts and circumstances accompanying the entire transaction."

According to the facts alleged in the complaint, the defendant knew that the bank was not satisfied with the note which was offered as an extension of the payment of the note which was then past due. He then telegraphed to Mr. Walker, who was attempting to arrange for the extension: "Tell bank I request them to renew the note. \* \* \* I will arrange things satisfactory to them upon my return to Seattle." We think it was clearly the intention of the defendant to guarantee the payment of the note, and it was evidently so understood by the bank at that time, according to the allegations of the complaint. In *Goldring v. Thompson*, 58 Fla. 248, 51 South. 46, 25 L. R. A. (N. S.) 418, the language used was: "Your money is good. I will be in your city in a few days." It was held that this constituted a guaranty. In *Dover Stamping Co. v. Noyes*, 151 Mass. 342, 24 N. E. 53, it was said that the plain-



tiff should be "taken care of." It was held that this constituted a guaranty. In *Willis v. Ross*, 77 Ind. 1, 40 Am. Rep. 279, where the statement was made: "Give John a little more time and I will see that you get your money," was held to be a guaranty. In *Mott Iron Works v. Clark*, 87 S. C. 199, 69 S. E. 227, the statement, "I will see that you are protected in any dealings that you may have with this corporation," was held to be a guaranty. In *Birdsall v. Heacock*, 32 Ohio St. 177, 30 Am. Rep. 572, the statement, "Please send my son the lumber he asks for, and it will be all right," was held to be a guaranty. We think the language quoted above in this case used by Mr. Pantages in his telegram, under the circumstances surrounding the transaction, was understood to be and was a guaranty of the note. We are of the opinion, therefore, that the court was in error in sustaining the general demurrer to the complaint.

The judgment is reversed, and the cause remanded for further proceedings.

GOSE, CHADWICK, and PARKER, JJ., concur.

(74 Wash. 433)

#### AYLMORE v. HAMILTON et al.

(Supreme Court of Washington. July 23, 1913.)

#### 1. COUNTIES (§ 178\*) — BONDS — AUTHORIZATION—ELECTION—SINGLE PROPOSITION.

Where several different roads sought to be improved in different parts of the county constituted as a whole a county highway, the fact that they were separated by waters of a lake and Puget Sound did not destroy the unity of the system nor make the roads distinct projects so as to invalidate bonds issued therefor, because the issuance of the bonds was submitted for the improvement of all the roads as a single proposition.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 269-273; Dec. Dig. § 178.\*]

#### 2. COUNTIES (§ 183\*)—HIGHWAY BONDS—ISSUANCE—CURATIVE LEGISLATION.

Laws 1913, c. 25, provides that the question of the issuance of bonds for any undertaking which relates to a number of different roads may be submitted to the voters as a single proposition, where such course is consistent with the Constitution. If the county commissioners, in submitting any such proposition relating to different roads, find that such proposition has for its object the construction of a system of public highways in such county, and has for its object a single purpose, such finding shall be presumed to be correct and on the issuance of the bonds shall become conclusive. A subsequent section validates bonds, where the submission would have been authorized under the act, had it been in force, if submitted to the people at any time within one year prior to the act. *Held*, that county bonds, issued for the improvement of several highways under authority conferred at an election at which the question was submitted as a single proposition within the time specified in the act, were validated; even though such submission might have been erroneous.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 275-281, 283, 284; Dec. Dig. § 183.\*]

Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Reeves Aylmore, Jr., against M. L. Hamilton and others, as the Board of County Commissioners of King County, and Byron Phelps, County Auditor, etc. Decree for defendants, and plaintiff appeals. Affirmed.

Arthur E. Nafe and Reeves Aylmore, Jr., both of Seattle, for appellants. John F. Murphy and Robert H. Evans, both of Seattle, for respondents.

MORRIS, J. It is sought in this action to restrain the sale of an issue of \$3,000,000 of King county road bonds, the case coming here on an appeal by the plaintiff from a judgment sustaining a demurrer to his complaint. The facts, so far as necessary to be stated for a proper understanding of the question submitted, are these: On September 30, 1912, the county commissioners of King county passed a resolution, submitting to the qualified electors of King county the question of whether or not bonds in a sum not exceeding \$3,000,000 should be issued for strictly road purposes. Pursuant to this resolution an election was duly held and the proposition carried by the requisite majority. The county commissioners thereupon issued the bonds and passed a resolution providing for their sale, when this suit was commenced, seeking to enjoin said sale.

[1] No question is raised as to the validity of any of the proceedings prior to the election, and, while the complaint alleges a number of reasons why the election and bonds should be held invalid, the main contention, and in fact the only one discussed in the briefs or upon the argument, is that the bonds are invalid because of the fact that included in the proposition submitted which called for but one affirmative or negative vote were 27 different roads and 15 bridges in various parts of the county. It being contended in this connection that each of these roads and bridges is a several and distinct purpose in no way related to each other, thus bringing this case squarely within the rule announced by this court in *Blaine v. Seattle*, 62 Wash. 445, 114 Pac. 164, Ann. Cas. 1912D, 315, where it was held that a proposition to issue bonds for sites for fire houses, for the construction of fire houses, a site for a city stable, a combined fire house and dock, a police substation, an isolation hospital, a bridge on Spokane avenue, and a bridge on Westlake avenue were eight several and distinct propositions, and that their submission as one proposition, in such a manner that the voter was compelled to vote for or against all of them, was invalid. The respondent, on the other hand, contends that the ruling of the lower court should be affirmed upon the authority of *Blaine v. Ham-*



lton, 64 Wash. 353, 116 Pac. 1076, 35 L. R. A. (N. S.) 577, where it was held that an election to authorize a bond issue was valid, where the proposition requiring one affirmative or negative vote included (1) the excavation of a canal connecting Salmon Bay and Lake Washington; (2) the deepening of the Duwamish river; (3) the diversion of the waters of Cedar river into Lake Washington; and (4) the erection of wharves or docks in aid or furtherance of these improvements; and that these purposes were so related as in fact to constitute one general project for the creation of a great harbor and the utilization and uniting of the waters in and about it.

With this latter view we are in full accord. Each of these Blaine Cases finds support in two distinct and well-recognized rules. The first is that, where different questions are submitted, when such questions or their subjects and purposes are not naturally related or connected in such a way as to require but one affirmative or negative vote, the proceeding is invalid. It was accordingly held in the first Blaine Case that the eight propositions there submitted as one were so distinct, unrelated, and independent that they could not be united or joined as one. The second Blaine Case finds its support in the other rule that, where several parts of a proposition submitted as one and calling for but one affirmative or negative vote are so related, united, and dependent as to form but one rounded whole, such submission is valid; and it was accordingly held that, it appearing that the four questions submitted in that case were in aid of one general scheme—the creation of a great harbor at the city of Seattle and the utilizing of all adjacent waters for that purpose—the method of submission there employed was proper. We again had occasion to review these two rules in *Tulloch v. Seattle*, 69 Wash. 178, 124 Pac. 481, where a like question was submitted, involving the validity of the bonds issued by the city of Seattle for municipal street railway purposes; and it was there held that the submission of a bond issue was not illegal as combining several distinct and unrelated objects, where the bonds were to be used for the purchase of existing street railways, or in the alternative for the construction of parallel lines in the discretion of the municipal officers; since the two purposes were natural related parts of but one object—the acquiring of a municipal street railway. We there discussed these Blaine Cases and pointed out the distinction between them and drew from them the two rules above advanced in saying that: "Separate, distinct, and independent purposes or objects may not be joined in one proposition for submission to the voter. United, related, and dependent objects, that together form one general scheme or plan, may be united and submitted as one. No

better illustration of the application of these two principles may be found than in *Blaine v. Seattle*, falling within the first rule, and *Blaine v. Hamilton*, falling within the second rule."

With this recent discussion and announcement of the law, it only remains to refer to the facts as clearly bringing this case within the second rule, and within that line of cases to which *Blaine v. Hamilton* and *Tulloch v. Seattle* belong. The proposition submitted embraced but one subject—a comprehensive system of county roads. The fact that it is comprehensive does not destroy its unity. It is one subject composed of many parts, each bearing its relation to the whole, and each bearing its relation to every other part. Employing the test suggested in the *Hamilton* Case, "Are the several parts of the project so related that united they form but one rounded whole?" the facts present a clear case. The whole is the county highway. The several parts are the different roads that together form that highway. Because one of these roads is on Mercer Island, separated from the mainland by the waters of Lake Washington, another on Vashon Island, separated from its companion parts by the waters of Puget Sound, does not destroy the unity of the system nor make these roads several and distinct projects. They may be several distinct parts of one project, but they all unite to form but one project, and that a comprehensive county highway that will furnish a beneficial access to all portions of the county.

In *City of Oakland v. Thompson*, 151 Cal. 572, 91 Pac. 387, a like question was presented. The city of Oakland sought to acquire several detached places of land in different portions of the city for public parks, and submitted it to the voters as one proposition. This method was questioned under a contention that each piece of land should have been submitted as a several and distinct proposition. The court, in passing upon this contention, held that, where the scheme had in contemplation the acquisition of several distinct parcels of land widely separated, to be converted into separate parks it was but a single scheme, and the purpose a single purpose. A like ruling may be found in *State ex rel. Horsley v. Carbon County*, 38 Utah, 563, 114 Pac. 522, where the county submitted a proposition to issue bonds to build roads and bridges in the county, as one proposition. The same attack was made as here that the purposes were several and distinct and could not be united as one proposition calling for but one vote, and it was held the single submission was proper.

[2] There is another reason why these bonds should be sustained. Chapter 25, Laws of 1913, provides: "The question of the issuance of bonds for any undertaking which relates to a number of different roads or parts thereof, whether intended to sup-



ply the whole expenditure or to aid therein, may be submitted to the voters as a single proposition in all cases where such course is consistent with the provisions of the state Constitution. If the county commissioners, in submitting any such proposition relating to different roads or parts thereof, find that such proposition has for its object the furtherance and accomplishment of the construction of a system of public and county highways in such county, and constitutes and has for its object a single purpose, such finding shall be presumed to be correct, and upon the issuance of the bonds such presumption shall become conclusive." A subsequent section provides for the validating of any bonds where the submission would have been authorized under this act, had it been in force, if submitted to the people at any time within one year prior to the taking effect of the act. These bonds were submitted within that time and are subject to the validating provisions of the act.

We therefore conclude the bonds are in all respects valid, and the judgment of the lower court is affirmed.

MAIN, ELLIS, and FULLERTON, JJ., concur.

(74 Wash. 448)

#### SHORETT v. KNUDSON et ux.

(Supreme Court of Washington. July 24, 1913.)

#### 1. SPECIFIC PERFORMANCE (§ 17\*)—DEFENSES—ASSIGNMENT OF CONTRACT.

The vendor cannot complain of the judgment for specific performance in favor of the vendee's administrator, because of the vendee having assigned the contract to one to whom he was indebted for services, the assignee having claimed nothing under the assignment, but filed his claim for service with the administrator, and having been made a defendant, and having defaulted, so that the judgment wiped out any interest he had under the assignment.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 83-46; Dec. Dig. § 17.\*]

#### 2. WITNESSES (§ 139\*)—COMPETENCY—TRANSACTION WITH DECEDENT.

By provision of Rem. & Bal. Code, § 1211, one sued by an administrator cannot testify to a personal transaction with deceased.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 582-597; Dec. Dig. § 139.\*]

#### 3. VENDOR AND PURCHASER (§ 95\*)—CONTRACTS—TIME AS ESSENCE—WAIVER—FORFEITURE.

Though time be of the essence of the contract, a vendor, by extending time of payment and by indulgence to the purchaser in this regard, waives this feature of the contract, so that he cannot thereafter declare a forfeiture of the contract for nonpayment till lapse of a reasonable time after he thereafter demands payment.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 158-160; Dec. Dig. § 95.\*]

#### 4. CONTRACTS (§ 316\*)—PARTY IN DEFAULT.

The rule that a party in default cannot enforce his contract is not applied, where the facts show a waiver of the default.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1382-1387, 1395, 1398-1400, 1480-1491; Dec. Dig. § 316.\*]

#### 5. SPECIFIC PERFORMANCE (§ 105\*)—LACHES.

Mere lapse of time will not, on the ground of laches, defeat suit by a purchaser's administrator for specific performance, brought shortly after intestate's death, deceased having been in possession of the premises up to his death, and having paid all taxes due up to that time, evidencing his possession to be under claim of right.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 325-341; Dec. Dig. § 105.\*]

Department 2. Appeal from Superior Court, King County; King Dykeman, Judge.

Action by L. Shorett, administrator of John Baughman, deceased, against Krist Knudson and wife. Judgment for plaintiff. Defendants appeal. Affirmed.

Henry Gulliksen and Martin J. Lund, both of Seattle, for appellants. Shorett, McLaren & Shorett and F. A. Gilman, all of Seattle, for respondent.

MORRIS, J. Respondent brought this action to enforce the specific performance of a contract to purchase real estate, in which the decedent is named as vendee. The contract was dated August 23, 1904. The price of the land was \$600, \$100 of which was paid in cash upon the execution of the contract, and the balance was to be paid in annual installments of \$100 each, with interest on deferred payments at 7 per cent. These payments were not made as provided by the contract, but at the time of his death in January, 1912, the vendee had made all of the payments except the last. The deferred payments were made as follows: August 23, 1905, \$105; March 3, 1907, \$78; May 18, 1907, \$85; August 31, 1907, \$119; November 23, 1907, \$103.75. No objection seems to have been made to this method of payment; and, while the contract provided that time should be of the essence, it is evident that the vendor waived this feature of it, and accepted payments when convenient to the vendee. Specific performance was resisted upon several grounds, it being pleaded that the vendee had assigned his interest in the contract to a third person, that the vendee had forfeited the contract, and that the action should be defeated because of laches. The court ruled against each of these defenses, and granted judgment awarding specific performance, and the defendants appealed.

[1] The chief assignments of error are addressed to the insufficiency of the evidence to sustain the decree, which was raised by appellant in various ways, and errors in the rejection of testimony. It is first suggested that the vendee had assigned his interest in the contract. Vendee had met with an acci-



dent about two years prior to his death, and just before his death he made out an assignment of his contract to the physician who had attended him, and to whom he was largely indebted for medical attention. This physician was made a party defendant to this action, but made no appearance, and permitted default to be taken against him, thus barring any interest he might claim by virtue of his assignment. It is stated, however, in argument that this physician, as a matter of fact, claimed nothing under this assignment, but had filed his bill with the administrator for services rendered deceased. The judgment having wiped out any interest covered by the assignment, no more attention need be paid to that feature of the case.

[2] It is next claimed that the vendee had forfeited the contract some time in September, 1909. Appellant complains that the court erred in rejecting the evidence offered to sustain this plea, but as the evidence sought to be introduced consisted of personal transactions with the deceased, its rejection was proper. Rem. & Bal. Code, § 1211.

[3] We think if appellant had been permitted to testify that he informed the decedent that the contract was forfeited, the facts shown would rule the case against him. He attempted to show that some two years after the last payment was due he demanded payment from the decedent, and at the same time declared it forfeited. This he could not do, notwithstanding time was of the essence of the contract. The vendor, by extending the time of the payment and by indulgence to the vendee in this regard, had waived this feature of the contract; and, having done so, he could not thereafter declare a forfeiture until after a demand of payment and the lapse of a reasonable time. *Thomas v. McCue*, 19 Wash. 287, 53 Pac. 161; *Whiting v. Doughton*, 31 Wash. 327, 71 Pac. 1026; *Douglas v. Hanbury*, 56 Wash. 63, 104 Pac. 1110, 134 Am. St. Rep. 1096; *Walker v. McMurchie*, 61 Wash. 489, 112 Pac. 500. It also appears that the vendee had remained in possession of the land up to his death in 1912, over two years subsequent to the claim of forfeiture, and had paid the taxes on the land. If the vendor had forfeited the contract, and had regarded the land as his own subsequent to September, 1909, it would seem that he would have taken some steps to assert his right of possession, or at least, as an evidence of his claim of ownership, paid the taxes. But he did neither of these things, although he did pay the 1911 taxes after the commencement of this action. It therefore seems to us the lower court was abundantly justified in holding against a forfeiture.

[4] Appellant maintains that it is the law that a party in default cannot enforce his contract. Ordinarily this is true, but such a rule applies only where the party in default is seeking to enforce the contract and asserts

rights thereunder against one who is not, by laches, estoppel, or waiver, barred from insisting upon a strict enforcement of the terms of the contract, and it is never applied where, as here, the facts show a waiver of the default.

[5] Neither do we think the right of action is barred by laches. Decedent was in possession of the premises up to the time of his death, and the fact that he had paid all taxes due up to that time evidences his possession under a claim of right. Under these circumstances, mere lapse of time will not defeat a recovery. *Mudgett v. Clay*, 5 Wash. 103, 31 Pac. 424.

Judgment affirmed.

MAIN, ELLIS, and FULLERTON, JJ., concur.

(74 Wash. 426)

# ENGLESON v. PORT CRESCENT SHINGLE CO.

(Supreme Court of Washington. July 23, 1913.)

## 1. BROKERS (§ 43\*)—INTERESTS IN REAL ESTATE—CONTRACTS FOR SALE ON COMMISSION—STANDING TIMBER.

A contract for the sale of standing timber on commission is a contract to sell real estate on commission within the meaning of Rem. & Bal. Code, § 5289, requiring such a contract to be in writing.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 44; Dec. Dig. § 43; *Frauds*, Statute of, Cent. Dig. § 131.]

## 2. BROKERS (§ 43\*)—EMPLOYMENT—SUFFICIENCY OF WRITING—CONTENTS.

Where an employment agent had furnished a landowner, on his oral request, with a list of firms to whom he might sell standing timber, a letter subsequently written by the owner in which he requested the agent to continue the work and agreed to pay him if a contract were entered into, but which did not specify the subject or terms of the sale or rate of compensation, was insufficient to satisfy the statute of frauds.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 44; Dec. Dig. § 43; *Frauds*, Statute of, Cent. Dig. § 131.]

## 3. BROKERS (§ 40\*)—AUTHORITY—CONSTRUCTION.

A contract to procure and furnish parties who would purchase standing timber is a contract for the sale of the timber on commission and not a contract merely to locate some one who would buy the land.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 38-40; Dec. Dig. § 40.\*]

Department 2. Appeal from Superior Court, King County; John E. Humphries, Judge.

Action by James Engleson against the Port Crescent Shingle Company. Judgment for the plaintiff, and defendant appeals. Reversed and remanded, with directions to enter a judgment for the defendant.

T. F. Trumbull, of Port Angeles, and Farrell, Kane & Stratton, of Seattle, for appellant. Geo. B. Cole, Gay & Olson, and Milo A. Root, all of Seattle, for respondent.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



FULLERTON, J. In this action the respondent recovered against the appellant for services rendered in the sale of certain timber owned by the appellant; a part of such timber being upon lands owned by the appellant and a part thereof on lands of third persons who had sold the timber on such lands to the appellant. The contract on which the recovery was had is set forth in the complaint in the following language:

"(2) That on or about the forepart of the month of January, 1912, defendant came to said Black Cat Employment Company and orally informed said company that it (said defendant) had a large quantity of shingle timber for sale in Clallam county, Wash., and orally requested said Black Cat Employment Company to procure and furnish said defendant a party or parties who would purchase said shingle timber, and then and there orally promised and agreed with said Black Cat Employment Company that, if said company would find, or procure, or furnish to defendant the name of a party who would purchase and contract for said shingle timber, it (said defendant) would pay said Black Cat Employment Company a reasonable sum or compensation for so furnishing said defendant said party.

"(3) That thereafter and during the forepart of the month of January, 1912, said Black Cat Employment Company obtained and in writing furnished to defendant the names of several parties who were desirous of purchasing said shingle timber, and amongst said list of names was the Howell-Hill Mill Company, a Washington corporation.

"(4) That thereafter, and on January 18, 1912, said defendant, in writing, acknowledged the receipt of said list of names of parties so furnished defendant by said Black Cat Employment Company, and then and there wrote said Black Cat Employment Company that it had written said Howell-Hill Mill Company, as well as each of said parties so furnished by said Black Cat Employment Company, and requested said Black Cat Employment Company to 'keep on working on this,' and then and there agreed to pay said Black Cat Employment Company for its trouble. (A copy of which said writing and said letter sent said Howell-Hill Mill Company is hereto attached, marked Exhibits A and B respectively, and made a part and portion of this paragraph by reference the same as though set out in *hæc verba* and immediately following.)

"(5) That said Howell-Hill Mill Company was ready, able, anxious, and willing to enter into a contract and to purchase said shingle timber, and thereafter and on May 23, 1912, by and through the efforts of said Black Cat Employment Company as in this complaint set forth, said defendant did sell to said Howell-Hill Mill Company and said Howell-Hill Mill Company did purchase

and contract to purchase and buy from said defendant said shingle timber, the location of which said timber, and the price and terms, and conditions thereof, and each and all thereof are more particularly set forth in Exhibit C hereto attached and made a part and portion of this paragraph by reference the same as though set out in *hæc verba* and immediately following."

The writing referred to in the complaint as containing a promise to pay for the services rendered is in the form of a letter and reads as follows: "Port Crescent, Wash., 1/18/12. Black Cat Emp. Office, Seattle, Wash.—Gentlemen: Inclosed is a copy of a letter we sent to Howell-Hill Mill Co. Have also written each of the other parties you named for us. Keep working on this and we will pay you for your trouble if we can close with any of them. Do not expose those prices when not necessary. Very truly yours, Port Crescent Shingle Co., by J. M. Joyce."

A demurrer was interposed to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action; the precise objection being that the contract sued upon was within the statute of frauds. The demurrer was overruled, whereupon the appellant answered, taking issue on all the material allegations of the complaint, and setting up certain affirmative defenses not necessary here to notice. On the issues made a trial was entered upon before a jury, at which the evidence of the respondent tended to substantiate the allegations of his complaint, with the additional particular that the greater part of the timber was uncut timber standing and growing upon lands situated in Clallam county. At the conclusion of all the evidence the appellant challenged its legal sufficiency to warrant a recovery against it, again contending that the contract sued upon, and shown to have been entered into by the evidence, was within the statute of frauds. The challenge was denied, and the cause was submitted to the jury under the following instructions: "This, in short, is an action for commission. \* \* \* If you find that the plaintiff pursuant to such employment brought together the defendant and said Howell-Hill Mill Company, or that they were brought together at his instance, and pursuant to a suggestion of plaintiff to the defendant, or to said Howell-Hill Mill Company, and that the defendant and said Howell-Hill Company entered into such an arrangement of purchase, or for the cutting of said timber, and that the defendant promised to pay the plaintiff for services in doing this thing, then I instruct you that the plaintiff is entitled to recover whatever would be the reasonable value of his services for so doing; and in determining what is the reasonable value of his services you may take into consideration what the ordinary commission or compensation is that is customarily allowed



for such services in this community. In fixing the value of the plaintiff's services, in case you find he did render the services which he alleges with the results which he alleges, you are not to be bound solely by the length of time, or shortness of time that he consumed in bringing the defendant together with the Howell-Hill Mill Company, but you may also take in consideration what the general custom is in brokerage business of this character, and if you find that it is the general custom to pay commission at a certain rate for this kind of service, and find that plaintiff rendered such services, then you are permitted to allow him compensation at the rate of commission testified to as being customary, and based upon the reasonable market value of the timber at that time, as you find such reasonable market value to be shown by the fair preponderance of the evidence in the case." The jury returned a verdict in favor of the respondent for the sum of \$1,500 on which judgment was rendered as before stated.

[1] The statute (Rem. & Bal. Code, § 5289) provides that an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission, shall be void unless such agreement, or some note or memorandum thereof, be in writing and signed by the party to be charged. The principal question suggested by the record is, therefore, whether the contract on which the recovery was had falls within this statute. As shown by the quotation from the complaint, the appellant orally requested the respondent to procure and furnish a purchaser for its shingle timber situated in Clallam county, which timber was not severed from the realty but was standing and growing thereon. Whether, therefore, the contract was valid or void must depend upon the answer to the question, Was the timber a part of the realty upon which it was standing, or was it personal property? That growing timber was regarded as pertaining to the real property upon which it stood under the common law there can be little, if any, doubt. Being the product of nature, and attached to and partially imbedded in the soil, it was considered by all of the older writers as a part of the inheritance and not as emblements passing to the administrator on the death of the owner. That the rule is still the same in most of the American jurisdictions is shown by the cases collected in the note to *Ives v. Atlantic, etc., R. Co.*, 9 Ann. Cas. 188. The rule, as announced by some of the state courts, is that a verbal sale of standing timber is a license authorizing the purchaser to enter and cut and remove timber until the license is revoked, but it is at the same time held that a contract for the sale of standing and growing timber must be in writing before it can be specifically enforced against the vendor.

In *Seymour v. La Furgey*, 47 Wash. 450, 92 Pac. 140, this court held that an action to rescind a contract for the removal of standing timber was local, and that a change of venue to the county of the defendant's residence was properly denied. And in *Thill v. Johnston*, 60 Wash. 393, 111 Pac. 225, it was held that an oral agreement purporting to abrogate a written contract for the sale of standing timber was void; the reason given being that the original agreement was one for the conveyance of real property and hence required to be in writing and could not be abrogated by an executory parol agreement. These cases, while not directly in point, clearly indicate that the court believed that the rule of the common law on the question here involved prevailed in this state. This we think now is the better rule, and it follows that the contract sued upon falls within the statute above cited.

[2] Was the agreement by which the respondent was employed to find a purchaser for the property in question in writing within the meaning of the statute? The claim that it is so is founded on the letter of January 18, 1912, which we have quoted. But it is manifest that this is insufficient for the purpose under the authority of the cases of *Keith v. Smith*, 46 Wash. 131, 89 Pac. 473; *Foote v. Robbins*, 50 Wash. 277, 97 Pac. 103; *Forland v. Boyum*, 53 Wash. 421, 102 Pac. 34; and *Crouch v. Forbes*, 63 Wash. 564, 116 Pac. 14. These cases lay down the rule that a writing sufficient to satisfy the statute must be coextensive with the stipulations of the parties; that is to say, it must express the entire contract and leave nothing that pertains to the essentials of the contract to be supplied by parol. The contract here in question neither describes the property to be sold nor specifies the amount of commission or compensation that will be paid for the services, and under the rule as we have heretofore announced it is plainly insufficient.

[3] We are aware that the respondent argues: "In this case respondent did not sue for services as an agent in selling standing timber nor for selling anything. He was employed to find somebody who would enter into a milling proposition with appellant. It was not a proposition to sell some real estate; it was not a proposition even of selling the timber standing upon the land; but it was a proposition of getting some one who would enter into a deal with appellant for the building of a mill, the cutting, removing, and payment for of certain timber, part of which was standing and part of which was lying upon certain lands. Appellant desired some company to come upon those lands with a mill and with a logging outfit and convert the timber into lumber or shingles and pay therefor. Respondent was employed by appellant to secure some one who would do this and who would enter into the



necessary agreement and arrangement for bringing this about. The services of respondent were engaged by appellant for this purpose, and they resulted successfully for appellant. Through respondent's efforts and influence negotiations were opened up between appellant and the Howell-Hill Mill Company, which resulted in a contract whereby the latter company undertook to locate a mill, cut and remove certain timber, and do various other things." But this was not the cause of action stated in the complaint, nor was it the theory upon which the case was tried. The allegation of the complaint is that the appellant orally requested the respondent "to procure and furnish \* \* \* a party or parties who would purchase said timber," and agreed in writing to pay the respondent for its trouble. The instructions of the court were founded on the same theory. He charged the jury directly that the basis of recovery was for commissions earned, and that the jury could allow the respondent "compensation at the rate of commission testified to as being customary." Moreover, the contract as shown by the evidence was in its essence a contract employing a broker to sell standing and growing timber on commission, and its nature cannot be changed by calling the services performed by another name.

The judgment is reversed and remanded, with instructions to enter a judgment in favor of the defendant, the appellant in this court, to the effect that the respondent take nothing by his action.

MAIN, ELLIS, and MORRIS, JJ., concur.

(74 Wash. 452)

**MORRISON MILL CO. v. AMERICAN MERCANTILE CO.**

(Supreme Court of Washington. July 24, 1913.)

**1. BROKERS (§ 40\*)—RIGHT TO COMMISSION.**

To entitle a broker to a commission on a sale he must have had a specific agreement with the seller therefor, or the course of dealing must have been such as to clearly imply a promise to pay one.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 38-40; Dec. Dig. § 40.\*]

**2. APPEAL AND ERROR (§ 1011\*)—REVIEW—FINDING ON CONFLICTING EVIDENCE.**

A finding on conflicting evidence depending on veracity of witnesses will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

Department 2. Appeal from Superior Court, Pierce County; C. M. Easterday, Judge.

Action by the Morrison Mill Company against the American Mercantile Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Fletcher & Evans, of Tacoma, and Shepard & Burkheimer, of Seattle, for appellant. Hadley, Hadley & Abbott, of Bellingham, and Grosscup & Morrow, of Tacoma, for respondent.

**PER OURIAM.** The respondent is engaged in the business of manufacturing lumber, cross-ties, box shooks, and other timber products; one of its principal manufacturing plants being in the city of Bellingham. In December of the year 1910 it sold and delivered to the appellant certain cross-ties at the agreed price, according to the respondent's measurements, of \$400.30. The appellant failed to pay for the ties at the expiration of the term of credit, and the respondent brought the present action to recover the purchase price. The appellant, answering the complaint, claimed an offset on account of certain defective ties, but admitted an indebtedness on account thereof in the sum of \$360. It also set up a counterclaim for certain brokerage commissions. It alleged that its principal business was that of a broker buying and selling goods and supplies on commission; that it found a customer desirous of purchasing a large quantity of hemlock box shooks out of which to make oil cases or coverings, and that he communicated the fact to one Goff, who was doing a brokerage business at Seattle, Wash., under the name of Washington-Canadian Lumber Company, and requested him to find a manufacturer who would furnish the shooks on such terms as would allow a brokerage commission, which commission it agreed to divide with Goff; that Goff opened negotiations with the respondent to supply the shooks which resulted in an agreement between the respondent and Goff by which the respondent agreed to quote such prices to the appellant's customer as would enable it to pay a commission to Goff of one-half cent per case for all shooks it should be able to sell such customer; that Goff thereupon advised the respondent of the name of the customer, and the respondent thereupon entered into a contract with such customer for the sale of and did sell to such customer a large number of shooks for oil cases on which commissions were due the appellant; the precise amount it was unable to state. An accounting was asked, and judgment prayed for such sum as might be found due upon the accounting. In reply the respondent conceded the offset claimed on account of the defective ties, but denied all of the allegations concerning the claim for commission. A trial was had on the issues made by the answer and reply before the court sitting without a jury and resulted in a judgment in favor of the respondent for the sum conceded to be due for the cross-ties, and denying recovery on the claim for commission. This appeal followed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



The controversy in this court, as it was in the court below, is over the claim for commissions. The evidence is somewhat voluminous, and it would serve no useful purpose to detail it at length here. Outlined, the evidence tended to show that the Asiatic Petroleum Company, whose purchasing agent resided at Tacoma, desired to purchase a large quantity of hemlock shocks out of which to make cases or containers for casing cans of petroleum oil which it sold to its Asiatic trade. One Dorr, the secretary of the appellant, learned of this fact and called on the agent of the oil company and asked if he as such agent was willing to receive offers for box shocks, saying he could do better than could the agent in making purchases. The agent replied that he would receive such offers, whereupon Dorr communicated with the Mr. Goff mentioned in the answer and requested him to find a manufacturer who would furnish the shocks on such terms as would allow a broker's commission on such sales as might be made to the oil company, agreeing to divide any commission that could be thus obtained equally with Goff. Goff, corresponding under his trade-name of Washington-Canadian Lumber Company, requested quotations from the respondent for shocks delivered at Seattle suitable for the purpose desired. After some correspondence looking to further details, the respondent quoted him a price of 10½ cents per case. Goff demurred to this as being too high, saying it would "take a price of 9 cents, less 2½ per cent.," to handle the matter. Some further negotiations were had when the respondent offered him a price of 9 cents per case net to it at its mill in Bellingham. In none of the correspondence up to this time did Goff disclose his interest in the transaction or the fact that he was acting for another. He used, as we say, his trade-name and led the respondent to believe that his purported company was the person desiring the shocks. While Goff was endeavoring to get quotations from the respondent, the purchasing agent of the oil company was pressing Dorr for a quotation on shocks and was quoted a price of 9½ cents per case, delivered at the respondent's mill in Bellingham. He demanded a confirmatory report from the mill company itself as to the price, which led Dorr to request Goff to procure such a report. Goff agreed to get such report and inquired of Dorr for information as to whom the letter should be addressed. Dorr answered giving the purchasing agent's name and address, accompanying his answer with a caution to the effect that "it would greatly assist in this business if the buyer can go direct to the supplier, and you to provide for your own and our commission by separate agreement, and then the buyer will not know that any commission is being paid and will be better satisfied." Goff then again took up the question of prices with the respondent, inquiring if it could not "furnish hem-

lock shocks at 8¼ cents f. o. b. cars at Bellingham." This telegram the appellant answered by letter, saying that they would not take less than 9 cents net at their mill. On the next day he learned that the prospective buyer was intending to visit the mill company, and thereupon wired them of that fact, and made a request that the respondents quote him a price that "will allow us a commission of 2½ per cent." On the next day Goff called the respondent on the telephone and made a similar request orally. What answer the manager of the respondent made is a subject of dispute between the parties. Goff testifies that in this conversation the manager agreed to quote such prices to the intended purchaser's agent as would allow him (Goff) a commission of one-half cent per case on all shocks sold such purchaser. The manager of the mill company directly contradicts these statements. He testified that he positively refused to allow commissions; that he told Goff that it was not their custom to deal through brokers; that their prices were net to them at the mill, and any commission he received must be from the purchaser; testifying further that the telegram of the day before was the first time that the respondent had any information that Goff, or rather the Washington-Canadian Lumber Company, in which name the correspondence was carried on, was a broker and not a prospective purchaser. The next day (November 3, 1910) letters passed between the parties purporting to be confirmatory of their respective versions of the telephone conversation. The order of the succeeding events is not made very clear in the record, but on the same day the purchaser's agent wrote Goff addressing him as the Washington-Canadian Lumber Company, saying, among other things that; "Mr. Joseph K. Dorr has had the question up with me for the last 14 days to supply him with box shocks of Hemlock and Spruce and especially Hemlock from the Morrison Mill in Bellingham. I have been after him every day since to get a letter so I have it in black and white what you have got to offer. I was therefore kind of surprised this morning to receive your letter of yesterday in which you quoted him White Pine to the extent of 30,000 cases at \$13.25, without quoting him for Hemlock. I have agreed with Mr. Dorr that I should telephone long distance to Morrison Mill Company and mention your name. I have got quotations from them and I shall go there to-morrow. As I understand you are the broker in this case, I think it would be advisable for you when you receive this letter to telephone them, or write them, that you have been the broker in this case, as it is not my intention to beat you out of any brokerage, but the business I do must be done so everything is clear."

On his way to Bellingham the agent called on Goff personally and in the course of his



conversation with him told him that he had quotations from the respondent offering the shooks at 9 cents a case. He testifies that Goff told him this was a mistake; that the price was 9½ cents; and that he was the agent for the Morrison Mill Company. After he had started on his way Goff again wired the respondent the following: "Seattle, Wash., Nov. 3rd, 1910. Morrison Mill Co., Bellingham, Wash.: Mr. Blaauw states he is afraid there may be some misunderstanding in reference to the price as you stated to him over telephone this morning something about a nine cent price. He wants a nine and one-half cent price quoted him on cars Bellingham and understood either he or us will be credited with one-half cent per case commission leaving you nine cents net. He will await his departure for Bellingham until you confirm this. As regards delivery, etc., he will take chance on coming up to make satisfactory arrangements. In wiring reply might be well to state how many could ship this month and next provided you took contract. Washington-Canadian Lumber Co." In answer to this the respondent replied: "No misunderstanding about price. Can furnish twenty thousand this month and more next." The agent reached Bellingham on the same evening, and on the next day entered into a trial order for a limited number of shooks of a better grade than those contemplated at the nine-cent offer, and for an increased price. Subsequently the order was renewed and a large quantity of shooks sold the purchaser.

On November 9, 1910, Goff by letter notified the respondent that he would hold it for commission at one-half cent per case for all shooks sold the Asiatic Petroleum Company. The respondents answered immediately on the receipt of the letter denying its liability for commissions.

[1, 2] It seems to us that there is nothing in the evidence that justifies a recovery on the part of the appellant of the commissions claimed. Before a broker can recover a commission from a seller on account of a sale of any property or commodity, he must have a specific agreement with the seller for the payment of such commission, or the course of dealing must have been such as will clearly imply a promise to pay commissions. Here there is clearly no promise made in writing to pay a commission. Indeed, the writings, and the greater part of the negotiations between the parties were had by writings, clearly negative any such idea. The promise must rest in the telephone conversation, but the conduct of the respondent with regard to the transaction both prior and subsequent to that time plainly indicate that it did not so understand the conversation, though we may believe that the other party to the conversation so understood it. If both are truthful, there was no meeting of minds

upon the proposition, and hence no contract. If one is falsifying, it is better that we adopt the conclusion the trial court reached from the evidence, since the truth rests entirely on the veracity of the witnesses who testified orally before that tribunal, than substitute our own judgment gathered from the printed record.

The judgment is affirmed.

(74 Wash. 477)

#### MUNDY v. KERN et al.

(Supreme Court of Washington. July 28, 1913.)

##### 1. JUSTICES OF THE PEACE (§ 125\*)—JUDGMENT—DELAY IN DOCKETING—EFFECT.

Rem. & Bal. Code, § 1770, directs a justice of peace to keep a docket in which to enter judgments, and section 1859 requires judgment to be entered within three days after the close of the trial. *Held* that, while rendering judgment is a judicial act, the entry of a judgment is a ministerial act, and failure to enter the judgment in the time prescribed by statute does not render the judgment void.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 390-392, 395-399; Dec. Dig. § 125.\*]

##### 2. JUSTICES OF THE PEACE (§ 125\*)—JUDGMENT—DOCKETING—EFFECT OF DELAY.

A delay of ten days in the entering of a judgment is not such an unreasonable delay as to render the judgment void.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 390-392, 395-399; Dec. Dig. § 125.\*]

##### 3. JUSTICES OF THE PEACE (§ 119\*)—"JUDGMENT"—NATURE—ENTRY IN DOCKET.

Rem. & Bal. Code, § 404, defines a judgment to be "the final determination of the rights of the parties in the action." At the close of a trial a justice announced "judgment for plaintiff." *Held*, that this announcement, and not the entry in the docket, constituted the judgment; the entry being only evidence of the judgment.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 373-376; Dec. Dig. § 119.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3827-3842; vol. 8, pp. 7695, 7696.]

##### 4. JUSTICES OF THE PEACE (§ 54\*)—ENTRY OF CAUSE ON DOCKET—JURISDICTION.

The fact that when a cause was tried the justice of the peace had not entered the cause nor any of the proceedings upon his docket, and did not do so until ten days thereafter, did not affect the jurisdiction of the justice of the peace over the subject-matter of the action but was a mere defect, the remedy for which was by appeal.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 190-198; Dec. Dig. § 54.\*]

Department 2. Appeal from Superior Court, Kittitas County; Ralph Kauffman, Judge.

Action by Charles I. Mundy against F. A. Kern and others. From a judgment for defendants on sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Pruyn & Hoeffler, of Ellensburg, for appellant. F. A. Kern, of Ellensburg, for respondents.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



MAIN, J. The purpose of this action is to obtain an injunction restraining the levying of an execution and to have declared void a judgment upon which the execution issued.

On February 26, 1912, the appellant filed in the superior court his amended complaint, the material parts of which are, in substance, as follows: That in the month of December, 1911, the respondent, F. A. Kern, commenced an action before a justice of the peace in Ellensburg precinct, Kittitas county, Wash.; that appellant appeared therein and filed his answer on December 19, 1911; that the cause was tried on the same day and at the conclusion of the trial the justice announced "judgment for plaintiff"; that at the time of the trial the justice had not entered the cause upon his docket, nor any of the proceedings therein, nor had he done so on December 29, 1911; that he did not enter on his docket a judgment in favor of the plaintiff and against the defendant until more than three days had elapsed after the date of the trial; that the judgment so entered is void; that execution has been issued and is now in the hands of the respondent, B. A. German, as sheriff of Kittitas county, who is about to levy upon the property of appellant and sell the same to satisfy the judgment; that appellant will be thereby irreparably injured and has no plain, speedy, or adequate remedy at law. The appellant further alleges facts which constituted his defense to the action before the justice. To this complaint, on March 1, 1912, the respondents filed a general demurrer. Thereafter, and on March 16, 1912, the demurrer was considered by the court and an order entered sustaining the same. The appellant failed to plead further within the time allowed, and on March 16, 1912, a judgment was entered dismissing the appellant's action and rendering judgment against him for costs. This appeal follows.

[1] Section 1770, Rem. & Bal. Code, provides that "every justice of the peace shall keep a docket in a well bound book, in which he shall enter: \* \* \* The judgment of the court, and the time when rendered." The section contains 13 other subdivisions providing other entries which the justice of the peace shall make under proper circumstances prior and subsequent to judgment.

Section 1859, Rem. & Bal. Code, provides: "Upon the verdict of a jury, the justice shall immediately render judgment thereon. When the trial is by the justice, judgment shall be entered immediately after the close of the trial, if the defendant has been arrested and is still in custody; in other cases it shall be entered within three days after the close of the trial."

The foregoing provisions of the statute direct the justice to keep a docket, provide the entries he shall make therein and the times when judgments shall be entered there-

in. No time is fixed for the making of the entries other than judgments. When the justice announces or renders judgment, he performs a judicial act; the entry of the judgment in his docket is the performance of a ministerial act. His failure to make the entries in his docket at the time prescribed by the statute does not render the judgment void. This ministerial act may be lawfully performed thereafter. In *Fish v. Emerson*, 44 N. Y. 376, it was said: "The act of rendering judgment by the justice is judicial; that of entering it in his docket is ministerial. The judicial functions of the justice are completed when he has rendered his judgment. The duty of rendering judgment where the cause is tried by himself is imperatively to be performed within four days. The duty of entering it in his docket has been held to be directory merely, owing to its ministerial character; and, although the time is prescribed by the statute to be four days within which it is to be done, that is not a limitation upon the power of the justice, but it may be validly performed afterward."

[2] The appellant cites and apparently chiefly relies upon the case of *Tomlinson v. Litze*, 82 Iowa, 32, 47 N. W. 1015, 31 Am. St. Rep. 458. In that case under a statute requiring the justice to enter a judgment forthwith, it was held that a judgment not entered for more than 90 days after the verdict of the jury had not been entered within a reasonable time and was therefore void. But the rule there announced is hardly applicable to the present case for the reason that there more than 90 days had elapsed after the conclusion of the trial, while in the present case, according to the allegations of the complaint, the judgment had not been entered within 10 days after the time required by the statute. To make the rule of the Iowa case applicable, it would be necessary to hold that a delay of 10 days in entering the judgment was such an unreasonable delay as to avoid the judgment. This, we think, should not be done.

[3] Section 404, Rem. & Bal. Code, defines a judgment to be "the final determination of the rights of the parties in the action." At the close of the trial the justice announced "judgment for plaintiff." It is clear that the justice intended by the words uttered to render judgment in favor of the plaintiff and against the defendant for the full amount of plaintiff's claim. The appellant was evidently present and does not allege that he was misled thereby. The announcement of the justice indicated that he had determined the issues in favor of the plaintiff and against the defendant; that he had determined the rights of the parties and considered that the plaintiff was entitled to judgment in the sum claimed. This announcement and not the entry in his docket constituted the judgment. The entry in the docket, when made, would constitute the best evidence



of the judgment. *Hickey v. Hinsdale*, 8 Mich. 287, 77 Am. Dec. 450; *Packet Co. v. Bellville*, 55 W. Va. 560, 47 S. E. 301.

In the last case cited it is said: "The announcement of the conclusion arrived at by the justice is the judgment; the entry of it upon his docket is simply the evidence of the judgment."

[4] The appellant attempted in his complaint to challenge the jurisdiction of the justice over the subject-matter of the action upon which the judgment was rendered. We do not, however, consider that the facts stated in the amended complaint are sufficient to show a want of jurisdiction by the justice over the subject-matter of the action. It appears to us that the facts alleged were mere matters of defense. If the appellant felt aggrieved by the judgment of the justice in this regard, his remedy was by appeal or review. The facts stated in the amended complaint were not sufficient to constitute a cause of action against the respondents, and the superior court properly sustained their demurrer.

The judgment is therefore affirmed.

ELLIS, FULLERTON, and MORRIS, JJ.,  
concur

(74 Wash. 698)

**HOKO RIVER BOOM CO. v. FAIRSERVICE et al.**

(Supreme Court of Washington. July 31, 1913.)

En Banc. On rehearing. Former opinion (69 Wash. 357, 125 Pac. 145). Affirmed.

**PER CURIAM.** The court has considered this case upon rehearing, and the majority of the court adhere to the opinion as reported in 69 Wash. 357, 125 Pac. 145; and for the reasons there given the judgment should be affirmed.

(74 Wash. 697)

**YAMOAKA v. KLOEBER.**

(Supreme Court of Washington. July 30, 1913.)

On rehearing. Rehearing denied, and judgment affirmed.

For former opinion, see 129 Pac. 387.

**PER CURIAM.** The court has considered this case upon rehearing, and the majority of the court adhere to the opinion as reported in 129 Pac. 387; and for the reasons there given the judgment should be affirmed.

(85 Colo. 175)

**SNOW et al. v. UNION PAC. R. CO.**

(Supreme Court of Colorado. July 7, 1913.)

**1. PUBLIC LANDS (§ 92\*)—GRANTS TO RAILROAD—CONSTRUCTION AND OPERATION.**

Under Act Cong. July 1, 1862, c. 120, 12 Stat. 489, granting to a railroad company named and its successors in title a 400-foot right of

way through the public lands from the Missouri river to the 100th meridian, and the amendment of 1864 (Act July 2, 1864, c. 216, 13 Stat. 356), authorizing an extension of the road from the 100th meridian to connect with the Union Pacific Railroad, and providing that the company constructing the road should be entitled to all the benefits of the original act, the company constructing the extension westerly from the 100th meridian and its successor in title acquired title to a right of way 400 feet wide through the public lands.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 276-282; Dec. Dig. § 92.\*]

**2. ADVERSE POSSESSION (§ 7\*)—LAND SUBJECT TO ADVERSE POSSESSION.**

Under Act Cong. July 1, 1862, c. 120, 12 Stat. 489, granting to a railroad company named a 400-foot right of way through the public lands from the Missouri river to the 100th meridian, and the amendment of 1864 (Act July 2, 1864, c. 216, 13 Stat. 356), authorizing an extension of the road from the 100th meridian to connect with the Union Pacific Railroad, and providing that the company constructing the extension should be entitled to all the benefits of the original act prior to Act June 24, 1912, c. 181, 37 Stat. 133, title could not be acquired by adverse possession to any part of the right of way 400 feet wide acquired by the company constructing the extension, the act of Congress having exclusively determined that a right of way of that width was essential to the performance of the public duties assumed by the grantees.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 24-42; Dec. Dig. § 7; Public Lands, Cent. Dig. §§ 51-53.]

**3. APPEAL AND ERROR (§ 1107\*)—DECISION—EFFECT OF CHANGE IN LAW.**

In an action of ejectment, involving a portion of the right of way granted by Act Cong. July 1, 1862, c. 120, 12 Stat. 489, and Act Cong. July 2, 1864, c. 216, 13 Stat. 356, to the railroad company constructing a road from the 100th meridian westwardly, to connect with the Union Pacific Railroad, a demurrer was sustained to a plea of the statute of limitation. The judgment in the lower court was rendered in March, 1909, and an appeal to the Supreme Court docketed in September, 1909. While the case was pending on appeal Act Cong. June 24, 1912, c. 181, 37 Stat. 133, was passed, which provides that where title or ownership of any part of such right of way is claimed as against the railroad company, its successors or assigns, by adverse possession of the character and duration prescribed by the laws of the state, such adverse possession shall have the same effect as though the land had been granted absolutely, or in fee, instead of being granted as a right of way. Held that, although the judgment of the lower court was correct when rendered, the decision of the appeal was governed by the act of 1912.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4399-4404; Dec. Dig. § 1107.\*]

**4. ADVERSE POSSESSION (§ 3\*) — PROPERTY SUBJECT TO ADVERSE POSSESSION—STATUTES—RETROACTIVE OPERATION.**

Under Act June 24, 1912, c. 181, 37 Stat. 133, providing that where title or ownership of any part of the right of way granted to the Union Pacific Railroad Company by the government by Act Cong. July 1, 1862, c. 120, 12 Stat. 489, is claimed as against such company, its successors or assigns, by adverse possession of the character and duration prescribed by the laws of the state in which the land is situated, such adverse possession shall have the same effect as though the land embraced

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



within the right of way had been granted absolutely, or in fee, instead of being granted as a right of way, in an action of ejectment involving a portion of such right of way, a plea of title by limitation, based upon adverse possession prior to the act of 1912, was good.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 1-5; Dec. Dig. § 3.\*]

Gabbert and Garrigues, JJ., dissenting in part.

En Banc. Appeal from District Court. Arapahoe County; Charles McCall, Judge.

Action by the Union Pacific Railroad Company against George A. Snow and another. Judgment for plaintiff, and defendants appeal. Reversed, and judgment entered for defendants.

Milton Smith, Charles R. Brock, and W. H. Ferguson, all of Denver (W. W. Platt, of Alamosa, of counsel), for appellants. Clayton C. Dorsey and E. I. Thayer, both of Denver, and N. H. Loomis, of Omaha, Neb. (Gerald Hughes, of Denver, of counsel), for appellee.

GARRIGUES, J. This is an action of ejectment brought by the Union Pacific Railroad Company. Judgment below was for plaintiff, and defendants bring the case here on appeal.

[1] 1. In 1862 Congress passed an act (Act July 1, 1862, c. 120, 12 Stat. 489) granting to the Leavenworth, Pawnee & Western Railroad Company, and its successors in title, a 400-foot right of way through the public lands from the Missouri river, where Kansas City is now located, westerly in Kansas to the 100th meridian. In 1864 (Act July 2, 1864, c. 216, 13 Stat. 356) Congress amended the act of 1862, and authorized an extension of the road westerly from the 100th meridian to connect with the Union Pacific at any point desired, and provided the company that constructed the road should be entitled to all the benefits of the act. The Kansas Pacific, as successor in title, constructed the road westerly from the 100th meridian through Denver, and in 1870 connected it with the Union Pacific at Cheyenne. The Union Pacific is the successor in title of the Kansas Pacific, and when the latter built the road through the land, it was a part of the public domain. The only question tried in the lower court was whether the right of way is 400 feet wide through this land. This question has been finally and definitely settled by the Supreme Court of the United States in the late case of *Stuart et al. v. Union Pacific Railroad Company*, 227 U. S. 342, 33 Sup. Ct. 338, 57 L. Ed. —. It is there held that the 400-foot right of way through the public lands, granted to the Leavenworth, Pawnee & Western Railroad Company from the Missouri river to the 100th meridian by the act of 1862, was extended westerly by the act of 1864 to any point desired to connect the road with the Union Pacific; that the constructing company was entitled to all the

benefits of the act; that a right of way is a benefit, and the right of way granted was definitely located by the construction of the road to Cheyenne, and is 200 feet wide from the center line of the track through lands that were public, although never occupied and used to its full width. The land in controversy was public land when the Kansas Pacific built through it and connected with the Union Pacific at Cheyenne. The Leavenworth, Pawnee & Western was the predecessor in title of the Kansas Pacific, and the Union Pacific is the successor in title of the latter. It therefore follows from the final decision of the highest court of the land, by which in this matter we are bound, that the Kansas Pacific became vested by these acts of Congress with title to a right of way 400 feet wide through the land, and that the Union Pacific, its successor in title, is the owner of that right of way.

[2] 2. Defendants pleaded as a second defense the seven-years statute of limitations, to which a general demurrer was sustained, and as to that issue defendants elected to stand on the answer. A jury was waived, and by consent the case was tried to the court on the issue raised by the complaint and the general denial. On the trial defendants admitted that plaintiff's witnesses would testify that the Union Pacific is successor in title to the Kansas Pacific, formerly known as the Union Pacific Railroad Company, Eastern Division, and before that known as the Leavenworth, Pawnee & Western, which are the companies mentioned in the acts of Congress; that in 1870 the Kansas Pacific constructed the road from Kansas City through the land in question to Denver; that the main track is now located as it was at the time of construction; that the Kansas Pacific, as plaintiff's predecessor in title, complied with all the requirements of the acts of Congress; that the Union Pacific is now the owner of the lands granted by Congress for a right of way to the predecessor companies; that the parcel in dispute lies within 200 feet from the center line of the track, but outside a line 100 feet from the center line; that the line through the land is a part of the railroad constructed from the Missouri river at the mouth of the Kansas river westward to connect with the main line of the Union Pacific at Cheyenne; that the road was constructed as authorized by these acts of Congress; and that the defendants detain from the plaintiff the possession of the premises which, prior to the commencement of the action, it demanded from them.

The determination by the court of the facts upon the issue raised by the first defense was, as we have shown, in conformity with the decisions of the Supreme Court of the United States. The remaining question is whether the court erred in its ruling sustaining the company's demurrer to the second de-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



fense, which pleaded the statute of limitations. The district court in sustaining this demurrer followed the decisions of the United States Supreme Court. In *Kindred v. U. P. R. R. Co.*, 168 Fed. 653, 94 C. C. A. 117, decided by the Circuit Court of Appeals, it is said: "It was conclusively determined by the act of Congress that a right of way 400 feet in width was essential to the performance of the public duties assumed by the grantee upon its acceptance of the grant. No part of that right of way could be alienated without the consent of Congress, nor lost by laches or acquiescence. \* \* \* It became in a sense a national public highway, and private encroachments upon it could be neither strengthened nor confirmed by lapse of time." This case was appealed to the Supreme Court of the United States (*Kindred v. U. P. R. R. Co.*, 225 U. S. 582, 32 Sup. Ct. 780, 56 L. Ed. 1216), where on page 597, it is said: "At an early stage of the case it appears to have been contended that the appellants acquired title to parts of the right of way by adverse possession, but as the contention is expressly abandoned in the brief, evidently in view of the ruling in *Northern Pacific Railroad Co. v. Smith*, 171 U. S. 267 [18 Sup. Ct. 794, 43 L. Ed. 157], and *Northern Pacific Railway Co. v. Ely*, 197 U. S. 1 [25 Sup. Ct. 302, 49 L. Ed. 639], it need not be considered." In *Northern Pacific Railway Co. v. Ely*, 197 U. S. at page 5, 25 Sup. Ct. 303, 49 L. Ed. 639, we find the following: "On the 4th day of May, 1903, the decision of this court in *Northern Pacific Railway Company v. Townsend*, 190 U. S. 267 [23 Sup. Ct. 671, 47 L. Ed. 1044], was announced. We there ruled that individuals could not, for private purposes, acquire by adverse possession, under a state statute of limitations, any portion of a right of way granted by the United States to a railroad company in the manner and under the conditions that the right of way was granted to the *Northern Pacific Railroad Company*." In *Northern Pacific Railway Co. v. Townsend*, 190 U. S. at page 272, 23 Sup. Ct. 673, 47 L. Ed. 1044, it is said: "Congress having plainly manifested its intention that the title to and possession of the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way cannot be treated without overthrowing the act of Congress, as forming the basis of an adverse possession, which may ripen into a title good as against the railroad company."

[3, 4] So it is plain that prior to June 24, 1912, an individual could not acquire title to any portion of the 400-foot right of way by the statute of limitations or adverse possession, and that the judgment of the lower court on this issue was correct. The judgment in the lower court was rendered in March, 1909, and the case was docketed here in September, 1909. June 24, 1912, while the

case was pending here on appeal, Congress passed an act (Act June 24, 1912, c. 181, 37 Stat. 138), which, among other things, provides: "That in all instances in which title or ownership of any part of said right of way heretofore mentioned is claimed as against said corporations, or either of them, or the successors or assigns of any of them, by or through adverse possession of the character and duration prescribed by the laws of the state in which the land is situated, such adverse possession shall have the same effect as though the land embraced within the lines of said right of way had been granted by the United States absolutely or in fee instead of being granted as a right of way. That any part of the right of way heretofore mentioned which has been, under the law applicable to that subject, abandoned as a right of way is hereby granted to the owner of the land abutting thereon." In November, 1912, supplemental briefs were filed by appellants' counsel, conceding that at the time of trial, title to no part of the right of way could be acquired by adverse possession or the statute of limitations. But it is now contended that the 1912 act of Congress removes all restrictions against acquiring title by the statute of limitations or adverse possession, not only as to the future, but also regarding the past. A majority of the court are of the opinion the 1912 statute applies to this case while here on appeal, which opinion is based on the following authorities: *United States v. Schooner Peggy*, 1 Cranch, 103, 2 L. Ed. 49; *Cooley's Const. Lim.* § 469, n. 5; 3 Cyc. 407; *Board v. Glover*, 160 U. S. 170, 16 Sup. Ct. 321, 40 L. Ed. 382; same case on rehearing, 161 U. S. 101, 16 Sup. Ct. 492, 40 L. Ed. 632; *Dinsmore v. Company*, 183 U. S. 115, 22 Sup. Ct. 45, 46 L. Ed. 111; *American Co. v. City*, 119 Fed. 691, 55 C. C. A. 328; *Day v. Day*, 22 Md. 530; *Price v. Nesbitt*, 29 Md. 263; *Meloy v. Scott*, 83 Md. 375, 35 Atl. 20; *Chesapeake Co. v. Western Co.*, 99 Md. 570, 58 Atl. 34; *Ferry v. Campbell*, 110 Iowa, 290, 81 N. W. 604, 50 L. R. A. 92; *Simpson v. Stoddard County*, 173 Mo. 421, 73 S. W. 700; *Vance v. Rankin*, 194 Ill. 625, 62 N. E. 807, 88 Am. St. Rep. 173; *K. P. Ry. Co. v. Twombly*, 100 U. S. 78, 25 L. Ed. 550. They are also of the opinion it is controlling, and the case should be reversed, and judgment entered here in favor of appellants.

The writer does not agree with the court as to that part of the opinion which decides that the statute of 1912 applies to this case here on appeal. I am of the opinion the case is here for the purpose of reviewing the judgment of the lower court, to reverse which we must find prejudicial error. The judgment of the lower court is in strict conformity with the decisions of the Supreme Court of the United States, and therefore, when rendered, was not erroneous. In my judgment, the cases cited do not support the opinion of the court. The leading case (*U. S.*



v. Schooner Peggy, 1 Cranch, 103, 2 L. Ed. 49), has no similarity and its reasoning cannot be applied to the facts and conditions here existing. That decision was based upon a treaty between the United States and France, and in the opinion the Chief Justice said: "It is in the general truth that the province of an appellate court is only to inquire whether a judgment *when rendered* was erroneous or not. \* \* \* It is true that in mere private cases \* \* \* a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties." The Maryland cases, in my opinion, are the only ones cited which are apparently in point, and they fairly illustrate a slavish adherence to precedent. They purport to be based on the Schooner Case, and quote an isolated paragraph therefrom as authority for their contention, notwithstanding the case bears no similarity in fact or principle to those in which it is cited. It is a misapplication of a misconceived authority. The case of K. P. Ry. Co. v. Twombly, 100 U. S. 78, 25 L. Ed. 550, instead of supporting the opinion of the court, it seems to me to be directly contrary. It says in the syllabus, "Where no errors are found in the record, all this court can do is to affirm the judgment." I am authorized to say that Mr. Justice GABBERT concurs in this view.

The judgment of the lower court is reversed, and judgment will be entered here in favor of appellants.

Reversed.

(55 Colo. 174.)

#### SIDES et al. v. UNION PAC. R. CO.

(Supreme Court of Colorado. July 7, 1913.)

In Banc. Appeal from District Court, Arapahoe County; Charles McCall, Judge.

Action by the Union Pacific Railroad Company against Martin V. Sides and another. Judgment for plaintiff, and defendants appeal. Reversed, and judgment entered for defendants.

Milton Smith, Charles R. Brock, and W. H. Ferguson, all of Denver (W. W. Platt, of Denver, of counsel), for appellants. Clayton C. Dorsey and E. I. Thayer, both of Denver, and N. H. Loomis, of Omaha, Neb. (Gerald Hughes, of Denver, of counsel), for appellee.

GARRIGUES, J. This case presents the identical question decided in No. 6951, entitled Snow et al. v. Union Pacific Railroad Co., 133 Pac. 1037. For the reasons stated in that opinion, the judgment of the lower court is reversed, and judgment will be entered here in favor of appellants.

Reversed.

(55 Colo. 264)

#### CANON CITY v. COX.

(Supreme Court of Colorado. June 2, 1913.)

#### 1. MUNICIPAL CORPORATIONS (§ 741\*)—NEGLIGENCE—NOTICE—STATUTES.

The object of Rev. St. 1908, § 6661, providing that no action for personal injury against a city shall be maintained unless writ-

ten notice of the time, place, and cause of injury is given to the clerk by the person injured, his agent or attorney, within 90 days, is to require a person sustaining a personal injury to advise the city in what its negligence consists, and give it an opportunity to investigate the nature and cause of injury while the conditions remain substantially the same.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1562; Dec. Dig. § 741.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 851\*)—PARKS—NEGLIGENCE OF MUNICIPAL OFFICERS—LIABILITY.

Where a park, which is the private property of a city, is under the exclusive control of a park commission appointed by authority of the city, the commissioners are municipal officers, and must exercise reasonable care to maintain the park and devices therein in a reasonably safe condition; and their failure to do so is negligence for which the city is liable for personal injury proximately caused thereby.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1808; Dec. Dig. § 851.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 857\*)—NEGLECT MAINTENANCE OF PARKS AND APPLIANCES THEREIN—EVIDENCE—SUFFICIENCY.

In an action against a city for injuries to a child playing on a merry-go-round in a park of the city, evidence held to sustain a finding that the city was negligent in maintaining the appliance in a defective condition.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1812; Dec. Dig. § 857.\*]

#### 4. MUNICIPAL CORPORATIONS (§ 851\*)—PARKS AND APPLIANCES—DEFECTS—NOTICE.

A city has constructive notice of a defect in an appliance maintained by it in its public park, where the defect has existed for such a length of time prior to an injury therefrom that its proper officers, by the exercise of ordinary diligence, could have ascertained its existence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1808; Dec. Dig. § 851.\*]

#### 5. DAMAGES (§ 132\*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

A verdict for \$8,000 for injuries to a seven year old child, necessitating the amputation of the left arm at the left shoulder joint, will not be disturbed as excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

#### 6. APPEAL AND ERROR (§ 169\*)—QUESTIONS REVIEWABLE—QUESTIONS NOT RAISED IN TRIAL COURT.

A question not called to the attention of the trial court, and not covered by any assignment of error, will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018-1034; Dec. Dig. § 169.\*]

#### 7. MUNICIPAL CORPORATIONS (§ 741\*)—PERSONAL INJURIES—NOTICE—SERVICE.

Where the notice required by Rev. St. 1908, § 6661, providing that no action for a personal injury against a city shall be maintained unless notice of the time, place, and cause of the injury is given to the clerk of the city, is signed by the person injured, his agent or attorney, it is immaterial who serves it on the clerk so long as it reaches him within the time specified.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1562; Dec. Dig. § 741.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**8. MUNICIPAL CORPORATIONS (§ 741\*)—PERSONAL INJURIES—NOTICE—SUFFICIENCY.**

A summons and complaint, in an action against a city for personal injuries, which state the time, place, and cause of the injury, and which are signed by the attorney for the person injured, and which are delivered to the mayor who delivers them to the clerk within the statutory time, constitute a compliance with Rev. St. 1908, § 6861, requiring the giving to the city clerk notice of the time, place, and cause of a personal injury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1562; Dec. Dig. § 741.\*]

Appeal from District Court, Fremont County; Charles Cavender, Judge.

Action by Genevieve Cox, by Grant Cox, her father and next friend, against the City of Canon City. Judgment for plaintiff, and defendant appeals. Affirmed.

Hardy Sayre, of San Diego, Cal., and Augustus Pease, of Canon City, for appellant. Joseph H. Maupin and James T. Locke, both of Canon City, for appellee.

GABBERT, J. Appellee, as plaintiff, commenced an action against the city of Canon City to recover damages sustained by the alleged negligence of the latter. The verdict and judgment were in her favor. The defendant appeals.

The first point made by counsel for appellant is that the preliminary notice of injury for which damages were claimed, as required by section 6861, R. S. 1908, was not given the city. This section is as follows: "No action for the recovery of compensation for personal injury or death against any city of the first or second class or any town on account of its negligence, shall be maintained unless written notice of the time, place and cause of injury is given to the clerk of the city, or recorder of the town, by the person injured, his agent or attorney, within ninety (90) days and the action is commenced within two years from the occurrence of the accident causing injury or death. \* \* \*" Within 60 days of the injury plaintiff instituted a suit against the city without having given the notice required by the above section. Before an answer had been filed by the city, plaintiff voluntarily dismissed this action and commenced the one under consideration. In her complaint in this action she charged that within 90 days of the date of her injury, and before the commencement of this action, written notice of the time, place, and cause of her injury was given to, and received by, the clerk of the city; that this notice was entitled, "Genevieve Cox, by Grant Cox, her father and next friend, Plaintiff, v. City of Canon City, Defendant," and was designated "Complaint," and was signed "Joseph H. Maupin, Attorney for the Plaintiff." It further appears from apt averments that this notice described with particularity the time, place, and cause of injury of plaintiff, and

fully complied with the requirements of the statute in these respects. At the trial of the cause it developed that the notice so claimed to have been given was a copy of the summons issued in her original action, to which was attached a copy of her complaint in that suit. These copies were served on the mayor by a deputy sheriff less than 60 days after the injury. Very shortly thereafter, the mayor delivered these copies to the city clerk. At a meeting of the city council a few days after the service of the summons and complaint on the mayor, at which all the members were present, the record of the proceedings then had show that "Mayor Tanner reported that summons from the district court, wherein Genevieve Cox sues the city for \$20,000 damages for injuries alleged to have been sustained on account of a fall at the city park, had been served on him by the sheriff of Fremont county."

[1] The first question to consider is whether the statute requiring a notice as a condition precedent to the right to maintain the action was complied with. We think it was. The object of the statute is to require a plaintiff to advise the city, through its executive officers, in what its alleged negligence consists, and afford it an opportunity, at an early date, to investigate the nature and cause of the injury while the conditions remain substantially the same. City of Denver v. Saulcey, 5 Colo. App. 420, 38 Pac. 1098; City of Pueblo v. Babbitt, 47 Colo. 593, 108 Pac. 175. The statute says this notice shall be served upon the clerk, and evidently contemplates that through this channel the claim thereby made will be called to the attention of the city council or other proper officials. In the case at bar it appears that the claim of plaintiff was brought to the notice of the council when in session by the mayor. The copy of the complaint in the case was then in the hands of the clerk. True plaintiff could not maintain her action without the service of the notice contemplated by the statute, but when it appears, as it does, that by means of a copy of the summons, to which was attached a copy of her complaint, issued and filed in her first action, the identical officer named in the statute was advised of her claim, together with the action of the mayor by his report to the council in session, that he had been served with summons in the case, the object of the law was accomplished, and that the service of these papers constituted such notice as would enable plaintiff to maintain her second action in so far as the question of the statutory preliminary notice is involved. In other words, the city authorities were thereby advised of the claim of plaintiff, the cause of her injury, and the time and place where it occurred, as set out in her second action. This is the main purpose of the law, and in the circumstances of this case

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
183 P.—66



we think it was carried out, and the requirements of the statute on the subject of notice complied with. *Powers v. City of Boulder*, 131 Pac. 395.

It is also urged on behalf of appellant that the copy of the summons and complaint introduced in evidence as having been served upon the mayor, and which afterwards reached the clerk, were not sufficiently identified to justify admission. Without reviewing the evidence on this subject, we think it is sufficient to say that in our opinion there is no merit in this claim.

On behalf of the city it is claimed that the copies of the summons and complaint did not constitute the statutory notice. These copies conveyed all the information which the statute requires, and more. They were signed by the plaintiff's attorney, and although they were designated copies of a summons and a complaint, they served the purpose to convey the information therein contained, regardless of their designation by name.

It is next contended that the copy of the complaint was not intended or taken by anybody as a statutory notice. At the time of the service this was probably true, but as by this means it appears such notice was given the city as would permit the plaintiff to maintain her second action, we think the original purpose of the service is immaterial.

Plaintiff, at the time of her injury, was about seven years of age, and was injured while engaged in play with two girl companions a trifle older, on a parcel of land owned by appellant, and located within the corporate limits of the city, and generally known as its city park. The children were playing with a contrivance known as a merry-go-round, which consisted of a wooden post set in the ground, and extending about three feet above the surface, across the top of which a plank about 12 feet in length was balanced by means of an iron pin through the center of the plank and the top of the post. This plank could be rocked like a teeter-board, and also swung around. Plaintiff and one of the other girls were on the board, one at each end, with the third pushing them around, when the plank fell on plaintiff, breaking her arm. This contrivance, with the knowledge and consent of the city, had been constructed and maintained by a voluntary association known as the "Civic Improvement League." Later the park was under the control of the park commission appointed by the mayor and council. This commission, at the time of plaintiff's injury, had the exclusive management and control of the park. Counsel for the city urge that the evidence is insufficient to establish liability of the city for the reasons: (1) The control of the park was under the exclusive control of the commission; (2) the merry-go-round was a mere amusement contrivance, and in constructing and maintaining it the city was acting in a governmental

capacity, and was not liable for injuries to users resulting from defective construction or maintenance; and (3) that it was not defective, or, if it was, the city did not have notice of its defective condition.

[2] The first two propositions can be considered together. The park was the private and exclusive property of the city. Its exclusive management and control was in the hands of a park commission appointed by its authority. The commissioners were therefore municipal officers, and they were bound to exercise reasonable care to maintain the device in question in a reasonably safe condition. Their failure to do so would constitute negligence for which the city is liable if such negligence was the proximate cause of plaintiff's injury. This question is authoritatively settled in *City of Denver v. Spencer*, 34 Colo. 270, 82 Pac. 590, 2 L. R. A. (N. S.) 147, 114 Am. St. Rep. 158, and further discussion of the subject is unnecessary. See, also, *City of Denver v. Rhodes*, 9 Colo. 554, 13 Pac. 729; *City of Denver v. Dunsmore*, 7 Colo. 328, 3 Pac. 705; *City of Denver v. Capelli*, 4 Colo. 25, 34 Am. Rep. 62; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. Ed. 440.

[3] With respect to the third proposition, the evidence discloses without question that the city knew of the existence of the merry-go-round for about two years previous to plaintiff's injury. It appears that the pin which held the plank to the post was without a key, or any suitable appliance to prevent it coming out; that is, the pin was merely held in place by its own weight. The whirling of the plank had worn the hole in the post and plank, by means of which the plank, as a witness expressed it, was "wobbly" or "shaky," because it would tilt sideways as a result of the hole being worn. It appears from the testimony that the contrivance had been in this condition for a considerable length of time, perhaps a year; that its condition rendered it unsafe, for the reason that the plank was liable to fall when being whirled or teetered, and that in fact it had fallen several times when being used by children. We think this evidence was sufficient to sustain the finding of the jury that the defendant was guilty of actionable negligence.

[4] The city will be presumed to have what in law is termed constructive notice of a defect for which it may be liable, when it has existed for such a length of time prior to an injury therefrom that its proper official, by the exercise of ordinary diligence, could have ascertained its existence. *City of Denver v. Hyatt*, 28 Colo. 129, 63 Pac. 403.

[5] The jury returned a verdict for \$12,800. In ruling on the motion of appellant for a new trial, the court announced that it would be granted unless plaintiff would agree to remit the sum of \$4,800. Counsel for plaintiff accepted the reduction. The motion for a new trial was overruled, and judg-



ment entered for \$8,000. This judgment the defendant claims is excessive. We do not so regard it. Plaintiff sustained a compound fracture of the left arm above the elbow; the tissues were badly contused, and fragments of the fractured bones penetrated the flesh. The wound developed a poison called "gas germ." Gangrene set in, and, in order to save plaintiff's life, the arm was amputated at the left shoulder joint. For such a serious injury we do not think it can be said that \$8,000 is an excessive award.

[6] At the oral argument it was suggested that, inasmuch as the trial judge ruled that the verdict was excessive, a new trial should have been granted unconditionally. That question was not called to the attention of the trial court; neither is there any assignment of error covering it.

The judgment of the district court is affirmed.

Judgment affirmed.

Chief Justice MUSSER, and Mr. Justice HILL concur in the affirmance of the judgment and in the opinion, except as it may be modified by the following opinion by

MUSSER, C. J. [7, 8] Mr. Justice HILL and myself are of opinion that when the notice required by the statute is signed by the person injured, his agent or attorney, it is immaterial who serves it upon or leaves it with the clerk, so that it reaches that officer within the time. In this case the summons and complaint in the former action, signed by the attorney for the person injured and stating the time, place, and cause of the injury, was delivered by the mayor to the clerk within the 90 days. This, in our opinion, was a full compliance with the statute.

(55 Colo. 302)

# CAMPBELL v. PEOPLE.†

(Supreme Court of Colorado. March 3, 1913.)

## 1. HOMICIDE (§ 105\*)—JUSTIFIABLE HOMICIDE—HOMICIDE BY OFFICER.

While a police officer may use such force as is reasonably and apparently necessary to retain the custody of one arrested, he cannot kill a person for such purpose, unless there is an apparent necessity therefor.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 135; Dec. Dig. § 105.\*]

## 2. HOMICIDE (§ 254\*)—SUFFICIENCY OF EVIDENCE.

Evidence in a prosecution for homicide committed while acting as a police officer held sufficient to sustain a conviction of second-degree murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 533-538; Dec. Dig. § 254.\*]

## 3. HOMICIDE (§ 342\*)—APPEAL—HARMLESS ERROR.

Where the evidence was sufficient to sustain a conviction for second-degree murder, ac-

cused cannot complain of error in convicting him of manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 722; Dec. Dig. § 342.\*]

## 4. CRIMINAL LAW (§ 829\*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

Requested instructions which are substantially covered by those given in a criminal case are properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.\*]

## 5. HOMICIDE (§ 298\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In a prosecution of a police officer for homicide committed while acting as an officer, after accused had directed decedent to move on down the street, the court instructed that a private citizen had the right to use the city streets, and so long as he conducted himself peaceably could not be arrested for investigation, and if decedent and his brother had not committed any crime, and there was no reasonable ground for arrest of either of them, and accused, knowing that, sought to arrest and strike or beat decedent, such acts were not justified. There was evidence that accused directed decedent to move on down the street without any apparent cause, and that he beat his brother, because the latter objected to the accused striking decedent to make him move on. Held, that the instruction was supported by evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 612; Dec. Dig. § 298.\*]

## 6. CRIMINAL LAW (§ 1038\*)—APPEAL—PRESENTATION BELOW.

Instructions not objected to by accused at trial will not be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2646; Dec. Dig. § 1038.\*]

## 7. CRIMINAL LAW (§ 918\*)—ADMINISTRATION—DE FACTO OFFICER.

An oath administered by a de facto officer is binding, so that it was not ground for a new trial in a criminal case that the deputy clerk who administered the oath to the jury and witnesses was a minor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2163-2192, 2195, 2196, 2219-2224; Dec. Dig. § 918.\*]

Error to District Court, City and County of Denver; H. C. Riddle, Judge.

Frank Campbell was convicted of voluntary manslaughter, and he brings error. Affirmed.

John I. Mullins and Simon J. Heller, of Denver (T. E. McIntyre and Alexander M. Smith, both of Denver, of counsel), for plaintiff in error. Benjamin Griffith, Atty. Gen., Archibald A. Lee, Deputy Atty. Gen., and Theo. M. Stuart, Jr., Asst. Atty. Gen., for the People.

GABBERT, J. Plaintiff in error caused the death of Roy Blackford, and for this homicide was charged with the crime of murder. A jury returned a verdict of voluntary manslaughter, and he was sentenced to the penitentiary for a term of not less than two nor more than three years. In his behalf it is asserted that the testimony does not support the verdict. The material testimony is substantially as follows:

Plaintiff in error, whom we shall hereafter designate as defendant, was a policeman on

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indices

† For opinion on petition for rehearing, see 133 Pac. 1199.



duty about 8:30 in the evening on Market street, in the city of Denver. On the part of the people the testimony was that William Bell, about 17 years of age, was sitting on the doorstep in front of a market, talking with Roy Blackford, when the defendant accosted and asked him where he was from, and what he was doing, to which Bell replied he was looking for work. At this time Harry Blackford, a brother of Roy, stepped up and asked Bell if he was going to work in the morning, and started to sit down by the side of his brother, when the defendant took hold of Harry and threw him on the steps in front of the market. The defendant then struck Harry with his fist, and chased him down the street a short distance, and brought him back. Roy Blackford then said to the defendant, "That is my brother; you hadn't ought to do anything like that," when the defendant struck him (Roy) over the head three times with his club, fracturing his skull, from the effects of which he died the next morning. Further evidence on the part of the people was to the effect that neither Bell nor the Blackfords used any insulting language toward the defendant, nor had either of them offered him any violence. The defendant in error testified that he spoke to Bell; that Harry said to the Bell boy, "Come on, kid, if you are going to work in the morning;" that he, the defendant, said to Harry, "Go on down the street." What then occurred, according to the defendant's testimony, is as follows: "And when I told him to go on down the street he simply crossed in front of me and sat right here \* \* \* in this recess of the doorway; \* \* \* so I told him, 'You move on as I told you,' and I took him by the arm and gave him a push down the street, and he went sort of diagonally across the sidewalk down to a position not over 12 feet from this first place, where the boy, Bell, was sitting. They have some steps there; \* \* \* he sat on them, and I went again and told him, and said, 'You go down the street as I told you to;' \* \* \* and he got up and said he didn't have to, his brother was there. \* \* \* He got up and straightened up to me, facing me, instead of going, and as he did I struck him flat with my hand across the cheek, and started down the street, and knocked his hat off. I picked up his hat and gave it to him, and he wouldn't go, and I took him by the cuff \* \* \* with my left hand, and I walked back to where this boy, Bell was. I put my stick under my left arm, and I reached down and got hold of the boy, Bell, by the cuff, and straightened up with him, and as I was turning I saw this other fellow, Roy Blackford, standing with his fist drawn back, and I had the two boys, and I kind of pushed them, and I told him to go away, 'Go on and go away from here;' and he wouldn't do it. I held the two boys with one hand, and I pulled my stick out and struck him once, and he was still in the same attitude,

and I struck him again, and he went down, and he tried to get up, and I reached down with my hand and told him to stay there. I didn't want to strike him again, at all." The defendant further stated that he did not strike Blackford with the intention of killing him, but just to subdue him, to keep him from striking him. As his reason for striking Roy with the club, he stated (quoting from the abstract): "I had my hands full with two prisoners, and I had to protect my prisoners and protect myself; protect my prisoners to get them to jail, after I had put them under arrest in order that I might keep them (the prisoners) that I had already arrested, under arrest. These two were under arrest when Roy Blackford approached me and drew back his hand; never had any previous difficulty with Roy; never saw him until just the time I saw him there. There was no feeling of any kind between us; no ill will."

With respect to the force used, a witness on behalf of the people testified on cross-examination, in describing the action of the defendant: "In the first place, he said, 'You want some of it, too?' and then he hit him then, and then hit the lick, a back-handed blow like that and came back this way (witness illustrating), and he was pretty near down, and then he struck him across here (witness indicating), and then he turned to me and said, 'This is what I ought to do to you.' Q. This first lick was across the bridge of the nose? A. Yes, sir; and the next one was here, and the next one was up here, right across here (witness indicating). Q. That first lick was the hardest lick that was struck, wasn't it? A. They all three was pretty hard. Q. When he jumped at your brother, he struck him a very hard lick across the nose? A. He didn't jump; he turned around like that (witness illustrating); he turned around very suddenly, and hit him with his billy with all his force." It will be observed from the foregoing statement that neither of the parties taken into custody had committed any offense in the presence of the defendant. It also appears that defendant was not attempting to take these parties into custody by virtue of any legal process, or because they were charged with any felony, from the following questions propounded to him, and his answers thereto: "Q. The only right you claimed to interfere with him (Bell) at all was because he was a boy. Is that all? A. A young boy in that neighborhood. Q. The only reason in the world that you had for arresting that boy (Harry Blackford) on that night was because he refused to go further on down the street without his brother accompanied him? Isn't that so? A. I arrested him for investigation. The primary cause was because he interfered with me."

As we understand the contention of counsel for defendant, their argument in support of the proposition that the evidence is not



sufficient to support the verdict is to the effect that, as defendant committed the homicide in the performance of his official duty, he was not guilty of murder, for the reason that in such circumstances he did not take the life of Blackford with specific intent deliberately formed and acted upon, and consequently could not be guilty of voluntary manslaughter because there was no intent on his part to take Blackford's life. Section 1635, R. S. 1908, is as follows: "If an officer in the execution of his office in a criminal case, having legal process, be resisted and assaulted, he shall be justified if he kill the assailant. If an officer or private person attempt to take a person charged with treason, murder, rape, burglary, robbery, arson, perjury, forgery, counterfeiting or other crime denominated felony by the common law, and he or they be resisted in the endeavor to take the person accused and to prevent the escape of the accused, by reason of such resistance, he or she be killed, the officer or private person so killing shall be justified; provided that such officer or private person previous to such killing shall have used all reasonable efforts to take the accused without success, and that from all probability there was no prospect of being able to prevent injury from such resistance, and the consequent escape of such accused person."

[1] Conceding, for the sake of the argument, that defendant had lawfully arrested Bell and Harry Blackford, the important question to determine is whether or not he was justified in taking the life of Roy Blackford in order to prevent the escape or rescue of his prisoners. The defendant had the right to use such force as was reasonable and apparently necessary to retain the custody of the parties he had arrested; but the law does not clothe an officer with authority to judge arbitrarily of the necessity of killing a person to prevent the rescue of a prisoner. He cannot kill for this purpose, unless there is an apparent necessity for it, and the jury must determine from the testimony the absence or existence of such necessity. *State v. Bland*, 97 N. C. 438, 2 S. E. 460. According to the testimony for the people, Roy simply protested against defendant striking his brother. The excuse given by the defendant for striking Roy is to the effect that he approached him and drew back his fist after he had taken Bell and Harry into custody, and as Roy had refused to get out of the way when commanded to do so he struck him, in order that he might retain the custody of his prisoners, and prevent Roy from striking him. It was for the jury to determine which version of the circumstances under which the homicide was committed was true, and also to determine from the version they adopted the necessity for the defendant striking Roy with his club. When a peace officer takes a human life in circumstances which the law does not justify, he cannot take

shelter behind his character, and claim that he was acting in his official capacity. In such circumstances his guilt or innocence of a criminal homicide must be determined from the facts established by the testimony under the rule above announced.

Counsel for defendant also urge that the evidence does not sustain the verdict of voluntary manslaughter, for the reason that the testimony does not disclose the elements of passion or provocation necessary to reduce an intentional killing to that degree of criminal homicide. Conceding this to be correct, the defendant cannot successfully complain. The information charged murder, and included all degrees of criminal homicide. The unjustified use of an instrument on a part of the body of one killed thereby in a manner calculated to take human life tends to prove malice aforethought of the slayer. According to the testimony on behalf of the people, the jury could have determined that striking the deceased on the head several times with the club wielded by defendant was not justified; that so striking the deceased was calculated to cause his death; and, although not done with premeditation and deliberation to take the life of the deceased, it was done willfully and with malice aforethought. In such circumstances the law holds the slayer responsible for the consequences of his acts.

[2, 3] So that, as defendant from the testimony might have been found guilty of murder in the second degree, he cannot, for the reason assigned, be heard to say that a conviction for manslaughter is erroneous.

It is next contended that the court erred in denying defendant's motion for a directed verdict of not guilty interposed at the time the testimony on the part of the prosecution closed. This motion was based upon the ground that the testimony did not establish that deceased died as the result of injuries inflicted by the defendant. This motion was clearly without merit, and was properly overruled.

[4] Error is also assigned upon the refusal of the court to give certain instructions requested by the defendant. These instructions were based upon the theory that defendant, in making the arrest of Bell and Harry Blackford, and in resisting the interference of deceased, was acting within his authority in the capacity of a police officer. The court on its own motion gave an instruction which gave the defendant the benefit of the theory upon which the instructions refused were grounded. It is not error to refuse instructions which are substantially covered by those given.

[5] Error is further assigned upon an instruction given, to the effect that a private citizen has a right to use and enjoy the public thoroughfares of the city, and, so long as he conducts himself in an orderly and peaceable manner, is not subject to arrest for investigation, and if it appeared from the



evidence beyond a reasonable doubt that Bell and Harry Blackford had not committed any crime, or otherwise broken the law, and that there was no reasonable ground for the arrest of either of these parties, and the defendant, knowing this, sought to arrest and strike or beat the deceased, such acts were not justified under the law, as in such circumstances he would not be acting within the scope of his authority as an officer. In the circumstances of this case we think this instruction cannot be successfully challenged. Its effect was to advise the jury that if defendant was knowingly committing an illegal act in arresting the Bell boy and the Blackfords, and, growing out of this, beat deceased, he was not justified in so doing. We think the evidence is ample to warrant the instruction upon the theory that defendant was knowingly acting without legal authority in arresting any of the parties; and as, according to the evidence on the part of the people, he beat Roy because he had objected to him striking his brother, there was testimony from which it could be inferred that this act was wholly unjustified. Under such a state of facts, which the testimony tended to establish, the defendant stands upon the same plane as though he had been a private citizen committing the same acts.

[8] Other instructions given and complained of will not be considered, because it appears they were not objected to by the defendant at the trial. Aside from this, it is clear that the defendant was not prejudiced by these instructions.

[7] In the motion for a new trial the defendant set out that the deputy clerk, who administered the oaths to the jury and witnesses, was a minor. It was not stated in the affidavit supporting the motion upon this ground that defendant was not aware of this at the time the oaths were administered by the deputy; but, waiving this, that official was at least a de facto officer. An oath administered by an officer de facto is as valid and binding as if he were an officer de jure. *Walker v. State*, 107 Ala. 5, 18 South. 393; *Izer v. State*, 77 Md. 110, 26 A.H. 283; 30 Cyc. 1416.

The judgment of the district court is affirmed.

Judgment affirmed.

MUSSER, C. J., and HILL, J., concur.

(24 Colo. App. 377)

#### CONSOLIDATED LOWER BOULDER RESERVOIR & DITCH CO. v. ALAUX.

(Court of Appeals of Colorado. July 14, 1913.)

#### 1. APPEAL AND ERROR (§ 1002\*)—VERDICT—CONFLICTING EVIDENCE—REVIEW.

Where, in an action for injury to land by seepage, the evidence was conflicting, and the court instructed that the burden was on plaintiff to prove his causes of action by a preponderance of the evidence, and that defendant's

negligence was the proximate cause of the seepage of water from defendant's ditch, and defined the term "preponderance," defendant could not contend on appeal that a verdict for plaintiff was against the preponderance of the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

#### 2. EVIDENCE (§ 474\*)—OPINION EVIDENCE—VALUE OF LAND.

Witnesses who had lived and owned property in the vicinity of the property in controversy for several years prior to the trial, who were acquainted with the property, knew of sales being made and prices received for other similar property and the value thereof, were qualified to testify as to the value of the property in question.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2190-2219; Dec. Dig. § 474.\*]

#### 3. TRIAL (§ 255\*)—INSTRUCTIONS—OMISSIONS—REQUEST TO CHARGE.

In an action for injury to real property by seepage from an irrigation ditch, an instruction that the measure of damages was the difference between the market value of the property damaged immediately before the damage occurred and such value when suit was begun was not objectionable because the court did not further charge as to any depreciation in value by closing certain mines in the vicinity, and the moving away of a large number of the inhabitants, where defendant merely objected to the instruction as a whole without a request covering the qualification.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 627-641; Dec. Dig. § 255.\*]

#### 4. TRIAL (§ 296\*)—INSTRUCTIONS—CURING ERROR.

The error was also cured by other instructions that the jury must base their verdict on the damages sustained on account of seepage from defendant's ditch.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 703-713, 715, 716, 718; Dec. Dig. § 296.\*]

Appeal from District Court, Boulder County; James E. Garrigues, Judge.

Action by Charles Alaux, Sr., against the Consolidated Lower Boulder Reservoir & Ditch Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Rowland & Giffin, of Boulder, for appellant. O. A. Johnson, of Boulder, for appellee.

MORGAN, J. The Boulder district court rendered judgment on a verdict for the aggregate amount of \$1,000 upon plaintiff's three separate claims for damages caused by the seepage of the water from defendant's irrigating canal upon the land of plaintiff and two neighbors who assigned their claims to him, destroying the vegetation and injuring the soil and improvements, and thus lessening the value of the property. The defendant appeals. The judgment should be affirmed.

[1] The appellant contends there was not "that preponderance of the evidence" to show negligence that the law requires in such instances. On this question the evidence was conflicting, and the court instructed the jury

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



that the "burden is upon the plaintiff to prove his alleged causes of action by the preponderance of the evidence" and to prove that "defendant's negligence was the proximate cause of the seepage, and that the property was injured thereby," and then defined preponderance; therefore this contention is without merit.

[2] It is further contended that witnesses were permitted to testify concerning the value of the property damaged, without sufficient qualification as to their knowledge. Their testimony was that they lived and owned property in that vicinity at and for several years prior to the time at which the values were in question; that they knew the property involved, knew of sales being made and prices received for other property; and that they knew what such value was. One witness had been a deputy assessor there for 4 years, and one had bought and sold property there for 20 years. This was sufficient.

[3] It is further contended that the court erred in instructing the jury, upon the question of damages, that the measure thereof is the difference between the market value of the property damaged immediately prior to the time when the damage occurred and such value at the time the suit was begun, without further instructing the jury or calling their attention in any way to the depreciation in the value of the property caused by closing the mines near the place where the property is situated and the moving away from such vicinity of a number of the inhabitants thereof. This contention would be well founded under this instruction (which should have limited the measure of damage to the difference, caused by seepage, between the market value immediately before the damage occurred and immediately after the final culmination thereof) if the testimony introduced by the defendant concerning such depreciation had been sufficiently definite in its character upon which to base such an instruction, and also if the defendant had requested the court at the time to instruct the jury in this regard instead of merely objecting and excepting to the instruction given, without suggesting this feature. The evidence as to the wet condition of the land damaged, from the beginning of the seepage toward the commencement of the action, reasonably warranted the form of the instruction, but it may readily be comprehended that this instruction, given without calling the jury's attention to the depreciation in the value by other things than that complained of by the plaintiff, would be erroneous, if such depreciation clearly appeared from the testimony, in a definite and ascertainable form, and if the court had been requested to so instruct the jury, and did not in any other way cure the defect; but the evidence did not establish anything more than the closing of the mines and the consequent decrease in

the population and values. It was not shown to what extent property had depreciated for this reason. The objection to this instruction was upon the sole ground that it was incorrect as to the measure of damages, and no instruction was tendered covering the defect, nor was the court's attention called to it.

[4] The court, however, instructed the jury in one or two instances that they must base their verdict upon the damages sustained on account of seepage from defendant's ditch, thus curing the defect complained of.

There was no reversible error committed by the lower court, and no substantial right denied the appellant, and, mindful of the statute requiring a disregard of all errors that do not go to the substantial rights of the parties, the judgment of the lower court is affirmed.

Affirmed.

(24 Colo. App. 272)

GURNETT v. HENRY.

(Court of Appeals of Colorado. July 14, 1913.)

1. TAXATION (§ 789\*)—TAX DEEDS—PROCEEDINGS SUBSEQUENT TO SALE.

Where it appears that a tax deed was issued upon a certificate of sale, originally issued to the county and was as signed by the county more than three years after its date, the deed is void on its face and not admissible as evidence of title.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1556-1569; Dec. Dig. § 789.\*]

2. PROPERTY (§ 9\*)—EVIDENCE AS POSSESSION.

In the absence of any evidence to the contrary, title to land raises a presumption of possession.

[Ed. Note.—For other cases, see Property, Dec. Dig. § 9.\*]

3. APPEAL AND ERROR (§ 877\*)—PERSONS ENTITLED TO ALLEGE ERROR.

In an action to quiet title, where the land was vacant, a judgment for the plaintiff, who proved title, will not be reversed because of the absence of evidence of possession as alleged in the complaint, since no prejudice results therefrom to a defendant who has proved no title.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3560-3572; Dec. Dig. § 877.\*]

Appeal from District Court, Washington County; H. P. Burke, Judge.

Action by Fannie L. Henry against Michael D. Gurnett. Judgment for plaintiff, and defendant appeals. Affirmed.

August Muntzing and Egbert More, both of Akron, for appellant. Chaikley A. Wilson and Asher B. Wilson, both of Akron, for appellee.

PER CURIAM. Code action to quiet title. Appellee, plaintiff below, deraigned her title to the land in question from the government.

[1] Appellant's title depended entirely upon a tax deed which was void on its face for the reason that it was based upon a tax sale certificate originally issued to the county and assigned by the county to appellant's grantor

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



more than three years after its date. This fatal defect appearing upon the face of the tax deed, the trial court properly excluded said deed and rendered judgment for appellee.

[2, §] Appellee in her complaint alleged that she was in actual possession of the land. Appellant denied this averment and alleged both in his answer and in his cross-complaint that the land was vacant and unoccupied. On the trial no proof whatever was offered by either party touching possession. On this state of the record appellant insists that because of this failure of proof the judgment must be reversed. This contention is without merit. If the land was occupied by plaintiff (and in the absence of any evidence to the contrary her proof of title raises a presumption of possession), the judgment is right; if it was vacant, as appellant alleged, the judgment cannot prejudice him, for by his own proof he disclosed affirmatively that he was without title.

Judgment affirmed.

(24 Colo. App. 340)

**DEL MONTE LIVE STOCK CO. et al. v. RYAN et al., Board of County Com'rs.**

(Court of Appeals of Colorado. June 10, 1913.)

**1. EMINENT DOMAIN (§ 274\*)—REMEDY OF OWNER—INJUNCTION.**

The appropriation of private property for a permanent public use under color of the power of eminent domain will be enjoined where the right to possession has not been condemned in compliance with the law, regardless of the question of irreparable damages or the existence of legal remedies.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 753, 765-768; Dec. Dig. § 274.\*]

**2. EMINENT DOMAIN (§ 293\*)—PLEADINGS—SUFFICIENCY—"IRREPARABLE INJURY."**

The complaint, in an action to enjoin the laying out of a road by the county commissioners, which showed that they were taking the land apparently without due process of law, that the road would deprive defendants of a private way and prevent the cattle on their land from reaching necessary water states a cause of action for relief by injunction; the monetary value of the injury not preventing it from being irreparable, for the term "irreparable injury" does not mean that the injury is beyond the possibility of compensation in damages but rather that sufficient damages cannot be obtained.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 797-802; Dec. Dig. § 293.\*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3772-3774.]

**3. EASEMENTS (§ 61\*)—OBSTRUCTION OF WAY—INJUNCTION.**

An injunction will lie to prevent an obstruction of a private way on the ground that there is no adequate remedy at law.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 102, 130-144, 148; Dec. Dig. § 61.\*]

**4. APPEAL AND ERROR (§ 890\*)—DETERMINATION.**

Upon appeal cases must be determined on the showing in the record, and additional aver-

ments or evidence of *ex parte* matters cannot be introduced.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3623, 3624; Dec. Dig. § 890.\*]

**5. APPEAL AND ERROR (§ 1175\*)—NATURE OF PROCEEDING.**

In an action for a permanent injunction, where the lower court denied, and the Supreme Court granted, a temporary injunction pending complainant's appeal and ordered the defendants to show cause why the writ should not be made permanent, the proceeding was not an original one under Const. art. 6, § 3, providing that the Supreme Court shall have power to issue original writs but was one under Mills' Ann. Code, § 398, providing that in all cases of appeals and writs of error the Supreme Court may give final judgment and issue execution; hence the defendants were confined to the record as made in the court below and could not introduce new evidence or raise defenses not made below.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.\*]

**6. APPEAL AND ERROR (§ 187\*)—DEFECTS IN PARTIES—TIME FOR RAISING.**

Under Mills' Ann. Code, §§ 50, 54, and 55, respectively, providing that a defendant may demur when there is a defect or misjoinder of parties, that when any of the matters enumerated as demurrable do not appear on the face of the complaint the objection may be taken by answer, and that if the objection be not taken by demurrer or answer the defendant shall be deemed to have waived the same, the failure of the defendants, in an action to enjoin the opening of a county road to complain by demurrer or answer that they were not named in accordance with Mills' Ann. St. § 778, providing that the proper title for suits against a county is "the board of the county commissioners of the county," waives the error; it appearing that the defendants were described as "constituting the board of county commissioners."

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1184-1189; Dec. Dig. § 187.\*]

**7. EMINENT DOMAIN (§ 234\*)—PROCEEDINGS—VALIDITY.**

Rev. St. 1908, § 5838, requires viewers to assess the damages and benefits to owners of any land over which a proposed county road may pass, while sections 5842 and 5843, respectively, require the viewers to file a report with the county clerk ten days before the next regular meeting of the board of county commissioners, giving a description of the land and assessment of damages, and the board of county commissioners at their next meeting after the report to consider all objections and to determine whether the road shall be established. *Held* that, where the viewers failed to file their report and the members of the board of county commissioners assured individual objectors that the proposed road would not be established, an order made without notice establishing the road is not valid and will not allow the county to enter upon the land, for the harsh power of eminent domain must be exercised according to the provisions of the statute.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 592-600, 603; Dec. Dig. § 234.\*]

Appeal from District Court, Chaffee County; Lee Champlon, Judge.

Action by the Del Monte Live Stock Company and another against Thomas Ryan, J. A. Burnett, and C. L. Nachtrieb, constituting and being the Board of County Commission-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ers of the County of Chaffee. From a judgment denying an injunction, complainants appeal. Reversed, and permanent injunction directed.

William B. Tebbetts and Herbert M. Munroe, both of Denver, and George D. Williams, of Salida, for appellants. Wallace Schoolfield, of Salida, for appellees.

BELL, J. This action comes before us on an appeal from an order and judgment made by the district court of Chaffee county, Colo., denying the right of the appellants to a perpetual injunction and dismissing the action. The complaint alleges, among many other things, that on or about the 3d day of March, 1908, a petition was presented to the appellees, as county commissioners of the county of Chaffee, praying that a county road be laid out and established along a certain course or route, therein described, which ran through certain lands and premises of the appellants; and on or about the 6th day of April, 1908, the appellees, at a special meeting, entered on said petition an order appointing road viewers, and did appoint road viewers to view the road described in said petition, and directed said viewers to meet at 10 o'clock a. m. of May 9, 1908, and to mark out said road, to assess the benefits and damages accruing to all persons affected by reason of the laying out of same, to award damages to all persons, in excess of the benefits accruing to him or them, a sum equal to such excess, and to report to the appellees their acts and doings in the premises; that on or about the 15th day of May, 1908, after having met and viewed said proposed road, the viewers filed in the office of the county clerk and recorder of said county a report in writing of their view and recommended that said road run along a certain course or route mentioned and described in said report; that prior to the first Monday of July, 1908, which was the date of the next regular meeting of said board of county commissioners, the appellants conferred with the various members of said board and protested to the individual members thereof against the opening of said proposed road, and was assured and advised by said individual members that no further action would be taken in the matter; that, however, on the first Monday of April, 1909, appellees, without notice to the appellants or either of them, acted favorably on the proposed road as far as reported upon, but authorized and directed said viewers to complete their view of said road and make further report thereon with all convenient speed; that on or about the 30th day of August, 1909, said viewers filed an additional and amended report recommending the establishment of a road along a course or route mentioned and described in said amended report, which report was approved by the appellees on the 7th day of September, 1909, and said road ordered opened as a public road or highway of said county, and, in com-

pliance with said order, notices were posted in three public places that said road would be opened for public use from and after 60 days from the date of said notice; that the road recommended in the amended report was wholly different from that mentioned and described in the petition, and also from that recommended in the original report of the viewers; that the opening of said new proposed road would embrace a large amount of land owned by the appellants; that the amended and additional report of said viewers does not show that said viewers viewed the property of the appellants, or either of them, over and across which said new proposed road runs; that said viewers in making said report did not allow any damages whatever to said appellants or either of them for the land proposed to be taken, and the report so made does not show that the rights of said appellants or either of them were considered, or that the damages or benefits accruing to them or either of them were in any manner assessed or determined; that said appellants had no actual notice of the action of said commissioners or of said viewers in their efforts or proceedings to take, condemn, or appropriate the lands of the appellants or either of them for the purpose of establishing said proposed road, and have never been given an opportunity to be heard respecting the damages that might be sustained by them in the opening of said road; that, notwithstanding the order of said commissioners made on or about the 7th day of September, 1909, no further action has been taken to this date, January 25, 1910, by said commissioners or others toward the opening of said proposed new road, but the appellants are informed and believe that the appellees are contemplating such opening during the month of February, 1910, and will so open it if not enjoined by the court; that great and irreparable injury would be done to the appellants if said road was opened, and they therefore prayed the order and decree of the court perpetually enjoining and restraining said appellees and their successors in office from opening and establishing the public highway provided for in the order of the commissioners made on September 7, 1909.

The complaint was filed February 11, 1910. On the 2d of April, 1910, the appellants made an application for a temporary injunction, which was resisted by the appellees, and upon that day the court denied the temporary injunction and held that the only relief sought in the action was a perpetual injunction, and therefore dismissed the action, to which ruling the appellants excepted and took an appeal to the Supreme Court. The appellants applied to the district court for a temporary injunction pending the appeal, which was also denied, and on May 2, 1910, filed their petition in the Supreme Court for a temporary injunction and general relief. On May 3, 1910, the Supreme Court issued a temporary injunction and further ordered



that the appellees, on the 23d day of May, 1910, at 10 o'clock a. m., show cause, if any they had, why an order of said court should not be made permanently restraining and enjoining the appellees from doing the things temporarily restrained as aforesaid. On June 6, 1910, appellees filed an answer in the Supreme Court and divers affidavits in support thereof, all of which were on November 10, 1910, stricken from the files because said answer raised issues of fact which were not raised in the district court. On June 24, 1910, appellants moved for a permanent injunction in accordance with the prayer of their petition. On July 2 and August 27, 1910, appellees filed a brief and reply brief, which are confined largely to matters raised in the answer and affidavits in support thereof which, since their filing, have been stricken from the record and thus leaves the matters stated in the complaint as confessed. That part of appellees' brief which is pertinent to the record, as we are to consider it, charges that the complaint is without equity and does not state facts sufficient to constitute a cause of action; that the Supreme Court has no jurisdiction of the cause; and that there is no defendant herein against whom a writ might issue.

[1-3] We think the complaint, taken as confessed, states a cause of action, and the Chief Justice of the Supreme Court must have so thought when the temporary injunction was issued and when the order was made requiring the appellees to show cause why the writ should not be made permanent. "Where the power of eminent domain has been delegated to public officers or others who are threatening to make a permanent appropriation of private property to public uses, in excess of the power granted or without complying with the conditions upon which the right to make the appropriation is given, a court of equity will prevent the threatened wrong without regard to the question of irreparable damages or the existence of legal remedies which may afford a money compensation." 2 Lewis on Eminent Domain (2d Ed.) p. 1356, § 632; *Browning v. Camden & Amboy R. R. Co.*, 4 N. J. Eq. 47-57; *Bass v. Met. West Side El. R. R. Co.*, 82 Fed. 857, 27 C. C. A. 147, 39 L. R. A. 711.

Counsel for appellees vigorously urges that both the statutory and general remedy for damages are open to appellants, and that no great or irreparable injury will be done if the writ is denied.

In addition to taking the land, apparently without due process of law, the complaint shows that the appellants are engaged in the cattle business, and use the premises crossed by the proposed road for pasturing cattle, and have a private lane or roadway connecting said premises with the south Arkansas river as the only source of water supply for said cattle at certain seasons of the year, and, if said road should be laid out as ordered by the appellees, it would deprive the Del

Monte Live Stock Company, one of said appellants, of the use and benefit of said private lane for the purpose for which it was purchased by said company and for the purpose for which it had been continuously used by said company since the year 1885.

In *Elliott on Roads and Streets* (2d Ed.) p. 714, § 665, it is held that: "It [irreparable injury] does not necessarily mean, as used in the law of injunctions, that the injury is beyond the possibility of compensation in damages, nor that it must be very great. And the fact that no actual damages can be proven, so that in an action at law the jury could award nominal damages only, often furnishes the very best reason why a court of equity should interfere in a case where the nuisance is a continuous one."

This proposition is also supported in *Newell et al. v. Sass*, 142 Ill. 116, 31 N. E. 180, which further holds: "That injunction will lie to prevent obstructions to a private way on the ground that the party has no adequate remedy at law." See, also, *McCann et al. v. Day*, 57 Ill. 101.

In 2 *Lewis on Eminent Domain* (2d Ed.) p. 1351, § 631, it is stated that: "It is said to be almost universally held that an entry upon private property under the color of the eminent domain power will be enjoined until the right to make such entry has been perfected by a full compliance with the Constitution and the laws." *Chicago & Atchinson Bridge Co. v. Pacific Mutual Telegraph Co.*, 36 Kan. 113, 12 Pac. 535; *Mettler v. Easton & Amboy R. R. Co.*, 25 N. J. Eq. 214.

[4] It is also contended that the Supreme Court has no original jurisdiction to entertain an application for an injunction in a case like this, unless presented in the same manner and upon the same facts as it was submitted to the court below.

According to the record before us, as we are to consider it, the case has been so submitted. It is well settled in our Supreme Court that appealed cases must be based upon matters contained in the record. It is not a trial de novo; additional averments or evidence or ex parte matters cannot be introduced. *Luthe v. Luthe*, 12 Colo. 430-431, 21 Pac. 467; *German Nat. Bank v. Elwood*, 16 Colo. 244-248, 27 Pac. 705.

[5] We do not understand that the application to the Supreme Court for the injunction comes within the purview of section 3, art. 6, of the Constitution, as contended by the appellees. The record shows that an application was made in the court below for a temporary injunction, which was denied; then the court held in effect that, as the only permanent relief sought in the complaint was a perpetual injunction or making the temporary injunction perpetual, the action should be and was dismissed. The appellants appealed to the Supreme Court and applied to the court below for a temporary injunction pending the appeal, which was also denied; then the ap-



pellants applied to the Supreme Court for a temporary injunction, which was granted, and an order was issued on the appellees to show cause why the writ should not be made permanent. We gather from the record that it was the purpose of the Supreme Court and the parties to the action to have a final judgment rendered in the matter in that court, which is authorized under section 398, p. 707, Mills' Annotated Code, which reads as follows: "In all cases of appeals and writs of error, the Supreme Court may give final judgment and issue execution, or remand the cause to the lower court, in order that execution may be there issued."

[8] The appellees further insist that there is no defendant in this cause against whom a writ might issue. The suit is brought against "Thomas Ryan, J. A. Burnett, and C. L. Nachtrieb, constituting and being the board of county commissioners of the county of Chaffee in the state of Colorado." Section 778, p. 746, 1 Mills' Annotated Statutes, provides that the proper title for suits against a county is "the board of county commissioners of the county of ———." The title stated in this case is technically insufficient, and, if the appellees had objected in the court below and properly preserved their objection in the record, then they could have the point properly considered here. However, the order appealed from is properly entitled "the board of county commissioners of Chaffee county, Colo., defendants," and the final order states that Wallace Schoolfield, Esq., appeared for "the board of county commissioners of Chaffee county, Colo., defendants," and it appears throughout the record that the parties plaintiffs, defendants, and the court below treated "Thomas Ryan, J. A. Burnett, and C. L. Nachtrieb, constituting and being the board of county commissioners of Chaffee county, Colo., defendants," and "the board of county commissioners of the county of Chaffee" as synonymous terms, and all parties understood and treated the appellees as "the board of county commissioners of the county of Chaffee"; and, the appellees not having raised any question as to the proper entitling of the case, and having appeared for "the board of county commissioners of the county of Chaffee" and defended in the court below and in the Supreme Court, this court should and does hold that "the board of county commissioners of the county of Chaffee of the state of Colorado, defendants," are bound by these proceedings and by any order or decree of the court that may properly be made herein. "A defect of parties must be raised either by demurrer or answer, and if not so raised it is waived." *Fitzgerald v. Burke*, 14 Colo. 559-562, 23 Pac. 993; *Great West Min. Co. v. Woodmas of Alston Min. Co.*, 12 Colo. 46, 20 Pac. 771, 13 Am. St. Rep. 204; *Poundstone v. Holt*, 5 Colo. App. 66-69, 37 Pac. 35; *Miller v. Kinsel*, 20 Colo. 346-349, 78 Pac. 1075; sections 50, 54, and 55, Mills' Annotated Code.

In this case no defect of parties has been raised by answer or demurrer, or at all, except by suggestion in brief of counsel in the Supreme Court, which is wholly insufficient, though defects do occur which should have been corrected if properly raised.

[7] Section 5338, Revised Statutes of 1908, requires viewers to assess the damages and benefits to owners of any land over which a proposed road may pass. Section 5342 of said statutes requires the viewers to file a report with the county clerk ten days before the next regular meeting of the board of county commissioners held after the view is completed, giving a description of the land, an assessment of the damages and benefits accruing to any person, and the sum awarded to any person in excess of the benefits, with a plat, survey, and a report of the surveyor. Section 5343 of said statutes requires the board of commissioners, at their next regular meeting after the return of said report, to consider the same and all objections that may be made thereto, and to determine whether or not said road shall be established and opened to travel, with permission to such board of commissioners to refer the matter of viewing to the same or other viewers, with instructions to report in like manner or specially upon some particular matter.

As private property can be taken for public use against the consent of the owner only in such cases and by such proceedings as may be specially provided by law, and these proceedings are not according to the common law and are in derogation of private rights, and as they wholly depend upon statute regulation in this state, any one using this extraordinary and harsh power must, substantially at least, comply with all the provisions of the statute; and we think, under the allegations in the complaint, that there has not been a substantial compliance such as we think is necessary to justify the board of county commissioners of the county of Chaffee to proceed with the opening of said road; and therefore it is ordered and decreed by the court that said board of county commissioners of the county of Chaffee should be restrained and perpetually enjoined from opening the road or roads described in the complaint under the proceedings heretofore had and taken in the premises, that the judgment of said district court dismissing the action should be and is hereby reversed and held for naught, and this cause is remanded to said district court, with directions to issue a perpetual injunction against the board of county commissioners of the county of Chaffee, permanently restraining said board and its successors in office from opening any road or roads through the premises of the appellants as mentioned or described in the complaint on any of the proceedings heretofore had in this action, and that the costs of the appellants be taxed against said board of county commissioners of the county of Chaffee.



(24 Colo. App. 392)

**JOHNSON v. GIBSON.**

(Court of Appeals of Colorado. July 14, 1913.)

**1. TAXATION (§ 761\*)—TAX DEED—VALIDITY—SALE OF SEVERAL TRACTS.**

A tax deed, reciting a sale of several non-contiguous tracts en masse for a gross sum, is void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1509, 1510-1513; Dec. Dig. § 761.\*]

**2. TAXATION (§ 762\*)—TAX DEED—VALIDITY—ASSIGNMENT OF CERTIFICATE.**

A tax deed, based on an assignment of a certificate of purchase issued to the county, reciting assignment of the certificate of purchase by the county clerk more than three years after its issuance, is void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1514-1516; Dec. Dig. § 762.\*]

**3. ADVERSE POSSESSION (§ 79\*)—PAYMENT OF TAXES UNDER COLOR OF TITLE.**

For either reason that less than seven years had elapsed between the issuance and recording of the tax deed, relied on as color of title, and commencement of the suit, or that less than that period had elapsed between the first payment of taxes after the recording of the deed and commencement of the suit, the seven years' statute of limitations does not operate as a bar.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 459-462; Dec. Dig. § 79.\*]

**4. TAXATION (§ 769\*)—TAX DEEDS—CORRECTION DEEDS—CONSTRUCTION.**

Two tax deeds based on one and the same sale and assignment of purchase, being offered by plaintiff, will be construed together, and the first being void because showing assignment by the county clerk, more than three years after its issuance, of the certificate of purchase issued to the county, the second not negating but mere omitting this showing, is also void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1533-1536; Dec. Dig. § 769.\*]

**5. TAXATION (§ 762\*)—TAX DEED—SHOWING AS TO ASSIGNMENT OF CERTIFICATE.**

A tax deed, based on an assignment of a certificate of purchase issued to the county, failing to designate the officer by whom the assignment was made, is void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1514-1516; Dec. Dig. § 762.\*]

**6. QUIETING TITLE (§ 10\*)—RIGHT TO OBJECT TO DEFENDANT'S TITLE.**

Plaintiff in a suit to quiet title, failing to show title in himself, can make no objection to defendant's title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 36-42; Dec. Dig. § 10.\*]

Appeal from District Court, City and County of Denver; Greeley W. Whitford, Judge.

Action by Fred Johnson against Charles E. Gibson. Judgment for defendant. Plaintiff appeals. Affirmed.

R. H. Gilmore, of Denver, for appellant. John F. Mall, of Denver, for appellee.

**KING, J.** This is a controversy over the title to several quarter sections of land located in Kiowa county, Colo. On February 17, 1909, appellant, as plaintiff, commenced his action to quiet title, making the usual allegations under section 255 of the Civil Code.

Plaintiff claimed title by virtue of two tax deeds, supplemented by the alleged payment of taxes for seven successive years under claim and color of title made in good faith to vacant and unoccupied land.

[1, 2] 1. The first tax deed offered in evidence was executed by the treasurer of said county August 9, 1902, and recorded on the same day, and was offered as color of title only. This deed recited a sale of several noncontiguous tracts of land en masse for a gross sum; that the lands were stricken off to the county on the first day of the sale, to wit, November 29, 1898; and that the certificate of purchase issued therefor was assigned by the county clerk more than three years after the date of the sale and issuance of said certificate. For these reasons the deed was void.

[3] 2. Less than seven years elapsed between the time said tax deed was issued and recorded and the commencement of the suit, and much less than seven years between the first payment of taxes after the recording of said deed and the commencement of the suit, for either of which reasons the seven-year statute of limitations invoked does not operate as a bar in plaintiff's behalf.

[4, 5] 3. The second treasurer's deed, which is called an amended or correction deed of the first, was executed November 30, 1906, and recorded December 31st of the same year, long after the suit was begun. Objection to the introduction of this deed was sustained by the court for the reason given that the same was dated and recorded after the commencement of the suit. This action of the court is assigned as prejudicial error. It is not necessary to decide at this time whether the reason given by the court was good. The two tax deeds offered by the plaintiff were based upon one and the same sale and assignment of certificate. As heretofore stated, the first showed upon its face that the county clerk assigned the tax sale certificate of purchase more than three years after its date. Both deeds having been offered by the plaintiff, they will be construed together; and, nothing appearing in the second to show that the certificate upon which it was issued was not assigned by the county clerk as recited in the first deed, those recitations furnish the only authority upon which the second deed was based and make it likewise void. *Empire Ranch & Cattle Co. v. Howell*, 23 Colo. App. 265, 129 Pac. 245; *Empire Ranch & Cattle Co. v. Nelkirk*, 23 Colo. App. 392, 128 Pac. 468. Moreover, it was held by this court in the last case cited that a tax deed which fails to designate the officer by whom the assignment of the certificate of purchase was made is void. The second tax deed seems to have been artfully worded for the purpose of concealing the fatal defects appearing upon the face of the deed it was made to correct rather than to speak the



truth; but we think the negative showing of the second cannot prevail against the fatal affirmative recitals of the first, when both deeds are offered together.

[§] 4. Defendant deraigned title by mesne conveyances from the patentee owner, in part through trustee's deeds executed pursuant to sale under deeds of trust. To the introduction of these deeds by the defendant, plaintiff objected for reasons which have been repeatedly held by this court not available to an adverse claimant under tax title. Furthermore, plaintiff, having shown no title in himself, could make no objections to defendant's title. In *Empire Ranch & Cattle Co. v. Bender*, 49 Colo. 522, 113 Pac. 494, the Supreme Court, speaking by Mr. Justice Bailey, said: "The moment defendant's alleged adverse title failed, as it did when it offered in support of it a tax deed void on its face, it had no further interest in the cause, and could raise no other issue. \* \* \* When the defendant failed to establish its alleged adverse title, it was in effect out of court. \* \* \* It is only because of his adverse interest that a defendant is permitted to question a plaintiff's rights at all." The rule there laid down is opposed to the position of the plaintiff in this case.

The judgment quieting title in the defendant is affirmed.

(21 Wyo. 498)

CARLSON SHEEP CO. v. SCHMIDT et al.  
(Supreme Court of Wyoming. July 19, 1913.)

1. DAMAGES (§§ 94, 139\*)—EXCESSIVENESS—TORTS.

Defendant, in order to drive plaintiffs' sheep out of the country where they were ranging on a public range, and to destroy their business, caused one of defendant's bands of sheep to be herded so close to plaintiffs' that they mixed, after which plaintiffs went away, and defendant took the sheep to a corral and separated them. After being separated, plaintiffs not being there to take charge of them, defendant, not having sufficient help to run the two bands separately again, put them together, and separated them again a few days later. Plaintiffs' sheep were in defendant's possession about seven days. Thirty-eight head and a few lambs were lost, and the sheep considerably damaged, but defendant's evidence was that the sheep were only slightly damaged, if at all. *Held*, that a verdict allowing plaintiffs \$750 actual damages and \$250 exemplary damages was not excessive.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 216, 218, 219, 221, 400-403; Dec. Dig. §§ 94, 139.\*]

2. APPEAL AND ERROR (§ 882\*) — INSTRUCTIONS—RIGHT TO ALLEGE ERROR.

Where, in an action for willfully mixing defendant's sheep with plaintiffs' band, at defendant's request the court charged that, even if the jury found that defendant's employes willfully mixed the sheep, and that plaintiffs sustained damages thereby, that would not authorize exemplary damages, unless the jury found that defendant's managing officer or foreman authorized or directed its employes so to do, or ratified their acts after they were done, defendant could not object, on the ground that there was no evidence of ratification, to

an instruction that the rule that an employer is responsible for a trespass committed by a servant in pursuance of his master's business does not apply to or permit the recovery of exemplary damages for the willful and malicious acts of a servant, unless authorized or subsequently ratified, etc.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 8591-8610; Dec. Dig. § 882.\*]

Error to District Court, Weston County; Carroll H. Parmelee, Judge.

Action by Charles Schmidt and others, doing business as Charles Schmidt & Sons, against the Carlson Sheep Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Enterline & La Fleiche, of Sheridan, for plaintiff in error. Metz & Sackett, of Sheridan, for defendants in error.

BEARD, J. This action was brought by the defendants in error against the plaintiff in error, to recover damages alleged to have been sustained by the mixing of the bands of sheep of the respective parties. The cause was tried to a jury, and a verdict returned in favor of plaintiffs (defendants in error), and against defendant (plaintiff in error) for \$1,000 damages. Judgment was entered accordingly. A motion of defendant for a new trial was denied, and defendant brings the cause here on error.

The substance of the material allegations of the pleadings necessary to an understanding of the issues are that during the month of January, 1911, the plaintiffs were the owners of 1,004 head of sheep, which they were ranging and caring for on the public range in Weston county; that said band of sheep consisted of breeding ewes, kept by plaintiffs for the purpose of raising lambs and wool and for market; that defendant was engaged in the sheep business, ranging his sheep in the same vicinity; that on January 27, 1911, the defendant, with the intention of injuring and damaging plaintiffs' sheep, and with the willful, unlawful, and malicious intent to drive the plaintiffs out of the country where they were ranging their sheep, and to injure and destroy their business, willfully, unlawfully, and maliciously drove a band of 3,000 sheep of defendant into the band of plaintiffs, to their actual damage in the sum of \$1,500, and claiming exemplary damages in the sum of \$1,500. The answer admitted the corporate capacity of the defendant, and denied the other allegations of the petition. The verdict was as follows: "We, the jury, duly impaneled and sworn in the above-entitled cause to try the same, do find generally upon the issues in favor of the plaintiff, and against the defendant, and assess the damages of the plaintiff at the sum of one thousand dollars (\$750 damages, and \$250 exemplary) against the defendant."

The only grounds relied upon for a rever-



sal of the judgment and presented by the brief of counsel for plaintiff in error are: (1) That the damages awarded are excessive; (2) that exemplary damages were improperly awarded; and (3) that the court erred in giving instruction numbered 12.

[1] We shall not attempt to set out the evidence at length, as to do so would serve no useful purpose. The undisputed facts are that plaintiff was ranging and herding a band of about 1,000 head of sheep on the public range in Weston county, and that defendant was at the same time also ranging a band of about 2,220 head of sheep about a mile distant from plaintiffs' band; that one Edlum was the range foreman of the defendant in charge of the camp movers, herders, and four bands of sheep, including the band mentioned; that as soon as Edlum learned the plaintiffs' sheep were at or near where the mix occurred, he directed the camp mover and herder to take the band to the vicinity of plaintiffs' sheep, as he did not want them to get all the feed; that in pursuance of his directions they were taken close to plaintiffs' sheep, to which plaintiffs objected; that no effort was made by defendant's herder or camp mover to prevent the mixing; and that the sheep became mixed. The camp mover testified that what he did was by direction of the foreman; that he was perfectly willing that the sheep should mix up. He further testified, speaking of the mix-up: "Q. Why didn't you prevent it? A. Carl Schmidt was in between them. Q. Did you go in between them? A. No, sir. Q. You took your rifle out to follow the sheep that morning? A. Yes, sir. Q. You expected trouble? A. Yes, sir. Q. You took your rifle along for that purpose? A. Yes, sir. Q. You intended to go through with it and back it up with a gun? A. Yes, sir." And further on in his testimony: "Q. You wanted the Schmidt sheep to be moved in that vicinity? A. Yes, sir. Q. That was what you desired? A. Yes, sir. Q. That was the desire of the foreman? A. I don't know. Q. Didn't you say he expressed dissatisfaction about their being there? A. Yes, sir. Q. You knew it was his desire that they should be gotten out? A. I supposed so. Q. You knew it was the desire of your company? A. Yes, sir. Q. You went there endeavoring to get the Schmidt sheep out of that section of the country? A. Not necessarily. Q. That was part of the purpose? A. To get the feed, and they would have to get out. Q. You intended to get the feed anyway, didn't you? A. Yes, sir. Q. You didn't care whether the Schmidt sheep got any feed or not? A. No, sir." Without further stating the testimony at length, it strongly tends to show that defendant's sheep were purposely taken so near plaintiffs' band, if they were not actually driven into it, that the result would be a mix-up if plaintiffs did not move from that locality, and that it was the de-

fendant's intention in so doing to compel plaintiffs to move their sheep from that place. After the mix-up, plaintiffs went away, and defendant took the sheep to a corral and separated them. After being separated, the plaintiffs not being there to take charge of them, and the defendant not having sufficient help at hand to run the two bands separately, put them together, and again separated them a few days later.

Plaintiffs' sheep were in defendant's possession about seven days, and there was evidence tending to prove that 38 head and a few lambs were lost and the sheep considerably damaged. There was also evidence on part of defendant that the sheep were but slightly damaged, if at all. The extent of the plaintiffs' damages, if any, was a question for the jury on a consideration of all of the evidence; and, as the evidence was conflicting, and there being substantial testimony, if believed, to warrant the verdict, this court under the well-established rule will not disturb the judgment on the ground that it is not supported by sufficient evidence. A careful reading of the evidence convinces us that the acts of the defendant were willful, and done with the intent and for the unlawful purpose of compelling plaintiffs to cease grazing their sheep on that part of the public range. Such being the case, and if the jury so found, it was proper to award exemplary damages. The amount so awarded was not large, and evidently no more than the jury believed sufficient to admonish the defendant that in the future it should conduct its business with due regard for the rights of others.

[2] By the twelfth instruction the court told the jury, in substance, that the employer is responsible for a trespass committed by the employé while acting within the scope of his employment and in pursuance of his employer's business. "But this instruction shall not apply to or permit the recovery of exemplary damages for the willful and malicious acts of such agents, servants, or employés, except where the defendant corporation previously authorized or directed, or subsequently ratified or approved, such acts, or where it retained the agent, servant, or employé committing such act in its employ, after knowledge of such willful and malicious conduct, or where, through its officers, it directly participated in, directed, authorized, approved, or ratified such acts." It is argued that there was no evidence of ratification of the acts of the camp mover and herder by the officer or officers of the company, to which the instruction was applicable. We think, however, that there was sufficient evidence tending to show a ratification by Carlson, the vice president and manager of the company, to go to the jury. But whether or not that instruction should have been refused on that ground, the giving of it was not, in our opinion, prejudicial to defendant; for



by the ninth instruction given, to which no objection is here made, the jury was instructed "that even if you should find from a fair preponderance of the evidence that the employes of the company willfully mixed the band of sheep belonging to the defendant company with those belonging to the plaintiffs, and that plaintiffs sustained damages thereby, this would not authorize you to assess exemplary damages—that is, damages in the way of punishment—unless you should further find from a further fair preponderance of the evidence that the managing officer or foreman of the defendant company authorized or directed such employes to so willfully mix the sheep, or ratified such acts after they were done." There was ample testimony, given by defendant's witnesses alone, tending to show that the acts of the camp mover and herder were done by the express direction of the foreman of the defendant company, and the question of awarding exemplary damages was rightly submitted to the jury.

No prejudicial error being made to appear, the judgment of the district court is affirmed.

Affirmed.

SCOTT, C. J., and POTTER, J., concur.

(21 Wyo. 505)

#### CLAUSSEN v. STATE.

(Supreme Court of Wyoming. July 19, 1913.)

#### 1. CRIMINAL LAW (§ 1158\*) — APPEAL AND ERROR—REVIEW—QUESTIONS OF FACT.

Where the audience at a criminal trial applauded on one or two occasions, and the court promptly checked the applause and instructed the jury not to be influenced thereby, a determination by the trial judge, in ruling on a motion for new trial, that the misconduct did not prejudice the defendant will not be reversed, where the affidavits concerning it are conflicting.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066, 3070, 3071, 3074; Dec. Dig. § 1158.\*]

#### 2. CRIMINAL LAW (§ 1091\*) — APPEAL AND ERROR—QUESTIONS PRESENTED FOR REVIEW —MATTERS NOT APPARENT OF RECORD.

A motion to require the state to elect upon which of two theories it would rely, which was made at the close of the state's case, will not be considered by the Supreme Court, where neither the motion nor the evidence is contained in the bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2815, 2816, 2818, 2819; Dec. Dig. § 1091.\*]

#### 3. CRIMINAL LAW (§ 789\*)—INSTRUCTIONS—REASONABLE DOUBT.

A requested instruction on reasonable doubt, which predicates it upon "a full comparison and consideration of the evidence," is erroneous, as not requiring a fair and impartial comparison and consideration of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. § 789.\*]

#### 4. CRIMINAL LAW (§ 789\*)—INSTRUCTIONS—REASONABLE DOUBT—DEFINITION.

A requested instruction that "reasonable doubt is that state of mind which leaves the

minds of the jury in that condition that they cannot say that they feel an abiding faith, amounting to a moral certainty, that the defendant is guilty" does not make the meaning of reasonable doubt any clearer than the phrase itself, and was properly refused, even though the court gave no correct definition.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. § 789.\*]

#### 5. WORDS AND PHRASES—"DOUBT"—"REASONABLE."

To "doubt" means to question or hold questionable, and "reasonable" means having the faculty of reason; rational; governed by reason; being under the influence of reason; agreeable to reason.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, p. 2187; vol. 7, p. 5953.]

#### 6. CRIMINAL LAW (§ 1122\*) — APPEAL AND ERROR—QUESTIONS PRESENTED FOR REVIEW —INSTRUCTIONS.

Where none of the evidence is in the bill of exceptions, the only question presented by objection to instructions is whether they would be proper under any possible phase of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2040-2045; Dec. Dig. § 1122.\*]

Error to District Court, Sheridan County; Carroll H. Parmelee, Judge.

Herman Clausсен was convicted of involuntary manslaughter, and he brings error. Affirmed.

H. W. Nichols, of Sheridan, for plaintiff in error. D. A. Preston, Atty. Gen., for the State.

SCOTT, C. J. The plaintiff in error was charged by information in the statutory form with the crime of murder in the first degree, tried and convicted of the crime of involuntary manslaughter, and judgment pronounced against him upon the verdict, and he brings error.

The bill of exceptions contains none of the evidence produced upon the trial, and for that reason our consideration of the case will have to be confined to those questions which do not involve a consideration of the evidence.

[1] 1. It is contended that there was misconduct of the audience during the trial, which was prejudicial to and prevented the defendant from having a fair trial. Upon this question the defendant presented affidavits in support of his contention, and the state presented affidavits in opposition thereto. The misconduct of the audience consisted in one or two outbursts of approval by the audience which were promptly checked by the judge who tried the case, and the threat was then made to clear the courtroom if there was a recurrence, and the court also directed the jury not to be influenced by such conduct. The matter was again brought to the attention of the trial court upon a hearing of the motion for a new trial, and that court, having upon the affidavits submitted and hereinbefore referred to, and in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Ann. Dig. Key-No. Series & Rep'r Indexes



view of his personal knowledge of what occurred at the time of the conduct complained of, was the better able to judge whether the conduct was prejudicial or not. While such conduct is reprehensible, it appears that the court pursued the right course, and if the conduct did not impede the administration of justice the defendant cannot complain. That it did not impede the administration of justice nor deprive defendant of a fair trial was determined by that court in view of its personal knowledge of the acts complained of, and from the conflicting affidavits submitted, and we cannot say that the trial court erred in so finding.

[2] 2. It is urged that the court erred in overruling defendant's motion, made at the close of the state's case in chief, to require the state to elect upon which of its two theories it would proceed, "whether (first) upon the theory that the defendant was guilty of causing the death of the deceased, Elise Claussen, by strangulation or suffocation, or (second) upon the theory that the defendant caused the death of the deceased, Elise Claussen, by culpable neglect." This quotation is from the motion for a new trial. Neither the motion to require the state to so elect, nor the evidence, is incorporated in the bill, and for that reason the motion is not properly before this court for consideration.

[3] 3. The court gave no instruction to the jury defining reasonable doubt, although the defendant prepared and requested the court to instruct the jury "that reasonable doubt is that state of mind which, after a full comparison and consideration of all the evidence, both for the state and the defense, leaves the minds of the jury in that condition that they cannot say that they feel an abiding faith, amounting to a moral certainty, from the evidence in the case that the defendant is guilty of the charge as laid in the information. If you have such doubt—if your conviction of the defendant's guilt as laid in the information does not amount to a moral certainty, from the evidence in the case—then the court instructs you that you must acquit the defendant." It was not error to refuse this instruction. The state of mind produced by the evidence arises, not alone from "a full comparison and consideration," but after a fair and impartial comparison and consideration of all the evidence.

[4] As to whether the court should have instructed as to what constituted reasonable doubt was discussed by this court in *Smith v. State*, 17 Wyo. 481, 101 Pac. 847, and we there said: "In the absence of the presentation, either orally or in writing, of an instruction correctly defining the term, we think there was no error in the court declining to make the attempt." The jury were properly instructed that they could not convict unless they were satisfied of defend-

ant's guilt beyond a reasonable doubt, and that they should give him the benefit of such doubt.

[5] In our judgment there is no definition of "reasonable doubt" which would convey to a juror's mind any clearer idea than the term itself. The word "doubt" is plain and simple to understand. "To doubt," as defined in Webster's New International Dictionary means, "To question or hold questionable," and the same author defines "reasonable" "as having the faculty of reason; rational; governed by reason; being under the influence of reason; thinking, speaking, or acting rationally, or according to the dictates of reason; agreeable to reason; just; rational." Courts have attempted in giving the definition of "reasonable doubt" to define the state of mind when a reasonable doubt may be said to exist. Every juror knows, or ought to know, what a doubt is and the meaning of the word "reasonable" as applied to such doubt. Is it any clearer in meaning to say to a juror that, if he be convinced from the evidence to a moral certainty of defendant's guilt, then he has no reasonable doubt? What does moral certainty mean more than reasonable certainty or beyond a reasonable doubt?

In *State v. De Lea*, 36 Mont. 531, 538, 93 Pac. 814, 817, the court say: "Every attempt to define the apparently simple phrase 'a reasonable doubt' has been attended with the greatest difficulty, and it may fairly be said that in a great majority of instances the definitions do not convey any more accurate idea than the phrase itself. So great is the difficulty that some courts hold that it is not error to decline any attempt at a definition." 12 Cyc. 623. Our statute does not expressly require the definition of "reasonable doubt" to be given to the jury. We think the definition requested failed to define "reasonable doubt," or make its meaning any clearer to the jury than the phrase itself, and for that reason the court did not err in refusing to give it.

[6] Objection was made to the giving of other instructions, some or most of which referred to definitions of the higher degrees of the crime of which defendant was convicted. As already stated, there is none of the evidence given upon the trial incorporated in the bill of exceptions. The only question presented then is whether these instructions, or any of them, would be improper under any possible phase of the evidence. *Downing v. State*, 11 Wyo. 86, 70 Pac. 833, 73 Pac. 758. We have examined the instructions in this view of the case, and without further discussion find that plaintiff in error's contention in this respect is without merit.

We find no error in this record, and the judgment will be affirmed.

Affirmed.

POTTER and BEARD, JJ., concur,



(74 Wash. 532)

**BUTY v. GOLDFINCH.**

(Supreme Court of Washington. Aug. 1, 1913.)

**1. TAXATION (§ 804\*)—TAX DEED—SETTING ASIDE—TIME TO SUE.**

Rem. & Bal. Code, § 162, providing that an action to set aside or cancel a tax deed or for the recovery of land sold for taxes must be brought within three years from the date of the tax deed, does not prevent the owner of land sold for taxes, who, at the date of the deed, and all times subsequent thereto, is in possession of the land, from asserting the invalidity of a tax deed for want of service in the tax foreclosure action in a suit brought against her by the holder of the tax deed to recover the possession, since pure defenses are not barred by statutes of limitation, especially in view of the doubtful constitutionality under the due process of law provisions of the federal and state Constitutions or any law barring the rights of one in possession by mere lapse of time.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1591, 1592; Dec. Dig. § 804.\*]

**2. WORDS AND PHRASES—"EXCEPTION."**

In Louisiana the word "exception" is a comprehensive term, referring to defenses.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2538-2544; vol. 8, p. 7656.]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Frank Buty against Julia Goldfinch. Judgment for defendant, and plaintiff appeals. Affirmed.

Wm. C. Keith, of Seattle, for appellant. A. G. McBride and H. S. Tremper, both of Seattle, for respondent.

**PARKER, J.** The plaintiff commenced this action in the superior court seeking recovery of real property, claiming title thereto under a tax deed executed by the treasurer of King county in pursuance of a tax foreclosure judgment rendered in the superior court of that county. The defendant, being in possession of the property and claiming to have been in possession ever since prior to the tax foreclosure, defended upon the ground, among others, that the tax foreclosure judgment and deed were void for want of jurisdiction, because there was no service of any process whatever in the foreclosure action, either personal or constructive, upon either of the defendants therein named; this defendant and her then husband being named as the defendants therein, they being the record owners as well as the actual owners of the property, and it being their community property. This defense was met by the plaintiff by denial of the alleged want of service in the tax foreclosure action, and by invoking the three-year statute of limitation against actions to set aside and cancel tax deeds. A trial before the court resulted in findings and judgment in favor of the defendant and in quieting her title as against the claims of the plaintiff, reserving a lien upon the property in his favor for a small sum on account of taxes paid by

him thereon. From this disposition of the cause the plaintiff has appealed to this court.

On May 1, 1903, and for several years prior thereto respondent was the wife of T. B. Daly. On that day they were divorced. While they were husband and wife they acquired title to the property herein involved as their community property, taking title thereto in the name of the husband, T. B. Daly. The property was then wild, unimproved, and unoccupied. Soon thereafter and prior to their divorce they commenced to clear and improve the property, doing sufficient work thereon to render plainly visible their actual physical possession thereof. The trial court found, in substance, that respondent's possession of the property thus commenced was thereafter open, notorious, and continuous until the trial of this action in October, 1912. In November, 1903, Rosa D'Elia, claiming to be the owner of a delinquent tax certificate against the property, commenced an action in the superior court of King county to foreclose the same by filing therein her application in usual form. Thereafter judgment of foreclosure was rendered in that action in her favor. Thereafter sale of the property was made by the treasurer of King county in pursuance of that judgment, when he executed a tax deed to Rosa D'Elia on January 23, 1904; she being the purchaser at that sale. Thereafter appellant acquired by mesne conveyances whatever right, title, or interest in the property Rosa D'Elia had acquired by the tax foreclosure and sale, and on February 23, 1912, commenced this action against respondent to recover possession of the property. The commencement of this action, it will be noticed, was over eight years after the execution of the tax deed, upon which appellant rests his claim to the property. In March, 1906, T. B. Daly conveyed all his interest in the property to respondent, his former wife; the decree of divorce not having divested either of them of their interest therein. In November, 1911, respondent was married to Geo. E. Goldfinch, and they are now husband and wife. While he was made a defendant in this action and is with his wife in possession of the property, he disclaims all interest therein. We therefore refer to her alone as the defendant and respondent. The trial court found, in substance, that no service of summons or process, either personally or by publication, was made in the tax foreclosure action upon T. B. Daly, the then record owner, or upon respondent, his former wife and joint owner, or upon any person whomsoever. The trial court not only found that the respondent was in the open and notorious possession of the property at all times since the commencement of the tax foreclosure action, but also that she had made valuable and lasting improvements thereon at a cost to her of not less than \$900, and that she has paid all general taxes charged against the property for the years 1903 to 1911, in-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
133 P.—67



clusive, except the year 1906, for which year she tendered payment to the county treasurer, which tender was refused by the treasurer because some other person had previously paid the taxes for that year. Neither appellant nor any of his predecessors in interest, including Rosa D'Elia, were ever in possession of the property, nor did they ever seek to obtain possession thereof until the commencement of this action in November, 1912.

Some contention is made by counsel for appellant that the evidence was not sufficient to support the findings of the trial court that there was no service of process in the tax foreclosure action and that respondent was in open and notorious possession of the property continuously since prior to the commencement of that action. We deem it sufficient to say that a careful review of the evidence convinces us that it was ample to call for the making of these findings.

[1] The principal contention of counsel for appellant is that the tax deed has become conclusive against the claims of respondent, and that she has been thereby divested of all title to the property by virtue of the three-year statute of limitation against actions to set aside tax deeds. In view of the fact that the tax foreclosure judgment was rendered without jurisdiction because of absolute failure of process in that action, it is plain that the tax deed does not result in divesting respondent of her title to the property, unless the statute of limitation here invoked can be held to have rendered unavailable to respondent her defense resting upon want of jurisdiction of the court to render the tax foreclosure judgment. The statute invoked, being section 162, Rem. & Bal. Code, reads: "Actions to set aside or cancel the deed of any county treasurer issued after and upon the sale of lands for general, state, county or municipal taxes, or for the recovery of lands sold for delinquent taxes, must be brought within three years from and after the date of the issuance of such treasurer's deed." This statute has been the subject of consideration by this court and given full force and effect in the following cases, which are relied upon by counsel for appellant: *Cordiner v. Dear*, 55 Wash. 479, 104 Pac. 780; *Anderson v. Spokane, Portland, etc., R. Co.*, 57 Wash. 439, 107 Pac. 183; *Huber v. Brown*, 57 Wash. 654, 107 Pac. 850; *Baylis v. Kerrick*, 64 Wash. 410, 116 Pac. 1082; *Fleming v. Stearns*, 66 Wash. 655, 120 Pac. 522.

In each of those cases the original owner of the land was the plaintiff, seeking in effect to set aside a tax deed and recover the land held or claimed by the defendant under the tax deed. In each it was held that the cause of action there sought to be enforced was barred by this statute; but in none of them was it held or even suggested that this statute would bar the original owner, in possession at all times following the tax foreclosure, from defending his possession and title upon

the ground of such foreclosure being void, when claim to the property is asserted by another under such foreclosure. In none of those cases was the effect of this statute upon the defense, which the original owner in possession might make, involved. Our attention has not been called to any decision of this court, and we think there have been none, where any such question has been considered. We have held that a void tax deed may constitute such color of title as to become a basis for the running of the statute of limitations (*Lara v. Sandell*, 52 Wash. 53, 100 Pac. 166); but not that such color of title, unaccompanied by possession, will by mere lapse of time divest the original owner of title to property he is in the actual possession and enjoyment of. This respondent did not commence this action "to set aside or cancel" the tax deed, nor "for the recovery of" the property in question. She was already in possession of the property and in the full enjoyment of all the rights in that regard which ownership and possession could possibly give her. Being in this situation, she had no occasion to do anything or take any steps looking to the protection of those rights until some one sought to invade them. All that she here seeks to invoke in the protection of her rights is by way of pure defense. If the language of this statute should be given the construction claimed for it by counsel for appellant, we are unable to see how it could be held to be a valid exercise of legislative power in the light of the due process of law provisions of the federal and state Constitutions.

Judge Cooley, in his work on *Constitutional Limitations* (7th Ed.) at page 522, after noticing the legislative power to pass statutes of limitation, observes: "All limitation laws, however, must proceed on the theory that the party, by lapse of time and omissions on his part, has forfeited his right to assert his title in the law. Where they relate to property, it seems not to be essential that the adverse claimant should be in actual possession; but one who is himself in the legal enjoyment of his property cannot have his rights therein forfeited to another for failure to bring suit against that other within a time specified to test the validity of a claim, which the latter asserts, but takes no steps to enforce. It has consequently been held that a statute which, after a lapse of five years, makes a recorded deed purporting to be executed under a statutory power conclusive evidence of a good title, could not be valid as a limitation law against the original owner in possession of the land. Limitation laws cannot compel a resort to legal proceedings by one who is already in the complete enjoyment of all he claims."

In *Groesbeck v. Seeley*, 13 Mich. 329, 342, Justice Campbell, speaking for the court, touching statutes of limitation and legislative power to make them effective against per-



sons already in possession; said: "These laws do not purport to take away existing rights, although their operation may often have substantially that result. But they are designed to compel parties whose rights are unjustly withheld from them to vindicate their claims within some reasonable time. If a person who has been ousted of his possession or dominion desires to regain it, he knows that he must resort to those means which are furnished by the law, either by the peaceable act of a party himself or by legal prosecution. A limitation law simply requires him to proceed and enforce these rights within some reasonable time, on pain of being deemed to have abandoned them. Such laws can only operate on those who are not already in the enjoyment and dominion of their rights. A person who has a lawful right and is actually or constructively in possession can never be required to take active steps against opposing claims. The law does not compel any man who is unas-sailed to pay any attention to unlawful pre-tenses, which are not asserted by possession or suit. When such title is set up, he has a right to defend himself by jury, if the claim is one of common-law cognizance, or otherwise, if of a different nature. But to hold that, under any circumstances, a man can be deprived of a legal title without a hearing is impossible without destroying the entire foundations of constitutional protection to property. No one can be cut off by limitation until he has failed to prosecute the remedy limited; and no one can be compelled to prosecute, when he is already in possession of all that he demands."

In *Baker v. Kelley*, 11 Minn. 480, 495 (Gil. 358), Chief Justice Wilson, speaking for the court upon the same subject, said: "It is not necessary for a party in the enjoyment of his rights to institute any proceedings against an adverse claimant, and to require him to do so would be, in many cases, imposing a grievous and expensive burden. A law requiring a party to take such action is not, nor has it, any analogy to a statute of limitation. Statutes of limitation only operate as an extinguishment of a remedy, and, of course, can have no application to a party who neither seeks nor needs a remedy."

In *Dingey v. Paxton*, 60 Miss. 1038, 1054, the court, speaking through Justice Cooper on the same subject, said: "Before the entry of the defendant upon the lands, the plaintiffs, by their tenant, were in actual occupancy of all the land which was susceptible of cultivation, and were in the constructive possession of the whole tract. The sale of the lands for the unpaid taxes of 1874 was insufficient, under well-settled principles, to divest their title. By a proceeding in invitum the state had attempted to acquire title under its laws as then existing and had failed. By a subsequent law it provides that, notwithstanding such failure, the

shadow of title thus acquired shall become the actual title unless attacked within a certain time. It is the expiration of time without regard to possession which is to transfer title from the owner and vest it in the state, or its vendee or donee. The power of the Legislature to prescribe within what reasonable time one having a mere right of action shall proceed in unquestionable; but there is a wide distinction between that legislation which requires one having a mere right to sue, to pursue the right speedily, and that which creates the necessity for suit by converting an estate in possession into a mere right of action, and then limits the time in which the suit may be brought. The mere designation of such an act as an act of limitation does not make it such, for it is in its nature more than that. Its operation is first to divest from the owner the constructive possession of his property and to invest it in another, and in favor of the possession thus transferred to put in operation a statute of limitations for its ultimate and complete protection. A complete title to land, according to Blackstone, consists of *juris et seisinæ conjunctio*; the possession, the right of possession, and the right of property. One who is in the actual or constructive possession of his lands, and who has the right of possession and of property, needs no action to enforce his rights. He is already in the enjoyment of all that the law can give him, and cannot be disturbed in such enjoyment except by 'due course of law.'"

It is of interest to note that in these Minnesota and Mississippi cases the actions were brought by the original owners, who had evidently been in possession up to near the time of the bringing of their actions to recover against the holders of the tax deeds, who had acquired possession in some manner evidently against the will of the original owners. These holdings were in effect that the statute did not operate in favor of the holder of the tax deed while the original owner was in actual possession of the land. The Mississippi case apparently goes to the extent of holding that a void tax deed will not draw to its holder the constructive possession of the land, even if the land is unoccupied. The Supreme Court of Iowa, in *Lewis v. Soule*, 52 Iowa, 13, 2 N. W. 401, *Monk v. Corbin*, 58 Iowa, 503, 12 N. W. 571, and cases there cited, holds that the statute of that state providing, "No action for the recovery of real property sold for the nonpayment of taxes shall lie unless the same be brought within five years after the treasurer's deed is executed and recorded," gives a void tax deed the effect of drawing the constructive possession of unoccupied lands to the holder of such deed, but leaves the inference which is almost conclusively to be drawn from the language of its decisions that such constructive possession will not be drawn by the tax deed to its holder while the original



owner is in actual possession of the land. The logic of all these decisions is that the statute will not run in favor of the holder of a tax deed while the land in question is in the actual possession of the original owner. This, of course, is in harmony with the view that he who is in possession and full enjoyment of his property is not required to protect his right to the property by instituting legal proceedings against another who merely claims such property but takes no steps to recover it.

Turning now to decisions involving the right of a person in possession of property, who is assailed by a suit in which the plaintiff rests his right upon an instrument other than a tax deed, we find the holdings of the courts equally conclusive in respondent's favor.

In *Pinkham v. Pinkham*, 60 Neb. 600, 610, 83 N. W. 837, 841, where the defendant sought to defend his possession under a deed needing reformation, and by his answer sought to have it reformed, and the statute of limitations was invoked against such defense, Justice Holcomb, speaking for the court, said: "It is urged that the statute of limitations operates as a barrier to prevent the appellee from reforming the instrument, under which he claims by correction of the alleged error. There are, we think, two substantial reasons why this plea cannot be made available, first, the appellee is in possession of the land under claim of title to the property; his right and title is assailed by appellants. He may, in such a case, rightfully present any defense, legal or equitable, to sustain his title to the property, irrespective of the running of the statute. When his right of possession is attacked, a cause of action accrues, by which he may plead and prove any equitable defense of which he may be possessed. As long as his title is undisputed, and he is in the peaceable possession of the property thereunder, the statute of limitations would not run, so as to prevent him when sued from setting up any equity he has in defense of his possession."

Responding to a petition for rehearing in this case, in 61 Neb. 336, Justice Sullivan, speaking for the court, used this vigorous expression: "The right to commence and prosecute an action may be lost by delay; but the right to defend against a suit for the possession of property is never outlawed. The limitation law may, in a possessory action, deprive a suitor of his sword, but of his shield never."

In *Robinson v. Glass*, 94 Ind. 211, 216, Judge Elliott, speaking to the question of a defense invoked against a mortgage alleging fraud in its execution, said: "In the argument on the assignment of cross errors, it is contended that, as the mortgage was executed more than six years before the suit was instituted and the defense of fraud interposed, the rights of the appellants are barred

by the statute of limitations. This position is untenable. Actions are barred, but defenses are not. A person who is sued upon a contract may show that it was procured by fraud, although more than six years elapsed before the action on the contract was instituted and the defense interposed. We speak now of pure defenses, and not as to matters which may be relied upon as forming a foundation for a counterclaim or cross-complaint."

In *Mott v. Fiske*, 155 Ind. 597, 603, 58 N. E. 1053, 1055, involving a defense made against a deed upon which the plaintiff rested his claim, the defendant asserting it to have been executed as a mortgage, Judge Monks, speaking for the court, said: "Appellant nor any one under whom she claims title has ever occupied said land, nor is it shown that they ever attempted to enforce any rights thereto under the deed from Work before the commencement of this action. Under such circumstances, whenever any attempt is made to enforce any rights under said deed, mere lapse of time will not bar the right to assert and show the same is a mortgage."

In *Muse, Syndic, v. Yarbrough*, 11 La. 326, 334, the court applied the maxim, "*quæ temporaria sunt ad agendum perpetua sunt ad excipiendum*," as applicable to the defense made by a defendant in possession. The translation of this maxim is given in 32 Cyc. 1279, as follows: "Things which afford a ground of action, if raised within a certain time, may be pleaded at any time, by way of exception."

[2] The applicability of this principle under our law will be more readily understood by noting the fact that in Louisiana the word "exception" is a comprehensive term referring to defenses. Section 330, Garland's Revised Code of Practice, Louisiana (3d Ed., 1910); *Gayosa v. Garcia*, 1 Mart. (N. S.) (La. 1824) 324. The substance of the doctrine which we have been discussing is well summed up in the text of 25 Cyc. 1063, as follows: "Pure defenses are held not to be barred by the statute of limitations." Numerous authorities are there cited supporting and illustrating the applicability of this general rule.

Much of what we have said may seem more appropriate to the question of the constitutionality of statutes which assume to take away defenses which may be made by those in possession and enjoyment of their rights when assailed by others. But we think the authorities reviewed are equally applicable as showing that our Legislature did not intend that the statute should ever be invoked to deprive one, in the possession and enjoyment of all he claims, from making any lawful defense he may have in the protection of such possession and enjoyment regardless of the question of time which may have elapsed following the initiation of the



right under which his assailant claims. We do not hold that the statute is unconstitutional, but only that it has no application to the defense which this respondent here invokes; she being in the possession and enjoyment of the property at all times prior to the commencement of the void foreclosure proceeding.

The judgment is affirmed.

GOSE, MOUNT, and FULLERTON, JJ.,  
concur.

(74 Wash. 524)

**BUTTERWORTH v. BREDEMEYER.**

(Supreme Court of Washington. July 31, 1913.)

**1. JURY (§ 31\*)—RIGHT TO JURY TRIAL—INVASION OF FUNCTIONS OF JURY.**

In an action upon an express promise of a wife to pay the funeral expenses of her husband, where the court set aside a verdict for the defendant because the evidence was insufficient to sustain a charge that the contract had been altered after she signed it, but found also that the contract had been only partially performed, it was error to render a judgment for the plaintiff for the amount due for the part performance without submitting the amount of such recovery to the jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 204-219; Dec. Dig. § 31.\*]

**2. ALTERATION OF INSTRUMENTS (§ 29\*)—EVIDENCE—SUFFICIENCY.**

In an action upon an express written promise of a wife to pay the funeral expenses of her husband, evidence held sufficient to support a finding by the jury that the contract had been materially altered after it was signed.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 259-263; Dec. Dig. § 29.\*]

**3. HUSBAND AND WIFE (§ 151\*)—WIFE'S LIABILITIES—FUNERAL EXPENSES OF HUSBAND.**

Under Rem. & Bal. Code, § 1563, making funeral expenses a preferred charge against the estate of the deceased, the liability of the estate is primary, and that of a wife for her husband's funeral expenses is secondary and can be enforced only after the remedy against the primary fund has been exhausted.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 582-595, 599; Dec. Dig. § 151.\*]

**4. HUSBAND AND WIFE (§ 151\*)—WIFE'S LIABILITIES—FUNERAL EXPENSES—IMPLIED PROMISE.**

While an express promise to pay for her husband's funeral creates a primary liability on the part of the wife, such a promise is not implied from the fact that she ordered the services to be rendered.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 582-595, 599; Dec. Dig. § 151.\*]

Department 2. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by E. R. Butterworth against Rea F. Bredemeyer. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with instructions.

Jay C. Allen, of Seattle, for appellant. Karr & Gregory, of Seattle, for respondent.

FULLERTON, J. The respondent, plaintiff below, brought this action against the appellant to recover for services rendered and for funeral supplies furnished and used at the funeral of the appellant's husband. The cause was before this court in *Butterworth v. Bredemeyer*, 62 Wash. 134, 113 Pac. 253, in which the complaint, aided by the bill of particulars, was held sufficient to state a cause of action. The complaint, with the aid of a writing set forth in the bill of particulars, showed an express promise on the part of the appellant to pay for the services and furnishings a fixed sum of money. On the return of the cause to the superior court, the appellant answered denying the material allegations of the complaint and pleading affirmatively that there had been a material alteration in the writing set forth subsequent to the time the appellant placed her signature thereto. A reply was filed to the answer and on the issues made the cause was tried before a jury, which returned a verdict in favor of the appellant. This verdict on the motion of the respondent was set aside by the court. The court, however, found that the contract had not been performed in its entirety, even as it found it written, and entered judgment for the amount shown by the writing to be due, less a sum he found would compensate the appellant for the failure to perform the contract in its entirety. From the judgment so entered, the present appeal is taken.

[1] The court set aside the verdict of the jury on the ground that the evidence was insufficient to justify the finding that a material alteration had been made in the writing subsequent to its execution by the appellant. But, if we concede this conclusion to be justified, there was still error in the action of court when it directed judgment to be entered for the respondent. If it be true that the evidence did not justify a finding that the writing relied upon for a recovery had been materially altered, but did justify a finding that it had been only partially performed, permitting of a recovery only for a lesser sum than the amount stated in the writing to be due, then the proper procedure was to so instruct the jury and take their verdict on the recovery properly to be allowed. This the court did not do, although its attention was called to the proper practice by the attorney for the respondent. It submitted the question of the alteration of the instrument to the jury, took their verdict thereon, and then set the verdict aside and determined the remaining questions of fact without the aid of the jury. Unless the right of trial by jury no longer remains inviolate in this state, this was manifest error.

[2] But we think the court erred in setting aside the jury's verdict on the principal question of fact involved. The promise sued

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



upon was written on a billhead of the respondent. Omitting the advertising matter it read as follows:

"Seattle, Wash., May 10, 1910.

"Mrs. Rea F. Bredemeyer to E. R. Butterworth & Sons, Dr. Solid oak black casket, 3 hacks and pall coach, funeral car, incineration fee, partial embalming, and all services for funeral of J. A. O. Bredemeyer, \$393.00.

"O. K. as arranged and payment guaranteed inside of thirty days. Rea F. Bredemeyer."

The evidence does not disclose who summoned the respondent to the appellant's residence on the death of her husband, but it appears that a representative of the respondent appeared there on the evening of the day of the husband's death and laid out the body, and that on the next morning another representative appeared to ascertain what arrangements were desired for the funeral. The evidence is in conflict as to the occurrences between the appellant and this representative, but the appellant testified that, in answer to the representative's inquiry as to the character of funeral desired, she stated to him that her husband desired to be cremated, and that, while she wanted the funeral neat, she wished it made as inexpensive as possible; that they looked over a catalogue containing a description and pictures of caskets, and that the agent pointed out one of solid oak as suitable for the purpose; that she inquired if a less expensive one might not answer the purpose inasmuch as the body was to be cremated, but was assured by the representative that the solid oak casket was the only one suitable for the purpose, and that she consented to the selection of the particular casket on the faith of his representations; that other furnishings were talked over and as they were agreed upon the representative would put them down on a paper; that after they had concluded he passed the paper over to her and requested her signature upon it; that she inquired as to the purpose of having her sign it, and was assured that it was "only to show the office that this is what you want." She testified further that nothing was said about prices during the negotiations; that she was not asked to and did not guarantee payment of the furnishings selected; that the cost of the same was not written on the paper when she put her name thereto, nor was any guaranty of payment written thereon.

The appellant was corroborated as to the conversation that occurred between herself and the representative by a lady, a neighbor of the appellant, who stood at the back of the appellant's chair while the arrangements were being made. The witness, however, was not able to say what was written on the paper prior to the signing by the appellant. While she corroborates the appellant as to the purpose for which the representative stat-

ed he desired the appellant's signature, she did not examine the writing sufficiently close to know what it contained. There were other circumstances shown also which lend color to the appellant's version of the transaction. There is a printed form of guaranty on the back of the paper, prepared for execution in the presence of a witness, which it seems might have been used had the transaction been entirely open and aboveboard; the casket selected was excessively large (so much so indeed that it could not be carried through the hallway of the house and had to be put in and taken out through a window), while Mr. Bredemeyer was a very small man, and when placed therein "looked like a child" in comparison with his surroundings; and the representative, when testifying to the occurrences at the time, puts a phrase into the mouth of the appellant which she testified she never uses, and which it appears she could hardly have used, even had she been addicted to it, under the circumstances shown here.

But it is not necessary to pursue the inquiry. There was here abundant evidence to carry the question of the guaranty to the jury, and the court was right in submitting the question of fact to them in the first instance, but in error in setting aside the verdict on the ground that the evidence was insufficient to support their finding.

[3] The respondent argues that a promise to pay for funeral services and findings arises from the order given to furnish them, and that in this case a recovery can be had against the appellant on the implied promise, even if the proofs of the direct promise fail. It may be that a wife is liable for the reasonable funeral expenses of her husband whether she expressly promises to pay for them or not (*Butterworth & Sons v. Teale*, 54 Wash. 14, 102 Pac. 768, 18 Ann. Cas. 854); but, in the absence of an express promise her liability therefor is secondary and not primary. As was held by the Supreme Judicial Court of Maine in *Phillips v. Phillips*, 87 Me. 324, 32 Atl. 963, the necessity of a decent burial arises immediately after the decease, and the law, both ancient and modern, pledges the credit of the estate for the payment of such reasonable sums as may be necessary for that purpose, even though such expenses may have been incurred after the death and before the appointment of an administrator. In this state the funeral expenses of a deceased person is made by statute a preferred charge against his estate. *Rem. & Bal. Code*, § 1568; *Cunningham v. Lakin*, 50 Wash. 394, 97 Pac. 447. Under this statute the liability of the estate must be regarded as primary, and the rule in such a case, as in other cases of primary and secondary liability, is that the creditor must exhaust his remedy against the primary fund before he can resort to the secondary fund.

[4] It is not denied, of course, that an express promise to pay the expenses of a fu-



ral will create a primary liability against the person so promising, but it is meant that nothing less than an express promise will create such a liability. In other words, a mere direction to furnish such service and supplies is presumed to be made on the faith of the credit of the estate, and nothing short of an order and an express promise to pay for the furnishings by the person giving the order will create a primary liability on his part.

The judgment is reversed and remanded, with instructions to overrule the motion for judgment non obstante verdicto and proceed to a final judgment in the cause in accordance with the usual course of practice.

MAIN, ELLIS, and MORRIS, JJ., concur.

(17 N. M. 694)

STATE ex rel. PARSONS MINING CO. v. McCLURE, District Judge.

(Supreme Court of New Mexico. May 16, 1913.)

*(Syllabus by the Court.)*

1. VENUE (§ 4\*)—INSOLVENCY PROCEEDINGS—"TRANSITORY ACTION."

A proceeding in insolvency against a corporation under chapter 79, Laws 1905, is a "transitory action" in the nature of quo warranto, and the venue thereof, under section 2950, C. L. 1897, may be in the county where either the plaintiff or the defendant resides.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 3; Dec. Dig. § 4.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7072-7074.]

2. COURTS (§ 475\*)—INSOLVENCY—CONCURRENT JURISDICTION.

As between courts of concurrent jurisdiction, the first acquiring jurisdiction of the subject-matter of an action is permitted, with certain exceptions, to retain it to the end. Applied to one district court, having jurisdiction of an insolvency proceeding against a corporation, under chapter 79, Laws of 1905, in which a mortgagee of the insolvent corporation is made a party defendant and answers, setting up his mortgage, and another district court, in which, pending the former proceeding, said mortgagee has obtained a decree of foreclosure and sale of the insolvent's property thereunder, the former district court is entitled to retain the jurisdiction first acquired by it, and to administer said estate, to the exclusion of any such decree by the latter court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1229, 1231-1239, 1247-1259; Dec. Dig. § 475.\*]

3. RECEIVERS (§ 77\*)—PROHIBITION (§ 15\*)—POSSESSION OF PROPERTY—RIGHTS OF INTERFERER.

A receiver cannot ordinarily take into custody property found in possession of a stranger to the record, claiming title. But where such stranger intervenes in the receivership proceedings, and submits his rights to the court for adjudication, he is not entitled to a writ of prohibition to restrain the court from determining those rights.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 91, 138-144; Dec. Dig. § 77;\* Prohibition, Cent. Dig. §§ 57-60; Dec. Dig. § 15.\*]

Application for writ of prohibition by the State, on the relation of the Parsons Mining Company, a corporation, against J. T. McClure, District Judge. Alternative writ discharged.

Wilson, Bowman & Dunlavy and Lorin C. Collins, all of Santa Fe, for relator. Gibbany & Black, of Roswell, for respondent.

PARKER, J. This is a proceeding for a writ of prohibition against John T. McClure, as judge of the district court of Chaves county, and against said district court. The facts giving rise to the controversy may be briefly stated as follows:

One R. E. Lund, being a judgment creditor of the Eagle Mining & Improvement Company, instituted a proceeding against said corporation as an insolvent under the provisions of chapter 79 of the Laws of 1905, seeking an injunction against the further exercise of its corporate functions by it, and seeking the appointment of a receiver of its assets. The corporation answered, setting up that all of its property had been conveyed by mortgage deed to one J. H. Fulmer, Jr. Thereupon Fulmer was ordered to be made a party defendant. Upon final hearing, the court made the following finding: "Upon the pleadings and the proofs submitted, it is found by the court that the defendant corporation is insolvent, and cannot, as now conditioned, conduct its business in the future with safety to the public or advantage to the stockholders. A decree may accordingly be drawn, granting the relief prayed in the complaint, and as provided by chapter 79 of the Laws of A. D. 1905." Thereupon a decree was entered appointing a receiver, but omitting to adjudge insolvency or to enjoin the further exercise of corporate functions by the corporation. This decree was brought to the territorial Supreme Court by writ of error, and the writ was dismissed, on the ground that, there being no injunction, the order appointing a receiver was interlocutory and not reviewable. *Eagle Mining & Improvement Co. v. Lund*, 15 N. M. 696, 113 Pac. 840.

Upon the remanding of the case to the district court, the Eagle Mining & Improvement Company offered to file an amended answer, setting up certain occurrences since the writ of error was sued out, and herein-after mentioned, which application was denied. Thereupon, on October 4, 1911, the cause came on for final hearing, and the district court, reciting its former findings, and that its former decree by inadvertence failed to award the injunction, entered a final decree adjudging insolvency, awarding injunction, and appointing the same receiver, who had never qualified under his former appointment, and ordered said decree to take effect nunc pro tunc as of September 18, 1908, the date of the original decree in the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



case. On March 15, 1912, the relator intervened in the cause, and set up that it was the owner of the property sought to be administered by the court through the receivership, by reason of a certain foreclosure proceeding prosecuted to final decree and sale in the district court of Lincoln county, and by conveyance to it from the said J. H. Fulmer, Jr., the purchaser at the foreclosure sale; that no receiver of the property of the Eagle Mining & Improvement Company had qualified, and hence none was made party defendant: that R. E. Lund, the plaintiff in the receivership case, was made a party and answered; that the receiver appointed by the nunc pro tunc decree of October 4, 1911, qualified and was assuming possession of the property and interfering with the possession of intervener, relator here. It prayed for a decree that it owned the property, and for an order to the receiver to refrain from further interference with the same. A demurrer was interposed to the petition of intervention, but, so far as appears, the same remains undisposed of.

Subsequently, the receiver being still in charge, relator filed a motion in the receivership case to be permitted to install certain machinery, which should not become subject to the receivership. The court denied the motion, but made an order permitting the installation of the machinery, provided it became a part of the estate, and as such subject to the administration of the court through the receivership.

It appears that the domicile of the Eagle Mining & Improvement Company is at Parsons, in Lincoln county, in the Sixth judicial district, and that all of its property was situated in said county of Lincoln, all of its business done there, all of its officers residing there, while the action for the injunction and receivership was begun and prosecuted in Chaves county, in the Fifth judicial district. Most of the property is real estate in the form of mining property.

A consideration of this case naturally involves three propositions, which may be stated as follows: (1) Is the subject-matter of the action within the general scope of the jurisdiction of the Chaves county court? (2) If within the general jurisdiction of that court, what effect did the proceedings have upon the jurisdiction of courts of concurrent jurisdiction? (3) Was the manner of seizing possession of the property lawful; and, if not, does the conduct of the relator waive the error?

[1] 1. A decision of the first proposition above mentioned required an examination into the nature of the action provided by chapter 79, Laws 1905. This act was adopted bodily from the corporation act of New Jersey of 1896, to be found in Parker's New Jersey Corporations, and in which all of the New Jersey decisions are cited and digested. In that state the courts have inter-

preted the statute in numerous cases. In *Gallagher v. Asphalt Co. of America*, 65 N. J. Eq. 258, 55 Atl. 259, the United States Circuit Court of New Jersey had taken jurisdiction of the Asphalt Company, and of all of its assets, and, through a receiver, was distributing the same to its creditors, and the objection was made that the New Jersey court had no jurisdiction under the statute to entertain the proceedings; the jurisdiction having been assumed by the federal court. The New Jersey court, after pointing out that the federal court was not assuming to strip the corporation of its power to exercise its corporate functions, but was administering the corporate assets under its general equity powers, overruled the objection and proceeded to discuss the nature of the statutory proceedings. The court said:

"Both sides, I think, conducted their argument somewhat under a misconception in regard to the nature of this act—or at least upon the idea that the suit brought under that act is an action for a receiver—an action necessarily to reach assets and effect their distribution through a receiver. I do not find that that is the main purpose and object of our statute, and the history of our statute strongly indicates that that view is erroneous. In my opinion, our statute, originally passed, as I said, in 1829, provides for a proceeding more in the nature of a quo warranto than of a creditors' bill. It provides for a proceeding which can be pursued to a finish, even though the corporation has no assets whatever. Whether a receiver shall be appointed under our statute, or not, is wholly discretionary with the court, and the receivership is not the essential object of the suit. The discretionary power to appoint a receiver can only be exercised at the time the injunction is ordered, or at some time thereafter. \* \* \* As in the New York act, the direct object of the suit is accomplished by an injunction placing the corporation under disabilities—restraining it from the exercise of any of its franchises. As in the New York act, the receivership is purely discretionary, and, when created, follows the decree for an injunction. A decree for an injunction might go, although there were no assets. The order appointing the receiver could never be made unless the decree passed at the same time, or had already passed, disabling the corporation by the injunction. \* \* \*

"Insolvency is one of the jurisdictional facts upon which the decree goes. The decree itself is that the corporation shall be enjoined from the exercise of its franchises. That is the decree. It is often said that our statutory suit is a proceeding in rem—that the status of the corporation is permanently fixed by this decree. True enough. But the status is not the status of a corporation as insolvent. It is the status of a corporation with respect to the exercise of its



franchises. The status that is determined and fixed by the decree is that of a corporation under disabilities, enjoined from exercising its franchises. \* \* \*

"Now, I think it will be perceived that our statutory suit is a proceeding more in the nature of a quo warranto than a creditors' bill for a receivership. In the case of a creditors' bill, the direct object is the sequestration of the assets by a receiver, and any injunction is ancillary to that object. If there are no assets, and consequently no receivership, it would be a strange case which would afford any function for an injunction. On the other hand, in the case of a quo warranto suit, the direct object is to procure a forfeiture of the corporate franchises—practical corporate death—and a receivership in those states where there can be a receivership in a quo warranto case is purely ancillary and dependent upon the necessities of the particular case, dependent upon the existence of assets to be received and distributed. \* \* \* If a corporation is insolvent to the extent defined by our statute, it is not material whether it has or has not assets, or, if it has assets, what their value may be; the suit proceeds to final decree in any case. \* \* \*

"The result, therefore, is that the motion to dismiss this bill is denied. The bill will be retained (in spite of the fact that all the assets of the corporation are in the possession of a receiver of the federal court, and at present there seems to be no reason why any receiver should be appointed by this court) for the accomplishment of the statutory object of this suit, which has no essential relation to the sequestration or distribution of assets."

See, also, *Pierce v. Old Dominion Copper Mining & Smelting Co.*, 67 N. J. Eq. 390, 58 Atl. 319, to the same effect, referred to and approved in *Eagle Mining & Improvement Co. v. Lund*, 15 N. M. 696, 113 Pac. 840. In the New Jersey cases it is said that the proceeding is a proceeding in rem; but it is clearly pointed out in those cases that the res is the status of the corporation, not its assets.

The sequestration and administration of the assets of the corporation is merely incidental to the main object of the proceeding, and is in the nature of an execution. If this is the correct interpretation of the statute, of which we have no doubt, it follows that the action is in its nature a personal and transitory one, and falls within the first subdivision of section 2950, C. L. 1897, which provides that transitory actions may be brought in the county where either the plaintiff or the defendant resides, and does not fall within the fourth subdivision of the section, which provides that, when lands are the object of a suit, such suit shall be brought in the county where the lands are situated.

We have hesitated to adopt this conclusion by reason of a practical question involved.

Under this holding a corporation having a domicile in one corner of the state may be sued by a creditor residing in the extreme opposite corner of the state, and thus be subject to great costs and inconvenience. But, no matter what the consequences may be, we cannot see our way clear to adopt any other doctrine. The remedy, if any is needed, lies with the legislative and not with the judicial department.

In this connection, we have not failed to notice the provisions of section 83 of the corporation act hereinbefore mentioned. The section is as follows: "Any creditor or claimant who shall lay his claim before such referee may, at the same time, demand that a jury shall decide thereon, and in like manner the receiver may demand that the same shall be referred to a jury; and in either case such demand shall be entered on the minutes of the referee, and thereupon an issue shall be made up between the parties, under the direction of the district court, and jury impaneled, as in other cases, to try the same in the district court of the county in which the corporation carried on its business or had its principal office, as in other civil cases, and the claim shall be docketed as other civil cases in said court; the verdict of the jury shall be subject to the control of the court as in suits originally instituted therein, and when rendered, if not set aside by the court, shall be certified by the clerk to the receiver and referee, and the creditor shall be considered in all respects as having proved his debt or claim for the amount so ascertained to be due, and in all cases in which no trial by jury shall be demanded the court shall have jurisdiction to pass upon the claims presented and to determine the rights of the claimants, and to make such order or decree touching the same as shall be equitable and just."

This section was adopted from section 77 of the New Jersey Corporation Act (2 Comp. St. 1910, p. 1649), which is as follows: "Any creditor or claimant who shall lay his claim before such receiver may, at the same time, demand that a jury shall decide thereon, and in like manner the receiver may demand that the same shall be referred to a jury; and in either case such demand shall be entered on the minutes of the receiver, and thereupon an issue shall be made up between the parties, under the direction of one of the justices of the Supreme Court, and a jury impaneled, as in other cases, to try the same in the circuit court of the county in which the corporation carried on its business or had its principal office; the verdict of the jury shall be subject to the control of the Supreme Court, as in suits originally instituted therein, and when rendered, if not set aside by the court, shall be certified by the clerk of the Supreme Court to the receiver; the creditor shall be considered, in all respects, as having proved his debt or claim for the amount so ascertain-



ed to be due, and in all cases in which no trial by jury shall be demanded the Court of Chancery shall have jurisdiction to pass upon the claims presented and to determine the rights of the claimants, and to make such order or decree touching the same as shall be equitable and just."

It appears that the Legislature attempted to adapt the New Jersey law to our situation, but that the adaptation is perhaps faulty, in that it is not clear and specific as to just what is meant. In New Jersey the Chancery Court has, we understand, territorial jurisdiction throughout the state, and it is clearly pointed out in their act that the jurisdiction of the main insolvency proceeding is vested in a court other than the one in which issues of fact are to be tried by a jury. In our jurisdiction, however, the several district courts are courts of both common-law and chancery jurisdiction, and possesses all of the general original jurisdiction in their respective districts, with some minor exceptions, and to the exclusion of other district courts. At first glance it would seem anomalous for an issue to be framed under the direction of one district court, to be tried to a jury in another district court of equal dignity and general character of jurisdiction. In other words, if a district court has jurisdiction of a given subject-matter, it would seem that its jurisdiction should be adequate to dispose of every issue that might arise in the course of the litigation. But the Legislature, we assume, could provide, if it so desired, for just such a result as has been outlined, and the question is whether it is so provided by the act in question.

Some little light is thrown upon the question by the adaptation of the law from New Jersey act. In New Jersey it clearly appears that the issues are to be tried by a jury in a court other than that in which the main insolvency proceeding is pending, and the Legislature followed the New Jersey act as closely in terms as possible under our circumstances. While not conclusive, this is persuasive as to the legislative intent that the venue of the main cause may be in one county, and the venue of an issue of fact before a jury in another county. Again, our district courts possess both common-law and chancery jurisdiction. While our district courts, so possessed of both jurisdictions, are presided over by the same judge, still the functions of the court in the two classes of cases are as distinct as those of the English courts of chancery and the English common-law courts. And when the district court entertains an insolvency proceeding of this kind, it sits as a court of chancery, and when it tries an issue to a jury, it sits as a court of law, with entirely different powers and functions.

But a more careful inspection of our act itself leads to the conclusion that the Legislature contemplated that the venue of the main action and that of the issue at law might be in different counties or even in dif-

ferent districts. It is to be observed that the venue of the issue at law alone is fixed by the act, wherein it provides: "And thereupon an issue shall be made up between the parties, under the direction of the district court, and a jury impaneled, as in other cases, to try the same in the district court of the county in which the corporation carried on its business or had its principal office, as in other civil cases, and the claim shall be docketed as other civil cases in said court." And it is seen that this venue may be either in the county where the corporation carried on its business, or in the county where it had its principal office. It is a matter of common observation that corporations may have, and do have, their principal office in a given county, and may transact all of their business in another county or district. A corporation having its principal office in Sante Fé county may do all of its business in Dona Ana county, for instance. The word "business," in this connection, evidently means the acts of the corporation whereby they come in contact with the public, and is the equivalent of "occupation." It does not refer to the internal management of the corporation, such as the holding of directors' and stockholders' meetings and the like, else the business of the corporation would always be done at its principal office. Once admitted that the venue of the main insolvency proceeding and that of the trial of an issue to a jury may be in different counties, or even in different districts of the state, it seems clear that section 83 was not intended to, and does not control, the venue of the main action. As a practical question we assume that the issue may be framed under the direction of the district court in which the main insolvency proceeding is pending, and that the same may be filed by either of the parties in the proper district court, as provided by the act, and as an ordinary action at law in a civil case.

[2] 2. A discussion of the second proposition necessitates a determination of when jurisdiction of a subject-matter attaches, and what effect the same has upon the concurrent jurisdiction of other courts. It is to be remembered that Fulmer, the mortgagee, was a party to the proceedings in the Chaves county court, served with process, and answering, setting up his mortgage. It is likewise to be observed that under the act (chapter 79, Laws of 1903) ample provision is made for the determination of every question of law or fact involving the validity, priority, or other characteristic of any claim of any creditor of the insolvent corporation, and for the payment of the same out of the estate of the insolvent. It is further to be observed that the parties before the Lincoln county court, where the mortgage of Fulmer was foreclosed, were the same as the parties before the Chaves county court. It is true that in the Lincoln county court the form of the procedure was somewhat differ-



ent, in that it was strictly a foreclosure proceeding; but Lund, the plaintiff in the Chaves county proceeding, was made a defendant, and the question as to the priority of the claims of Fulmer and Lund, respectively, was litigated. In the Lincoln county proceeding the fact of the pendency of the Chaves county proceeding was called to the attention of the court by the answer of Lund. While these proceedings, as before said, were slightly different in form, the essential elements of the two were the same in each instance. In the Chaves county proceeding the mortgage could not be foreclosed in form but the question of its validity, its relative priority, and the subjection of the insolvent estate to its payment, were all within the scope of that proceeding. We therefore consider the two proceedings as identical in substance and effect.

It is a fundamental rule of law, subject to some exceptions to be hereafter noticed, that, as between courts of concurrent jurisdiction, the first acquiring jurisdiction of a subject-matter of an action is permitted to retain it to the end. 1 Freeman on Judgments (4th Ed.) § 118a; Young v. Hamilton, 135 Ga. 339, 69 S. E. 593, 31 L. R. A. (N. S.) 1057, Ann. Cas. 1912A, 144; State v. Reynolds, 209 Mo. 161, 107 S. W. 487, 15 L. R. A. (N. S.) 963, 123 Am. St. Rep. 468, 14 Ann. Cas. 198; Coleman v. State, 83 Miss. 293, 35 South. 937, 64 L. R. A. 807, 1 Ann. Cas. 406. This doctrine has often been applied under various circumstances. Thus, in Farmers' Loan, etc., Co. v. Lake Street Railroad Co., 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667, a contest arose between a trustee under a trust deed to secure the payment of certain bonds of railroad and a set of minority bondholders, who were seeking to oust the trustee from its office, and to prevent its action in the federal court to foreclose the mortgage. The proceeding was first instituted in the federal court. The Supreme Court of the United States, in passing upon the question, says: "The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons. Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature, where, in the progress of the litigation, the court may be compelled to assume possession and control of the property to be affected."

In McDowell v. McCormick, 121 Fed. 61, 57 C. C. A. 401, an action by a creditor was brought against an insolvent corporation in a court of general jurisdiction in the state of Indiana, which court appointed a receiver. Subsequently, on the application of another creditor, another court of Indiana, of co-ordinate general jurisdiction, also appointed a receiver, who thereupon took possession of the insolvent corporation's property. It was held that the first-named court acquired complete and exclusive jurisdiction of the subject-matter, irrespective of any actual seizure of the property, and the record of such proceedings was admissible in evidence to prove title to the property as against title asserted by the second appointee. It is said by the court: "When the complaint on behalf of another creditor was filed in the La Porte superior court, and summons was served and appearance entered, that court was without present jurisdiction of the subject-matter; 'for the property could not be subject to two jurisdictions at the same time.' Covell v. Heyman, 111 U. S. 176, 182 [4 Sup. Ct. 355, 358 (28 L. Ed. 390)]. Possession of the property obtained by its receiver was, of course, nugatory, as were any orders for the sale thereof."

In Louisville Trust Co. v. Knott, 130 Fed. 820, 65 C. C. A. 158, the minority stockholders of the corporation filed a bill in the state court for an inspection of its books, the ascertainment of its debts and liabilities, together with a sale and distribution of its assets, and other equitable relief. The majority stockholders appeared in that case, but pending the same filed a creditors' bill for the appointment of a receiver in the federal court, who, when appointed, took possession of the assets, which the federal court refused to surrender to a receiver subsequently appointed by the state court. It was held that the state court had first acquired jurisdiction of the subject-matter of the administration of such corporation's assets, though it had not first taken physical control thereof, and hence was entitled to their surrender by the receiver of the federal court. The court says: "To avoid such conflict, most liable to arise between the federal and state courts, it has come to be settled, as we think, that, wherever a state or federal court has lawfully taken jurisdiction of a case for the purpose of subjecting assets within its territory to the charge or disposition which the law applicable to the case requires, such assets are thereby brought in custodia legis, subject to the power and control of the court, and that no other court of co-ordinate jurisdiction can, in a suit commenced while the assets are in that situation, lawfully deprive the court, which has already acquired the right of control, of the possession of them; this because the possession of the res is indispensable to the exercise of its jurisdiction by the court, to the



end that it may be impressed by its decree. It does not seem to us important that a receiver had not actually been appointed. An appointment of a receiver would rest upon considerations of convenience, and might be made at any time during the progress of the case, if occasion should arise. The conversion of the assets might be made without the employment of a receiver at all. Besides, the appointment goes upon the ground that the court has acquired control of the assets. He is a mere agent of the court. The possession is that of the court, and not his own. It is quite true that in many cases the rule has been stated in terms no broader than to include an actual possession by the court consequent upon a seizure. But it is seen that generally in such cases the exigency did not make it necessary to go beyond that limit. When the question we are now considering has been actually presented, the decisions have been quite uniformly in accord with the rule which we have indicated as the correct one."

In *Sullivan v. Algrem*, 160 Fed. 366, 87 C. C. A. 318, it is said: "The legal custody of specific property by one court of competent jurisdiction withdraws it, so far as necessary to accomplish the purpose of that custody, until that purpose is completely accomplished, from the jurisdiction of every other court. The court which first acquired jurisdiction of specific property by the lawful seizure thereof, or by the due commencement of a suit in that court, from which it appears that it is, or will become, necessary to a complete determination of the controversy involved, or to the enforcement of the judgment or decree therein, to seize, charge with a lien, sell, or exercise other like dominion over it, thereby withdrawing that property from the jurisdiction of every other court, and entitles the former to retain control of it requisite to effectuate its judgment or decree in the suit free from the interference of every other tribunal."

In *Lang v. Choctaw, etc.*, R. Co., 160 Fed. 355, 87 C. C. A. 307, Judge Sanborn states the doctrine in the same form.

In *Waters-Pierce Oil Co. v. State*, 47 Tex. Civ. App. 162, 103 S. W. 836, there was a conflict of jurisdiction between the state court and the federal court as to the custody of the estate of the Waters-Pierce Oil Company, whose charter had then been lately forfeited by the state of Texas. In that case it is said: "There is a rule, not only one of comity, but by force of judicial decisions of the highest court in the land has become one of jurisdiction, a rule so universally recognized that no court will question it, and it may be stated to be that, when the power of a court of jurisdiction is first invoked to seize and administer property, its jurisdiction is exclusive, and no other court of concurrent jurisdiction can interfere to materially disturb or hinder the former in the exercise of its

authority and jurisdiction over the res." The court further says: "When did the property become in custodia legis, and when did the jurisdiction of the trial court attach? For the purpose of this controversy we need not discuss the conflict of decisions, which on the one hand hold that the jurisdiction is complete from the filing of the bill, and upon the other that it does not attach until the service of subpoena; for here in this instance it is clear that the defendant corporation was in court properly served, and appeared in the receivership proceeding. When service is had, or there is the equivalent by appearance, if there could be any doubt as to which of the two lines of decisions should prevail, the weight of reason and authority is clear to the effect that the jurisdiction of the court will, under the doctrine of relation, after order made, commence from the time of the filing of the bill for appointment, although no possession has been taken by the receiver of the property sought to be administered by the court. This principle is well settled."

See *Craig v. Hoge*, 95 Va. 275, 28 S. E. 317, for specific application of this principle to cases of the general character of the case at bar. See, also, numerous cases collected in the note to *Young v. Hamilton*, Ann. Cas. 1912A, 150.

It seems clear from the foregoing authorities, and upon principle, that the Chaves county court, upon the filing of the bill and the service of process in the proceeding, which contemplated the adjudication of the question of insolvency, the awarding of an injunction against the corporation, if found insolvent, stripping it of its corporate powers, adjudicating the claims of all of its creditors, subjecting its estate to the payment of the same, absorbed all of the jurisdiction concerning the corporation and its property, to the exclusion of all courts of co-ordinate jurisdiction.

As before stated, an exception to the general rule exists as to actions in personam, as the exception is usually stated. The early and leading case pointing out this exception is *Buck v. Colbath*, 3 Wall. (U. S.) 334, 18 L. Ed. 257. In that case a United States marshal was sued for trespass, and he defended himself on the ground that his acts were performed under a writ of attachment of a proper federal court, and Mr. Justice Miller, speaking for the court, says: "It is scarcely necessary to observe that the rule thus announced [the general rule heretofore mentioned] is one which has often been held by this and other courts, and which is essential to the correct administration of justice in all countries where there is more than one court having jurisdiction of the same matters. \* \* \* But it is not true that a court, having obtained jurisdiction of a subject-matter of a suit and of parties before it, thereby excludes all other courts from the right to adjudicate



upon other matters having a very close connection with those before the first court, and, in some instances, requiring the decision of the same questions exactly. In examining into the exclusive character of the jurisdiction of such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits. For example, a party having notes secured by a mortgage on real estate may, unless restrained by statute, sue in a court of chancery to foreclose his mortgage, and in a court of law to recover a judgment on his notes, and in another court of law in an action of ejectment to get possession of the land. Here in all the suits the only question at issue may be the existence of the debt mentioned in the notes and mortgage; but as the relief sought is different, and the mode of proceeding is different, the jurisdiction of neither court is affected by the proceeding in the other. And this is true, notwithstanding the common object of all the suits may be the collection of the debt. The true effect of the rule in these cases is that the court of chancery cannot render a judgment for the debt, nor judgment of ejectment, but can only proceed in its own mode to foreclose the equity of redemption by sale or otherwise. The first court of law cannot foreclose or give a judgment of ejectment, but can render a judgment for the payment of the debt; and the third court can give the relief by ejectment, but neither of the others. And the judgment of each court in the matter properly before it is binding and conclusive on all the other courts. This is the illustration of the rule where the parties are the same in all three of the courts."

In commenting upon the illustration of the principle given in this case, Mr. Justice Field, in the Circuit Court, in the case of Sharon v. Terry, 36 Fed. 337, 359 (1 L. R. A. 572), uses the following language: "The exceptions to the doctrine that priority of jurisdiction controls priority of decision, to which we have referred, and to which our attention has been called by counsel of the defendants, will be found on examination to range themselves under two classes: First, where the same plaintiff has asked in the different suits a determination of the same matter, as, for instance, where different obligations are issued upon the same transaction, which is attacked in each suit as fraudulent and illegal, and therefore vitiating the several obligations, or where the jurisdiction of a court of equity, as well as a court of law, is invoked by him with reference to the matter. Of course, a decision first rendered in either suit may be pleaded in the others. The plaintiff must abide the adjudication which he has sought. And, second, where the cases are upon contracts or obligations which from their nature are merged in the judgment rendered; the

subject upon which the first suit is founded having thus ceased to exist."

But it is apparent that the case at bar does not fall within the exceptions. In this case the same parties, the same questions, the same relief, could be obtained in both proceedings, with some additional relief to the plaintiff. But so far as the mortgagee, Fulmer, is concerned, the two cases are exactly alike in all particulars, except the technical form of procedure, and of subjecting the property to the payment of this debt.

In connection with this exception to the general rule, and as illustrative of the same, reference is made to *Gallagher v. Asphalt Co.*, 65 N. J. Eq. 258, 55 Atl. 259, *Squire v. Princeton Lighting Co.*, 72 N. J. Eq. 883, 68 Atl. 176, 15 L. R. A. (N. S.) 657, and *Gallagher v. True American Pub. Co.*, 75 N. J. Eq. 171, 71 Atl. 741, 138 Am. St. Rep. 514. In each of these cases the action was in personam upon a legal demand against an insolvent corporation, and judgments were obtained after the filing of a proceeding against the defendant corporation as an insolvent, but before an adjudication of insolvency and the award of an injunction. It was held that, until an adjudication of insolvency and the awarding of an injunction, creditors of the corporation might pursue their legal remedies in personam, and thereby acquire a preferential claim against the insolvent estate. But these cases in no way affect the general doctrine above stated.

It seems clear, therefore, that upon the filing of the bill and the service of process in the Chaves county court that court absorbed the whole jurisdiction over the defendant corporation, its creditors, and its estate, and that the Lincoln county court had no jurisdiction then to entertain the foreclosure proceeding.

[3] 3. A serious question is presented by reason of the manner in which the Chaves county court took possession of the estate of the insolvent corporation. The receiver, who was finally appointed and qualified, found in possession of the property a stranger to the record, claiming to own the property, and protesting against any interference with its possession. This cannot ordinarily be done. See *Havemeyer v. Superior Court*, 84 Cal. 327, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192. Rights to property cannot ordinarily be tried in a summary manner by the appointment of a receiver who arbitrarily takes possession of the same. The more orderly and proper method, in cases where property is found in the possession of a stranger to the record, claiming ownership and right to possession of the same, and which is sought to be taken into possession as the property of another person, is to authorize the receiver to bring a suit to try the title. But whether in this case the facts justified the taking of the possession of the property under the circumstances shown by



the record or not, the relator being privy in estate with the mortgagee, Fulmer, it is not necessary for us to decide, by reason of the subsequent conduct of the relator.

It appears, as before seen, that the relator intervened in the Chaves county proceeding, and there set up its title to the property, and asked to have the same relieved from the custody of the receiver. Upon that petition issues can be made up, and the question of the jurisdiction of the Lincoln county court, under whose decree the relator holds, can be fully adjudicated. The relator has submitted its case to the Chaves county court, and must be held to await its judgment, which it is to be presumed, will be correct.

For the reasons stated, the alternative writ of prohibition will be discharged; and it is so ordered.

ROBERTS, C. J., and LEIB, District Judge, concur.

(18 N. M. 44)

MURRY et al. v. DAUGHTRY.  
(Supreme Court of New Mexico. Jan. 9, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 794\*)—MOTION TO DISMISS—PRESENTATION.

A motion for dismissal, not supported by brief or argument, will not be considered by this court.

[Ed Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3142-3166; Dec. Dig. § 794.\*]

Appeal from District Court, Quay County; T. D. Lieb, Judge.

Action by Clara Murry and others against J. R. Daughtry. From judgment for defendant, plaintiffs appeal, and defendant moves to dismiss the appeal. Motions overruled. See, also, 133 Pac. 101.

C. C. Davidson, of Tucumcari, for appellants. Harry H. McElroy, of Tucumcari, for appellee.

HANNA, J. There are two motions, for our consideration, for the dismissal of the appeal, raising substantially the same questions. The grounds assigned in support of the motion for a dismissal as to the appellant Clara Murry are all incorporated in the motion for dismissal as to the appellant Sarah Jane Murry, which, however, incorporates additional grounds. Neither of these motions are supported by brief or argument.

We are disposed to believe that motions not deemed worthy of argument are so lightly considered by the party presenting same that our time should not be consumed by an investigation into their merits.

For the reason stated, the motions are overruled.

ROBERTS, C. J., and PARKER, J., concur.

(21 Wyo. 281)

JUSTICE et al. v. BROCK.

(Supreme Court of Wyoming. Aug. 2, 1913.)

FACTORS (§ 43\*)—ACTIONS FOR NEGLIGENCE—EVIDENCE.

In an action by factors for advances, where defendant counterclaims for loss occasioned by the factors' failure to sell the property sent them, evidence showing a long delay in selling during a falling market might justify the submission of the factors' lack of diligence to the jury and, if unexplained, support a finding of negligence; the jury being properly instructed with reference to the duty of a factor who has made advances.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 45-57; Dec. Dig. § 43.\*]

On petition for rehearing. Denied.

For former opinion see 131 Pac. 38.

PER CURIAM. The defendant in error has filed a petition for rehearing, but takes exception only to certain language in the former opinion used in discussing the sufficiency of the evidence, and does not question the correctness of the conclusions reached upon the other points discussed in the opinion. Exception is taken particularly to the following language of the opinion: "The plaintiffs here were bound under their contract to exercise ordinary care, skill, and diligence to obtain the fair market value of the wool. We look in vain to find any evidence in this record showing or tending to show negligence in that respect on the part of the plaintiffs. \* \* \* The undisputed evidence, notwithstanding the market quotations furnished, shows that they used due diligence and were unable to find a purchaser who would pay the market quotations for the wool or sufficient to reimburse them for their advances and charges." In the brief supporting the petition for rehearing, it is conceded that the judgment must be reversed upon other grounds stated in the opinion and not now contested, but it is contended that there was evidence in the case tending to show that the plaintiffs below held the consigned wool for several months during a falling market, and that such evidence was not only competent but was proper to go to the jury and sufficient prima facie to show negligence or lack of diligence on the part of the plaintiffs. And it is said that the language above quoted from the former opinion ignores such evidence, and unless modified will have the effect upon a new trial of preventing the submission of such evidence to the jury.

In stating that "we look in vain to find any evidence in this record showing or tending to show negligence in that respect on the part of plaintiffs," and that "the undisputed evidence \* \* \* shows that they used due diligence," etc., reference was had to the whole of the evidence, and it was not intended as an assertion that there was no evidence tending to show lack of diligence. If there was evidence in the case which

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



might properly be understood as showing that there had been a long delay during a falling market, or if upon another trial evidence to that effect is introduced, then to that extent the evidence tended, or may tend, to show lack of diligence and sufficient to justify the submission of the matter to the jury, and if unexplained might be sufficient to justify a finding of negligence. *Felld v. Farrington*, 10 Wall. 141, 19 L. Ed. 923. It was not the intention by the use of the language above quoted to foreclose or embarrass the defendant below, plaintiff in error here, in the proof of his defense upon another trial. It must be remembered that advances had been made by the factors in this case, and in view of such fact, and the failure, as it seemed, to the court to show that the wool could have been sold at an earlier date for a sufficient amount to reimburse the factors for their advances, and all the evidence bearing upon the question, the court was of the opinion, intended to be expressed by the language now criticised, that upon the whole evidence negligence had not been shown.

The above explanation of the language used in expressing that opinion will, we think, obviate any danger of its misconstruction upon another trial. We repeat that it was not intended to deny the admissibility of evidence showing long delay in selling the wool during a falling market, nor its sufficiency, in the absence of satisfactory explanation, to show negligence; but, in applying that principle where advances have been made, the rule concerning the duty of a factor under such circumstances should be considered, and the jury properly instructed with reference thereto.

Having thus explained the language excepted to, a rehearing is deemed unnecessary and will be denied.

(22 Wyo. 1)

#### WILLIAMS v. CAMPBELL.

(Supreme Court of Wyoming. July 19, 1913.)

#### 1. ASSAULT AND BATTERY (§ 35\*)—EVIDENCE—VERDICT.

In an action for assault and battery, evidence *held* to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 51; Dec. Dig. § 35.\*]

#### 2. ASSAULT AND BATTERY (§ 39\*)—WILLFUL BEATING—EXEMPLARY DAMAGES.

Where, in an action for assault and battery, the evidence shows that the assault and beating were wanton, willful, and excessive, if not malicious, plaintiff may recover punitive damages.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 54; Dec. Dig. § 39.\*]

#### 3. ASSAULT AND BATTERY (§ 40\*)—DAMAGES—EXCESSIVENESS.

Where defendant, on meeting plaintiff driving a stallion in which they were interested, objected to plaintiff using the stallion for freighting and without provocation called plaintiff vile names and assaulted and bruised him,

injuring his side and neck, from which he suffered considerable pain, and was disabled for a week or ten days, a verdict allowing plaintiff \$100 actual damages and \$400 exemplary damages was not excessive.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 55; Dec. Dig. § 40.\*]

#### 4. ASSAULT AND BATTERY (§ 43\*)—ACTION—INSTRUCTIONS.

In an action for assault and battery committed on a public highway, the court properly charged that plaintiff was entitled to go about the public roads or places on his own business, free from molestation, so long as he conducted himself in an orderly manner, and any one violating such rights was liable for the actual damage suffered therefrom by the injured person without reference to whether the wrong was one of pure neglect or a wanton or willful wrong, and that actual malice or wanton or willful conduct on the part of the wrongdoer was material only on the question of punitive damages and must be shown in order to recover such damages, but, if plaintiff was injured by the wrongful acts of defendant, the jury should award compensatory damages whether there was actual malice or intent to do wrong on the part of defendant.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. §§ 57-59, 61, 62; Dec. Dig. § 43.\*]

#### 5. ASSAULT AND BATTERY (§ 43\*)—INSTRUCTIONS—PUNITIVE DAMAGES.

In an action for assault and battery, an instruction that in addition to actual damages, if any were found, the jury might award exemplary damages, if they found that defendant's wrongful acts, if any, were committed in a wrongful, wanton, or willful manner, without due regard for plaintiff's rights or from a bad motive or so recklessly as to imply a disregard for the obligations and rights of plaintiff, was proper.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. §§ 57-59, 61, 62; Dec. Dig. § 43.\*]

#### 6. ASSAULT AND BATTERY (§ 43\*)—INSTRUCTIONS—DAMAGES.

In an action for assault and battery, an instruction that in estimating the damages it was not necessary that any specified sum should have been named or stated in the evidence, and that actual damages were such as flowed directly and naturally from the act complained of, and such as the jury should find from the evidence and allow not exceeding the amount claimed in the petition, was proper.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. §§ 57-59, 61, 62; Dec. Dig. § 43.\*]

#### 7. ASSAULT AND BATTERY (§ 26\*)—EVIDENCE—BURDEN OF PROOF.

Where both plaintiff and defendant testified that defendant struck plaintiff, and there was no evidence to the contrary, the burden was on defendant to show that his action was in self-defense in order to relieve himself from civil liability for assault and battery.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 36; Dec. Dig. § 26.\*]

Error to District Court, Sheridan County; Carroll H. Parmelee, Judge.

Action by David A. Campbell against W. J. Williams. Judgment for plaintiff, and defendant brings error. Affirmed.

Camplin & O'Marr, of Sheridan, for plaintiff in error. Metz & Sackett, of Sheridan, for defendant in error.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



BEARD, J. Action by defendant in error, David A. Campbell, against plaintiff in error, W. J. Williams, for damages for an alleged assault and battery. Verdict and judgment for plaintiff, and defendant brings error.

The plaintiff alleged in his petition that about January 28, 1912, the defendant with great force and violence made an assault on plaintiff and beat, bruised, and wounded him and thereby caused him to become sick and to suffer great pain, to his damage in the sum of \$1,000. He further alleged that said assault and beating were done by defendant with great force and violence and was maliciously and willfully done and claimed \$2,000 exemplary damages.

The defendant's answer contained: First, a general denial of the allegations of the petition; and, second, alleged that at the time and place stated in the petition plaintiff made an assault on defendant, and that in defending himself against said assault he necessarily struck plaintiff with his hand, doing plaintiff no unnecessary damage, and that said striking was done in the necessary defense of his person from said assault. The reply denied the allegations of the second defense except that defendant struck plaintiff with his hand.

[1] It appears that, at the date stated, the plaintiff, Campbell, was driving a six horse team attached to two sleds; one of the horses of the team being a stallion of which plaintiff owned eight-ninths and defendant one-ninth. That defendant with his wife was driving a two horse team attached to a sled or sleigh. The parties met and stopped, when defendant got out of his sled and went to the sled in which plaintiff was sitting and objected to plaintiff's using the stallion for freighting, which use of said horse was the cause of the difficulty. The evidence on part of plaintiff tended to prove that defendant, without other provocation, then called plaintiff vile names and assaulted him, striking him with his fist several times on the head and face, inflicting several wounds and bruises and otherwise injuring his side and neck from which he suffered considerable pain, made him sore and lame, and that his side troubled him for a week or ten days and his neck for about five weeks, so that for a week or more he "wasn't able to do anything hardly at all. Could drive the team, but couldn't load or unload, had to have help." The evidence on part of defendant tended to prove that when he went to plaintiff's sled the latter raised a whip to strike him, and to prevent him from doing so he slapped the plaintiff in the face two or three times with the back of his hand on which he had a cotton flannel mit, and that he did not injure plaintiff at all unnecessarily or seriously. It is not contended that plaintiff resisted or attempted to defend himself. He testified: "I knew it was utterly

useless for me to compete with Mr. Williams, because he is a much better man than I am." "I was afraid, and I thought if any defense was made it would mean more punishment." After the affray defendant took the stallion out of plaintiff's team and took him away. It is contended that the verdict and judgment are not sustained by sufficient evidence. The evidence was in direct conflict, and it was simply a question for the jury to determine which witnesses were most worthy of credence. The parties and witnesses were before it, and it had full opportunity to observe them and to decide between them. It has passed upon the credibility of the witnesses and the weight to be given to their testimony; and the judge who presided at the trial has refused to disturb the verdict. If the testimony on the part of the plaintiff is to be believed, the verdict and judgment find sufficient support therein.

[2] It tends strongly to show that the assault and beating were wanton, willful, and excessive, if not malicious; and, if so, it was a proper case for awarding exemplary or punitive damages. Sedgwick on Damages (9th Ed.) §§ 363a and 366.

[3] The jury by the verdict found \$100 actual damages and awarded \$400 exemplary damages and the court rendered judgment accordingly. In our opinion the amount of damages awarded was not excessive.

[4] Instructions numbered 4, 5, and 6, given by the court to the jury, are claimed to be erroneous. By instruction numbered 4 the court told the jury that the plaintiff "had a right to go about the public roads or places on his own business, free from molestation by the defendant or any one, so long as he conducted himself in an orderly manner. \* \* \* And any one guilty of violating any of these rights is liable for the actual damages suffered therefrom by the injured person. It matters not whether the wrong be one of pure neglect or a wanton or willful wrong; an action will lie for the actual damages suffered. Actual malice or wanton and willful conduct on the part of the wrongdoer is material only on the question of punitive or exemplary damages and must be shown in order to recover such damages; but, if you find that the plaintiff in this case has been injured by the wrongful acts of the defendant, you have a right to assess actual or compensatory damages against the defendant caused by such wrongful acts regardless of whether there was any actual malice or intent to do wrong on the part of the defendant or not."

[5] By instruction numbered 5 the jury was told: "In addition to any actual damages (if you find that there were any), you may award exemplary damages to the plaintiff, in case you should find that the wrongful acts, if any, by the defendant causing such actual damages were committed in a wanton, willful, or reckless manner, or in



case you find such acts were committed wantonly, recklessly, and without due regard to the rights of the plaintiff, or if you find that wrongful acts of the defendant causing such damages were from any bad motive or so recklessly done as to imply a disregard for the obligations and rights of the plaintiff."

[6] And by instruction numbered 6: "You are instructed, in estimating the damages which accrue from an assault and battery, it is not necessary that any specific sum should have been named or stated in the evidence. Actual damages are those which flow directly and naturally from the act complained of, and such damages, if any, which you find from the evidence, and allowed by you, shall not exceed \$1,000, the amount claimed in the petition." These instructions, we think, fairly stated the law of the case on the points covered by them, and we fail to see how the jury could have been misled by them as claimed by counsel for plaintiff in error. The refusal to give certain instructions requested by defendant is assigned as error. They related to the burden of proof.

[7] Both plaintiff and defendant testified that defendant struck plaintiff, and there was no evidence to the contrary, and in the first instruction given, to which there was no objection, the jury was told that in those circumstances the burden was upon the defendant to show that his action in striking plaintiff was in self-defense. That was the only issue in the case on which the court told the jury that the burden was upon the defendant, and rightly so. The instructions as a whole fairly stated the issues and law of the case as applicable to the evidence and were not erroneous.

Finding no error in the record, the judgment of the district court is affirmed.

Affirmed.

SCOTT, C. J., and POTTER, J., concur.

(23 Wyo. 8)

### LAUGHLIN v. KING.

(Supreme Court of Wyoming. July 19, 1913.)

#### 1. ANIMALS (§ 18\*)—BREEDING CONTRACTS—OFFER AND ACCEPTANCE—PART PERFORMANCE.

Where defendant offered to breed 40 mares to a certain horse if he was purchased by plaintiff, and it was alleged that the offer was accepted, and 15 of the mares were furnished by defendant and bred to the horse, an agreement to that extent having been performed, it was not material that the place of performance was not stated in the offer.

[Ed. Note.—For other cases, see Animals, Cent. Dig. § 36; Dec. Dig. § 18.\*]

#### 2. PLEADING (§ 193\*)—CONTRACTS—PARTIAL PERFORMANCE—DEMURRER—COMING SEASON—BREED.

Defendant wrote plaintiff that if plaintiff would purchase a certain stallion defendant would guarantee to breed 40 mares the coming season at \$20. This offer was accepted. Plaintiff purchased the horse, but defendant

furnished only 15 mares, and plaintiff brought suit alleging that he furnished the horse, and that defendant had furnished no more than 15 mares, and refused to pay \$20 per head or any sum therefor, and also failed to furnish to be bred any other mares except the 15 head, and prayed for damages. *Held*, the terms, "coming season" and "breed," in the offer, in the connection in which they were used, were not so ambiguous or uncertain as to render the petition vulnerable to a general demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 425, 428-435, 437-443; Dec. Dig. § 193.\*]

#### 3. PLEADING (§ 193\*)—COMPLAINT—ACTION ON CONTRACT—GENERAL DEMURRER.

Where a complaint stated two causes of action in one count, one for serving 15 mares by plaintiff's stallion under a specified contract, and the other for damages for failure to furnish 25 more, no motion having been made to require the causes of action to be separately stated, the statement as a whole was not subject to general demurrer because it failed to allege as to the breeding of the mares not furnished that plaintiff was ready and willing to perform the agreement on his part.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 425, 428-435, 437-443; Dec. Dig. § 193.\*]

#### 4. ANIMALS (§ 18\*)—BREEDING HORSES—COMPLAINT—VERDICT—EVIDENCE.

In an action for the service of plaintiff's stallion for breeding certain mares under contract to breed a larger number than those furnished, and for defendant's failure to furnish the balance, evidence *held* to sustain a verdict for plaintiff for the contract price for service of the mares furnished.

[Ed. Note.—For other cases, see Animals, Cent. Dig. § 36; Dec. Dig. § 18.\*]

#### 5. TRIAL (§ 334\*)—VERDICT—DEFINITENESS.

A verdict "that there is due said plaintiff from said defendant the sum of \$200 with interest, \$238.66%," meant that there was due plaintiff \$200 principal and \$38.66% interest, which was in accordance with the instructions of the court, and was not too indefinite to support a judgment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 785; Dec. Dig. § 334.\*]

#### 6. APPEAL AND ERROR (§ 1064\*)—REVIEW—INSTRUCTIONS—PREJUDICE.

Where plaintiff sued for breach of contract to furnish 40 mares to be bred to plaintiff's stallion and plaintiff was allowed to recover only the price for the 15 mares actually furnished, defendant was not prejudiced by instructions that, if plaintiff purchased the horse on defendant's offer to furnish mares, the offer and acceptance constituted a contract, and if plaintiff had performed and was ready to breed the mares, as furnished, the jury should find for him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.\*]

#### 7. APPEAL AND ERROR (§ 480\*)—SUPERSEDEAS BOND—PENALTY—SUPREME COURT—AUTHORITY TO FIX.

Comp. St. 1910, § 5116, provides that no proceeding to reverse a judgment rendered in the district court, except as provided in the fourth subdivision of the section, and in sections 5119 and 5120, shall stay execution until the party against whom the judgment is rendered shall file in the office of the clerk of the trial court a written undertaking with sureties to be approved by the court, or judge thereof, or by the clerk; when the judgment or final order sought to be reversed directs the payment of money, the written undertaking shall be in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 133 P.—68



such sum as shall be fixed by the court or the judge thereof, and shall be to the effect that plaintiff in error will pay the condemnation money and costs, if the judgment or final order be affirmed in whole or in part, or if the proceedings in error be dismissed. Section 5117 provides that such undertaking shall operate as a stay of execution for 90 days from the date the same is filed, whether proceedings to reverse, vacate, or modify the judgment have been taken or not, and if within such 90 days proceedings in error have been commenced, as provided by section 5114, it shall operate to stay execution until the cause is finally determined in the Supreme Court. Section 5124 provides that execution of a judgment, other than those enumerated in the chapter, may be stayed on such terms as may be prescribed by the court in which the petition in error is filed, or by a judge thereof. *Held* that, where defendant on April 22, 1912, filed an undertaking to stay execution pursuant to sections 5116 and 5117, but no order of the court or judge fixing the amount of such undertaking appeared in the record, and no proceedings in error were commenced until January 6, 1913, defendant, on commencing his proceedings in error notwithstanding a prior undertaking, was entitled to stay execution by complying with section 5116, but the judgment having been rendered in an action for the recovery of money only, the terms and conditions of the bond could not be fixed by the Supreme Court or judge thereof, but should be fixed by the court entering the judgment appealed from.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2257; Dec. Dig. § 480.\*]

Error to District Court, Albany County; Charles E. Carpenter, Judge.

Action by Herbert King against L. L. Laughlin. Judgment for plaintiff, and defendant brings error. Affirmed.

Gibson & Sullivan, of Laramie, for plaintiff in error. C. P. Arnold, of Laramie, for defendant in error.

BEARD, J. This action was brought in the district court of Albany county by the defendant in error, Herbert King, against the plaintiff in error, L. L. Laughlin, to recover on an alleged contract for the breeding of certain mares to a stallion owned by King. There was a verdict and judgment for plaintiff below, and Laughlin brings error.

The plaintiff alleged in his petition, substantially, that about August 16, 1905, the defendant agreed with plaintiff that if plaintiff would purchase a certain stallion then for sale, known as "Tarquin," the defendant would breed to said stallion 40 mares, and would pay for such services the sum of \$20 for each mare. That about said date, to induce plaintiff to purchase said stallion, the defendant made the following offer in writing, to wit: "Dear Herb.: If you make a deal with Mr. Holdridge for the Oldenburg coach horse Tarquin, I will guarantee to breed 40 mares the coming season at \$20. I think him a magnificent stallion. Yours truly, L. L. Laughlin. This is provided I know before I make other arrangements." That plaintiff accepted said offer and purchased the stallion, all of which

the defendant well knew. That during the year 1905, after the purchase of said stallion by plaintiff, the defendant bred 15 mares to said stallion, and no more, and refused to pay \$20 per head or any other sum therefor, and that he failed to furnish to be bred any other mares except the 15 head, to plaintiff's damage in the sum of \$800, for which with interest plaintiff prayed judgment against defendant.

The defendant demurred to the petition on the ground that the facts stated therein were insufficient to constitute a cause of action. The demurrer was overruled, and the defendant answered, first, denying specifically the allegations of the petition; and second, alleging that when the written instrument was made he was the agent and manager of the Toltec Live Stock Company; that it was a general, uniform, and established custom and usage on the part of defendant to use his own name in acting for the company of which custom and usage plaintiff had full knowledge; that said instrument was made by defendant on behalf of said company, and was preliminary to negotiations for the service of said stallion provided plaintiff should purchase it. That plaintiff failed to notify defendant of the purchase of said stallion until about July 15, 1906, after arrangements had been made for the season. Alleged that the 15 mares were turned over to plaintiff to be bred for said company under an agreement made about July 15, 1906, and that plaintiff knew that the company was the principal party to said contract, and accepted said mares with that understanding, and elected to hold it for his charges. A motion to strike out parts of the second count of the answer was denied; a demurrer to said second count was overruled, and plaintiff replied, denying the allegations contained in said count except that plaintiff bred 15 mares as stated in his petition.

[1, 2] The overruling of the demurrer to the petition is assigned as error, and it is argued that the writing was too ambiguous, indefinite, and uncertain to constitute an offer capable of becoming a contract by its acceptance. That the place of performance is not stated, and that the term "during the coming season" and the word "breed" are indefinite. We think the petition stated a cause of action at least for the breeding of the 15 mares which it is alleged were bred. The offer was to breed 40 mares to the horse if he was purchased by plaintiff, and it is alleged that the offer was accepted, and 15 mares were furnished by defendant and bred to said stallion. The agreement to that extent having been performed, it was not material that the place of performance was not stated in the offer. Nor do we think the terms "coming season" or "breed," in the connection in which they were used, were so ambiguous or uncertain as to render

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index



the petition vulnerable to a general demurrer.

[3] It is further contended that the petition contained no allegation that the plaintiff was ready and willing to perform the agreement on his part. That might apply to that part of the petition claiming damages for the failure of defendant to furnish the other 25 head of mares; but the petition was in one count including two causes of action, one for breeding 15 mares under the contract, and the other for damages for the failure to furnish the others, and no motion was made to require the causes of action to be separately stated, and the demurrer was general and was therefore properly overruled.

[4] It is next urged that the verdict and judgment are not sustained by sufficient evidence. The verdict and judgment were for \$200 and interest, and we think the evidence was ample to sustain a finding that defendant was liable and that at least 10 of the 15 mares were bred in pursuance of the contract, and the jury evidently so found. The offer of defendant did not purport to be made by him as agent, and there was sufficient evidence to support a finding that plaintiff had no knowledge that the offer was intended to be other than the individual offer of defendant. Defendant testified that a few days after plaintiff purchased the horse he had a conversation with plaintiff in which plaintiff informed him of the purchase; and again, "there was nothing more said in regard to this agreement until along about time for the breeding season. I asked Mr. King where he was going to stand the horse, and intimated that I wanted to breed these mares. He said he was going to stand him at home." And again, speaking of another conversation: "Well, this was about the latter part of the breeding season. I should think about July, the middle of July, 1906, Mr. King approached me at the corner of the Cosgriff store—between that and Lewis' saloon—and made the remark, 'What about those mares, Laughlin?' And I said: 'Herb, it is too late for me to get those mares now. They are on the range, and many of them have been bred. I couldn't get them for you in time; but I will try and get some of them, if I can find some that have not been bred, haven't foaled; then you can keep those until they have their colts, and we can be sure they have been bred. I will get you 15, anyhow, if that will be satisfactory.' And he said, 'That will be satisfactory.'" This testimony in connection with that given on behalf of plaintiff was ample to support the judgment.

[5] It is contended that the verdict was too indefinite to support the judgment. By the verdict the jury found "that there is due said plaintiff from said defendant the sum of \$200 with interest, \$238.66%." That is, as we understand it, \$200 principal and \$38.66% interest, which was in accordance

with the instruction of the court, that if the jury found for the plaintiff they should allow interest on the sum so found at 8 per cent. per annum from October 1, 1906. There was no objection to that instruction on that ground, nor was it alleged to be error in the motion for a new trial. The verdict was returned March 23, 1909, and if the jury made a mistake in computing the interest it was in favor of defendant, and he should not complain.

[6] It is assigned as error that the court instructed the jury to the effect that if it found that plaintiff accepted the offer and purchased the stallion, then the offer and acceptance constituted a contract between the parties. And in the next instruction, if they found that plaintiff performed the contract on his part and held himself ready to breed the mares in accordance with its terms, then they should find for the plaintiff. If there was error in these instructions the defendant was not prejudiced thereby, as it is evident the jury awarded no damages for the failure of defendant to furnish the full number of mares stated in the offer, and that the verdict was for the number only that the evidence showed were actually furnished and bred. It is contended that there was error in the refusal of the court to give certain instructions requested by defendant. Those instructions presented substantially the same questions decided by the ruling on the demurrer, and relate to the alleged indefiniteness of the offer, which we have already considered. A careful examination of the record convinces us that no prejudicial errors were committed on the trial and that the judgment should be affirmed, and it is so ordered.

[7] Upon filing his petition in error, the plaintiff in error applied to the chief justice of this court for an order staying execution on said judgment, pending the proceedings in error, and such order was made. The defendant in error thereupon filed his motion to vacate said order on the grounds that it was improvidently issued; that the chief justice had no jurisdiction to issue said order, in that the judgment was an action at law for the recovery of money only, and the judgment was for the payment of money. This motion was argued and submitted with the main case. The statute (section 5116, Comp. Stat. 1910) provides: "No proceeding to reverse, vacate, or modify a judgment or final order rendered in the district court, except as provided in the fourth subdivision of this section and in sections 5119 and 5120, shall operate to stay execution until the party against whom such judgment or final order was made shall file in the office of the clerk of the court wherein such judgment or final order was rendered a written undertaking with sureties to be approved by the court or the judge thereof, or by the clerk of said court as follows: (1) When the judgment or final order sought to be reversed directs the



payment of money, the written undertaking shall be in such sum as shall be fixed by the court or the judge thereof to the effect that the plaintiff in error will pay the condemnation money and costs, if the judgment or final order be affirmed in whole or in part, or if the proceedings in error be dismissed. (2) When it directs the execution of a conveyance or other instrument. \* \* \* (3) When it directs the sale or delivery of possession of real property. \* \* \* (4) When it directs the assignment or delivery of documents. \* \* \* Section 5117 provides that such undertaking shall operate as a stay of execution for the period of 90 days from the date the same is filed whether proceeding to reverse, vacate, or modify such judgment or final order have been taken or not, and, if within said 90 days proceedings in error have been commenced as provided by section 5114, it shall operate as a stay of execution until the cause is finally determined in the Supreme Court. Section 5119 provides for the filing of the conveyance or instrument mentioned in the second subdivision of section 5116 instead of the undertaking. Section 5120 relates to executors, etc. Section 5124 provides: "Execution of a judgment or final order, other than those enumerated in this chapter, of any judicial tribunal, or the levy or collection of any tax or assessment therein litigated, may be stayed, on such terms as may be prescribed by the court in which the petition in error is filed, or by a judge thereof."

The judgment in the present case is one for money only, and comes within the first subdivision of section 5116, and is excepted from the provisions of section 5124 by the language of the latter section. The question presented by the motion was directly decided by the Supreme Court of Ohio in *Hyde v. Bank*, 49 Ohio St. 60, 34 N. E. 720. The court said: "Where a judgment is rendered in the court of common pleas against a defendant for money only, and it is affirmed by the circuit court, the defendant, upon filing a petition in error in this court to reverse the judgment below, is entitled to a stay of execution upon giving an undertaking in double the amount of the judgment, to the acceptance of the clerk of the circuit court, in accordance with section 6718, Revised Statutes. (Substantially our section 5116, except in ours the amount is fixed by the district court or judge thereof.) In such case, this court is not required nor authorized by the provisions of section 6725, Revised Statutes (our section 5124) to fix the terms of the stay of the judgment of the circuit court." The decision in that case accords with our view of the correct construction of the several sections of the statute. Prior to the act of March 8, 1890 (chapter 38, S. L. 1890; section 5117, Comp. Stat. 1910) it would seem that the undertaking provided for by section

5116 was to be filed after proceedings in error were commenced; but by the latter act the undertaking may be filed at any time after the rendition of the judgment or entering of the final order, and will stay execution for 90 days from such filing whether proceedings in error are taken or not; and if proceedings in error are commenced within the 90 days such undertaking will stay execution until the final determination of the case. In this case it appears from the record that defendant on April 22, 1912, filed an undertaking to stay execution under the provisions of sections 5116 and 5117; but no order of the court or judge fixing the amount of such undertaking appears in the record, and no proceedings in error were commenced until January 6, 1913.

We are of the opinion however that notwithstanding the giving of the undertaking of April 22, 1912, whether valid or not, the defendant (plaintiff in error) had the right, on commencing his proceedings in error, to stay execution by complying with the provisions of section 5116; but in a case like the present one neither this court nor a judge thereof is authorized to fix the terms on which execution will be stayed, the statute having otherwise prescribed the method for so doing. The application for the order, made to the chief justice, was ex parte, and the order was inadvertently issued, and while perhaps not of much importance at this stage of the case the defendant in error is entitled to have the order vacated. The judgment of the district court is affirmed, and the motion to vacate the order staying execution granted.

Affirmed, and order vacated.

SCOTT, C. J., and POTTER, J., concur.

(21 Wyo. 513)

BLONDE v. MERRIAM et al.

(Supreme Court of Wyoming. July 19, 1913.)

1. APPEAL AND ERROR (§§ 281, 305\*)—PRESENTATION OF GROUNDS IN LOWER COURT—MOTION FOR NEW TRIAL—NECESSITY.

The filing of a motion for new trial and exceptions to the overruling thereof are necessary to a consideration on writ of error of questions which could have been properly assigned as grounds for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1650-1661, 3024, 3281, 1759-1764; Dec. Dig. §§ 281, 305.\*]

2. NEW TRIAL (§ 119\*) — TIME FOR APPLICATION—EFFECT OF DELAY.

Comp. St. 1910, § 4603, requiring an application for new trial to be made within 10 days unless the party applying therefor is unavoidably prevented from filing it within that time, and section 4604, providing that the application must be by motion upon written grounds, filed at the time of making the motion, are mandatory; and where a motion for new trial was filed after the expiration of the 10 days without any showing of unavoidable delay, the motion should be stricken from the files, even though an order of the court extending the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



time was entered upon an oral *ex parte* application.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 243; Dec. Dig. § 119.\*]

**3. NEW TRIAL (§ 118\*)—TIME FOR MOTION—EXTENSION—NATURE OF REMEDY—"PLEADING."**

Comp. St. 1910, § 4418, providing that the court or judge may, for good cause shown, extend the time for filing any pleading, does not apply to the filing of a motion for new trial, which is not a pleading.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 242; Dec. Dig. § 118.\*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5400-5411; vol. 8, p. 7736.]

Error to District Court, Fremont County; Charles E. Carpenter, Judge.

Action by Edward Merriam and another against Charles E. Blonde. Judgment for plaintiffs, and defendant brings error. Affirmed.

V. H. Stone and L. E. Winslow, both of Lander, for plaintiff in error. W. E. Hardin and P. B. Coolidge, both of Lander, for defendants in error.

**POTTER, J.** The plaintiff in error, Charles E. Blonde, was the defendant in the district court. It appears that a partnership had existed between him and the plaintiffs below, Edward Merriam and William Madden, and that the same had terminated, and the action was brought for an accounting and to recover the amount which might be found to be due the plaintiffs from the defendant; the petition alleging a stated amount to be due. Upon the evidence, which was taken before a special master commissioner, and reported to the court with the commissioner's findings, the defendant was found by the court to be indebted to the plaintiffs, and judgment was rendered for the amount so found to be due. This proceeding in error is brought to reverse that judgment.

[1] No ground for reversal is here suggested that could not have been properly assigned as ground for new trial, and, therefore, under the rule and decisions of this court the filing of a motion for new trial, the overruling thereof, and an exception thereto, would be necessary to a consideration of the questions involved.

[2] A motion for new trial was filed by the defendant, but the court ordered it stricken from the files on the motion of plaintiffs, on the ground that it was not filed within the time allowed by the statute. That order was excepted to, and is assigned as error. The major portion of each brief is devoted to a discussion of that assignment, it being contended by counsel for plaintiff in error that the motion was timely filed, because within the time allowed by an order extending the time, and that the order striking it from the files is equivalent to an order overruling the motion, if it was filed in time. Opposing counsel, on the other hand, contend that the

order extending the time was unauthorized and invalid, and that the motion was, therefore, not filed in time to entitle it to any consideration, and was properly stricken from the files.

A bill of exceptions is in the record showing the motion that was filed, the disposition made of it, and the facts relating thereto. The record discloses the following facts respecting the matter: The findings of the court and judgment were rendered July 15, 1911; that being one of the days of the May, 1911, term of the court. An order, appearing in form as a court order, was signed by the district judge, dated July 24, 1911, and filed July 29, 1911, reading as follows (omitting the caption, signature, and date): "Upon the application of the defendant, Charles E. Blonde, and for good cause shown, it is hereby ordered that the time for the filing of the motion for a new trial in the above-entitled cause is hereby extended to and including the 1st day of August, A. D. 1911; and said defendant is now and hereby given to and including the 1st day of August, A. D. 1911, within which to prepare and file his motion for a new trial of said cause."

On July 29, 1911, more than 10 days after the rendition of the judgment, the defendant filed his motion for new trial. At the November term the motion was presented to the court and argued by counsel for defendant below; counsel for plaintiffs being present. Thereupon the argument was suspended at the court's suggestion and by agreement of the parties to permit the preparation and filing of written briefs. On or about January 29, 1912, the defendant's attorneys filed with the judge of said court, and served upon the attorneys for the plaintiffs their brief in support of the motion; the same being set out in full in the bill of exceptions, discussing the questions presented by the exceptions to the findings, and contending that the same were not supported by the evidence. On the 12th day of May, 1912, the attorneys for plaintiffs served upon the defendant's attorneys their written brief opposing the motion by a discussion of the questions thereby raised.

On May 14, 1912, while said motion for new trial was pending before the court, and, as stated in the bill, before the motion had been finally submitted, the plaintiffs made and filed their motion to strike the defendant's motion for a new trial from the files, on the ground that it was not filed in time, and, therefore, a nullity. The motion to strike recited the date of the judgment, the date when the motion for new trial was filed, the fact that it was not filed within 10 days after the rendition of the judgment, and that it does not allege newly discovered evidence, or that the defendant was unavoidably prevented from filing the same within 10 days from the rendition of the judgment; that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes



no showing was made to the court prior to its filing that the defendant had been unavoidably prevented from filing the same within said 10 days; and alleging that defendant was not unavoidably prevented from filing the motion within that time. It was recited also that an order of court had been filed in the cause on July 29, 1911, purporting to extend the time within which to file the motion for new trial to August 1, 1911; and it was alleged that said order was granted upon an *ex parte* application, that neither the plaintiffs nor their attorneys had any notice or knowledge that such an order would be applied for, or that the same had been entered until after it was filed as aforesaid, and that said order was granted without any written application or petition therefor, and was, therefore, ineffective. The motion to strike was supported by affidavits.

On June 29, 1912, an order was made and entered sustaining the motion to strike. That order recites that the motion of the plaintiffs to strike defendant's motion for new trial came for hearing, that the plaintiffs appeared in person and by attorneys, and that the defendant appeared in person and by his attorneys, and also recites the dates respectively when the judgment was rendered and the motion for new trial was filed, and continues as follows: "And it further appearing that the previous order of this court purporting to extend the time for filing said motion for a new trial to August 1, 1911, was granted on an oral and *ex parte* application of the defendant's attorneys, without any notice to the plaintiffs or either of them, or to their attorneys or either of them, or without any showing to this court that the defendant was or would be unavoidably prevented from filing said motion for new trial within the statutory period, and said order, for the reason aforesaid, being ineffectual, and without warrant or authority of law; and no showing having been made in said motion for a new trial, or otherwise, that the defendant had been unavoidably prevented from filing a motion for a new trial within the statutory period; and it further appearing for the reasons aforesaid that this court is without jurisdiction to hear and determine said motion for a new trial, and the same should be stricken from the files of this case and the records of this court; it is therefore considered, ordered, adjudged, and decreed by the court that said motion to strike be and the same is hereby sustained, and the defendant's said motion for a new trial is hereby stricken from the files in this case and the records of this court."

The defendant excepted to the above ruling and order. Thereafter the defendant filed and presented a motion for a new trial upon the motion to strike, which was also overruled, and the ruling excepted to. It appears that the judge who presided when the motion for new trial was stricken from the files was the same judge who had signed the order ex-

tending the time. It does not appear that any evidence was produced by the defendant upon the hearing of the motion to strike, and, therefore, the only evidence that the court had before it at the time of that hearing consisted of the court records, and the affidavits filed in support of the motion to strike, the latter showing that neither the plaintiffs nor their counsel had any notice that an order to extend the time for filing a motion for a new trial would be applied for, and no knowledge that an order purporting to extend the time had been entered until long after the same had been filed, and that the extension order was secured upon an oral and *ex parte* application. The fact that the application for the order was oral and *ex parte* was probably also within the knowledge and recollection of the judge, as well as the fact that no showing had been made at that time that the defendant was or would be unavoidably prevented from filing the motion within the period prescribed by statute. The record does not disclose any written application for the order, or a showing by affidavit or otherwise of any necessity or cause therefor, nor does the motion itself make any showing in that respect.

The statutory provisions applicable to the above facts are found in sections 4603, 4604. Compiled Statutes 1910. Section 4603 reads as follows: "The application for a new trial must be made at the term the verdict, report, or decision is rendered; and except for the cause of newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial, shall be made within 10 days after the verdict or decision is rendered, unless such party is unavoidably prevented from filing the same within such time." Section 4604 provides that the application must be by motion upon written grounds filed at the time of making the motion. These provisions of the statute are held to be mandatory. *Kent v. Upton*, 3 Wyo. 43, 2 Pac. 234; *McLaughlin v. Upton*, 3 Wyo. 48, 2 Pac. 534; *Boswell v. Biller*, 9 Wyo. 277, 62 Pac. 350; *Todd v. Peterson*, 13 Wyo. 513, 81 Pac. 878; *Casteel v. State*, 9 Wyo. 267, 62 Pac. 348.

The very question here presented was considered and determined upon facts somewhat like those in the case at bar in *Kent v. Upton* and *McLaughlin v. Upton*, *supra*. At the time of those decisions the motion was required to be filed within three days after the verdict or decision was rendered, instead of within 10 days as the statute now provides; but otherwise the provisions of the statute were substantially and practically the same. In the case of *Kent v. Upton* it appeared that the verdict was rendered December 14, 1876; that on December 16, 1876, an order was entered by the court, on the application of counsel for defendant, extending the time for filing a motion for new trial to the end of the



term; and that the motion for new trial was not filed until February 16, 1877, presumably during the term. In the *McLaughlin v. Upton* Case it appeared that within three days after the verdict was rendered a like order extending the time was entered, on the application of counsel for the party desiring to file the motion; the journal entry reciting that the order was made "for good cause shown." It was held in each case that the order extending the time was invalid, for the reason that the court was without any power to extend the time upon an *ex parte* application. It was further held that a party, desiring to file a motion for new trial after the period has expired within which he might have filed it as of right, must show that he was unavoidably prevented from filing it within such period. The court said in *McLaughlin v. Upton*: "We hold that every motion for a new trial must be on written grounds, and that any party coming in after his right to file his motion for a new trial has expired must do so upon written grounds filed at the time of coming in, and then showing how and in what manner he has been unavoidably prevented." Further it was said: "To dispense with the requirement of being 'unavoidably prevented,' something more is required than the mere will of the judge, or the wishes of one party to the suit."

In *Kent v. Upton*, the case of *Odell v. Sargent*, 3 Kan. 80, was referred to, and the following was quoted with approval from the opinion in that case: "When the motion is filed in writing after the three days during which the motion for new trial is a matter of right, it is equally clear that there must be affirmative matter in writing in the motion or accompanying it showing that the party has been unavoidably prevented from earlier making such motion. And even then such affirmative showing that a party has been unavoidably prevented from making the motion within the statutory period is not to be taken as of course true, but may be traversed." In each of the cases cited the judgment was affirmed for the reason that, the motion for new trial not having been filed within the time allowed by the statute, no question presented by the petition in error was before the court for consideration.

These cases determined by our own court are not only decisive upon the facts in this case, but they are sustained by the uniform holding in other states under similar statutory provisions. *Sedam v. Meeksback*, 6 Ohio Cir. Ct. R. 219; *Fox v. Meacham*, 6 Neb. 530; *Rogencamp v. Dobbs*, 15 Neb. 621, 20 N. W. 100; *Aultman, Miller & Co. v. Leahey*, 24 Neb. 286, 38 N. W. 740; *Davis v. State*, 31 Neb. 240, 47 N. W. 851; *McDonald v. McAllister*, 32 Neb. 514, 49 N. W. 377; *Neb. Nat. Bank v. Pennock*, 59 Neb. 61, 80 N. W. 255; *Odell v. Sargent*, 3 Kan. 80; *City of Osborne v. Hamilton*, 29 Kan. 1; *Schallehn v. Hibbard*, 64 Kan. 601, 68 Pac. 61; *Railroad*

*Co. v. Holland*, 58 Kan. 317, 49 Pac. 71; *Joiner v. Goldsmith*, 25 Okl. 840, 107 Pac. 733; *Riely v. Robertson*, 29 Okl. 181, 115 Pac. 877; *Eggleston v. Williams*, 30 Okl. 129, 120 Pac. 944.

In *Fox v. Meacham*, *supra*, it was contended that the right to grant a new trial is an inherent power in the court, and hence the court might grant a new trial upon a motion filed at any time without regard to the statutory limitation as to time, but the court said: "Now the authority of the Legislature to regulate by statute the application for a new trial will not be questioned; and as the Legislature of our state has, by a mandatory act, fixed the time within which the application must be made, we think the court has no power to disregard such law."

In *Aultman, Miller & Co. v. Leahey*, *supra*, it appeared that an amendment to the motion for new trial was made the fourth day after the verdict was rendered, the statute requiring the motion to be made within three days after verdict; and it also appeared that the amendment was made "without the finding by the court that the plaintiff 'was unavoidably prevented' from a compliance with the statute, as a palliation for the amendment." After stating these facts the court proceeded to show that without the amendment the original assignments in the motion were incomplete and insufficient, and that the amendment comprised substantially the whole of the error assigned, and then said: "It does not seem, therefore, to have been competent for the court to have extended the time limited by the Code, by the allowance of a substitute, as a amendment, after the expiration of the three days appointed, after the verdict. The authority of the Legislature to regulate, by the Code, application for new trials will not be disputed. It has done so in a mandatory provision. This amendment is no less than an infraction of it."

In the case of *McDonald v. McAllister*, *supra*, the court say: "Where a motion for a new trial is filed out of time, it must be supported by a showing excusing delay." And, because the affidavit filed for the purpose of excusing delay was found to be insufficient for that purpose, it was held that no error was committed in striking the motion from the files; the same having been filed after the expiration of the three days provided by the statute.

In *Davis v. State*, *supra*, it is said: "The court has no power to extend the time for filing such a motion beyond three days except for newly discovered evidence, unless the party 'was unavoidably prevented' from making the application in time. If the court could grant an extension of one day, it can extend the period for one month or six months." The motion in that case was not filed until the fourth day after the verdict, and it was not based on the ground of newly discovered evidence. It is further said in the opinion: "No showing was made excus-



ing the delay, nor is there any finding of the trial court that the defendant was unavoidably prevented from filing his motion before the time allowed him by law had expired. The errors assigned in the motion for a new trial could not be considered by the court below, and cannot be reviewed here."

In the Oklahoma case of Joiner v. Goldsmith, *supra*, the court say that the statute, "requiring that the motion be filed within three days after the verdict, is mandatory; and, in the absence of a showing that the party filing it has been unavoidably prevented from filing it within the time specified by the statute, this court cannot consider it or review the errors occurring upon the trial." In Kansas and Oklahoma it is held that the words in the statute "unless unavoidably prevented" apply as an exception to the provision requiring the motion to be filed during the term at which the verdict or decision was rendered, as well as to the provision requiring it to be filed within three days after verdict. Schallehn v. Hibbard, *supra*; Riely v. Robertson, *supra*.

In the Kansas case of Schallehn v. Hibbard a new trial had been granted; but the record was silent as to whether a showing was made that the party was unavoidably prevented from filing it during the term. It was held by reason of the silence of the record on that matter that it should be presumed that the motion fell within the exception, and that the facts showing such to be the case were proven to the satisfaction of the trial court. The court say: "In this case the record shows that although the motion for a new trial was not filed until after the adjournment of the term at which the verdict was given and the judgment rendered, yet that the court took up this motion and granted it. This the court might do if the party filing the motion out of time was unavoidably prevented from filing within the time. The failure to file within three days and within the term is not inexcusable. If a party is prevented from so doing by unavoidable circumstances, yet his motion may be heard. The court must determine whether such circumstances exist. In this case the record is silent upon the question as to whether there was sufficient excuse for not filing the motion within the term. Nothing whatever is said upon the subject. But all presumptions that are warranted by the record must be indulged in to support the correctness of the ruling of the court, and, so far as the record shows, abundant proof may have been introduced to show that the party was unavoidably prevented from filing his motion for a new trial within the term. We cannot presume error. If this evidence was not before the court, the record ought to have shown its absence in order to show error. It must be remembered that this case is one where a new trial was granted, and not one where it was refused. In a number of cases this court has decided that a trial

court is justified in refusing a new trial where the motion therefor was not filed within the time prescribed by the section which we have cited."

In the Oklahoma case of Riely v. Robertson, it appeared that the trial court had refused to strike the motion for new trial from the files. The court say: "Obviously the court found as a fact that the plaintiff in error was unavoidably prevented from filing his motion for a new trial at the term at which the verdict was rendered, and for that reason he refused to strike the motion from the files. We are not prepared to say that he erred, as there was evidence reasonably tending to show the unavoidable prevention of its filing within time. The motion for new trial, however, failed to allege the unavoidable casualty, but the defendant in error having of his own motion introduced evidence without objection, from which the court evidently found the fact of unavoidable casualty, that cured such defect." The court further say: "We are of the opinion where a party is prevented by an unavoidable casualty from filing a motion for a new trial within the prescribed three days and at the term at which the verdict was returned that under proper allegations, supported by proof, a motion to vacate and set aside the judgment may be filed after the close of the term, and that the conclusion reached in Schallehn v. Hibbard, 64 Kan. 601, 68 Pac. 61, is correct. This being in line with the adjudications of the same procedure in Kansas, and facilitating the ends of justice, we follow the same."

In the case of Sedam v. Meeksbach, *supra*, decided in one of the circuit courts of Ohio, from which state our Code provisions were taken, it is said in the opinion: "The record shows the filing of the motion for a new trial long after the time fixed by the statute—and that, as is claimed by counsel for the defendant in error, no leave to do this by the court is shown, and that there is no finding by the court on the journal that the person moving for a new trial was unavoidably prevented from doing so within the three days allowed. This, we think, is requisite. \* \* \*"

In Indiana the statute provided that the application for a new trial may be made at any time during the term at which the verdict or decision is rendered; and if the verdict or decision be rendered on the last day of the session of any court, or on the last day of any term, then on the first day of the next term of such court, whether general, special, or adjourned. In Evansville & Richmond R. Co. v. Maddux, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511, it appeared that the verdict had been rendered some time before the final adjournment of the term, but the judgment was entered on the last day of the term; that there was no offer to file a motion during the term, nor until the first day of the next term. It was held that the mo-



tion came too late. In *McIntosh v. Zaring*, 150 Ind. 301, 49 N. E. 164, it appeared that the verdict was returned on the last day of the term, that an adjourned term was called, and that the court allowed until the first day of the "next term" to present a motion for new trial, "but without consent of or notice to" the other party. It appeared also that the motion was not filed at the adjourned or special term. It was held that the motion was carried forward to the next term "whether general, special, or adjourned," and that whichever term, general, special, or adjourned, came next after the term in which the verdict was returned would be the "next term" within the meaning of the statute and that, therefore, the application should have been made at the adjourned term, and the court said: "The court had no right to extend the time for filing the motion beyond the time fixed by law for filing the same, especially in the absence and without the consent of the appellees." See, also, *King v. Gilson*, 206 Mo. 264, 104 S. W. 52; 29 Cyc. 927-929.

[3] Counsel for plaintiff in error has called attention to section 4418, Compiled Statutes 1910, which provides that the court, or a judge thereof in vacation, may, for good cause shown, extend the time for filing any pleading upon such terms as are just, and to the fact that when the *Upton Cases* were decided the section provided only that time might be extended for filing a petition or answer. The provision is not applicable. A motion for a new trial is not a pleading under our Code provisions, as we have frequently held, and as held in other states having the same Code procedure. It clearly appears by this record that no showing was made at any time that the plaintiff in error, defendant below, would be or had been unavoidably prevented from filing his motion for a new trial within 10 days after the decision was rendered. It also appears that the order purporting to extend the time was made upon an oral ex parte application, without notice to or the consent of the defendants in error, plaintiffs below, or their counsel. Such order was therefore ineffectual. Whether such an order might be made before presenting a motion, upon notice to and consent of the other party to the cause, and a satisfactory showing that the one desiring to file the motion would be unavoidably prevented from doing so within the statutory period, it is unnecessary to decide. An order extending the time would not be required, for it would be competent for the party to make the necessary showing that he had been unavoidably prevented upon coming in with his motion and asking leave to file the same. Defendant's motion having been filed when he had no right to file it, it was properly stricken from the files. 29 Cyc. 929. He is here without a motion for new

trial, and, for that reason, none of the errors assigned can be considered.

The judgment must therefore be affirmed.

SCOTT, C. J., and BEARD, J., concur.

(21 Wyo. 266)

# HAMILTON v. DIEFENDERFER

(two cases).

(Supreme Court of Wyoming. July 19, 1913.)

## 1. EVIDENCE (§ 265\*)—DECLARATIONS OF ASSIGNOR—CONCLUSIVENESS.

Declarations by the owner and holder of a note and mortgage, prior to assignment, that it had been paid, or that she thought it was paid, and that she had intended to cancel it, but had neglected to do so, while admissible against a subsequent assignee are not conclusive against the latter taking in good faith and for a valuable consideration, nor in favor of a junior lienor who did not act on such declaration.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1029-1050; Dec. Dig. § 265.\*]

## 2. CHATTEL MORTGAGES (§ 235\*)—CANCELLATION—PAYMENT—EVIDENCE.

In an action to recover personal property subject to a chattel mortgage, evidence held to sustain a finding that the mortgage had not been paid.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 496-499, 507; Dec. Dig. § 235.\*]

## 3. CHATTEL MORTGAGES (§ 210\*) — JUNIOR LIENOR — ASSIGNMENT — CONSIDERATION — RIGHT TO QUESTION.

Where a junior lienor did not become such, or change his position, on the faith of statements by the senior mortgagee that her mortgage had been paid, or she thought it was paid, and that she had intended to cancel it, such junior lienor was not entitled to question the consideration for which the senior mortgage was subsequently assigned to establish that the assignee was not a holder for value.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Dec. Dig. § 210.\*]

On rehearing. Denied.

For former opinion, see 131 Pac. 37.

POTTER, J. A petition for a rehearing has been filed in each of these cases which, as stated in the former opinion, were submitted together, and had been consolidated in the district court for the purpose of trial.

The only points discussed in the brief in support of the petition for rehearing are those mainly relied upon by the plaintiff in error at the time the cases were originally submitted, viz., that the mortgage assigned to Diefenderfer had been paid, and should have been canceled, while it remained in the hands of the assignor, Marie Schmitt; and that the assignment was without consideration. It is argued at some length that the statements made by Mrs. Schmitt to Hamilton and others before she assigned the mortgage, to the effect that it was paid, or she thought it was paid, and that she had intended to cancel it, but had neglected to do so, were admissible in evidence, and a number of authorities are cited upon that prop-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



osition. The statements were admitted in evidence, and, without deciding the question, it was assumed in the former opinion that the statements were admissible, notwithstanding that the note was indorsed, and the mortgage securing it assigned to Diefenderfer before maturity, it being found unnecessary to determine whether or not the assignee was a bona fide holder.

[1] But counsel erroneously assumes that the statements so made were conclusive in favor of Hamilton and against Diefenderfer. They might have been conclusive in favor of one who had acted upon them, if the assignee was not a bona fide holder for value under circumstances protecting him against such admissions. Not having been acted upon by Hamilton, whose mortgage was taken long prior to the making of the statements, it would have been competent to prove the untruth of the statements, and to prove by Mrs. Schmitt that although she made the statements they were untrue in fact. The principle is stated in *Greenleaf on Evidence*: "These admissions by third persons, as they derive their value and legal force from the relation of the party making them to the property in question, and are taken as parts of the *res gestæ*, may be proved by any competent witness who heard them, without calling the party by whom they were made. The question is whether he made the admission, and not merely whether the fact is as he admitted it to be. Its truth, where the admission is not conclusive (and it seldom is so) may be controverted by other testimony; even by calling the party himself, when competent." *Redfield's Ed.*, vol. 1, § 191. "Admissions, whether of law or of fact, which have been acted upon by others, are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced." *Id.*, § 207. "On the other hand, verbal admissions which have not been acted upon, and which the party may controvert, without any breach of good faith or evasion of public justice, though admissible in evidence, are not held conclusive against him." *Id.*, § 209. See, also, *Bigelow on Estoppel*, p. 480, et seq. It is said, in 1 *Encyclopedia of Evidence*, 612, 613, to be the general rule that admissions are not conclusive, but may be disproved by other evidence, the exceptions being judicial admissions, and those which were intended to be and have been so acted upon as to give rise to the doctrine of estoppel. The weight to be given to such admissions is to be determined by the jury, or by the court where the case is tried without a jury. 1 *Ency. Ev.* 612; 1 *Ency. Law* (2d Ed.) 724. Though verbally made, they may amount to satisfactory proof; but when unaccompanied by other facts or evidence are to be weighed with caution. 1 *Ency. Ev.* 611; 1 *Ency. Law*, 723.

[2] The only evidence that the note and

mortgage had been paid consisted of testimony showing the admissions aforesaid of Mrs. Schmitt. That testimony was not corroborated by any other fact in the case. On the contrary, all the other facts tended to show nonpayment. The trial court was as well able as this court would be to determine the weight to be given to the alleged statements of Mrs. Schmitt, if not, indeed, in a better position to do so. Counsel complains of the statement in the opinion that the mortgage was assigned for a valuable consideration. That remark had reference only to the acts of Mrs. Schmitt, seemingly in conflict with her alleged statements. The assignment executed by her recited that it was made in consideration of one dollar in hand paid "and other valuable considerations"; and it was shown that she was actually paid the sum of money stated at the time of executing the assignment.

[3] Nothing was said in the opinion concerning the adequacy or sufficiency of the consideration to constitute the assignee a bona fide holder; but the court refrained, as stated in the opinion, from deciding that question, deeming it unnecessary, for the reason that Hamilton was not in a position permitting him to question the consideration. Though the price be inadequate, and that fact may be considered in determining the question of good faith, it may nevertheless be a valuable consideration within the legal meaning of that term, as where money is paid, whether the amount be large or small. Having concluded that the evidence was sufficient to sustain a finding that the mortgage and the note which it secured had not been paid, the consideration for the assignment became immaterial in this case, for it did not concern Hamilton, the junior mortgagee, whether there was any consideration for the assignment of the senior mortgage. 1 *Jones on Mort.* § 788; *Jones on Chat. Mort.* (5th Ed.) § 502; 2 *Ency. Law* (2d Ed.) 1073, 1075; 20 *Id.* 920, 921; 4 *Cyc.* 31, 32; 7 *Cyc.* 58; 27 *Cyc.* 1284; *Beach v. Derby*, 19 *Ill.* 617; *Briscoe v. Eckley*, 35 *Mich.* 112; *Whittaker v. Johnson County*, 10 *Iowa*, 161; *Norris v. Hall*, 18 *Me.* 332; *Pugh v. Miller*, 126 *Ind.* 189, 25 *N. E.* 1040; *Sammis v. Wightman*, 31 *Fla.* 10, 12 *South.* 526; *Deach v. Perry*, 53 *Hun.* 638, 6 *N. Y. Supp.* 940; *Anderson v. Maynard*, 1 *Colo. App.* 1, 27 *Pac.* 168; *Rue v. Scott* (*N. J.*) 21 *Atl.* 1048. In *Beach v. Derby*, *supra*, the court say, concerning the assignment of a chattel mortgage: "Nor do we think the court erred in ruling out the evidence offered, tending to show that Derby paid no consideration to Graves for the assignment of the mortgage. That was no business of the creditors of the mortgagor." In 27 *Cyc.* page 1284, it is said: "But the consideration of the transfer is in general no concern of the mortgagor, and he cannot be permitted to impeach it, nor can a junior mortgagee do so." In *Jones on Mort.*



gages (vol. 1, § 788) it is said: "Whether the assignee of a mortgage has paid value for it or not does not concern the mortgagor, except in reference to his interposing an equitable defense in way of payment or set-off." We quote the following from Am. & Eng. Ency. of Law (2d Ed., vol. 2, page 1075): "In an action by the assignee of a chose in action against the debtor, it is in general no defense that the assignment was made without consideration, as the matter in no way affects his liability." It is well settled, also, that one who has taken an assignment of a mortgage for less than its value or the amount secured is not limited in his recovery to the amount actually paid, but may recover the whole amount due. *Rue v. Scott*, supra; *Jones on Chat. Mort.* (5th Ed.) § 502.

While we have rested our decision upon the well-established principles above stated, we might add that the difficulty, if any, in holding the consideration for this assignment to be sufficient to constitute the assignee a bona fide holder for value seems much less to us than it does to counsel. The point urged against the sufficiency of the consideration is that the assignee's promise to pay the note of John Schmitt at the bank was merely a promise to perform an existing obligation, since he was liable thereon as surety, and hence did not constitute in law a consideration for the assignment. In that respect the chief difficulty, we think, would be in determining the effect of the evidence relating to the agreement between the assignor and assignee for the payment of the note. It might reasonably be concluded from that evidence, in our opinion, that Diefenderfer's agreement was to pay and discharge the debt of his principal, and not merely perform his obligation as surety. In other words, that his agreement was to make the debt his own and pay it as such, thereby assuming the obligation of the principal to the holder of the note, and releasing the obligation of the principal to him as surety.

While it is true that before the mortgage was assigned to Diefenderfer he was bound as surety upon the note which he agreed to pay as a part of the consideration for the assignment, he was bound only as surety, with all the rights and entitled to all the remedies allowed a surety, including the statutory remedy of an action aided by attachment to obtain indemnity. *Comp. Stat.* §§ 5030, 5031. Having signed the note as surety the principal might at any time thereafter indemnify him, the obligation assumed by the surety being a sufficient consideration, especially where the surety upon receiving such indemnity agrees to pay the note. This is well-settled law. It is said in *Brandt on Suretyship* (volume 1, 3d Ed., § 239): "The liability of a surety or guarantor for the debt of his principal before he has made any payment on account thereof is a sufficient consideration for the execution of a mortgage or

trust deed for his indemnity, and such mortgage or trust deed will take precedence of any subsequent lien upon the property incumbered thereby. A promissory note for the payment of a certain sum of money executed for the purpose of indemnifying the payee against his liability as a surety for the maker of an administration bond, and to enable him to secure himself by an attachment of the property of the maker, is valid, notwithstanding the payee at the time of its execution has not been damaged. The existing liability, with an implied promise to pay that amount upon the principal indebtedness, forming a sufficient consideration for the note, the note will be enforced against the objections of other creditors." The following authorities also sustain and illustrate the general proposition above stated, and some of the cases cited sustain as to consideration an instrument executed by a third person to indemnify the surety, where the latter has agreed to pay the debt, or relinquished some right, upon receiving the indemnity. *Swift v. Crocker*, 21 Pick. (Mass.) 241; *Osgood v. Osgood*, 39 N. H. 209; *Cushing v. Gore*, 15 Mass. 69; *Stevens v. Bell*, 6 Mass. 339; *Hamaker v. Eberley*, 2 Bin. (Pa.) 506, 4 Am. Dec. 477; *Bank v. Jefferson*, 101 Wis. 452, 77 N. W. 889; *Harris v. Harris*, 180 Ill. 157, 54 N. E. 180; *Coal Co. v. Blake*, 85 N. Y. 226; *Hapgood v. Wellington*, 136 Mass. 217; 1 Page on Contracts, § 276; 6 Ency. Law (2d Ed.) 709; *Carroll v. Nixon*, 4 Watts & S. 517; *Carman v. Noble*, 9 Pa. 366; *Gladwin v. Gladwin*, 13 Cal. 330; *Goodwin v. McMinn*, 204 Pa. 162, 53 Atl. 762; *Steen v. Stretch*, 50 Neb. 572, 70 N. W. 48; *Williams v. Silliman*, 74 Tex. 626, 12 S. W. 534; *Ellis v. Herrin* (N. J.) 24 Atl. 129; *Willis v. Heath* (Tex.) 18 S. W. 801; *Landigan v. Mayer*, 32 Or. 245, 51 Pac. 649, 67 Am. St. Rep. 521.

Where a married woman may contract and convey her property in the same manner as if she were unmarried, as she may do under the laws of this state, what would prevent her from paying the note of her husband or conveying her property for that purpose, if such act is not fraudulent as to creditors? Assuming that a new consideration would be necessary to sustain a mortgage or other conveyance or an agreement by a third person, indemnifying one who has already become a surety and obligated as such, and that is said to be the rule in *Jones on Mortgages* (volume 1, § 615), the surety's agreement to waive a valuable right, or to assume and pay the debt of the principal might, perhaps, be found to be a sufficient consideration. *Pollock on Contracts* (8th Ed.) 201-203; *Wright v. McKittrick*, 2 Kan. App. 508, 43 Pac. 977; *Judy v. Louderman*, 48 Ohio St. 562, 29 N. E. 181; *Harris v. Harris*, 180 Ill. 157, 54 N. E. 180; *Hamaker v. Eberley*, 2 Bin. (Pa.) 506, 4 Am. Dec. 477; *Rockafellow v. Peay*, 40 Ark. 69. But deeming it not involved in this case, we do not decide the question of the suffi-



ciency of the consideration as between the assignee of the mortgage and the assignor, or her creditors. The assignor is not a party, nor is it sought to defeat the assignment in her interest. The plaintiff in error was not a creditor of the assignor, and no such creditor is here attempting to impeach the assignment. Indeed, it does not appear that Mrs. Schmitt had any creditors. Under such circumstances the question of consideration is not important. As an executed transfer it might, therefore, be sustained and enforced as a gift, if not otherwise.

Rehearing will be denied.

SCOTT, C. J., and BEARD, J., concur.

(21 Wyo. 477)

### NICHOLS v. HUFFORD.

(Supreme Court of Wyoming. June 30, 1913.)

#### 1. WATERS AND WATER COURSES (§ 24\*)—APPROPRIATION OF WATER—EXTENT OF RIGHT—STATUTORY PROVISIONS.

The right of an appropriator of water under Laws 1886, c. 61 (Rev. St. 1887, § 1331 et seq.), providing for the appropriation of water and the filing of statements of water rights, is limited to the amount required for the intended purpose, notwithstanding a recital in the statement of an appropriation of a greater amount.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 16; Dec. Dig. § 24.\*]

#### 2. WATERS AND WATER COURSES (§ 24\*)—APPROPRIATION OF WATER—EXTENT.

The right of an appropriator of water under Laws 1886, c. 61 (Rev. St. 1887, § 1331 et seq.), providing for the appropriation of water, may be limited by the courts and the board of control to what is sufficient and adequate for the purpose of the appropriator, notwithstanding the invalidity of the provision of Act 1890, c. 8, fixing the limitation on the use of water so far as it applies to a prior appropriation.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 16; Dec. Dig. § 24.\*]

#### 3. WATERS AND WATER COURSES (§ 33\*)—APPROPRIATION—CONTESTS—FINDINGS—REVIEW.

Where a contest instituted before the board of control to determine the extent of the water right of contestee was instituted and heard in the course of a proceeding for the adjudication of various priorities to the use of water from a stream and its tributaries, the record made by the examination and measurements of the state engineer, as provided by Comp. Laws 1910, § 776, will be presumed to have enabled the board to arrive at a reasonable conclusion, and, where the record is not in evidence, the court will hesitate before it will disturb the findings of the board.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 23-26; Dec. Dig. § 33.\*]

#### 4. WATERS AND WATER COURSES (§ 24\*)—APPROPRIATION FOR IRRIGATION—EXTENT OF RIGHT.

Though the statute limiting the use of water for irrigation does not necessarily control the allotment for an appropriation for irrigation made or initiated prior to the statute, the

statute will be followed where there is no evidence to establish the duty of water on the lands.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 16; Dec. Dig. § 24.\*]

#### 5. WATERS AND WATER COURSES (§ 24\*)—APPROPRIATION FOR IRRIGATION—EXTENT OF RIGHT.

Since the appropriation of water for irrigation must be limited to the amount reasonably required for the proper cultivation of the land, the mere fact that all of the water of a stream has been at times used or allowed to flow on the land does not necessarily prove an appropriation of all of it for a beneficial use.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 16; Dec. Dig. § 24.\*]

#### 6. EVIDENCE (§ 568\*)—OPINION EVIDENCE—WEIGHT.

The opinions of witnesses as to the amount of water needed for the irrigation of land based solely on the general gravelly character of the soil which will cause it to absorb more water than in the case of other kinds of soil is not entitled to great weight, especially where the witnesses did not know the quantity of water that would be embraced in a flow of one cubic foot per second, and had no acquaintance with the method employed in irrigating the land, except that ditches and laterals were used.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2392-2394; Dec. Dig. § 568.\*]

#### 7. WATERS AND WATER COURSES (§ 33\*)—APPROPRIATION OF WATER FOR IRRIGATION—RIGHT ACQUIRED—EVIDENCE.

Evidence held to sustain the findings of the district court affirming the findings of the board of control that one appropriating water for irrigation acquired only the right to use so much water as was necessary for the successful cultivation of the land, subject to the limitation prescribed by Act 1890, c. 8, fixing the maximum use at one cubic foot per second for each 70 acres.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 23-26; Dec. Dig. § 33.\*]

#### 8. WATERS AND WATER COURSES (§ 23\*)—APPROPRIATION FOR IRRIGATION—RECORD OF EXAMINATION AND MEASUREMENTS OF STATE ENGINEER—CONCLUSIVENESS.

The record made by the examination and measurements of the state engineer under Comp. St. 1910, § 776, requiring the state engineer to examine streams and the works diverting water therefrom, and measure the lands irrigated or susceptible of irrigation and reduce his observation and measurements to writing, does not affect the question as to the time or times when uncultivated land may have been irrigated, and the extent of an appropriation therefor as to the period of use.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 15, 18; Dec. Dig. § 23.\*]

#### 9. WATERS AND WATER COURSES (§ 33\*)—APPROPRIATION FOR IRRIGATION—RIGHT ACQUIRED—EVIDENCE.

Evidence held not to sustain a finding that an appropriator of water for uncultivated land could not use water during the season when irrigation was required for cultivated crops, and the appropriator when not using water for irrigating cultivated lands could use the water allowed him for the uncultivated lands during the irrigation season.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 23-26; Dec. Dig. § 33.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Error to District Court, Uinta County; David H. Craig, Judge.

Proceedings by Vaughn Hufford before the board of control against Harry Nichols to contest the latter's water rights. There was a judgment of the district court rendered on appeal from a decision of the board of control establishing the rights of contestee, and he brings error. Modified and affirmed.

H. E. & H. R. Christmas, of Kemmerer, for plaintiff in error. B. M. Ausherman, of Evanston, for defendant in error.

POTTER, J. This is a proceeding in error for the review of a judgment of the district court sitting within and for the county of Uinta, disposing of a contest on appeal from the state board of control, involving the right of the plaintiff in error, Harry Nichols, to the use of the waters of Pine creek, a tributary of Smith's fork, a tributary of Bear river. The board of control having taken up the matter of the adjudication of the priorities of rights by appropriation to the use of the water of Bear river and its tributaries, and Harry Nichols having produced evidence before the division superintendent in support of his claim to all of the water in Pine creek, Vaughn Hufford, who had been granted a permit to appropriate water from said stream, instituted a proceeding contesting the right of said Nichols to the amount of water claimed by him. That the right of Nichols to so much of the water as had been appropriated by him for irrigation was prior in point of time and superior to that which would be acquired by the contestant under his permit was not disputed, but the grounds of the contest were that Nichols was claiming to have irrigated much more land than had in fact been irrigated, and a greater quantity of water for that purpose than had in fact been beneficially used and appropriated. The evidence taken in the contest by the water division superintendent was transmitted to the board of control, and upon a hearing by the board upon that evidence, which was conflicting as to the number of acres irrigated, and upon "the records of the office of the state engineer," the board allowed the contestee an appropriation for practically the entire acreage of land shown by his testimony to have been irrigated, viz., 459 acres of cultivated land, and 296 acres of uncultivated land covered with a growth of sage brush, which had been irrigated at times when the water was not needed for the cultivated land to increase the growth of the natural grasses for pasture purposes, but limited him as to all of the land to an appropriation of one cubic foot per second for each 70 acres, and to the use of water upon the uncultivated land during the period between September 15th and June 15th, denying the right to use the water on that land during part of the irrigation season for cultivated crops, viz., be-

tween June 15th and September 15th. The board stated in its findings, explaining the amount allowed for the cultivated land as follows: "That no reliable or accurate measurements have been made of the discharge of Pine creek; that from the evidence it would seem that the normal flow of the stream during the late irrigation season does not exceed from six to eight cubic feet of water per second of time; that, if the contestee estimates that his lands require more than one cubic foot of water per second for each 70 acres of land, this conception is due to an overestimate of the volume of water flowing in Pine creek rather than because of the excessive demands of his lands and crops; that all of the measurements of the duty of water in Wyoming indicate that the maximum use, under conditions similar to those along Pine creek, would require a total depth of water of 2.50 feet on the land irrigated during the irrigation season; that the average use requires a total depth of approximately 1.50; that the volume put on the lands at the rate of one cubic foot per second for each 70 acres would cover the land to a depth of 3.43 for an irrigation season of 120 days, which would be sufficient under the most extreme conditions; that the law and the practice of the board of control only fixes the maximum limit, and the actual use is regulated thereunder by the water commissioner in accordance with actual needs; that there is no evidence in this case which would establish the duty of water for the lands along Pine creek and all information available would show that the statutory limit would furnish a volume in excess of the actual needs of such lands."

With reference to the irrigation of the uncultivated land, it was said in the findings of the board: "The Goodell ditch (one of the ditches of contestee) follows a ridge enabling it to serve 287 acres of land because of the favorable southern slope, and quality, thus enabling cultivation to take place and cultivated crops to be raised, and that other lands have, in a measure, been irrigated on the northern slope of said ridge. The testimony shows that lands on the said northern slope of the ridge, and which lie in a general northerly direction from the cultivated area, have been irrigated from time to time, after the cultivated crops have been served, for the purpose of increasing the growth of natural grasses. This area of land, still remaining uncultivated and covered with a growth of sage brush, has a total area of 296 acres. Such lands are reclaimed through the said Goodell ditch with a priority relating back to the year 1887, but the record discloses that they have been irrigated at times when the cultivated crops do not need irrigation." It was specified in the order or decree of the board that the contestee was found and adjudged entitled to water from Pine creek as follows: By and through the Collett ditch



2.47 cubic feet per second, for 172 acres, the same being particularly described, with a priority relating back to the year 1881. By and through the Goodell ditch, 4.10 cubic feet per second, for 287 acres, particularly described, with a priority of appropriation dating back to 1887. By and through the said Goodell ditch, with the same date of priority, 4.23 cubic feet per second of time, permitting the irrigation of 296 acres of uncultivated land. "These lands to have no right to irrigation between May 1st and September 15th of each year." This limitation as to the 296 acres is found in the tabulated statement contained in the order. But in a separate paragraph it was specifically ordered and adjudged that the use of water from the Goodell ditch for said uncultivated land be confined to the period between the 15th day of September of each year and the 15th day of June of the following year, and that such lands be denied the right of irrigation during that period of each year commencing with June 15th, and ending with September 15th. It was also ordered that the proof submitted by said Nichols for the "Nichols ditch" or "Pine Creek Falls ditch" be rejected, and that all the appropriations of water thereby determined shall be limited to the needs of the land, and not to exceed in amount "one cubic foot of water per second for each 70 acres of land irrigated." The "Nichols" or "Pine Creek Falls ditch," it appears, was intended by Nichols to carry water in the spring and fall to a certain tract referred to as a desert entry, but it was clearly shown by the testimony that said tract had not been irrigated; and it does not seem to be here contended that any error was committed in the denial of an appropriation for any land under that ditch. It was found by the board that the permit held by the contestant, Hufford, had not expired, and that he had further time to complete his irrigation works and apply the water to a beneficial use.

The cause was heard in the district court upon the evidence taken before the division superintendent, and without anything that appeared among the records in the office of the state engineer not included in the evidence so taken. Upon consideration thereof, the district court, in its judgment order, approved and confirmed the findings and order of the board of control, "save and except its finding as to the measurement or normal flow of water in Pine creek which the evidence and record in the case show to be 16 to 18 cubic feet of water per second of time, instead of 6 to 8 cubic feet as designated in said finding and order." And with that exception the findings and order of the board were adopted, approved, confirmed, and made the findings and order of the court. The evidence clearly showing that the normal flow of the stream is 16 to 18 feet per second, it is probable that the statement in the board's

order that the same was 6 to 8 feet was the result of a clerical error. The court, therefore, modified the order in that respect, and in every other particular allowed it to stand as the order and judgment of the court. The appeal to the district court was taken by the contestee, and he brings this proceeding in error.

[1] It is not contended that the plaintiff in error was allowed an appropriation and priority for less land than he was entitled to, but that such appropriation for the cultivated lands was improperly limited as to amount, and for the uncultivated lands improperly limited as to the time when the water may be used. It is argued that his right to the water having been acquired when Wyoming was a territory, and under territorial laws, prior to the enactment of the statute fixing in effect the maximum of use at one cubic foot per second for each 70 acres, and all of the water of the stream having been used by him at times in the irrigation of his land, he thereby became entitled to all of such water at all times. Counsel is in error in supposing that, under the territorial laws, one who filed a statement claiming a water right thereby obtained a permit to appropriate the specific amount of water claimed in such statement, whether the same would or would not be required for the intended purpose, or that by reciting in such statement the quantity of water claimed to be appropriated or intended to be appropriated his right to such quantity was conclusively established. The act of 1886, which provided for the filing of statements by ditch owners or claimants, was enacted for the purpose of making a record of the claims of water users to protect them in their rights, assist in the adjudication of the various priorities through the procedure established by the act, and in the regulation by public officials of the proper use of the water. Such statements were intended merely to set forth the claim of the party under oath, and respecting the amount of water appropriated or intended to be appropriated the act required only that there should be stated "the amount of water claimed by or under" the construction, enlargement, or extension of the ditch. Laws 1886, c. 61, § 10; Revised Statutes 1887, § 1340. It is true that in section 13 of the act (Rev. Stat. 1887, § 1343) it was provided as to statements thereafter filed by a person intending to construct a ditch and to use or appropriate water for beneficial purposes that "from the time of filing any such statement water sufficient to fill such ditch or ditches, and to subserve the use or uses aforesaid, if a lawful or just use, shall be deemed and adjudged to be appropriated: \* \* \* Provided, \* \* \* that such person \* \* \* shall within sixty days next ensuing the filing of such statement, begin the actual construction of said ditch or ditches, and shall prosecute the work of the con-



struction thereof diligently and continuously to its completion." The effect of that section, taken in connection with the rest of the act, was merely to provide that when the work was commenced within the time specified and pursued diligently and continuously to completion, water sufficient, within the capacity of the ditch, to subserve the intended lawful and just use, would be deemed and adjudged appropriated from the time of filing the statement. In other words, the date of filing the statement in such case was declared to be the date of the appropriation. No warrant can be found in that section, or in any other statute, for permitting or recognizing an appropriation of water not applied to a beneficial use, or intended to be so applied, or a greater quantity of water than is reasonably required for such purpose. Indeed, it was provided in the same act that the water commissioners shall so divide, regulate, and control the use of the water of all streams within their respective districts in such manner as will prevent unnecessary waste, and to that end that such commissioners shall so regulate the headgate or gates of all ditches that no more water will flow therein than is actually required and will be used for the purpose for which the water was appropriated. Laws 1886, c. 61, § 29; Rev. Stat. 1887, § 1359. The recital of a definite amount of water claimed would not, therefore, be controlling as to the amount to be adjudicated in favor of the party filing the statement.

[2] It is no doubt true that when the appropriators were few, and there was ample water for all, the law was not construed very strictly with reference to the amount of water appropriated, either by irrigators in using the water, or the courts in adjudicating priorities; more attention being paid to the capacity of ditches than the quantity of water actually required. And it was customary in compliance with the statute of 1886 as to the filing of statements to claim in such statement an amount for irrigation purposes equal to the capacity of the ditch, although that might exceed the quantity that could be economically or properly applied and used. But with the increase of the acreage under irrigation and the number of appropriators, requiring economy in the distribution and use of water to make it serve as much land as possible, there has been a gradual and persistent tendency to restrict the appropriation and use to an amount reasonably necessary when properly applied. Hence the enactment of our statute in 1890 by the first state Legislature (Laws 1890, c. 8), as the result, we suppose, of experience and measurements, declaring that no allotment of water for irrigation shall be made by the board of control in adjudicating the various priorities, exceeding one cubic foot per second for each 70 acres of land. Whether that provision is or is not a valid regulation as to appropriations made prior to its adoption it is unnece-

sary in this case to decide. Without such provision in the statute, it is clear that the board and the courts may properly so limit the right of any appropriator when it is found to be sufficient and adequate for the purpose. In this case the board so found, stating in its order the general result of the measurements of the duty of water in this state, and that there was no evidence in the case establishing such duty for lands along Pine creek, but that all available information shows that the statutory limit would furnish a volume in excess of the needs of such lands.

[3] Aside from the general information possessed by the board concerning the requirements of various classes or kinds of land in the state, we may assume that some such information as to these lands was on record in the office of the state engineer, for this contest was instituted and heard in the course of a proceeding for the adjudication of the various priorities to the use of water from Bear river and its tributaries, and it was and is made the duty of the state engineer, or some qualified assistant, in such cases, to make an examination of the stream, the works diverting water therefrom, the carrying capacity of the various ditches and canals, an examination of the irrigated lands, and an approximate measurement of the lands irrigated, or susceptible of irrigation, from the various ditches and canals, "which said observation and measurements shall be reduced to writing, and made a matter of record in his office." Comp. Stat. 1910, § 776. That section also requires that the state engineer shall make, or cause to be made, a map or plat on a scale of not less than one inch to the mile, showing with substantial accuracy, the course of said stream, the location of each ditch or canal diverting water therefrom, and the legal subdivisions of land which have been irrigated, or which are susceptible of irrigation from the ditches or canals already constructed. It is made the duty of a party appealing from a determination of the board within six months after the appeal is perfected to file in the office of the clerk of the district court a certified transcript of the order appealed from, the records of the board relating to such determination, and the evidence offered before the board, including the measurements of streams, tributaries, and ditches provided for by section 776. Comp. Stat. 1910, § 782. The certified transcript of the order, and the evidence which was taken before the division superintendent, was so filed in this case, but the record made of the measurements and examination provided for in section 776 do not appear in the record here by any certified transcript or otherwise. On that ground it appears that a motion was made in the district court by the contestant, Hufford, to dismiss the appeal. That motion was denied, and the contestee, the appellant, was given additional time within which to secure



from the board and file in the office of the clerk such additional papers as are necessary to make complete the certified copy of all the records of the board relating to the determination. Counsel for defendant in error, in his brief, insists that by the failure of the plaintiff in error to file such additional papers the entire record upon which the matter was determined by the board is not here and was not before the district court. So far as any such additional papers or record might affect the controversy, we should at least hesitate, in their absence, to disturb the board's findings and determination. And we think it possible, if not indeed probable, that the board may have had before it the record provided for in section 776, showing an examination of the irrigated lands of the plaintiff in error, and the result thereof respecting their quality and character, enabling the board to arrive at a reasonable conclusion in the absence of other satisfactory evidence upon the subject as to the amount of water which would be sufficient for their proper and successful irrigation.

[4] Again, if it should be conceded that the statutory limitation upon the use of water for irrigation would not necessarily control the allotment for an appropriation made or initiated prior to the enactment of the statute, we perceive no impropriety or injustice in limiting the use in accordance with the statute, where there is no evidence, or it is insufficient, to establish the duty of water upon the lands. The statutory provision has remained unchanged for more than 20 years, and we may suppose that the maximum use thereby prescribed has been found at least generally to be sufficient. Indeed, in the absence of other satisfactory evidence, there would seem to be no other course open than to follow the statute respecting the amount to be allotted.

[5-7] There was an attempt to show by the opinions of men having some acquaintance in a general way with the lands and were practical irrigators that the lands of plaintiff in error required more water than one cubic foot per second for each 70 acres, and some witnesses produced by the contestee testified that all of the water normally flowing in the stream would be required to irrigate the 800 acres. But, aside from the statement that one cubic foot per second was insufficient, the amount that would be sufficient for the cultivated land was not stated, either exactly or approximately, and it appeared that the irrigation of the uncultivated land had occurred only when irrigation of the cultivated tracts was finished or unnecessary. It was shown clearly enough that at times all of the water in the stream was turned into the ditches of plaintiff in error and allowed to run upon his lands, though we think that appears to have been done without any great care to ascertain whether all of it was necessary at the time; and there is evidence to the effect that

the attempt to use so much water resulted in waste, and to the detriment of the land. Mr. Hufford, the contestant, who testified that he was an engineer and had made a close study of irrigation for many years, and considered himself competent to determine when land is properly irrigated, and when it is not, and to judge the amount of water that different kinds of soil required, testified that at different times during the irrigating season he had examined and made a test of the soils from different locations upon the Nichols ranch, and that in his opinion too much water had been used upon the crops, the same standing in pools in some places, and that the soil is of such character that the legal allowance, or less than that, is sufficient to properly irrigate all of the land; that the soil generally is of a very good quality, gravelly loam, containing a light per cent. of gravel, and has what is called a gravelly cement subsoil, which water will not penetrate. He further testified that he knew that Mr. Nichols had turned in his ditches and upon his lands more than the statutory allowance, but also knew that in doing so he had turned more water upon the ground than could be sufficiently or beneficially used, and that the amount of water so attempted to be used was detrimental to the crops and the lands.

The showing that all of the water of the stream had been at times used or allowed to flow upon the land does not necessarily prove an appropriation of all of it for a beneficial use, for the appropriation must be limited to the amount reasonably required for the proper and successful cultivation of the land or other use to which the water is applied. *Little Walla Irr. Union v. Finis Irr. Co.* (Or.) 124 Pac. 666; 2 *Kinney on Irr.* (2d Ed.) § 885. Beyond that it was attempted to show, as above stated, by the testimony of practical irrigators that the amount of water allowed by statute to be allotted for irrigation purposes was insufficient for the irrigation of these lands. That testimony was confined to expressions of opinion, without showing any tests or measurements, or particular examination of the soil, but the opinions were based upon the general gravelly character of the soil, which would cause it to absorb more water than in the case of other kinds of soil, thereby requiring a greater amount of water for successful irrigation and cultivation. None of the witnesses appeared to know the quantity of water that would be embraced in a flow of "one cubic foot per second," and some of them had no acquaintance or very little with the method employed in irrigating these lands, except that ditches and laterals were used. One witness never saw the land irrigated. Another seemed to resent by disrespectful and even insolent answers the attempt by counsel on cross-examination to ascertain the extent of his knowledge of irrigation, and his competency to testify concerning the needs



of these lands, although the questions were courteous in form and appear to have been properly propounded for the purpose indicated. We are impressed, as the board must have been, with the unsatisfactory character of this testimony. The witnesses were no doubt honest in respectively stating their opinions, but such opinions seem to be little more than conjecture or guesswork, based solely upon the gravelly condition of the soil, and the fact that they had seen all the water of the creek turned into the ditches or on the land. It is not the kind of testimony usually deemed necessary for the purpose of establishing the duty of water as applied to irrigation. As the result of the decisions, it is stated in *Wiel on Water Rights* that in determining the duty of water in any particular case evidence should be from actual experiment and measurement if possible, and that opinion evidence is of less value than experiment. 1 *Wiel, Water Rights* (3d Ed.) § 487. And in *Kinney on Irrigation* (volume 2, § 916) it is said that the court should hear the evidence of persons who are competent to testify upon the subject, and who can do so not from guesswork or hearsay, but from actual measurements and tests and the actual application of the water to the lands irrigated. Further, in section 888, it is said that the courts hold, "In order for a witness to be competent to testify as to the measurement and duty of water, he must have had experience and training along these lines."

In the case of *Farmers' Co-operative D. Co. v. Riverside Irrigation District*, 16 Idaho, 525, 102 Pac. 481, the remarks in a former case were quoted as follows: "The law only allows the appropriator the amount actually necessary for the useful or beneficial purpose to which he applies it. The inquiry was therefore not what he had used, but how much was actually necessary"—following which the court announced this principle: "In determining the duty of water, reference should always be had to lands that have been prepared and reduced to a reasonably good condition for irrigation. \* \* \* Water users should not be allowed an excessive quantity of water to compensate for and counter balance their neglect or indolence in the preparation of their lands for their successful and economical application of the water." And, further, that for the purpose of determining the question as to the duty of water for irrigation "the court can hear the evidence of persons who are competent to testify on the subject, and who can do so, not from guesswork or hearsay, but from actual measurements and tests and applications of the water to the lands irrigated." In *Longmire v. Smith*, 26 Wash. 439, 67 Pac. 246, 58 L. R. A. 308, the court said that "the superior court \* \* \* found that it could not determine from the evidence the quantity of water required for the irrigation of plain-

tiff's parcels of land. The evidence upon this issue is not sufficiently clear for this court to set aside this finding. An examination discloses that a number of witnesses, when testifying, and while expressing opinions as to the number of inches of water required to irrigate the land, had not very definite ideas of the measurement of water; and the court was justified in attaching but little weight to such testimony." See, also, *Whited v. Cavin*, 55 Or. 98, 105 Pac. 396. The board evidently adopted the view that the opinions of these witnesses were not entitled to much weight in determining the duty of water as applied to the lands in controversy, and the district court no doubt took the same view. Without more minutely rehearsing this testimony, we think it sufficient to say that it fails to satisfy us that the board and court erred in that particular. It is stated in the findings of the board that all the measurements of the duty of water in this state indicate that the maximum use prescribed by the statute is sufficient under the most extreme conditions, thus showing the reasonableness of the statutory provision generally, at least. Whether it is conclusive or controlling in any case or not, we think it may at least be properly regarded as furnishing a standard, in the absence of competent or satisfactory evidence that the use thereby permitted is insufficient in a particular case, and that the evidence to that effect should be reasonably clear and satisfactory to entitle an appropriator to an allotment exceeding the statutory limit.

[8.] That part of the findings and order confining the plaintiff in error to a certain period of the year for the use of the water upon his 296 acres of uncultivated land is complained of. As stated in the findings, these lands appear to have been irrigated "after the cultivated crops have been served, for the purpose of increasing the growth of natural grasses," and that "the record discloses that they have been irrigated at times when the cultivated crops do not need irrigation." The order limits the use of the water found to have been appropriated for such lands to the period between the 15th day of September of each year and the 15th day of June of the following year, the purpose evidently being to deny the right to use such water during the season when irrigation is more particularly required for the cultivated crops. While the testimony is not very clear as to whether it had been the custom of the plaintiff in error to irrigate the uncultivated land during the usual so-called irrigation season, we think the evidence may reasonably be construed as showing that this irrigation may have occurred at times during such irrigation season, but when water was not being used upon the cultivated land. That plaintiff in error testified in that respect as follows: "Q. How then do you irrigate your pasture land? A. When we are not using the



water on the alfalfa, then we turn it out on the pasture. Q. Then do you have men there to distribute it? A. We change it as we need it from one place to another. Q. Do you keep two men employed that way? A. Not all the time. We change it as necessary." There is a discrepancy between the tabulated statement of the priorities contained in the findings and order, and the provisions of the order following such statement, as to the period to which the use of the water for the uncultivated land is limited. At the foot of the tabulated statement it is stated that said lands shall have no right to irrigation between May 1st and September 15th of each year. In the order, following the statement, it is declared that the right of irrigation for such lands is denied during the period each year commencing June 15th and terminating September 15th. The words contained in the latter provision of the order we think show what was finally intended by the board, because they are more specific, stating not only the period during which the water may not be used, but also the period during which it may be used; and the restricted period for using the water under that order should be understood and held to be from September 15th to the 15th day of June following, thus denying the right of use only during the period from June 15th in each year to September 15th, and, so far as we shall affirm the order, it will be affirmed with that modification. We do not believe that the record made by the examination and measurements of the state engineer provided for in section 776 of the Compiled Statutes could affect the question as to the time or times when the uncultivated land may have been irrigated, and the extent of the appropriation therefor in respect of the period of use. It seems to us that upon the evidence in the case the order of the board improperly restricts the use of the water found to have been appropriated for the uncultivated lands. Since it does not appear that those lands were irrigated or that the water was used therefor when the cultivated lands were being irrigated, we do not think the plaintiff in error is entitled to the right to use at the same time the water appropriated for the uncultivated lands, and also that appropriated for the cultivated lands. But when not engaged in irrigating the cultivated lands, even during the irrigation season, we see no impropriety in permitting him to use the 4.23 cubic feet per second found to have been appropriated for said uncultivated or pasture lands. This would not permit the plaintiff in error to turn his aggregate appropriation for all the lands into his ditches at the same time; but, when engaged in the irrigation of his 459 acres of cultivated lands, he would only be permitted the use of the amount of the allotted appropriation for those lands; and, when engaged at any time between June 15th

and September 15th in irrigating 296 acres of uncultivated or pasture lands, or any part thereof, he would only be permitted to turn into his ditch or ditches and use the amount of his appropriation for those lands, viz., 4.23 cubic feet per second of time. We believe that this matter can be properly regulated by the water officials, to the end that no subsequent appropriator will be thereby injured. The order will, therefore, be further modified by adding to the paragraph declaring the restriction upon the use of the water for the 296 acres of uncultivated lands the following: "Provided that during the period commencing with said 15th day of June and terminating with said 15th day of September, in each year, whenever the said Harry Nichols, or his successors in the ownership of said lands, are not using, taking or diverting water from Pine creek for the purpose of irrigating any of the cultivated lands described in the findings and tabulated statement, for which he is allowed an appropriation of 2.48, and 4.10 cubic feet per second of time respectively, the water allowed for said uncultivated lands may be used to irrigate the same; and whenever during that period the water shall be used for said 296 acres of land, or any part thereof, none of the water found to have been appropriated for the above described cultivated tracts shall be used, taken, or diverted from said stream."

In all respects, except as modified by the district court and by this court as above stated, the judgment will be affirmed.

SCOTT, C. J., and BEARD, J., concur.

(47 Mont. 554)

#### ANDREE v. ANACONDA COPPER MINING CO.

(Supreme Court of Montana. June 23, 1913.)

##### 1. MASTER AND SERVANT (§ 276\*)—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE.

In an employe's action for injuries caused by the "toggle" on a chain binding a load of logs becoming unfastened, evidence held insufficient to support a verdict for plaintiff because it was wholly conjectural whether the injury was caused by defendant's negligence in using a chain with a defective link or in superimposing the upper binding chain upon the lower as alleged, or by plaintiff's negligence in pushing the upper chain aside without taking precautions to prevent the toggle becoming unfastened.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.\*]

##### 2. MASTER AND SERVANT (§ 234\*)—LIABILITY FOR INJURIES—CONTRIBUTORY NEGLIGENCE.

Where an employe employed to unload logs from a flat car observed that one of the chains binding the logs was negligently superimposed upon the other, if this added to his danger he should have conducted himself accordingly.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 684-686, 706-709; Dec. Dig. § 234.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



### 3. MASTER AND SERVANT (§ 276\*)—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE.

A prima facie case is made out, where plaintiff shows that an injury is more naturally to be attributed to the negligence alleged than to any other cause, but not if the evidence leaves it doubtful whether the injury may not with equal propriety be attributed to one or more causes other than that alleged.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.\*]

### 4. MASTER AND SERVANT (§ 213\*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

An employé employed to unload logs from a flat car assumed the increased peril caused by the condition or position of the chains binding the logs produced by the jars incident to the movement of the car during the haul from the woods to the mill; it being one of the ordinary risks of the employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 559-564; Dec. Dig. § 213.\*]

Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.

Action by J. A. Andree against Anaconda Copper Mining Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed and remanded.

R. A. O'Hara, of Hamilton, and Henry C. Stiff, of Missoula, for appellant. W. P. Baker, of Hamilton, C. S. Wagner, of Helena, and E. C. Kurtz, of Hamilton, for respondent.

BRANTLY, C. J. Action for damages for personal injuries suffered by plaintiff during the course of his employment by defendant at its sawmill at Hamilton, Ravalli county. The defendant transports its supply of logs to the mill by a railway extending to its forest lands distant therefrom about 15 miles. The logs are loaded lengthwise on flat cars and are held in place by binding chains. Two chains are used on each car. One end of the first is passed around the middle of the lower half of the load, and, being drawn tight, is made fast to the other end by means of a finger-link or "toggle" with which the latter is provided. When the chain is adjusted the finger of the finger-link points upward. The length of the chain is such that, when it has been secured in place, a portion of it, consisting of a few links, called the "slack," hangs loose. The link at the end of the slack is hooked over the end of the finger in order to prevent the ring, which holds the finger in place, from slipping off and releasing the chain. The second chain is passed around the entire load and is secured in the same manner. The load is further secured by stakes along the sides of the car. A log train consists usually of 15 cars. When a train reaches the mill it is placed on a track extending along skidways at the pond, and on an incline toward the pond. When the stakes are removed and the chains released, the logs will generally of their own weight roll from the cars upon

the skidways and thence into the pond. The ends of the chains are fastened together on the side from which the unloading is done, because the logs would otherwise carry the chains into the pond. The work of unloading is done by persons who are employed exclusively for that purpose. In unloading a car, the stakes are removed, the slack end of the chain to be released is unhooked from the finger of the finger-link, and the link is tripped, releasing the chain. The lower chain is released first. The operation of tripping is accomplished by means of a trip chain. This is provided at one end with a hook which the operator hooks into the finger-link in such a way as to enable him by a quick jerk, after removing the slack, to disengage the finger by forcing off the ring, thus allowing the ends of the binding chain to part. The trip chain is of sufficient length to permit the operator to stand beyond the end of the car and out of the course of the logs as they roll from the car. It sometimes happens that a finger-link becomes jammed or is "grabbed" so that it cannot be tripped by means of the trip chain. The operator then releases the load by cutting one or both of the binding chains on the opposite side of the car with an implement supplied him for that purpose. It is frequently the case that the operator finds the upper chain lying over the lower in such a way as to prevent the lower from being readily tripped. When this is so, it is necessary for him to push the upper chain off. This is done by the hand or with a peavy, and ordinarily without trouble or danger. At the time of the accident the plaintiff was engaged in unloading logs from defendant's cars. He had unhooked the slack from the finger-links of both chains preparatory to tripping them in the usual way and had hooked his trip chain into the finger-link in the lower chain. Finding that the upper chain was in the way, he undertook to push it aside with his hand. While he was doing this, the finger-link was tripped, with the result that the logs in the upper part of the load suddenly rolled upon the skidway, catching and seriously injuring him.

It is alleged in the complaint that the defendant was guilty of negligence: (1) In so loading the car that the "toggle" of the upper chain was superimposed upon the "toggle" of the lower chain, thus causing it to interfere with the free manipulation of the latter; and (2) in furnishing for use as such upper chain "a chain provided with an unsound, insecure, and defective toggle," thus rendering the unloading of the car highly dangerous and unsafe. The answer joins issue upon these allegations, and alleges the usual affirmative defenses of contributory negligence, assumption of risk on the part of plaintiff, and negligence of his fellow servants. The plaintiff had verdict and judg-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ment. The defendant has appealed from the judgment and an order denying its motion for a new trial.

[1] At the close of plaintiff's evidence, counsel moved the court to take the case from the jury and render judgment for the defendant. One ground of the motion was that the evidence did not tend to show that any act or omission of defendant was a proximate or remote cause of plaintiff's injury. The overruling of this motion presents the only question which we are required to determine. Though, after the motion was denied, several witnesses were called on behalf of defendant, no one of them deposed to any fact which materially aided plaintiff's case. Whether, therefore, he made out a case for the jury depends upon his own testimony and that of the witnesses called by him. The evidence of these witnesses is so voluminous that it cannot be quoted at length. The plaintiff had been in the employ of the defendant about three months. He and his principal witness, Biddiscombe, were assigned the duty of unloading the trains as they came in, and this was their only duty. The following excerpts from the testimony are sufficient to show the circumstances of the accident:

The plaintiff testified: "I never loaded the logs and don't know if I can demonstrate how they are loaded or not. The chains are supposed to be so that you can work one without interference by the other. We take our trip chain the first thing we do and walk in and hook it onto the chain we want to trip. The logs on the car which I was unloading were hanging out, and if the car is on an incline, the track being also inclined, the springs come down making the incline considerable. The toggle of the upper chain was on the toggle of the lower chain so as to stop me from tripping the link off; so I went in there and pushed the top chain over. I was reaching up a little, and, as I pushed it, the jar of it tripped it off. There was nothing to stop the logs, and they came loose, and the first one hit me and knocked me down. \* \* \* I hooked my trip chain in the bottom chain so I could not trip that one without moving the top chain from over the top of the toggles, and when I did that it came loose, and that is all I remember for a time until I came to. I could not tell, from where I stood and reached up to push over the top chain, whether there was any defect in it. \* \* \* They (the chains) were crossed. Being crossed, in the performance of my duty there it was necessary, in order for me to trip the load, \* \* \* to push the top chain away further from the toggle of the bottom chain so I could trip it. I was trying to do that when it came loose and the logs tumbled down on me. The toggle of the top chain came loose. When I went in there I went in to trip the bottom chain. I walked in and put my trip chain on the bottom chain

and took the slack off the toggles of both chains. The toggle must have come loose because the logs came down and struck me. \* \* \* When I came to, the top chain was tripped and the bottom chain was still holding. \* \* \* When I was hurt I was in my regular employment. While working there I think I was a careful man, as careful as anybody could be. Q. At the time you unloaded these logs or attempted to unload them, could you discover from where you were standing any defects in the toggle? A. I could not discover that defect, no. Q. What defect did you have reference to? A. The finger being short. Q. Mr. Andree, from your knowledge of some three or four months there and what you did and what happened there, what would you say, if anything, was there any defect in the toggle or chain on that load? A. Yes, there was. Q. What would you say it was? A. The finger was short. \* \* \* I found toggles crossed or the chains on each other before the time I was hurt. In such cases it was my duty to uncross them or to go around on the other side of the car and cut the chain. I have cut the chains because we couldn't unfasten them any other way. \* \* \* We were furnished with appliances for cutting chains when we considered it necessary. There were nippers there that would cut the chains with very little work. I understood that, when the logs could not be safely unloaded otherwise, the chains were to be cut. I don't know that Biddiscombe had any authority over me, any more than that he hired me. I knew when I went in to hook the trip chain I was taking chances. I knew if one of the logs should come down on me it would be liable to kill me or to do me great injury. I knew that all the time. I knew if any mistake or miscue was made in tripping the chain or unloading the logs, and one of the logs caught me, I was liable to be all in. \* \* \* There was nothing to prevent me if I saw fit to cut the chain or trip the top chain. I always consulted Biddiscombe before cutting a chain, as he was the foreman. \* \* \* I consider myself a man of intelligence and prudent in the ordinary affairs of life. I went up and put my hand on that toggle and pushed it over without noticing its condition. It was impossible to notice. I never heard of another accident of this sort. I do not know whether, when I turned the chain over, I brought pressure on it so that it was released. If the logs are hanging in the chain, there is pressure on the chain. That is what holds the finger of the toggle and link in position. Yes, I said the chains were one over the other. When I went to release them I could not trip the lower chain until the upper chain was moved. They were crossed right over the toggle. I didn't try to trip the lower chain first. I could tell by looking at it. I have seen both men that worked it before me unloading logs in the same condition that was in. I do not know how long the chain was. There must



have been some pressure against the chain that I pushed over, because as soon as I did the logs fell on me. I had had sufficient experiences of the toggle coming in that shape; that is, one over the other. It was not an unusual condition. I have observed the loading of these cars in the woods. You could not tell whether they come into the yard in the same condition in which they were loaded. You would have to follow them down to tell about that. I have seen them load in the woods practically in the same way as they loaded these loads. \* \* \* It was not an unusual thing for cars to come in with the logs on them in the same condition that these were. I want to modify my statement: It was not an extraordinary happening. We might get one car like that in 2 or 3 days, get another car in a train of 15 or 20 cars, get another one on a train to-day and one tomorrow, and maybe not another for a week. I had occasion to see them quite often, but that was not the way they generally loaded them in the woods. Q. Then you consider that the condition of the car was due to a fault in the loading of the car; the condition of the chains which caused one chain to be imposed upon another? A. Yes, sir; I considered that to be the real cause of my injury. If the loading had not been defective, the chains would not have been crossed. I thought at the time, and think yet, that the chains were put that way at the time the logs were loaded, and I can see the condition in which they were. \* \* \* Yes, I moved that chain with my hand intentionally and deliberately, knowing if anything happened to it I would get my body crushed or maybe killed. I knew if it came loose I was liable to be killed. I could have gone to the other side of the car and cut the chains. Our method of working was to fasten the trip chain and get the other end of it and in that way get out of danger's way. If I put a trip chain on it and walked out to the end of it and tripped the toggle, I wouldn't be taking any chances." In another place in his testimony he said: "I did not know at the time it was possible for a finger to come off that way, the way it did, before it did. That was the first time I ever saw it done, a link to come off the finger in that particular way. \* \* \* I walk in and hook this trip chain in and then take the slack off those chains, off the fingers, both of them. There is the slack of each chain, on the bottom and top chain both; and when I took them off I could see that the finger on the link of the lower toggle could not be tripped on account of a toggle on the upper chain being in the way of it; so I just took it and pushed it over a little bit, and that's the last I remember of for the time being."

The witness Biddiscombe testified: "I was supposed to be foreman there, I guess, and just one man with me. While Mr. Andree was employed there he could have cut the chain without my telling him. I told him not

to cut any unless it was absolutely necessary to cut them. I considered it absolutely necessary when the chains were grabbed or caught on the car, when the finger catches so there is no way to get the finger off the link, either that or grabbed, just the two conditions. \* \* \* There is no danger in going in and pushing a toggle over so you can trip the chain if everything is all right. The trip chain should be put on the bottom chain first. If the toggle or upper chain is in the proper condition, there would be no danger in pushing it over. I have done it thousands of times with my peavy. \* \* \* There would be no danger in shifting that over at all. It could not well be unless the finger is short, to shove that over with his hand, and if that was a short finger a man's hand slipping it over, that would probably make it come loose. Nothing else could happen in shoving it over; the link would have to slip off the chain. \* \* \* A man standing on the ground or skidway for the purpose of hooking the trip chain would stand with his head—if he was a man of ordinary height—about even with the bunker of the car, and of course the toggles of the chains would be higher up than his head. The upper and lower toggle are generally about opposite each other. \* \* \* It would be no trick at all for me to see it. The logging train comes down 10 or 15 miles, and the jostling of the train and the slipping of the logs would have a tendency to loosen the toggle before the train got to the pond if the finger was a short one. \* \* \* When a man takes the chain off, it will stay in the same position until he goes to push it over or move it, and then it flies up. If I were going to push one of the toggles off the other, I would grab it and put my thumb over the link and keep the link from slipping off the finger of the toggles. I would do that as an act of caution. \* \* \* A man standing on the skidway and pushing one toggle off the other would push upwards. If a man were to push upwards on the toggle, he would be doing a careless and improper thing. I don't know what he would want to do that for. \* \* \* For cutting chains when it became necessary, we had a pair of chain cutters. They were there on that occasion. There was nothing unusual or extraordinary about the chains being crossed. It was not uncommon; it was a common thing. Andree must have known that, as he worked his shift night about with me. His opportunities for knowing were just the same as mine. I don't remember ever cutting a chain under any conditions other than they were grabbed and when they caught in the bottom of the car. I think I told Andree not to cut any more chains than he could possibly help; not any more than was necessary. \* \* \* I do not know what was the condition of the toggle of the particular chain which came unloosed when Andree was hurt. I didn't observe it before the accident."



The witness Rooney, who had theretofore been employed by the defendant to unload cars, testified: "A person could not tell by looking at it, when the logs came down in that way, whether the toggle was proper or not. When the chain is taken off, as a rule the link remains in the same condition until there is some jar of some kind which may move it around. The fact of the moving of the train might have some effect on the links moved up or down; that would depend upon the strain upon the logs and the chain. When the chain is taken off and the toggle receives a jar, that would cause the link to slip up. When you have a proper toggle it requires quite a force to unsnap or trip it. The links in the trip chain are about one-quarter inch in size. I have used force enough in tripping the toggles to break the trip chain. \* \* \* It was possible for a toggle to become defective on the way down from the woods. It might be in good condition when the train started with the logs, and by the time it reached the pond it might be in bad shape. \* \* \* During the time I was working there, toggles became defective. They would go on the works (to the woods?) in good condition and become defective in loading, hauling, and unloading logs. \* \* \* If a man left the slack of the chain on there while he was removing the upper toggle from the lower one, he would be taking less chances than if he undertook to move it after the chain had been removed."

The chain in question was not exhibited to the jury. It was not examined by any witness after the accident occurred. For demonstrative purposes there were exhibited to the jury two other chains. The witness Rooney was questioned with reference to one of these, as follows: "Q. Referring to the toggle presented in court by the plaintiff, but which has not been introduced in evidence, I will get you to tell the jury what is the matter, if anything, with that toggle as it now presents itself to you? A. The toggle might be all right enough, but the strain coming down there might bend that. Q. So a short toggle is due to the fact that a strain has been placed upon the finger at or near the bend, which has increased there and thereupon the finger has become shorter? A. Yes, sir. Q. Now, then, Mr. Rooney, I will get you to tell the jury whether or not that bent condition of the finger is not apparent to any log unloader when he approaches the load of logs? A. If he examined it close, it might. Q. Would it not be apparent without close inspection? A. Not necessarily. Q. You know that it is bent out of shape now? A. Yes. Q. You knew that when you saw it? A. By examining it closely. Q. Does it require any closer inspection than now, say three feet distant? A. No."

These excerpts include all the evidence tending to show the cause of the accident. Taking it at its utmost probative value, it

does not tend to show that plaintiff's injury was due to any omission of duty by the defendant, rather than to the negligence of plaintiff himself. Neither the plaintiff nor Biddiscombe observed the condition of the chain before or after the accident. While both ventured the opinion that the accident would not have occurred if the finger had not been too short, neither had any knowledge that such was the case. Let it be assumed that, in view of their experience in that kind of work, their opinions are entitled to some weight as tending to show that the link was defective, that the accident would not have occurred but for the existence of the defect, and that, in the absence of evidence pointing to another efficient cause, a case would be made which would call for explanation by the defendant, under the rule as stated in *Callahan v. Chicago, B., etc., Ry. Co.*, 133 Pac. 687 (decided May 17, 1913), nevertheless the circumstances furnish the basis for an inference equally as conclusive that plaintiff brought the injury upon himself by his own negligence.

[2] If it be conceded that the loading had been negligently done because the upper chain was superimposed upon the lower, this was observed by the plaintiff, and, if this added to the danger, he was made fully aware of the fact and should have conducted himself accordingly. His experience, because of which he was willing to express his opinion that the finger was defective, should have guided his conduct with reference to this condition. Though because of his position on the ground he was compelled to reach upward, with the necessary result that the force applied to move the upper chain would also tend to move the ring off the finger and thus release it, he first unhooked the slack when there was no occasion to do so, and without the least attention to the condition of the link proceeded to move the chain by pushing it. This, to quote the words of Biddiscombe, was "a very careless and improper thing." According to the testimony of this witness and that of Rooney, the plaintiff should, as a precaution to prevent just what occurred, have left the slack guard in place, or, at least, have held the ring with his thumb until he had accomplished the removal of the chain. So that, assuming that the finger was short because it had become bent, it cannot be inferred from the circumstances attending the accident that it was due wholly to the condition of the finger-link, rather than to plaintiff's own negligence as the sole, or at least a contributing, cause. In other words, the answer to the question whether the injury was due either to the negligence of the defendant in loading the car or the defect in the link, or to both, or, on the other hand, to the careless conduct of the plaintiff in manipulating the chain, is left to rest entirely in conjecture. Upon this condition of the evidence a verdict for the plaintiff can-



not stand, because it fails to show a direct causal connection between the negligence alleged and the injury, in the sense in which the rule of law applicable requires. "The nonexistence of a legal connection between the negligence and the injury is predicable whenever, for aught that appears, the accident might have happened even if the defects in question had not existed, or if the precautions which were omitted had been taken. The master cannot be held liable if his negligence was merely a condition as opposed to the efficient cause of the injury." 2 Labatt on Master & Servant, § 803.

In *Patton v. Texas & Pac. Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, the rule applicable here is stated as follows: "And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation \* \* \* for that conclusion. If the employer is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs." This passage was quoted by this court with approval in *Shaw v. New Year Gold Min. Co.*, 31 Mont. page 147, 77 Pac. 516, and the rule as stated was therein approved. See, also, *Monson v. La France Copper Co.*, 39 Mont. 50, 101 Pac. 243, 133 Am. St. Rep. 549; *Olsen v. Montana Ore Pur. Co.*, 35 Mont. 400, 89 Pac. 731; *Winnecott v. Orman*, 39 Mont. 349, 102 Pac. 570.

[3] It is sufficient to make out a *prima facie* case if the plaintiff can show that the injury is more naturally to be attributed to the negligence alleged than to any other cause (*Griffin v. Boston & Albany Ry. Co.*, 48 Mass. 143, 19 N. E. 166, 1 L. R. A. 698, 12 Am. St. Rep. 526); yet this requirement is not met if the evidence leaves it doubtful whether the injury may not with equal propriety be attributed to one or more causes other than that alleged.

[4] We have so far assumed that the position of the chains upon the car and the condition of the link point to negligence on the part of defendant. When we view the evidence as a whole, however, it is doubtful whether the condition of the chains was not the result of a shifting of the load produced by the jar incident to the movement of the car during the haul to the mill. If this was the fact—and it was not an unusual occurrence for cars to be found in that condition upon their arrival at the mill—it is fair to

conclude that the increased peril thus brought about was one of the ordinary risks of the employment which the plaintiff was hired to assume. From this point of view, the defendant was not chargeable with negligence because of the defect in the link, unless it owed the duty of having the cars inspected before the unloading began. It is a fair inference that this was a part of the plaintiff's duties. If it was not, the omission by defendant to have the inspection made by others is not the negligence alleged as the ground of recovery in this case. The motion for nonsuit should have been granted.

The judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

HOLLOWAY and SANNER, JJ., concur.

(47 Mont. 363)

### BAILEY v. EDWARDS.

(Supreme Court of Montana. March 27, 1913.  
On Rehearing, July 7, 1913.)

#### 1. JUDGMENT (§ 739\*) — CONCLUSIVENESS — "MANDAMUS"—"CIVIL ACTION."

Rev. Codes, § 7224, relating to mandamus, provides that if judgment be given for the applicant he may recover the damages which he has sustained as found by the jury. Section 7219 provides for the submission to a jury as a matter of discretion of any question of fact raised by the answer essential to the determination of the motion and affecting the substantial rights of the parties upon the supposed truth of the allegation on which the application is based. *Held*, that in a mandamus proceeding by members of a police force who had been unlawfully dismissed to compel their restoration to office, they were not entitled to recover their private damages caused by the wrongful dismissal; the damages recoverable under section 7224 being those incidental to the mandamus proceeding, especially as mandamus is not a "civil action," but is an extraordinary legal remedy, civil in its nature, for the enforcement of public rights, and not for the enforcement of private rights or the prevention or redress of private wrongs, and hence the right to recover such damages in an action was not barred by the failure to assert the right thereto in the mandamus proceeding.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1105, 1267; Dec. Dig. § 739.\*

For other definitions, see Words and Phrases, vol. 2, pp. 1183-1193; vol. 5, pp. 4323-4330; vol. 8, pp. 7603, 7714-7715.]

#### 2. MUNICIPAL CORPORATIONS (§ 185\*)—POLICE—DISMISSAL FROM OFFICE—LIABILITY—SUFFICIENCY OF EVIDENCE.

In an action by members of a police force against the mayor of the city for his unlawful act in dismissing them from the force, by which they were deprived of their compensation as members of the force, where the evidence showed that the mayor's act in dismissing them was subsequently held void, that they were restored to office and presented claims for their accrued salary to the mayor and city council, who for some reason not made to appear rejected such claims, although it was shown that the city had exceeded the constitutional debt limit there was a failure of proof as to any causal connection between their dismissal and the loss of their salary, as the failure of the city to pay them may have been due to circum-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



stances wholly unconnected with their dismissal.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 492-509; Dec. Dig. § 185.\*]

### 3. MUNICIPAL CORPORATIONS (§ 186\*)—POLICE—COMPENSATION DURING SUSPENSION.

Where members of a police force were wrongfully dismissed and were subsequently in a mandamus proceeding ordered restored to office, they were in contemplation of law police officers of the city during the entire period of their unlawful preclusion from office and entitled to their salary as such from the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 510-517; Dec. Dig. § 186.\*]

#### On Rehearing.

### 4. TRIAL (§ 54\*)—EVIDENCE—PURPOSE OF AD-MISSION.

In an action by members of a police force for damages for their wrongful dismissal, where the judgment roll in a mandamus proceeding to compel their restoration to office was pleaded only for the purpose of showing that their right to the office had been adjudicated, it could not when presented in evidence be considered for any other purpose.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 126-128; Dec. Dig. § 54.\*]

Appeal from District Court, Lewis and Clark County; E. K. Cheadle, Presiding Judge.

Action by Leonard Bailey against Frank J. Edwards. From a judgment for defendant, plaintiff appeals. Affirmed.

W. T. Pigott and Massena Bullard, both of Helena, for appellant. Walsh & Nolan and Edward Horsky, all of Helena, for respondent.

SANNER, J. According to the complaint, the appellant, plaintiff below, and Moses Quintin, George Farnam, and William F. Bossler were, on June 1, 1908, members of the police force of the city of Helena; on that day the respondent "wrongfully, unlawfully, maliciously, and oppressively, and under color of his pretended authority as mayor of said city, did without right or jurisdiction or authority, and contrary to the provisions of the statute in that behalf enacted," cause their dismissal and exclusion from office; and although they at all times and by all proper means protested against this exclusion, and repeatedly reported for duty and tendered their services as members of the police force, they were by the act of respondent deprived of "all the insignia, badges, privileges, and emoluments" of office until their restoration by judicial mandate on February 11, 1910. The personal claims of Quintin, Farnam, and Bossler are alleged to have been assigned to the appellant, and he prays damages measured by the salary of each officer during the period of deprivation, with interest.

Several questions are presented by the assignment of errors, but they are all resolvable into one, viz., whether the trial court correctly granted respondent's motion for

nonsuit. The order of nonsuit, to be sustained, must find support in one or the other of the following grounds: (1) That the appellant is barred and concluded from maintaining this action on principles of res judicata; (2) that the evidence does not show any damages suffered by plaintiff which are recoverable in this action.

[1] 1. It seems advisable to first dispose of the question, presented by the pleas in the answer, to the effect that the appellant is precluded from maintaining this action because he and his assignors prosecuted against the present respondent, as mayor of the city of Helena, their several mandamus proceedings in and through the district court of the First judicial district and to final decision by this court "for the same causes of action as are now pleaded and in which the matters now in controversy were, or might have been, determined."

It is disclosed by the reply that the fact basis for the relief now sought is essentially the same as that for relief in the mandamus proceedings. Among the issues then presented and determined were "whether or not defendant, acting under the pretense and cover of his office as said mayor, but without authority of law and contrary to the provisions of the statute in that behalf enacted and without any right or justification so to do, on June 1, 1908, did unlawfully dismiss and discharge plaintiff from said police force and preclude him from the use or enjoyment of said place, and prevent him from performing any service or duty as a member of said force, and thereafter always prevented plaintiff from acting as such member and from discharging his duties as such, and deprived him of his badges and other insignia of his office, and of his privileges as such member." The loss of emoluments, as a matter of special damage, was not raised by the pleading in the mandamus proceedings, but it is quite clear that if causes of action as against Frank J. Edwards, personally, now exist in virtue of the claims of appellant and his conferees, they existed in part, if not in toto, at all stages of the mandamus proceedings against Edwards as mayor; and if these claims should have been litigated in those proceedings, then, under the familiar principle, applicable in mandamus as elsewhere, that a judgment concludes the parties thereto and their privies as to all matters which might have been litigated as part of the subject in controversy, they cannot be litigated now.

The question is not free from perplexity. In the chapter of our Codes relating to mandamus, we find provisions for a verified answer; for traversing the answer; for trial by jury of certain questions of fact; for judgment; and "if judgment be given for the applicant, he may recover the damages which he has sustained, as found by the jury, \* \* \* together with costs," etc. Rev.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Codes, § 7224. This section is apparently an open door to any claim of damages whatsoever arising out of the transaction which the writ of mandate is invoked to remedy; and such—the expressed conclusion of some courts—is implied in the decisions of others to be found upon the subject. *Achey v. Creech, Sheriff*, 21 Wash. 319, 58 Pac. 208; *Bell, Sheriff, v. Thomas*, 49 Colo. 76, 111 Pac. 76, 31 L. R. A. (N. S.) 664; *People ex rel. Broderick v. Morton*, 24 App. Div. 563, 49 N. Y. Supp. 764; *People ex rel. Deverell v. Musical Mut. Pro. Union*, 118 N. Y. 109, 23 N. E. 129; *Marion Beneficial Society v. Commonwealth*, 31 Pa. 82; *Hibernia Fire Engine Co. v. Harrison*, 93 Pa. 264; *State v. Commissioners*, 11 Kan. 66; *State ex rel. Race v. Cranney*, 30 Wash. 594, 71 Pac. 50; *State ex rel. Billings v. Lamprey*, 57 Wash. 84, 106 Pac. 501; *McClure v. Scates*, 64 Kan. 282, 67 Pac. 856; *People ex rel. Van Valkenburgh v. Sage et al.*, 3 How. Prac. (N. Y.) 56. There are several considerations, however, which convince us that this cannot be the correct interpretation of the statute. In the first place, all the decisions which seem to hold that damages for the original wrong may be recovered in the mandamus proceeding are either upon statutes judicially declared to follow the Statute of Anne (9th Anne, c. 20), or they stand upon the theory that mandamus is to all intents and purposes a civil action. The chapter of our Codes relating to mandamus has been part of our written law since the territory was organized (*Bannack Statutes*, p. 123 et seq.; *Codified Statutes 1872*, p. 139 et seq.; *Revised Statutes 1879*, p. 142 et seq.; *Compiled Statutes 1887*, p. 206 et seq.; *Code Civ. Pro. 1895*, § 1960 et seq.); and very early in our history it was settled that mandamus is not a civil action and that the Statute of Anne is not in force with us (*Chumasero v. Potts*, 2 Mont. 242, 258 et seq.; *Territory v. Potts*, 3 Mont. 364, 366). In *Chumasero v. Potts*, this court, touching the nature of mandamus said: "To call this an action or suit at law would certainly be a misnomer. \* \* \* The manner in which the term civil action is used in these two sections [sections 522, 529, *Civil Practice Act 1872*; *Rev. Codes 1907*, §§ 7218, 7225] shows conclusively that our legislative assembly did not consider that the proceedings in mandamus were a civil action. \* \* \* The civil action \* \* \* has reference exclusively to private \* \* \* wrongs. \* \* \* What is the nature of the proceeding called mandamus? 'It is not applicable as a redress for mere private wrongs.' \* \* \* It can be resorted to only in those cases where the matter in dispute, in theory concerns the public, and in which the public has an interest. \* \* \* The enforcement of the writ may incidently, and as a result, affect private rights, but this is not the prime object of the issuance of the writ. \* \* \* The attempt to classify the

proceedings in mandamus is always futile. It is *sui generis*. Undoubtedly it may be called an extraordinary legal remedy, civil in its nature. \* \* \* But, "being a remedy to enforce public rights and not for the enforcement of private rights or the prevention or redress of private wrongs, it is not a civil action." Again, in the recent case of *State ex rel. Stuewe v. Hindson et al.*, 44 Mont. 442, 120 Pac. 489, we find the following: "This proceeding is essentially *ex relatione*. While Stuewe is nominally the complaining party, the taxpayers of Lewis and Clark county constitute the real party in interest; and if it can be said that from the allegations contained in the affidavit and the alternative writ the taxpayers of the county are entitled to relief of any character, which can be granted in this proceeding, it is the duty of the courts to extend that relief; whether this relator individually desires it; or the Attorney General opposes it. In our determination, we are not bound by the prayer of the relator, but may search the affidavit, and order such relief as the facts stated may warrant; for the relief is granted, not to Stuewe individually, but to the public—the real party in interest." Inferences, therefore, founded upon the Statute of Anne or upon the hypothesis that mandamus is a civil action, can have no validity to require such a construction of section 7224, *Revised Codes*, as respondent here seeks to evoke.

And this conclusion finds collateral support in the further fact that in a mandamus proceeding a jury is not a matter of right, but of discretion. Any and all of the questions arising therein, whether of law or of fact, may be tried by the court without a jury, with or without a reference. *Section 7219, Rev. Codes*; *Chumasero v. Potts*, *supra*. If the relator must litigate therein any private right to damages which he may have against the respondent personally arising out of the wrong to which the mandate itself is directed, perforce the adversary must submit; so that a cause of action at law becomes summarily justiciable without a jury, notwithstanding the fact that as to such causes of action both parties are entitled to a jury and cannot be compelled to submit to a summary adjudication. *U. S. Constitution*, 7th Amendment; *Basey v. Gallagher*, 20 Wall. 670, 22 L. Ed. 452; *Constitution of Montana*, art. 3, § 23; *Chessman v. Hale*, 31 Mont. 581 et seq., 79 Pac. 254, 68 L. R. A. 410, 3 Ann. Cas. 1038. But the statute clears itself of any such absurdity. It says the appellant, if he prevail, may have "the damages he has sustained" as found by the jury, etc. Sustained by what? Surely by those circumstances upon which a jury may, but need not, be called to pronounce. These are questions of fact raised by the answer "essential to the determination of the motion, and affecting the substantial rights of the parties, and upon the



supposed truth of the allegation of which the application for the writ is based." Section 7219. How is the question of what damages the applicant may have suffered from official inaction essential to the determination of whether the writ shall go to compel official action? Or how is the question of what damages the applicant may have sustained, by reason of preclusion from office, essential to determine whether he shall be restored? It seems to be the rule, even under the civil action theory of mandamus, that damages cannot be awarded unless the peremptory writ is issued (*Bron v. Worthen*, 63 Pac. 255<sup>1</sup>); and it is settled in this state that the peremptory writ cannot issue after the term of the officer involved has expired (*State ex rel. Stranahan v. Board*, 32 Mont. 13, 79 Pac. 402, 4 Ann. Cas. 73). What, in such a case, becomes of the relator's right to damages for the original wrong if they are necessarily triable in the mandamus proceedings?

The foregoing and other considerations, as we think, justify our opinion that section 7224 is not to be interpreted as contended by the respondent; but rather that the damages therein provided to be allowed in mandamus proceedings are such damages as are incidental to the proceedings themselves, and not those arising out of the prior preclusion or deprivation which the writ itself was invoked in part to redress. This brings us within, not the letter, but the spirit of the decision in *Peterson v. City of Butte*, 44 Mont. 401, 120 Pac. 483, Ann. Cas. 1912B, 538, and to our final conclusion upon this branch of the case: That the plaintiff is not precluded from maintaining this action by the litigation of the mandamus proceedings referred to in the answer.

[2] 2. We are constrained, however, to agree with the contention of respondent that the evidence presented to the trial court was insufficient to sustain the action as laid. The complaint alleges "that by, through, and because of the hereinbefore stated unlawful, wrongful, oppressive, and malicious acts and conduct of said defendant, plaintiff has been and still is deprived of said emoluments and compensation," to his damage, etc. The "unlawful, wrongful, oppressive, and malicious acts and conduct," above referred to, are the dismissal and preclusion of the plaintiff and his associates from their offices as policemen. No other damages are claimed, no other cause of damage is alleged, so that the burden of the charge is that the plaintiff and his associates were damaged by the loss of their salary in consequence of their unlawful dismissal and preclusion, and not otherwise. What causal connection there was between their dismissal and preclusion on the one hand, and the loss of salary on the other, is not further revealed.

At the close of appellant's case, the state of the proof as regards any causal connection between the respondent's acts and the damages claimed was this: Bailey and his associates had been kept out of their offices from June 1, 1908, to February 10, 1910, as the result of orders of the respondent under an ordinance judicially held to be void; during that time they drew no pay; upon their restoration they presented, in due form, to the mayor and city council their verified claims for the accrued salary, and these claims, for some reason not made to appear, were rejected. There was an offer of proof that the city had exceeded the constitutional limit of indebtedness, but this was rejected, and properly so, for lack of an allegation in the pleadings.

[3] The various decisions of this court relative to the status of the plaintiff and his associates establish that their dismissal and preclusion from office were without legal effect. *State ex rel. Quintin v. Edwards*, 38 Mont. 250, 99 Pac. 940; *State ex rel. Quintin v. Edwards*, 40 Mont. 287, 106 Pac. 695, 20 Ann. Cas. 239; *State ex rel. Bailey v. Edwards*, 40 Mont. 313, 106 Pac. 703; *State ex rel. Edwards v. District Court*, 41 Mont. 369, 109 Pac. 434. In contemplation of law, therefore, they were never dismissed, but were, during the entire period of their unlawful preclusion, police officers of the city, entitled to be paid as such, and, upon making good their claim to the office, in position to assert their right as against the city to the salary accrued. *Peterson v. City of Butte*, supra; *Wynne v. City of Butte*, 45 Mont. 417, 123 Pac. 531.

So far as we can tell, the failure of appellant and his associates to receive their pay may have been due to circumstances wholly unconnected with the acts of respondent complained of, for there is absolutely nothing before us to show that the city could not have been made to respond or that it cannot now be made to respond; and if it should be made to respond, no emoluments will have been lost, and therefore no damages suffered of the character alleged.

"But it does not lie in the mouth of defendant to say that another person—Helena—is liable for the salaries"—so say appellant's counsel, and *Lumley v. Gye*, 2 Ellis & Blackburn, 216, is cited in support of this position. That case, which was for damages directly due to the malicious act of Gye in procuring an opera singer to abandon her contract with Lumley, was decided upon principles wholly foreign to the case at bar; and without indicating whether we should, under appropriate circumstances, care to follow it, we note in the opinion of Compton, J., this language: "The damages occasioned by such malicious injury might be calculated upon a very different principle from the amount of the debt which might be the only sum recoverable on the contract.

<sup>1</sup> Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 63 Kan. 883.



\* \* \* The servant or contractor may be utterly unable to pay anything like the amount of the damage sustained entirely from the wrongful act of the defendant." In the case at bar, damage might have been claimed upon a different basis, and therefore calculated upon a different principle, and upon the amount of the unpaid salary; but it was not. The city of Helena may be utterly unable to pay the salary arrears, and the damage sustained by appellant may be due entirely to the wrongful act of respondent; but, if so, these facts have not been made to appear. This being true, there was a lack of proof, and for this reason the judgment must be affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J.,  
concur.

On Rehearing.

SANNER, J. After a careful consideration of the propositions submitted on rehearing by counsel for appellant, we are convinced that the result reached in the opinion heretofore announced is the right one. Much contention is based upon the use in the opinion of the following language: "There was an offer of proof that the city had exceeded the constitutional limit of indebtedness, but this was rejected, and properly so, for lack of an allegation in the pleadings." This statement is not literally correct. The trial court did reject the evidence referred to in the first instance for the reason stated, but later caused the record to show that evidence had been received of the fact that the indebtedness of the city was beyond the constitutional limit. However, the remark quoted was made merely in passing. The presence in the record of the fact referred to is not decisive of this appeal. The record still falls short of establishing a causal connection between the unlawful preclusion alleged, and the loss of emoluments. It still falls to show by competent evidence how the utterly void act of Edwards could produce the result complained of, or that the city could not have been made to pay the salaries of appellant and his associates as they accrued.

[4] We do not feel that the judgment roll in the mandamus suits presented in evidence can be considered for any purpose, save that for which they were pleaded, to wit, that there was adjudicated therein the right of appellant and his associates to the offices in question.

Judgment affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J.,  
concur.

(47 Mont. 437)

# WALLACE v. WEAVER et al.

(Supreme Court of Montana. June 2, 1913.)

## 1. TRESPASS (§ 10\*)—REAL PROPERTY—RIGHT OF ACTION.

One whose real property is trespassed upon has a right of action for nominal damages at least.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 8, 12; Dec. Dig. § 10.\*]

## 2. TORTS (§ 5\*)—RIGHT OF ACTION—VIOLATION OF DECREE.

To constitute a right of action for tort, the plaintiff's right must have been infringed by the wrongful act of defendant, resulting in plaintiff's damage; and hence the mere violation of a decree in a former suit enjoining defendant from handling or taking water from a stream in a certain way was not sufficient to give plaintiff a cause of action, even for nominal damages, plaintiff not owning the water of the channel in which it flows, but possessing a mere right to use the water when he needed it; his remedy being by contempt proceedings.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 5; Dec. Dig. § 5.\*]

## 3. APPEAL AND ERROR (§ 1042\*)—HARMLESS ERROR—RULINGS ON PLEADINGS.

Where a so-called affirmative defense was nothing more than a denial in affirmative form, reversible error could not be predicated upon the trial court's refusal to strike it out.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110-4114; Dec. Dig. § 1042.\*]

## 4. EVIDENCE (§ 131\*)—SIMILAR FACTS.

In an action for damages from defendants' wrongful use of the water of a stream so as to cast debris upon plaintiff's land, where there was evidence for plaintiff to show that silt was deposited over his meadow land, the admission of evidence that there was no such deposit on a ranch above that of plaintiff was incompetent, in the absence of any showing that the conditions of the two ranches were similar.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 399-402; Dec. Dig. § 131.\*]

## 5. NEW TRIAL (§ 66\*)—GROUNDS—VERDICT CONTRARY TO INSTRUCTIONS.

An instruction that on a finding of certain facts plaintiff should be awarded damages not to exceed the amount demanded in his complaint, whether correct or not, was the law of the case, by which the jury was bound; and where the verdict on the undisputed evidence could not have been for defendant a verdict for him was ground for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 132-134; Dec. Dig. § 66.\*]

## 6. APPEAL AND ERROR (§ 171\*)—CHANGE OF POSITION ON APPEAL—THEORY OF CAUSE.

By failing to object to an instruction in the court below, defendant consented to the rule of liability which it announced, and could not be heard on appeal to urge a theory in conflict with it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1063, 1066, 1067, 1161-1166; Dec. Dig. § 171.\*]

## 7. WATERS AND WATER COURSES (§ 152\*)—ACTION FOR DAMAGES—DEFENSES.

In an action for damages by plaintiff, who, as the prior appropriator of all the waters of a creek, was entitled to its maximum flow when needed, and could not be limited to its average flow, the contention of defendants that they took from the creek no more water than they conducted into it from another creek, with ample allowance for loss by seepage, evaporation,



etc., being founded upon their own method of dividing the water, constituted no defense.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.\*]

**8. APPEAL AND ERROR (§ 1171\*)—REVERSAL—NOMINAL DAMAGES.**

While a judgment for defendant will not be reversed and a new trial granted merely to enable plaintiff to recover nominal damages, yet the failure to award nominal damages is reversible error, where plaintiff is substantially prejudiced thereby, as where the judgment carries costs; and where the record showed that plaintiff was entitled to substantial damages, and that a judgment for defendants carried costs against him, there was reversible error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4546-4554; Dec. Dig. § 1171.\*]

Appeal from District Court, Granite County; J. Miller Smith, Presiding Judge.

Action by William Wallace against James P. Weaver and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded for new trial.

Edward Scharnikow, of Deer Lodge, and Rodgers & Rodgers, of Anaconda, for appellant. D. M. Durfee, of Phillipsburg, and W. E. Moore, of Missoula, for respondents.

**HOLLOWAY, J.** In 1865 William Wallace and his predecessors in interest located a ranch upon Dunkleberg creek, in Granite and Powell counties, appropriated all of the waters of that creek for irrigation and other useful purposes, and thereafter used all the waters of said creek for such purposes during the irrigation season in every year, until interfered with by defendants. Many years after Wallace's appropriation defendants Noid and Weaver located upon Dunkleberg creek above the ranch of Wallace, and about 1900 Weaver appropriated 200 inches of the waters of Gold creek, conveyed them into the channel of Dunkleberg creek, and, by means of ditches tapping that creek, applied them to use upon his ranch. By some arrangement Noid secured an interest in the right which Weaver claimed. In 1906 a controversy arose, and Wallace brought an action against Noid and Weaver, which action was numbered 734 on the records of the clerk of the court of Granite county. In that action Wallace alleged that defendants Noid and Weaver conducted the Gold creek water through a ditch from Gold creek to the top of a divide between Carruthers creek and Dunkleberg creek and on the Dunkleberg creek side of the divide, and there turned the water loose and suffered it to run down the mountain side into Dunkleberg creek, whereby large quantities of earth, rock, and other debris were carried down into Dunkleberg creek, polluting the waters of that creek, interfering with the flow of springs which constituted a part of the supply of Dunkleberg creek, and that large quantities of this debris

were carried down to Wallace's ranch and through his ditches over his property. It was further alleged that defendants were taking out of Dunkleberg creek much larger quantities of water than they were turning into the creek from Gold creek. In that action the defendants Noid and Weaver answered jointly, denying all the allegations of plaintiff's complaint with respect to their wrongful acts, and the defendant Weaver set forth affirmatively the facts relating to his appropriation of the Gold creek water and asked that his right to use the channel of Dunkleberg creek for conveying that water to his ranch be confirmed. The issues being settled and the cause ready for trial, the parties reached an agreement, and a stipulation was duly entered into for a consent decree in favor of Wallace and against Noid and Weaver, and that decree was rendered and entered on September 27, 1907. The decree follows the stipulation of the parties and specifically enjoins the defendants in that action from discharging the waters of Gold creek at the top of the divide and permitting them to flow down the mountain side into Dunkleberg creek, and from using, controlling, or handling the waters of Gold creek in the manner that the same had theretofore been handled by them, as set forth in plaintiff's complaint in that action. They were further enjoined from using or handling the water of Gold creek in any manner so as to cause the same to carry down into the channel of Dunkleberg creek any debris whatever, or depositing the debris about Dunkleberg creek so that it would find its way into the creek channel or interfere with the springs at its headwaters or along its course. They were also enjoined from taking out of Dunkleberg creek more water than they conducted into it from Gold creek, with a reasonable allowance for loss by seepage and evaporation. The right of defendants to use the channel of Dunkleberg creek through which to flow their Gold creek water was recognized and confirmed, but they were particularly enjoined from using it in the manner in which they had theretofore done; and by a mandatory provision they were required to devise and construct artificial ways and means through which the water should be conducted from the top of the divide into Dunkleberg creek, so as to prevent debris from being washed down into Dunkleberg creek.

In May, 1910, this action was commenced by Wallace against Noid, Weaver, and Gold-berg. In his complaint the plaintiff charges that the defendants have violated the decree in cause 734; that they have continued to conduct the waters of Gold creek into Dunkleberg creek channel in the same manner as they did before the decree was entered; that they have failed to devise any means for conducting the water from the top of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r. Indexes



the divide into Dunkleberg creek; and that they have taken from Dunkleberg creek larger quantities of water than they conducted into it from Gold creek. It is alleged that by reason of these violations of the decree and the wrongful conduct of these defendants plaintiff has suffered damages through the loss of crops, injury to certain of his crops, and a permanent loss of a portion of the waters of Dunkleberg creek by reason of the destruction of some of the springs at the headwaters of that stream. It is alleged that defendant Weaver violated the provisions of the decree directly, and that he further violated them acting through Goldberg. To this complaint defendants Nold and Goldberg interposed a joint answer, which is in effect a general denial of the allegations of the complaint, a plea of the bar of the statute of limitations, and an affirmative defense, so called, in which it is alleged that the acts complained of by the plaintiff are the identical acts of which complaint was made in cause 734, and that the decree in that case is an adjudication upon these particular acts. The separate answer of Weaver is to all intents and purposes the same as that of Nold and Goldberg. There is a specific denial in his answer that Weaver used any of the waters of Dunkleberg creek during the season of 1909. Plaintiff demurred to these answers, but the demurrers were overruled and replies were filed. The cause was brought on for trial, the evidence was introduced, and at its conclusion the plaintiff requested the court to charge the jury that the evidence showed without any contradiction that the defendants had discharged the waters of Gold creek into Dunkleberg creek during 1908 and 1909 in the same manner as said waters had been discharged at the time and prior to the entry of the decree in cause 734, and "therefore you are instructed that your verdict in this case must be in favor of plaintiff and against the defendants." He also requested another instruction relative to the measure of damages, based upon the instruction just referred to. These two requests were denied. The trial resulted in a verdict and judgment in favor of defendants, and from that judgment, and from an order denying him a new trial, the plaintiff has appealed.

[1, 2] 1. It is argued that the court erred in refusing to give plaintiff's requested instructions 2 and 3. It is urged that the evidence shows without any substantial contradiction that the defendants had not made any material change in the method of conducting the Gold creek water into Dunkleberg creek after the decree in No. 734 was entered; but we are unable to agree with this broad statement. There is evidence that they constructed certain ditches at the foot of the divide which caught up the waters as they came down the mountain side, and conducted them into Dunkleberg creek on grade. The evidence is not very clear as to the effi-

cacy of this means of preventing the injury described in plaintiff's complaint in cause 734; but the court was justified in its refusal to give these instructions for another reason. Counsel insist that for the violation of the decree in cause 734 plaintiff is entitled to a judgment for nominal damages at least, and certain authorities are cited, but they do not bear out counsel's contention. Each is a case of trespass upon real property, strictly speaking, and it is elementary that in such a case the plaintiff whose property is trespassed upon has a right of action for nominal damages at least. But counsel overlook the peculiar character of plaintiff's property in Dunkleberg creek. However secure he may be in his right to the use of the waters of that creek, he does not own the waters, and he does not own the channel of the creek. He has merely the right to their use when their use is needed; when the use is not needed, his rights are not superior to those of any one else. So that the bare violation of the decree in 734 does not, of itself, give the plaintiff a right of action. The statute provides a means for punishing the defendants for their contempt. In *Dillon v. Great Northern Ry. Co.*, 38 Mont. 485, 100 Pac. 960, we analyzed a cause of action for legal wrong and said: "To constitute a cause of action for a tort, then, the plaintiff's right must have been infringed by the wrongful act of the defendant, with the result that plaintiff suffered damages." While the mere violation of the decree might constitute a sufficient showing in a contempt proceeding, it is not sufficient to constitute a cause of action in favor of plaintiff, even for nominal damages.

[3] 2. The so-called affirmative defense in each answer is nothing more than a denial in affirmative form. To strike it would simplify the pleadings, but reversible error cannot be predicated upon the trial court's refusal to do so.

[4] 3. Because of errors committed upon the trial of the cause a reversal of this judgment must follow. We shall therefore not discuss the question of the sufficiency of the evidence. The plaintiff complained that debris was carried down through the channel of Dunkleberg creek and through his irrigating ditches over his meadow land, by reason whereof his hay crop was greatly injured, and that this resulted from the acts of defendants in handling the waters of Gold creek in the manner in which it is alleged they were handled. Upon the trial he offered evidence tending to show that silt was deposited over his meadow land, and that his hay, when it was cut, was dusty, dirty, and greatly depreciated in value. The defendants, over objection of plaintiff, offered evidence that this condition did not prevail upon Goldberg's ranch, which is situated above the Wallace ranch. Witnesses testified that there was no deposit left on Goldberg's ranch after



irrigation; that there was no dust or dirt upon his hay; and that his hay crop was of first-class quality. The error in the admission of this evidence is apparent. There was not any attempt made to show that the conditions at the Goldberg and Wallace ranches were similar. It is conceded by counsel for appellant that if conditions were shown to be similar this evidence would have been competent as tending to disprove the plaintiff's contention. But in the absence of any showing that the conditions were similar the evidence is not only of no probative force, but likely to mislead the jury into the belief that Wallace's contention cannot be true, because the same result was not found on the Goldberg ranch. To make the evidence competent, it was incumbent upon the defendants to show that the conditions were similar.

[5] 4. Upon the trial the court gave an instruction numbered 2, as follows: "You are instructed that if you believe from the preponderance of the testimony that the defendants have, within the periods of time alleged in plaintiff's complaint, violated the terms and provisions of such decree in said suit No. 734 in any, either, or all of the respects set out in plaintiff's complaint, that for such violations you should award to the plaintiff damages against the defendants, such damages not to exceed the sum of \$5,000, the amount demanded in plaintiff's complaint." That the jury disregarded this instruction and returned a verdict directly contrary to its provisions, there cannot be any doubt. The evidence offered by the defendants discloses that they did not provide any artificial ways or means for conducting the Gold creek waters from the top of the divide down the mountain side into Dunkleberg creek, as they were enjoined to do in the decree in cause 734. This failure upon their part is charged in plaintiff's complaint, and instruction 2, above, specifically directs the jury that if they found from the evidence that the defendants failed in that regard their verdict should be for the plaintiff. That they did fail is disclosed by their own evidence and that of every other witness who testified with regard to the situation at that point. There was no controversy over it whatever, and the verdict of the jury could not have been for the defendants. Counsel for respondents find fault with instruction No. 2 given, and we are now asked to say that the rule heretofore adopted in this state should be changed, and, unless an instruction correctly states the law, the jury should not be bound by it. In *Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714, this court, speaking through Chief Justice Pemberton, said: "It needs no authority, then, to say that the jury is bound to take the law from the court. \* \* \* And when the law is announced by the court it is the law of the case until overruled by a higher authority. It follows, then, that a verdict in direct conflict with the law of the court

is a verdict against the law. \* \* \* So far as the jury is concerned, there is no such thing as the charge of the judge being contrary to law, because, whatever may be his charge, it is the law to them. \* \* \* It matters not if the instruction disobeyed be itself erroneous in point of law. It is, nevertheless, binding upon the jury, who can no more be permitted to look beyond the instruction of the court to ascertain the law than they would be allowed to go outside of the evidence to find the facts of the case. \* \* \* If the contention of appellant is correct, the time of this court in hearing future appeals will be devoted to determining whether the court or the jury were right in their views of the law in the trial of the cause in the lower court. Authority or no authority, we cannot give our sanction to a practice that would lead to such results. Such a course would ultimately result in overturning our system of keeping separate and distinct the powers and duties of courts and juries, confining each to its own proper province, in the degradation of the courts, and confusion and chaos in the administration of the law. Such calamities are much more to be deplored than the inconvenience and costs of a new trial in cases where juries usurp the powers of the court." The decision in that case has been followed ever since. *State v. Dickinson*, 21 Mont. 595, 55 Pac. 539; *King v. Lincoln*, 26 Mont. 157, 68 Pac. 836; *McAllister v. Rocky Fork Coal Co.*, 31 Mont. 359, 78 Pac. 595; *State v. Radmilovich*, 40 Mont. 93, 105 Pac. 91; *Bliss v. Wolcott*, 40 Mont. 491, 107 Pac. 423; *Allen v. Bear Creek Coal Co.*, 43 Mont. 209, 115 Pac. 673; *Lynes v. Northern Pac. Ry. Co.*, 43 Mont. 317, 117 Pac. 81, Ann. Cas. 1912C, 183; *Mason v. Northern Pac. Ry. Co.*, 45 Mont. 474, 124 Pac. 271; *Gleason v. Missouri River P. Co.*, 46 Mont. 395, 128 Pac. 586. Any other rule than that announced above would confer upon the jurors in every instance the authority to determine the law of the case as well as the facts; and we are not prepared to go to that extreme limit, even for the sake of preventing the reversal of a judgment.

[6] 5. In any event, counsel for respondent contend that there was no liability on the part of the defendant Weaver. We do not agree with this, as a matter of fact. But even if their contention be correct, they would be precluded from making the assertion in this case because of the fact that without any objection on their part they suffered the trial court to give instruction No. 3, as follows: "You are instructed that if you believe from a preponderance of the evidence that there were violations of the provisions of the decree set out in plaintiff's complaint, between the periods of time mentioned therein by the defendant Goldberg after he went into possession and control of what is known as the Goldberg lands and into possession and control of what is known



(65 Colo. 146)

as the Gold creek ditch and waters flowing therein, that the defendant Goldberg and the defendant Weaver are jointly liable and responsible to answer for any damages to the plaintiff therefor." By their failure to object to this instruction in the court below the defendants, including defendant Weaver, consented to the rule of liability which it announces, and will not be heard in this court to urge a theory in conflict with it. *Cohen v. Clark*, 44 Mont. 151, 119 Pac. 775.

[7] 6. The contention of defendants that they took from Dunkleberg creek no more water than they conducted into it from Gold creek, with ample allowance for loss by seepage, evaporation, etc., is founded, in part at least, upon a method of dividing the water for which defendants cannot possibly find any justification in law. Plaintiff, as the prior appropriator of all the waters of Dunkleberg creek, was entitled to the maximum flow of that stream when needed, and could not be limited to the average flow—a result brought about by defendant's method of dividing the waters.

[8] 7. Contending that if plaintiff was entitled to recover at all he was entitled only to nominal damages, counsel for respondents, in their brief, say: "The rule is well settled that after verdict of a jury, and the refusal of the trial court to grant a new trial the judgment will not be reversed for a failure to find nominal damages." To this there are two objections: (1) While the statement is correct in part, it is not a correct statement of the rule. The rule is: "A judgment for defendant will not be reversed and a new trial granted *merely* to enable appellant to recover nominal damages." 3 Cyc. 446; *McCauley v. McKelg*, 8 Mont. 389, 21 Pac. 22; *McAllister v. Clement*, 75 Cal. 182, 16 Pac. 775; *Johnson v. Cook*, 24 Wash. 474, 64 Pac. 729. (2) The rule, when correctly stated, is not of universal application. "But a failure to award nominal damages is reversible error, where plaintiff is substantially prejudiced thereby, as where the judgment carries costs." 3 Cyc. 447, and cases cited. This record does not show that plaintiff is entitled to nominal damages *only*. According to his theory and the testimony offered by him, he is entitled to substantial damages. The record does disclose that if the judgment in favor of defendants is allowed to stand plaintiff will be compelled to pay them \$105 awarded them as costs.

Because of errors in the admission of evidence, and because of the fact that the verdict is contrary to the law, the judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

BRANTLY, C. J., and SANNER, J., concur.

# CARLOCK v. DENVER & R. G. R. CO.

(Supreme Court of Colorado. July 7, 1913.)

## 1. MASTER AND SERVANT (§ 129\*)—INJURIES TO SERVANT—PROXIMATE CAUSE.

Where a brakeman was dragged by cars, which had been set in motion by a fellow brakeman while the former was between the cars, until his foot caught in a frog which had not been blocked, and he was then thrown down and injured, the proximate cause of the injury, was the failure of the company to block the frog, as required by Rev. St. 1908, §§ 5507, 5508.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 257-263; Dec. Dig. § 129.\*]

## 2. NEGLIGENCE (§ 56\*)—PROXIMATE CAUSE OF INJURY—VIOLATION OF STATUTE.

In an action for personal injuries based on the failure of the defendant to obey a statute, the violation of the statute must be shown to have been the dominating cause of the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 69, 70; Dec. Dig. § 56.\*]

## 3. NEGLIGENCE (§ 56\*)—"PROXIMATE CAUSE."

Proximate cause means that cause which stands next in causation to the effect, not necessarily in time or place, but in causal relation.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 69, 70; Dec. Dig. § 56.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5758-5769; vol. 8, p. 7771.]

## 4. NEGLIGENCE (§ 61\*)—PROXIMATE CAUSE—CONCURRENT NEGLIGENCE OF THIRD PERSON.

Where an injury is the result of the combined negligence of the defendant and of a third person, for whom neither the plaintiff nor the defendant is responsible, the defendant is liable if the injury would not have occurred except for his negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 74, 75; Dec. Dig. § 61.\*]

## 5. MASTER AND SERVANT (§ 129\*)—INJURIES TO SERVANT—MASTER'S KNOWLEDGE OF DANGER.

A railroad company was bound to anticipate that one dragged by moving cars might be injured by having his foot caught in a frog, which it left unblocked in violation of the statute.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 257-263; Dec. Dig. § 129.\*]

## 6. MASTER AND SERVANT (§ 260\*)—INJURIES TO SERVANT—COMPLAINT—NEGATIVING ASSUMPTION OF RISK.

An allegation in a complaint for injuries to a brakeman, caused by an unblocked frog, that the plaintiff did not know or have any notice that the frog was not blocked, is an allegation of an ultimate fact negating assumption of risk, and it was not necessary to plead the evidence by which the fact would be established.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 844-848; Dec. Dig. § 260.\*]

## 7. MASTER AND SERVANT (§ 252\*)—INJURIES TO SERVANT—NEGLIGENCE OF FELLOW SERVANT—STATUTORY PROVISIONS.

The Employers' Liability Act (Laws 1901, p. 161) makes the employer liable for the negligence of a fellow servant to the same extent as if it were his own negligence and repeals all acts in conflict therewith, provided that the act shall not be construed to repeal or change the existing laws relating to the right of the



person injured, or, in case of his death, the right of his relatives, to maintain an action against the employer. Laws 1893, p. 129, § 1, gave a right of action against the employer for the negligence of a limited class of employees, and section 2 provided that no action should be brought thereunder unless notice of the injury were given to the employer within sixty days. Held that, even though the act of 1901 did not repeal the act of 1893, it was not an amendment thereof nor to be construed as a part of it, so that the requirement of notice would not apply to an action under the act of 1901 for injuries caused by the negligence of a fellow servant which would not be actionable under the act of 1893.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 806; Dec. Dig. § 252.\*]

Error to District Court, Denver County; Harry C. Riddle, Judge.

Action by William T. Carlock against the Denver & Rio Grande Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

John W. Helbig, of Denver, for plaintiff in error. E. N. Clark and George P. Steele, both of Denver, for defendant in error.

GABBERT, J. Plaintiff in error commenced an action against defendant in error to recover damages for a personal injury alleged to have been caused by the negligence of the defendant, or negligence for which it was responsible. The complaint was in two counts. The first count, so far as material to consider, charged that plaintiff was employed by defendant as head brakeman, and that in the discharge of his duties he was assisting in making up a train; that in making it up part of the cars were placed on the main track, about 75 feet from its intersection with a siding, at which point there was an unblocked frog; that the track had a descending grade towards this point; that the locomotive was temporarily detached from the cars, which were held in place by hand brakes; that he went between the cars to make a hose coupling; that while so engaged another brakeman in the employ of the defendant released the hand brakes which set the cars in motion; that one of the appliances used in connection with the air brakes caught in his coat and held him captive, with the result that he was dragged to the intersection of the main track and a siding, where his foot was caught in an unblocked frog, and he was thrown down and his left leg run over by the wheels of the moving cars, and so severely injured that it was necessary to amputate it near the hip joint. It was further charged in this count as follows: "And plaintiff further alleges that he did not, at any time prior to receiving his injuries herein mentioned, know or have notice whatever that the railroad frog or space between the rails aforesaid was unblocked, or in a defective condition, as aforesaid." By the second count it is sufficient to state that by apt averments it is made to

appear that plaintiff's injury was caused by the negligence of the rear brakeman, a co-employé, in releasing the brakes which set the cars in motion, whereby plaintiff was thrown down and his leg crushed. It is not averred in this count that written notice of the time, place, and cause of plaintiff's injury was given the defendant within 60 days of the date he was injured. To each of the counts a general demurrer was interposed and sustained. Plaintiff elected to stand by his complaint, and his action was dismissed.

[1, 2] The first count, as stated by counsel for plaintiff, is founded upon defendant's common-law liability in maintaining an unblocked frog; and the second count charges the injury, under the Employers' Liability Act of 1901 (Session Laws 1901, p. 161), as having been caused by the negligence of a fellow servant, and the question presented is whether a cause of action is stated in either of these counts. The laws of this state require railroad companies to block what is generally known in railroad parlance as frogs, and provides that a failure to do so shall be prima facie proof of negligence in actions for injuries occasioned by being caught in unblocked frogs. Session Laws 1897, p. 258; R. S. 1908, §§ 5507, 5508. The first count charges negligence in this respect; but does it appear that this negligence was the proximate cause of plaintiff's injury? This is the important question, for the reason that merely charging negligence is not sufficient, as, in addition, it must appear, in order to render the defendant liable for such negligence, that it was the proximate cause of the injury for which a recovery is sought. In other words, in a case for personal injury based on failure of the defendant to obey a statute, the violation of the statute must be shown to have been the dominant cause of the injury; otherwise, a cause of action is not stated. *A., T. & S. F. Ry. Co. v. Walz*, 40 Kan. 433, 19 Pac. 787; *Stoneman v. Atlantic & Pacific R. R. Co.*, 58 Mo. 503.

[3] The brakeman who released the hand brakes, whereby the cars between which plaintiff was coupling the hose were set in motion, was a fellow servant, and as the count under consideration is based on common-law liability the defendant is not liable for his negligence, if it appears from the facts averred that it was the dominating cause of plaintiff's injury. "Proximate cause" has been variously defined. Perhaps no definition could be given which would serve as a test in all cases, as from the several definitions they appear to have been framed as applicable to the facts or peculiar circumstances of the case under consideration. Proximate cause does not necessarily mean closeness in the way of time in which certain things occur, but, rather, that which is most proximate in the order of responsible causation, or that which stands next in causation to the effect, not necessari-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.



ly in time or place, but in causal relation. *Bouvier; Traveler's Ins. Co. v. Murray*, 16 Colo. 296, 26 Pac. 774, 25 Am. St. Rep. 267. It is quite clear that but for the negligence of the brakeman plaintiff's foot would not have caught in the unblocked frog; but it is also clear from the averments of the complaint that, had it not been for the unblocked frog, injury would not have resulted to the plaintiff from the negligent act of the brakeman.

[4] It is true, as contended by counsel for defendant, that, when plaintiff went between the cars to couple the hose, they were at rest. The unblocked frog was 75 feet distant, and, had that situation remained unchanged, plaintiff would not have been injured. The situation was changed by the act of the brakeman in releasing the brakes, but the failure of the defendant to comply with the statute requiring frogs to be blocked was negligence as a matter of law. The statute so declares, and it is so held by the cases on the subject construing statutes of similar import to ours. The act of the brakeman was negligence, but antecedent to this was the alleged negligence of the defendant. When there are several agencies or causes of an injury, the question is, which was the efficient, dominating cause. In determining this question, as applied to the facts under consideration, the rule is that where an injury is the result of the combined negligence of the defendant and the negligent act of a third person, for whose act neither plaintiff nor defendant is responsible, the defendant is liable when the injury would not have occurred except for his negligence. *Colo. Mortgage & I. Co. v. Rees*, 21 Colo. 435, 42 Pac. 42. In *Shearman & Redfield on Negligence*, § 10, it is said: "Negligence may, however, be the proximate cause of an injury of which it is not the sole or immediate cause. If the defendant's negligence concurred with some other event (other than the plaintiff's fault) to produce the plaintiff's injury, so that it clearly appears that but for such negligence the injury would not have happened, and both circumstances are closely connected with the injury in the order of events, the defendant is responsible, even though his negligent act was not the near-cause in the order of time." According to the averments of the first count, plaintiff would not have been injured if the frog had been blocked; so that, notwithstanding the fact that the brakeman was negligent in releasing the brakes, the dominant cause of plaintiff's injury was the antecedent negligence of the defendant in not complying with the statute. In other words, when the injury of an employé by a coemployé would not have happened except for the negligence of the common employer, the latter is responsible for the injury. *Tanner v. Harper*, 32 Colo. 156, 75 Pac. 404.

[5] Counsel for defendant urge that the

defendant could not reasonably have anticipated that its failure to comply with the statute would result in injury to plaintiff in the circumstances narrated in the first count; and hence that it should not be held responsible for failure to block the frog. The object of the act requiring frogs to be blocked was to protect employés from injury when making up trains, which often occurred in being caught by the foot in an unblocked frog. Blocking frogs would prevent this. It is only when an employé is in imminent peril from an approaching car that serious injury would likely occur from stepping into an unblocked frog. The purpose of the act was to afford protection in such circumstances. If there was a reason for having the frog blocked while an employé was walking about, able to control his movements, there was an additional reason when he was so unfortunate as to be caught between moving cars and involuntarily dragged in the direction of an unblocked frog. Danger in the latter instance from this source was as great, if not greater, than in the first. It was to guard against such perils that the act in question was passed. It was designed for the protection of employés who stepped into an unblocked frog, and also for those dragged into one when caught between moving cars. A railroad company is, therefore, bound to anticipate results from its negligence which the act was intended to prevent. *Cooper v. B. & O. R. Co.*, 159 Fed. 82, 86 C. C. A. 272, 16 L. R. A. (N. S.) 715, 14 Ann. Cas. 693.

[6] Counsel for defendant, however, contend that, even though it appears that the unblocked frog was the proximate cause of plaintiff's injury, the count is insufficient, because the risk on this account was assumed by the plaintiff. It may be that the assumption of risk, like contributory negligence, is a matter of defense, but it is not necessary to decide that question. Plaintiff alleged affirmatively that prior to his injury he did not know, or have any notice whatever, that the frog in which his foot was caught was unblocked. This is an allegation of an ultimate fact, and it was not necessary for plaintiff to plead the evidence upon which it is based, or from which he expected to establish such fact.

[7] The second count presents the single question of notice; that is, is it necessary, in order to maintain an action, under the Employers' Liability Act of 1901, for a plaintiff to allege in his complaint that written notices of the time, place, and cause of injury for which recovery is sought, was given? That act is as follows:

"Section 1. That every corporation, company or individual who may employ agents, servants or employés, such agents, servants or employés being in the exercise of due care, shall be liable to respond in damages for injuries or death sustained by any such agent,



employé or servant, resulting from the carelessness, omission of duty or negligence of such employer, or which may have resulted from the carelessness, omission of duty or negligence of any other agent, servant or employé of the said employer, in the same manner and to the same extent as if the carelessness, omission of duty or negligence causing the injury or death was that of the employer.

"Sec. 2. All acts, and parts of acts, in conflict herewith are hereby repealed. Provided, however, that this act shall not be construed to repeal or change the existing laws relating to the right of the person injured, or in case of death, the right of the husband or wife, or other relatives of a deceased person, to maintain an action against the employer."

At the time this act was passed, there was in existence the act of 1893 (Session Laws 1893, p. 129), and the act of 1877 (sections 2056-2058, inclusive, R. S. 1908). Section 2 of the act of 1901 recites that all acts and parts of acts in conflict with that act are repealed, with the saving proviso that the act shall not be construed to repeal or change existing laws, giving a right of action against an employer to the person injured, or in case of his death, to the husband or wife, or other relatives of the deceased person. Section 2 of the act of 1893 provided: "No action for the recovery of compensation for injury or death, under this act, shall be maintained unless written notice of the time, place and cause of the injury is given to the employer within sixty days, \* \* \* from the occurrence of the accident causing the injury or death." This section, it is contended by counsel for defendant, applies to the act of 1901, for the reason that the proviso in section 2 of that act leaves intact the acts of 1877 and 1893, and that, therefore, all three acts constitute one harmonious body of law on the subject to which they relate, and must be construed together. Conceding, but not deciding, that the acts of 1877 and 1893 are not repealed or affected by the act of 1901, we do not regard the contention of counsel as tenable. There is nothing in the act of 1901 to indicate that it is an amendment to, or that it is to be considered a part of the act of 1893. Neither does it require that a notice of the time, place, and cause of injury must be given the employer as a condition precedent to the right to maintain an action based upon its provisions. It is complete within itself. Its prime purpose was to do away with the defense of negligence by a fellow servant in all actions for personal injuries or death. In this respect it differs radically from the act of 1893. Subdivision 3 of section 1 of the latter act gave a right of action against the employer for the negligence of a limited class of employes, for whose negligence he was not liable at common law, while clauses

1 and 2 of that section gave a right of action for negligence of the employer in failing to exercise reasonable care in providing and maintaining reasonably safe and proper machinery for use in his business, and declared, in effect, that agents to whom he delegated this duty were not fellow servants and that he was liable for the negligence of his employé whose sole or principal duty was that of superintendence. Clauses 1 and 2 were therefore but a legislative recognition of the liability of the employer at common law in cases falling within their provisions, as laid down in previous decisions of this court, so that the act of 1893 only provided, in a limited way, for the liability of an employer for injury to an employé by a co-employé. *Colorado Milling & El. Co. v. Mitchell*, 26 Colo. 284, 58 Pac. 28. The act of 1901 in unmistakable terms changes this by declaring, in effect that the employer shall not only be liable for his negligence, but for the negligence of his employé in the same manner and to the same extent as if such negligence had been his own, so that the most that can be claimed for the proviso in section 2 of the act of 1901 is that, so far as notice is involved, that requirement only applies to actions covered by the act of 1893. To hold otherwise would be to say that notwithstanding the act of 1901 is a complete act, and that its primary object was to abrogate the common-law defense of the negligence of a fellow servant, yet, nevertheless, the rights conferred are limited and controlled by other acts which it does not purport to amend, and of which it is not made a part.

We have carefully considered the case of *Lange v. U. P. R. Co.*, 126 Fed. 338, 62 C. C. A. 48, where a conclusion contrary to ours was reached, but with due deference to the eminent tribunal which rendered the decision and the distinguished jurist who wrote the opinion, and the acknowledged ability of his learned associates, concurring with him, we must decline to follow that case. It proceeds upon the theory that the act of 1893, and the act of 1901, jointly constitute the body of legislation upon the subject to which they relate, and hence that the provisions of the prior act are unimpaired, and that its requirements for notice applies to the latter act. This, we submit, is contrary to the scope and purpose of the act of 1901, and injects a condition precedent to the right to maintain an action under it, which neither its plain reading nor the proviso justifies, for the reason that the most that can be claimed for the proviso is that it leaves unimpaired the act of 1893, the provisions of which are limited to the class of cases which it embraces. The case made by the second count does not come within the class mentioned in the act of 1893, and therefore the notice prescribed by it is not necessary.

It is contended by counsel for the defendant that the construction we have given the



act of 1901 renders it unconstitutional because a classification for the purpose of damages for personal injury is made, which is inhibited by our Constitution. It will be borne in mind that we have not held that the act of 1893 is in full force and effect; but that, conceding that it is, its requirements of notice do not apply to the act of 1901. Whether or not such a construction will render the act of 1901 unconstitutional, as claimed by counsel for defendant, is a question which can only be determined by the court en banc, and in department we must decline to consider that question.

The judgment of the district court is reversed, and the cause remanded for further proceedings in harmony with the views expressed in this opinion.

Reversed.

MUSSER, C. J., and BAILEY, J., concur.

(55 Colo. 244)

COMSTOCK, State Engineer, et al. v. RAMSAY.

(Supreme Court of Colorado. June 2, 1913.)

1. WATERS AND WATER COURSES (§ 146\*)—WATER SUBJECT TO APPROPRIATION—SEEPAGE.

The owner of a tract of land along a river which had been flooded by seepage water from irrigation ditches and reservoirs on the land above constructed a drainage ditch to drain the water into the river from his land and the land of adjoining owners. He sold to the plaintiff the right to use the water thus drained off, and plaintiff sought to divert it for the irrigation of land some distance below after using the bed of the river as a carrier therefor. Between the point where the drainage ditch emptied into the river and where plaintiff desired to divert the water there were a number of ditches with decreed appropriations which were supplied with water which had seeped back into the river after the entire surface flow had been diverted into ditches further upstream. Held that, even though the waters sought to be diverted by the plaintiff were the seepage from artificial and not natural sources and had not yet reached the stream or the water table sustaining it, they became a part of the water supply of the stream as soon as they left the control of the original appropriator and started back to the stream, and they could not be diverted to the injury of prior appropriators from the stream.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 153; Dec. Dig. § 146.\*]

2. EVIDENCE (§ 5\*)—JUDICIAL NOTICE—MATTERS OF COMMON KNOWLEDGE.

The court takes judicial notice of the fact that practically every decreed appropriation on South Platte river is dependent, and has been for years, upon the return of waste and seepage waters for its water supply.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 4; Dec. Dig. § 5.\*]

3. WATERS AND WATER COURSES (§ 142\*)—NATURAL STREAMS—RIGHT OF APPROPRIATORS.

Appropriators of water from a natural stream for irrigation purposes are entitled to have the conditions upon the stream maintain-

ed substantially as they were when the appropriations were made.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 15, 152; Dec. Dig. § 142.\*]

En Banc. Appeal from District Court, Weld County; James E. Garrigues, Judge.

Action by C. H. Ramsay against Charles W. Comstock, State Engineer, and others. Judgment for the plaintiff, and defendants appeal. Reversed and remanded with directions to dismiss.

Benjamin Griffith, Atty. Gen., Stephenson & Work, of Ft. Morgan, and Goudy & Twitchell, and J. H. Burkhardt, all of Denver, for appellants. John T. Jacobs, of Greeley, for appellee.

BAILEY, J. The contest is over seepage waters, and the right to use the river channel as a way through which to carry them. The site of the dispute is on the South Platte River, a short distance down the stream and east of the town of La Salle, in Weld County. The land upon which these waters accumulate is a strip of river bottom, varying in width from one-half to three-fourths of a mile and comprising several hundred acres, situated in water district No. 2. The bank of the river along which this land lies has been built up by accumulations from the river of silt and debris, until it is slightly higher than the land itself immediately adjacent thereto and extending back to the mesa.

The testimony shows that at an early day, prior to any extended irrigation in that vicinity, this land was comparatively dry in low water times, but when the river was high it was frequently overflowed, the waters of the river passing over it, covering at times practically all of this land except the higher portions, along the bank and immediately next to the channel of the river; and that in wet seasons there would be water in the sloughs or depressions in the bottom, having a general drainage with the course of the river, toward a point at or near the head-gate of the Highland Ditch, some two or three miles down the stream. The evidence shows that the flow of water in this course is undoubted, the slope of the land being toward the river in a diagonal direction to the northeast. About the year 1878 an irrigating ditch, known as the Lower Latham, was constructed upon the upper or second bench lands, immediately above and south of the bottom lands referred to. A little later the Union, another irrigating ditch, was constructed south and west of the Lower Latham Ditch. In 1890 a large irrigating reservoir, known as the Lower Latham Reservoir, covering six or seven hundred acres, was constructed immediately south of these lands, some two miles away, and higher than the two ditches above described. These ditches

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



and the reservoir take their supply of water from the South Platte River. The testimony shows that as irrigation became general upon the mesa above from the Union and Latham ditches, seepage soon appeared upon the bottom lands and increased each year until 1890 and 1891, when the land was largely seeped and swampy, and a portion of it had grown up in cat-tails and swamp grass and was unfit for cultivation. After the Lower Latham Reservoir was constructed, seepage upon this land began to largely increase. It became very heavy and destructive. Water flowed upon the land to a depth of three or four feet in places, and covered more than two hundred acres of it. Some time in 1894, a man by the name of Joshua New purchased a portion of the land lying just above the headgate of the Highland Ditch, which is about four miles down the river from the headgate of the Lower Latham Ditch, and constructed a dike across the south end of this land to prevent the seepage water and the river overflow coming upon it, and cut a ditch or channel through the bank of the river just above the dike, so the water accumulating above it could flow through to the river. Some of the water apparently did pass through this cut for several years, but the ditch became more or less filled up and did not serve to adequately drain the accumulated surface water.

This bottom land is underlaid with the ordinary coarse river sand and gravel, and undoubtedly, as indicated by the evidence, was once a part of the regular river channel. The soil upon top of this river sand and gravel is not of great depth, varying from none at all, at points where the sand and gravel itself appears on the surface, to a depth in places of three to four feet. This land is from five to six feet higher than the surface flow of the river at normal stage.

Generally during the months of July, August and September of each year, as shown by the testimony, the South Platte River is very low, and in the use of its waters for irrigation the entire flow is diverted at the headgate of the Lower Latham Ditch, which is taken out of the river some two and one-half or three miles above this land; but notwithstanding such total diversion of the flow of the river there is sufficient return water to the stream, by seepage through the sands and gravel, to make from twenty-five to thirty-five second cubic feet of surface flow at a point immediately above the headgate of the Highland Ditch, a distance down the river from the Lower Latham headgate, as already indicated, of about four miles. This shows a return of something over six second cubic feet of water to the mile. By reason of this return flow there is and has been for many years sufficient water in the river to supply the priorities awarded to the Patterson Ditch, just above the Highland, and the Highland Ditch itself, both of which

are senior to the second priority awarded to the Lower Latham Ditch; yet the Lower Latham, by reason of such return waters, has never been required, since 1883, to turn down any water from its dam to supply earlier priorities diverting water below this bottom land. All the waters of the South Platte River have been appropriated, and the entire normal flow of the river is inadequate to supply the priorities for irrigation purposes already decreed from it. There is no natural stream flowing into the river between the headgates of the Lower Latham and Highland Ditches. All the water found at the headgate of the Highland Ditch, after the Lower Latham Ditch has diverted the entire flow of the stream, must be return, seepage and waste water, coming, undoubtedly, in a large measure, from the seeped bottom lands under consideration.

In 1907 Messrs. Gordon and Varvel, who were owners of a portion of this bottom land, completed the construction of a ditch, practically through the center of the land and paralleling the river, commonly known as the Gordon and Varvel Seepage Ditch, for the purpose of draining those lands and acquiring the right to the use for irrigation of the waters taken from them. The drainage ditch is not to exceed three-quarters of a mile from the river at its farthest point, and at other places comes within a fifth of a mile of it. These parties also procured deeds from some of the owners of lands adjoining theirs, conveying to them all their right to the seepage, drainage and percolating waters on such adjacent lands, and also rights of way across them for seepage ditches. This seepage ditch, therefore, was constructed not only on the Gordon and Varvel land, but as well on the lands of adjacent owners. It is admitted that, because of the physical condition which obtains in reference to these lands, the seepage waters in question cannot be used to irrigate them, but that the only manner in which they can be applied to a beneficial use is by discharging them into the South Platte River, using the river as a carrier, and diverting them at a point down the stream, where they could be used to advantage in irrigating land which is without a proper water supply.

Below the Latham headgate the Patterson and Highland Ditches, in district No. 2, having decreed priorities, take practically all of the water of the river coming to their respective headgates. Between their headgates and the east line of water district No. 2 from fifteen to twenty feet accumulate in the South Platte River, by return and seepage water, and at such east line of water district No. 2 about twenty feet come into the South Platte from the Poudre River, which accumulates in the latter river by return and seepage water below the headgate of the Ogilvy Dam, which is the lowest ditch taking water from the Poudre River.



The ditches taking water from the South Platte River in district No. 1, immediately below district No. 2, all have priorities of such junior date that they are bound to rely, during the low water season, for their supply upon the waters coming into the river below the Highland headgate and from the Poudre River below the Ogilvy headgate, and the other accumulations to South Platte after it passes into district No. 1. This water supply is not sufficient to furnish the decreed priorities in district No. 1, and in fact the testimony shows that many of the larger ditches are closed during the low water period. It is also worthy of notice that about one hundred and fifty second cubic feet of water is required to flow out of district No. 1 and into district No. 64, the next district down the river, to supply earlier priorities in the latter district. It is, therefore, apparent that any interference with the tributaries to, or the taking of the supply of water from, the South Platte River at the point mentioned would have an injurious effect upon the appropriators of water from the river below with priorities already decreed.

Ramsay, appellee here, plaintiff below, had a tract of dry land under the Duel and Snyder Ditch, diverting water from the South Platte River at a point near Fort Morgan, in water district No. 1. This seepage water, and whatever right they had to the use of the river to carry it, together with their rights of way for the seepage ditch across the bottom land in question, was by Gordon and Varvel conveyed by deed to Ramsay, who procured an easement and license from the owners of the Duel and Snyder Ditch for the conveyance of this water, to be applied to a beneficial use on his land under that ditch. The purpose was to bring the seepage water to the Duel and Snyder Ditch by using the river as a carrier ditch. Ramsay requested the Water Commissioners of Water Districts Nos. 1 and 2, the Division Irrigation Engineer of Irrigation Division No. 1, and the State Engineer, to allow him to take from the river, at the headgate of the Duel and Snyder Ditch, the seepage water which he had discharged therein, less a proper and reasonable deduction for evaporation, which they declined to do. Thereupon this action was brought in the District Court of Weld County, to compel these officers to recognize the use of the river as a carrier for these waters, and thus permit the perfection of plaintiff's initiated right. The officers appeared and objected that certain water owners were interested and necessary parties, and, on motion, all water users on the river, with appropriations between the points where the seepage waters were discharged into the river and where purposed to be diverted, were made parties. Demurrers to the bill having been overruled, the defendants, who were appropriators and users of water between those points on the river, answered, setting up that

the waters sought to be so diverted were tributary to the South Platte River, and that the diversion thereof was an interference with a tributary of that stream, from which they were decreed prior appropriators and adversely affected by such interference. The fact that they were such appropriators was admitted, but plaintiff Ramsay contended that the water taken was in no sense a tributary or source of supply of or to the river. Upon this proposition the case was tried and determined. The real issue is whether the waters in question were tributary to the river, and that is the only one which we shall consider or determine, for if Ramsay has no right to divert this water, because such diversion would be an adverse interference with the rights of prior appropriators from the river, then he is entitled to no relief.

The court below found the issues for the plaintiff, and entered a decree accordingly. It is to review that decree that the case is brought here by the users and appropriators with decreed rights down the river.

[1] There is no actual dispute, in any proper sense, upon the facts which are controlling in, or necessary or material to, a determination of this case. The real question arises rather upon an application of the law to the facts. The trial court, among others, made this finding:

"That in 1906 after the construction of said reservoir a large amount of seepage and percolating waters appeared on said lands, which naturally, prior to the construction of said artificial waterworks, was dry and free from surface water and used for raising farm crops, and flooded about 200 acres of said land, said water standing permanently to a depth of from a few inches to three feet upon said land, there being no artificial, surface or subterranean channel carrying it to said river; the Court further finds that said water is derived from water escaping from said artificial sources and that it is not a tributary of said South Platte River. The Court finds that there is no interference with the water table of the South Platte River and no water is diverted from said river or its underlying water table in the gravel adjacent thereto, nor is the flow of water in or to said river in any way interfered with or diminished by reason of the construction, operation and maintenance of said seepage ditch, nor by the use of said ditch, nor by the use of said river as a conduit for said seepage water, nor by the diversion of said water into the Duel and Snyder ditch hereinafter permitted."

As throwing further light upon the manner in which the court regarded this seepage water, we quote what the trial judge said, during the progress of the hearing, respecting it, just prior to the entry of the formal findings and decree:

"Seepage water in this valley, if continued long enough and there was enough of it,



some time some part of it would eventually reach the river. Can it be said for that reason, that all such water is a tributary, and no one can use it, although it is not yet flowing into the river? I think not. \* \* \* This ditch does not interfere in any way with the body of underground water sustaining, making and holding up the water level of the river. It does not draw from that water level. The first effect of the ditch was to draw off the artificial lake, and now it collects the seepage water which made the lake. Merely because some of this water rises out of the gravel in the bottom of the ditch can make no difference. The ditch is higher than the river. The taking of this water is not a depletion of the natural waters of the stream and does not have that effect."

It is apparent from the foregoing quoted finding, and the oral statement of the trial judge as set out above, that the conclusions of the court were based upon the fact that the seepage waters under consideration were in a sense artificial, and not natural waters of the stream; that they had been brought from the river to their present position through artificial means, after once having been used by bona fide appropriators from the river, and that, therefore, they were not subject to the rights of other appropriators down the stream, and were not in fact a part of the river, for the purpose of supplying appropriations therefrom, that is, were not the natural waters of the stream and could not be called upon by decreed appropriators and users of water farther down the stream to supply their priorities. It appears from the statements of the trial judge that these waters had either already done so, or would at least eventually return to and become a part of the river; but it was held that until they had actually mingled with the waters of the stream they were subject to independent appropriation. The fact that this drainage ditch did not directly tap the river itself and withdraw water from it, or from the water table thereof, but only intercepted water in its course to the river, seems to have been decisive with the trial court that there was no interference with the river flow. That the river flow is as much affected by intercepting and diverting water, which otherwise would flow into it, as by directly withdrawing water from its channel, seems axiomatic. A judgment based upon the theory of the court as indicated above is unsound and cannot be upheld. To do so would overthrow and nullify every fundamental principle upon which the rights of appropriators of water in the state for beneficial use rest. To maintain the doctrine of "first in time first in right," and protect the rights of prior appropriators from the stream, which have been fully adjudicated and recognized for years, and preserve, as vital to these rights, conditions upon our streams substantially as they were when such rights were acquired, and under which they have

been maintained and perfected, as this court has consistently held must be done, requires a reversal of this judgment.

[2] We take judicial notice of the fact that practically every decree on the South Platte River, except possibly only the very early ones, is dependent for its supply, and for years and years has been, upon return, waste and seepage waters. This is the very thing which makes an enlarged use of the waters of our streams for irrigation possible. To now permit one who has never had or claimed a right upon or from the river to come in, capture, divert and appropriate waters naturally tributary thereto, which are in fact nothing more or less than return and waste waters and upon which old decreed priorities have long depended for their supply, would be in effect to reverse the ancient doctrine, "first in time first in right," and to substitute in its stead, fortunately, as yet, an unrecognized one, "last in time first in right."

It is clearly apparent from the entire testimony adduced that water flows continuously from the seeped land in question through the coarse sand and gravel underlying it to the river, and is one, at least, of its principal sources of supply. Upon the undisputed facts, considered in connection with the physical conditions shown to be present, it is self-evident that, agreeable to natural laws, this underflow has continued for years. Manifestly, since the testimony shows practically no other source of supply to the river between the headgate of the Lower Latham Ditch and the headgate of the Highland Ditch, the flow found at the headgate of the latter, after the former has diverted the entire river supply at its headgate, must accrue from seepage, return and waste water passing under and through this bottom land to the river. That such water is not only now, but for years has been, a material and substantial source of supply to the South Platte River, upon which the users down the stream, for irrigation purposes, have long depended and yet do depend to satisfy their decreed priorities, is too plain to need elaboration or further comment. These waters are not in any sense unappropriated waters; on the contrary, they have been appropriated and used over and over again.

Every appropriation of water on this stream, claimed and decreed for irrigation purposes, has been so claimed and decreed upon the theory that all waste and seepage water arising from the irrigation of land, or from the construction and maintenance of reservoirs using water from the river, and naturally returning to it, is available to supply such appropriations and decrees. To now permit independent appropriation and diversion of these waters in a way to adversely affect prior appropriations and decrees, is in direct conflict alike with the spirit of the law under which such priori-



ties have been decreed and the practical purposes for which these appropriations have been made and recognized. It is a well known fact that practically all appropriations down the stream are dependent on return, waste and seepage waters for their supply. If a part of these waters may be cut off, then all of them may be, with the result that the stream might thus become wholly depleted, and all appropriations and decrees, no matter how early, below the points where such waters are diverted, would be stripped of their rights and rendered useless and of no practical worth or value.

There is no law anywhere to support the contention that if these waters are naturally tributary to the river, still they may be taken by a new claimant to the damage and injury of prior appropriators upon that stream, simply because he captures and diverts them before they actually get into the river channel. If such act of capture and diversion can be upheld as lawful and proper, by the same reasoning a new claimant could divert the waters of a surface tributary, if he only be spry enough to capture and divert them before they actually reach and mingle with the waters of the main stream. When it is shown or admitted that these waters ultimately return to the river and thereby augment and replenish its flow, they are part and parcel thereof, whether the limit within which this occurs be short or long. The moment they are released by a user under an appropriation from the river, which has been duly decreed, and start back in their course to the stream, they become and are as much a part thereof as when they actually reach the stream. Whenever these waters start to flow back to the river and it is apparent they will reach it, they constitute a part of the stream and are not subject to independent appropriation as new or added water, or because they have been used to serve one priority and have been thus artificially brought into that position. It is asserted by the defendant in error that at the time of the construction of the seepage ditch the water sought to be thereby appropriated had not become tributary to the river, in the sense that it had not actually reached the river channel. The fact that it might ultimately do so is declared by him to be immaterial. This contention we cannot approve, but as already indicated, we are rather of opinion that when such waters leave the control of the original appropriator, having been used either for direct irrigation or reservoir purposes, without intention of recapture or further use, by him, they immediately become a component part of the river, and cannot be lawfully diverted from their course to it by independent appropriation, to the injury of those having decreed priorities therefrom.

We do not hold that there can be no independent appropriation of seepage, return and spring waters; but on the contrary, where such appropriation does not interfere with

a prior right, that it may be done upon facts and conditions which warrant it. What and all we do intend to here determine, on this particular point, is that where it appears that such waters are in fact tributary to the stream, and form a substantial and material source of its supply, upon which appropriators therefrom have long depended for water to satisfy their priorities, that then, as between such bona fide appropriators and users of such waters and a new claimant, the former has the first and better right.

There is no pretense whatever that the appropriation and diversion attempted by plaintiff is based on the statute providing for the appropriation and usage of seepage, waste and spring waters arising upon the land of the owner, and therefore, since that statute is not directly or necessarily involved, we neither consider nor discuss it.

This opinion is based upon the facts of this particular case, and is intended for application to them and to cases involving similar ones. The general doctrine announced is not to be unreasonably extended, or made to reach conditions where to apply it would be inequitable and unjust. It is rather to be looked to to bring about results fair to all, for the protection and preservation of vested rights, and the promotion of the general welfare and common good.

[3] To the proposition that appropriators of water out of a natural stream for irrigation purposes, with priorities decreed, are entitled to have the conditions substantially maintained upon the stream as they were when the appropriations were made, and have existed during the continuance and perfection of such appropriations, we cite the following authorities: *Handy Ditch Co. v. Loudon Irrigating Canal Co.*, 27 Colo. 515, 62 Pac. 847; *Ft. Lyon Canal Co. v. Chew*, 33 Colo. 392, 81 Pac. 37; *New Cache La Poudre Irrigation Co. v. Water Supply & Storage Co.*, 29 Colo. 469, 68 Pac. 781; *Baer Bros. Land & Cattle Co. v. Wilson*, 38 Colo. 101, 88 Pac. 265; *Cache La Poudre Reservoir Co. v. Water Supply & Storage Co. et al.*, 25 Colo. 161, 53 Pac. 331, 46 L. R. A. 175, 71 Am. St. Rep. 131; and *Vogel et al. v. Minnesota Canal and Reservoir Co. et al.*, 47 Colo. 534, 107 Pac. 1108.

Upon the proposition that the waters under consideration, as matter of fact, are tributary to the river and not subject to independent appropriation and diversion, when there is thereby an interference with the right of use by prior decreed appropriators from the stream for irrigation purposes, we cite the following: *Ogilvy I. & L. Co. v. Insinger*, 19 Colo. App. 380, 75 Pac. 598; *McClellan v. Hurdle*, 3 Colo. App. 430, 33 Pac. 280; *Bruening v. Dorr*, 23 Colo. 195, 47 Pac. 290, 35 L. R. A. 640; *Clark v. Ashley*, 34 Colo. 285, 82 Pac. 538; *Platte Valley Irr. Co. v. Buckers I. M. & I. Co.*, 25 Colo. 77, 53 Pac. 334; *Buckers I. M. & I. Co. v. Farmers' Independent Ditch Co.*, 31 Colo. 62, 72



Pac. 49; *Burkhart v. Melberg*, 37 Colo. 187, 96 Pac. 98, 6 L. R. A. (N. S.) 1104, 119 Am. St. Rep. 279; and *La Jara C. & L. Ass'n v. Hansen*, 35 Colo. 105, 83 Pac. 644.

The judgment is reversed and the cause remanded to the District Court of Weld County, with instructions to dismiss the bill.

**HILL and GARRIGUES, JJ.**, not participating.

(55 Colo. 271)

**OMAHA LUMBER CO. v. CO-OPERATIVE INV. CO.†**

(Supreme Court of Colorado. May 5, 1913.)

**1. LOGS AND LOGGING (§ 3\*) — SALE OF STANDING TIMBER—PASSING OF TITLE.**

A contract for the sale of standing timber executed February 3, 1906, provided that the measurement of the timber should begin not later than July 15, 1906, and that payment for the entire amount should be made within three years from the date of the contract, and further provided that, upon full payment, the vendor would execute a deed conveying all timber covered by the contract, conditioned that the same be cut and removed within the time therein specified, and that the contract should, unless terminated by failure of the buyer to perform, continue for 12 years from date, or until such time within 12 years as the buyer should have cut and removed all merchantable timber of a certain size. Paragraph M of the contract provided that title to all lumber should remain in the seller until the rentals or royalties provided for were paid, and paragraph N provided that title should pass to the seller "so such proportion thereof as has been paid for and removed under the terms hereof." *Held*, that title to the timber passed upon full payment under the contract.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. § 3.\*]

**2. SPECIFIC PERFORMANCE (§ 68\*)—CONTRACTS ENFORCEABLE—SALE OF TIMBER.**

A contract for the sale of standing timber may be specifically enforced.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 199; Dec. Dig. § 68.\*]

**3. CONTRACTS (§ 10\*)—EXECUTED CONTRACTS.**

A contract may be executed on one side and executory on the other.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 21-40; Dec. Dig. § 10.\*]

**4. SPECIFIC PERFORMANCE (§ 68\*) — CONTRACTS ENFORCEABLE—CONTRACTS INVOLVING PERSONALTY.**

That a contract involves personalty is not of itself ground for refusing specific performance; the test being whether the party seeking such relief can be fully compensated in a legal action.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 199; Dec. Dig. § 68.\*]

**5. SPECIFIC PERFORMANCE (§ 114\*) — CONTRACTS ENFORCEABLE.**

A complaint alleged that plaintiff's right, under a lease and sale of standing timber on 960 acres, to take possession of the land until February 3, 1918, when the right to remove timber terminated, for the purpose of constructing and maintaining tramways, sawmills, etc., for manufacturing and removing the timber, was a valuable right, but that its value could not be exactly determined, but it would result in large profit if plaintiff was permitted to car-

ry out the contract; that timber land of such character was very scarce and becoming more valuable; and that plaintiff's profits therefrom would increase in an amount impossible to determine at this time. *Held*, that the complaint showed the inadequacy of the legal remedy so as to entitle plaintiff to have the contract specifically performed.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 356-370, 372; Dec. Dig. § 114.\*]

**6. SPECIFIC PERFORMANCE (§ 30\*)—DEFENSES.**

Where a contract for the sale of standing timber provided that the price should be \$1.50 a thousand feet, the fact that it also provided that each party should choose a competent person to estimate the amount of "merchantable timber," for the purpose of fixing royalties, would not prevent specific performance on the ground that it left to such arbitrators the determination of the price of the timber; the term "merchantable timber" being one in common use, and what is merchantable being ascertainable by proof.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 83-85; Dec. Dig. § 30.\*]

Error to District Court, Denver County; Geo. W. Allen, Judge.

Action by the Omaha Lumber Company against the Co-operative Investment Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded for new trial.

Goudy & Twitchell and J. H. Burkhardt, all of Denver, for plaintiff in error. B. C. Hilliard, Charles W. Waterman, and William A. Jackson, all of Denver, for defendant in error.

**SCOTT, J.** The complaint in this case was by the Consolidated Lumber Company against the defendant in error, the Co-operative Investment Company, both of which were Colorado corporations. The amended complaint alleged a written contract between the defendant and the assignor of the plaintiff, dated February 3, 1906, in which contract it was agreed that the defendant was the owner of certain timber lands (960 acres) fully described in the contract, and which lands were by said agreement leased to the assignor of the plaintiff, with the right to construct and maintain thereon railroads, tramways, chutes and other timber appliances, sawmills, and houses for employes; and such possession as might be necessary for the purpose of cutting, removing, and manufacturing into lumber and other merchantable product, all of the logs and timber growing upon said lands, that would square at least six inches at the base of the tree.

The agreement provided that, in payment for the timber, the plaintiff's assignor should pay to the defendant the sum of \$633.33 on the 15th day of February, 1906, and a like sum on the 15th day of each month thereafter until the total amount of the purchase price of the timber should be paid, but with the proviso that, upon a final estimate of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
† Rehearing denied June 2, 1913.



the amount of the timber upon the lands, then the total at that time unpaid should be divided into such equal monthly payments as would bring the final payment within a period of three years from the date of the contract, and that the price to be paid for such timber, and all of it, was \$1.50 per thousand feet, log measure. The contract was to run for a period of 12 years and in which time or any part thereof the timber might be removed. It was further stipulated that the sum of \$3,250 theretofore paid upon a former contract between the parties should be credited upon this contract in the final settlement. The provision for measurement of the timber so agreed to be sold was: "That for the purpose of ascertaining the full amount of rental or royalties to be paid hereunder, the parties hereto and each shall choose a competent person who shall, beginning not later than July 15, 1906, completely inspect the lands heretofore described, and carefully and accurately estimate and compute the amount of merchantable timber, cut and uncut upon said land, excepting all timber that squares less than six inches at the base of the tree; and in the event that the two chosen are unable to agree as to the amount of such timber, the two chosen shall mutually agree upon a third person to act with them, and the estimate thereof, upon which a majority may agree, shall be the final estimate as to the amount of such timber, and said amount computed at the rate of \$1.50 per thousand feet log measure, shall be the total amount to be paid as rental or royalties under this contract." It was further provided that, upon full payment of the royalties so agreed, the defendant should execute and deliver to the second party to the contract good and sufficient deed or deeds of warranty, conveying all of the timber upon said premises by the contract to be conveyed, and conditioned that the timber be cut and removed within the time limit; that is to say, within 12 years.

It was alleged that the contract was assigned to the plaintiff on the 21st day of May, 1906, and that the plaintiff thereafter paid to the defendant the agreed monthly installments to the amount of \$19,155.59, and that adding to this the sum of \$3,250 so agreed to be credited upon the contract made the aggregate total payment by the plaintiff of \$22,416.59.

The complaint alleges that the measurement or cruising, as it is termed, was postponed from time to time to November, 1907, when the plaintiff completed a cruising by a competent person, as per the agreement; that as a result of such cruise there was found to be a total of 8,682,580 feet log measure, which at the rate of \$1.50 per thousand feet amounted to \$13,023.75, or, in other words, that the amount paid to the defendant at the time of the commencement of this suit was \$9,392.84 in excess of the value of all of

the timber included in the agreement. It appears that no timber whatever had, at the time of trial, been cut and removed. It was alleged further that the plaintiff had demanded from the defendant the result of the defendant's cruise, together with the name of the person who made the cruise, and that, if there was a difference in the result, the parties representing each in the matter of the cruise be required to select a third person to make a cruise. The prayer was for a specific performance of the contract, and that the defendant be enjoined from declaring the forfeiture of the contract. A demurrer to the amended complaint was overruled by the court, after which the defendant filed its answer followed by a replication on the part of the plaintiff. In view of the subsequent proceedings, it is not necessary to discuss the answer nor the replication.

When the case came on for trial the defendant objected to the introduction of any testimony upon the part of the plaintiff for the reasons: (1) That the complaint and amendments thereto do not state facts sufficient to constitute a cause of action against the defendant. (2) That the complaint and amendments thereto do not show that the court has jurisdiction of the subject-matter of the complaint. The court sustained these objections, and it is on account of such ruling that the plaintiff is here complaining. It may be stated, however, that prior to this time the plaintiff in error, the Omaha Lumber Company, was substituted for the original plaintiff in the case. The contention of the plaintiff in error is based chiefly upon the proposition that an action for specific performance will not lie in the case of a contract of this character.

[1] It is urged that the title to the standing timber, under the terms of the contract, was to remain in the grantor until removed; that therefore it is a contract for the sale of chattels and not for an interest in real estate, and for such reason the contract may not be specifically enforced. This contention cannot be sustained. It will be found upon examination that the measurement of the timber was to begin not later than July 15, 1906, and that payment for the entire amount of timber so contracted was to be made within three years from the date of the agreement, February 3, 1906. It was provided by section U of the agreement as follows: "That upon full payment of said royalty being made, the party of the first part will make, execute and deliver to the party of the second part good and sufficient deed or deeds of warranty conveying all the timber upon said premises intended by this contract to be conveyed and conditioned that the same be cut and removed within the time herein limited." It was also provided: "This contract shall, unless terminated by the failure of the said party of the second part to carefully keep all the covenants and conditions herein expressed, con-



tinue for twelve years from the date hereof or until such time within the said twelve years, as the said second party or its assigns shall have cut and removed from said land all merchantable logs and timber growing and being thereon that will square at least six inches at the base of the tree." Hence, under these provisions, the plaintiff was not required to cut or remove any of the timber prior to the time of full payment, and if such payment was made as is alleged in the complaint, within three years from the date of the agreement, the defendant still had nine years after the full payment in which to cut and remove the timber.

The defendant agreed to make a warranty deed for the timber immediately upon such full payment. Then under the allegations of the complaint, full payment having been made within three years from the date of the agreement, and no immediate cutting or removal being required, the deed demanded by the plaintiff in this action is for standing timber.

Counsel for defendant contend that paragraphs M and N of the contract conflict with this conclusion. These are as follows: "M. That the title to all lumber or other product manufactured on said land shall remain in the said first party or its assigns until the rentals or royalties herein provided for are paid. N. Provided, that title shall pass to the party of the second part to such proportion thereof as has been paid for and removed under the terms hereof." If, then, the entire consideration in the contract has been paid, these paragraphs pass from consideration. Beside, these provisions clearly have reference to such timber as may be removed under the agreement prior to the time of full payment.

The authorities are not uniform upon the question as to whether or not growing timber sold and to be removed from the land is to be regarded as an interest in realty or as purely personal property. But many of these, holding that such timber is to be regarded as personal property, have to do with oral contracts, and it would seem that the determination of each case rests generally with the particular contract considered, and the apparent intention of the parties at the time. Indeed, the cases cited by counsel for defendant in error deal chiefly with oral contracts. It will be noticed that in this case the defendant granted a lease of the lands for a period of 12 years, and while such lands were to be used by the plaintiff for the purpose only of removing the timber including specifically the right to construct and maintain all necessary equipment therefor, and for the manufacture of such timber into its products, yet it was a grant for possession for such purposes for a term of years, and, if the full consideration and price has been paid by the plaintiff, such lease and the right to possession remains with the

plaintiff for the life of the agreement, even though no part of the timber may have been removed. Clearly, then, in this case title was to pass upon such full payment, and the transfer of title was at that time to be evidenced by the execution and delivery of a deed of warranty.

That growing timber under such circumstances is to be treated as an interest in real estate seems to have been conceded by this court in the case of *Eddy v. Hall*, 5 Colo. 576. This case involved the sale of a building, not including the land upon which the building stood. It was there held that the building was real estate, and the court said: "The agreement of the parties did not, as is insisted, operate to give it the character of personality prior to severance. We do not see that the case is in any wise different in principle from the case of a sale of standing timber to be cut and severed from the freehold. When severed, the trees become personality and not before. *Claffin v. Carpenter*, 4 Metc. (Mass.) 580; *Lamson v. Patch*, 5 Allen (Mass.) 586 [81 Am. Dec. 765]."

In the very well-considered case of *Midyette v. Grubbs*, 145 N. C. 85, 58 S. E. 795, 13 L. R. A. (N. S.) 278, it was held that the interest of the grantee of the contract for the sale of growing timber, to be removed within a certain period of years, is a determinable fee in real estate, and further that it will pass to the heirs of such grantee and not to the administrator. The facts in that case were as follows: At the time of his death, Grubbs was the owner of certain standing timber, under and by virtue of three deeds, which conveyed to said intestate all the timber, except the oak, standing and growing upon certain lands, properly described and bounded, which would measure ten inches across the stump at the time of cutting, etc., to him and his heirs and assigns forever, with the right to enter on said lands, build tramroads, etc., and cut and remove said timber at any time, as to the first deed, within eight years from the date, with privilege of two more years on certain specified conditions; and, as to the second and third deeds, at any time within five years from the date, with the privilege of five more years, on certain specified conditions. The intestate having died holding the interest conveyed to him by these instruments, and before the time limited for the removal of the timber had expired, the plaintiff's administrator brought the action against intestate's widow and heir at law, claiming that the timber standing and growing on said land embraced in the deeds was personal property. In a very comprehensive review of that decision by the editor of the L. R. A. it is said: "While there are a few exceptional cases, the great weight of the authorities lies with *Midyette v. Grubbs*, and holds such a purchase to be one of realty." In this note, as well as in the decision, a great number of



authorities are cited to sustain the conclusion, not necessary to repeat here. Many of these authorities are cited and commented upon in the briefs of counsel in this case. We think that upon a careful examination of the authorities this view is well sustained and should be adopted in this case.

We do not think that the general rule that courts of equity will not generally decree specific performance of contracts relating to chattels can have application as to this particular contract.

[2] It seems to be quite well settled that a contract for the sale of timber such as we are now considering may be specifically enforced. The English rule was stated to be: "Thus a contract for a sale of timber can be specifically executed, although the timber is to be cut down at a future time or at intervals, and the money to be paid by installments. It is a certain contract, and the manner of dealing with the thing sold, by future cuttings, is no objection to a specific performance. The one man sells the timber, and the other pays for it the price contracted for. Here part of this contract is at once capable of a specific execution. This admits of no doubt." *Gervais v. Edwards*, 2 Drury & Warren, 83.

[3] In the case at bar it is not only alleged that the contract had been accepted, but that the entire consideration had been paid. In other words, in so far as the plaintiff is concerned, the contract was fully executed. And a contract may be executed on one side and executory on the other. 9 Cyc. 244. In considering a very similar case it was said by the Supreme Court of North Carolina in a recent case: "The next objection urged is that the subject-matter is but growing timber and not the body of the land, and that equity will not require specific performance of that kind of contract, but will award damages in lieu thereof. Some color is given to that position by the cases of *Paddock v. Davenport*, 107 N. C. 711, 12 S. E. 464, and *Bomer v. Canaday*, 79 Miss. 223, 30 South. 638, 55 L. R. A. 328, 89 Am. St. Rep. 593. But we find, upon a critical examination of the cases, that neither of them sustains the contention. The contract in the first-cited case provided for the sale of merchantable ash, poplar, and cherry trees, at the price of 50 cents and \$1 per tree, to be immediately removed. The refusal to decree specific performance is based upon the temporary character of the contract and because the breach is easily compensable in damages. In the other case the contract required the defendant to saw up the timber into lumber and ship it to complainants. The court held that it would not specifically enforce a contract to cut trees from land and saw them into lumber, 'if the contract be indefinite and uncertain as to the trees to be cut.' The contract we are asked to specifically enforce differs materially from those we have mentioned. The instrument defines with ac-

curacy the land upon which the timber is growing—described it as standing timber ten inches in diameter, and such as may attain that size when cut, and gives ten years within which to cut and remove it. The price to be paid, as well as time of payment, is clearly stated. The contract is definite and certain as to its subject-matter, its stipulation, its purposes, its parties, and the circumstances under which it was made. Its meaning is plain and its various provisions carefully and clearly stated. There is a valuable consideration; the agreement is mutual. Specific performance is not only entirely practicable, but is necessary, in order to give the plaintiff the full benefit of the contract, and there is nothing inequitable in its enforcement. In short, the contract has every requisite which is usually regarded as necessary to authorize a court of equity to compel specific performance. *Pomeroy*, Eq. §§ 1400-1505. Then, again, the contract does not deal with personal property. It plainly savors of the realty. Growing trees are often, especially in the older cases, regarded as a part of the land, and the sale thereof as a sale of an interest in land. 28 Am. & Eng. 537, and cases cited. In this state growing trees have ever been regarded as part of the realty, and deeds and contracts concerning them are governed by the laws applicable to land. *Bunch v. Lumber Co.*, 134 N. C. 116 [46 S. E. 24]; *Hawkins v. Lumber Co.*, 139 N. C. 162 [51 S. E. 852]; *Mizell v. Burnett*, 49 N. C. 249 [69 Am. Dec. 744]." *Bryant Timber Co. v. Wilson*, 151 N. C. 154, 65 S. E. 932, 134 Am. St. Rep. 982.

[4] The case at bar presents every element of certainty mentioned in that case. Our courts have held that the mere fact that the contract involves personalty alone is not determinative of the question as to whether or not the contract may be specifically enforced and that specific performance may be decreed where the subject-matter may be purely personal; the test being that the party seeking equitable relief cannot be fully compensated in action at law.

In *Colorado L. & W. Co. v. Adams*, 5 Colo. App. 190, 37 Pac. 39, that court said: "The old rule, that the remedy must pertain to an interest in realty, has been relaxed, and modern decisions decree the performance where the subject-matter is purely personal. See 1 Story, Eq. Jur. §§ 717, 724. In *Frue v. Houghton*, 6 Colo. 318, the rule as to jurisdiction in equity is clearly stated to be: 'The ground of the jurisdiction, when assumed, is that the party seeking equitable relief cannot be fully compensated by an award of damages at law. When, therefore, an award of damages would not put the plaintiff in a situation as beneficial as if the agreement were specifically performed, or where compensation in damages would fall short of the redress to which he is entitled, a specific performance may be decreed.' See *Fry*, Spec. Perf. § 10, and note; *Pome. Spec. Perf.*



§§ 7, 8; 3 Pome, Eq. Jur. § 1402, and cases cited."

Frue v. Houghton, supra, was an action to specifically enforce an agreement to transfer and deliver certain mining stocks. That courts of equity have jurisdiction to decree specific performance of agreements, whether relating to real or personal property, was stated to be the settled rule. It was held that there was not a sufficient or adequate remedy at law in such a case because of the uncertainty of value, and upon this point the court said: "This case comes within the principle decided in *Treasurer v. Commercial Mining Co.*, 23 Cal. 391. Here, as in California, we have numerous mining corporations. It may likewise be said as to many of them that their business and mining operations are in a peculiar condition; their stock is of uncertain value, and difficult to substantiate by competent testimony; yet it may have a peculiar value to those acquainted with their affairs. The risk also of the personal responsibility of individuals and corporations is equally great."

[8] The present case would appear to be clearly within the rule as there stated.

It is alleged in the complaint: That the right of plaintiff to take possession and occupy the use of the premises until the 3d of February, 1918, for the purpose of constructing and maintaining thereon during that period of time railroads, tramways, chutes, and other timber appliances, and erecting, maintaining and operating sawmills, and erecting and occupying houses for its employes for the purpose of cutting, manufacturing into lumber, and other merchantable products, logs and timber agreed upon, is a valuable right, but that such value is indeterminable; and further that its right under the contract to cut and manufacture the timber into lumber and other merchantable products, and to sell and move it, would result in profits of great value, and that, if permitted to carry out its contract and lease, it will realize large profits therefrom. That timber lands of that character and quality are very scarce, and become scarcer every year because of the fact that large amounts of lumber are manufactured from that character of timber. That such timber manufactured into lumber that may be manufactured therefrom is continually increasing in value and will so continue from year to year during the whole period of the contract. That as the timber and lumber that can and will be manufactured therefrom becomes scarcer and increases in value, the profits the plaintiff can and will realize therefrom will increase, and amount to a large and constantly increasing sum, but as to what the amount of the increase in the value of the timber and lumber will be is impossible to determine or even approximately estimate. That the plaintiff is authorized to cut and manufacture into lumber all

trees growing upon said premises that would square at least six inches at the base, and that said trees consisting of growing timber which are constantly increasing in size, and that by reason of such fact the number and size of the trees the plaintiff is authorized to cut, and the amount of lumber that the plaintiff can and will manufacture therefrom will increase during the terms of said lease, but the amount of such increase cannot be approximately determined.

The case of *St. Regis Paper Co. v. S. C. Lumber Co.*, 173 N. Y. 149, 65 N. E. 967, involved a contract for the sale and delivery by the Lumber Company to the Paper Company of 12,000 cords of pulp wood a year, for a period of ten years, with an option to the plaintiff to extend the term of the contract for another period of ten years. The same contentions made here were urged in that case. In that case the lumber company at the time was the owner of 32,000 acres of land, and the contract was for the sale of all the timber above a specific size as here; also, that the grantor was to saw the logs and deliver to the paper company. It was there said: "From the situation of the parties as disclosed by the contract and the allegations of the complaint, which for the purpose of this appeal stand admitted, it is apparent that the plaintiff's remedy at law is inadequate. Any attempt to prove damages that might result to the plaintiff by the nonperformance on the part of the defendant would encounter insuperable difficulties, as the contract extends over a term of ten years, and at the election of plaintiff may cover a period of ten years more." To the same effect is the case of *Stuart v. Pennis*, 91 Va. 688, 22 S. E. 509, where the court said: "The true equity rule is thus laid down in *Story's Eq. J.* § 33: 'The remedy must be plain; for if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate; for if at law it fall short of what the party is entitled to, that founds a jurisdiction in equity. And it must be complete; that is, it must attain the full end and justice of the case. It must reach the whole mischief and secure the whole right of the party in a perfect manner, at the present time, and in the future; otherwise, equity will interfere and give such relief and aid as the exigency of the particular case may require.' The remedy at law would fall short in the case at bar of measuring up to this rule. The vendee had the right, if he chose to exercise it, to let the trees remain standing upon the land for a period of three years. Where the fulfillment or execution of a contract may extend through several years, it would be difficult to estimate the damages. His profits, depending in such case on future events, could not be estimated in present damages without being largely conjectural. As it is said by *Pomeroy* in his book on Contracts, § 15: 'To compel a party to accept



damages under such circumstances is to compel him to sell his possible profits at a price depending on a mere guess."

In *O'Donnell v. Chamberlin*, 36 Colo. 395, 91 Pac. 39, 10 Ann. Cas. 931, involving a contract for the sale of a court judgment of foreclosure of a mortgage, it was held that specific performance would be enforced. Mr. Justice Gunter, after a review of the authorities, concluded with a statement which may well be reiterated as applicable to this case: "The principle of law announced by the foregoing authorities, and by others not cited, is that if under the facts of the particular case before the court there is not an adequate remedy in an action at law, specific performance will lie; whether the action can be maintained depends upon the facts of each particular case. In the case before us an action at law will not satisfy the justice of the case, because it will not give to appellant the specific securities which he for good reasons contracted to purchase of Stratton, and because the damages by appellant otherwise sustained by a breach of the contract cannot be estimated in an action at law."

[6] The next contention of the defendant is that the contract cannot be specifically performed because it leaves to arbitrators or appraisers the determination of value or price of the timber. If the contract so provided, this contention might well be sustained; but it does not. The contract provides for the uniform and specific price of \$1.50 per thousand feet log measure, for the whole of the timber contracted to be sold, and provides a fixed and sufficiently definite plan of measurement. This method of measurement or computation is termed in the contract a "cruise." It is a system for the measurement of growing timber in common use, and must have been well understood by the parties to the agreement, and by which they clearly intended to be governed.

There is no reason why a court may not order such computation, and in the exact manner provided in the contract. Clearly there is no element of discretion upon the part of the persons who were to be selected to make such computation. This in no sense is different in principle from survey of lands in a case where the price per acre is agreed upon. The principle is stated in *Howison v. Bartlett*, 141 Ala. 593, 37 South. 590, to be: "By our construction of the stipulation for a survey of the land, it was not intended to make the selection of a surveyor, or the act of surveying, essential to the completion of the sale. Such survey was provided for only as an incident of the sale and for the purpose of measuring and marking out the property constituting the subject-matter of the contract." *Chicago, K. & S. Ry. Co. v. Lane*, 150 Mich. 162, 113 N. W. 22; *Castle Creek Water Co. v. City of Aspen*, 146 Fed. 6, 76 C. C. A. 516, 8 Ann. Cas. 660; *Stuart v.*

*Pennis*, supra; *Bryant Timber Co. v. Wilson*, supra; *Worch v. Woodruff*, 61 N. J. Eq. 78, 82, 47 Atl. 725.

It is further urged that the timber contracted for was to be "merchantable timber" and that this required the exercise of judgment and discretion upon the part of those who were to make the computation. This contention cannot be sustained. The term "merchantable" is one in common use and ascertainable by proof. *Hayes v. McLin*, 115 Ky. 39, 72 S. W. 339; *Tenny v. Mulvaney*, 9 Or. 405; *Michigan Iron and Land Co. v. Mester*, 147 Mich. 599, 111 N. W. 177; *Teachout v. Clough*, 143 Mo. App. 474, 127 S. W. 672.

Under the allegations of the complaint, then, which must be accepted as true for the purposes of the case, the plaintiff has bought and paid for all the timber specified in the contract and has paid in addition thereto an excess of \$9,000 above the contract price, without having received anything in return. Justice and equity demand the enforcement of this contract upon the part of the defendant.

The judgment is reversed, and the case remanded for a new trial in accordance with the views herein expressed.

MUSSER, C. J., and GARRIGUES, J., concur.

(24 Colo. App. 273)

# TRAYER v. DODD et al.

(Court of Appeals of Colorado. July 14, 1913.)

1. VENDOR AND PURCHASER (§ 239\*)—BONA FIDE PURCHASERS—NOTICE OF ORAL LEASE. An oral lease of land from plaintiffs' vendor to defendant will not bind the plaintiffs, who purchased without notice of defendant's claim.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 583-600; Dec. Dig. § 239.\*]

2. ANIMALS (§ 100\*)—TRESPASS—DAMAGES—AMOUNT OF—EVIDENCE.

Evidence examined, and held insufficient to sustain a judgment for \$570 for defendant's trespassing, by pasturing cattle on plaintiffs' land.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 354-365, 380-385, 397-401, 409-419; Dec. Dig. § 100.\*]

3. ANIMALS (§ 100\*)—TRESPASS—DAMAGES—MITIGATION OF.

In an action for an injunction and for damages, on account of defendant pasturing cattle on plaintiffs' land, it was reversible error to exclude evidence, offered for the purpose of minimizing the amount of the damages, that plaintiffs' tenant was negligent in watering the alfalfa, and that part of the land was planted in beets, and that there was not enough water for both the beets and the alfalfa.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 354-365, 380-385, 395, 397-401, 409-419; Dec. Dig. § 100.\*]

Appeal from District Court, Montrose County; Sprigg Shackelford, Judge.

Action by A. B. C. Dodd and another

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



against Isaac N. Traver. From the judgment for plaintiffs, defendant appeals. Reversed and remanded.

Millard Fairlamb, of Delta, for appellant.  
Catlin & Blake, of Montrose, for appellees.

CUNNINGHAM, P. J. Appellees, plaintiffs below, were the owners of 160 acres of land, which they had purchased in 1906 from one Finch. Finch had owned the land but a few months, having purchased it from one Davis. At no time were there any buildings or improvements of that character upon the land. Plaintiffs leased the land in March, 1909, to A. W. Dillon, who took possession of it and began preparing a portion of it for seeding to alfalfa. Appellant, defendant below, interfered with Dillon's possession of the land by turning his stock upon a 40-acre tract that was in alfalfa. Dillon attempted to keep defendant's stock off of the land by locking gates, but the latter tore down the fences, opened the gates, and successfully persisted in ranging his cattle upon the land. Thereupon the owners of the land, appellees here, brought suit in the district court to enjoin defendant's use of the land, and for damages. The defendant in his answer admitted the facts hereinabove stated, but justified his conduct by claiming and alleging that he was a tenant from year to year of John W. Davis, the first owner named, at the time the said Davis sold the land to Finch; that at the time Finch, the second owner, purchased the property from Davis, he had a talk with Finch, resulting in the renewal, substantially, of the leasing arrangement which he, the defendant, had with the said Davis, that he, the defendant, had never received any notice from the present owners, appellees here, to quit the premises, and that he had continued to perform the obligations of his original lease with Davis and Finch. A temporary injunction was issued against the defendant, which, on the final trial, was made permanent, and damages were awarded plaintiffs against the defendant in the sum of \$570. From this judgment defendant appeals.

[1] 1. We are clearly of opinion that the trial court committed no error in that portion of its decree enjoining and restraining the defendant from in any wise trespassing upon the lands of the plaintiffs. The testimony of the defendant himself showed clearly that he was without right, as against the plaintiffs, to possession of the land. The date and character of his lease from Davis, if he had one, nowhere appear in the record. On this point the defendant contented himself with simply stating: "I have been in possession of this land about eight years, seven or eight years. \* \* \* I first rented this place from the Davis Bros. It was owned by them. This land was in my possession under a lease from the Davis Bros. when it was purchased by Larry Finch about

the 1st day of April, 1906." His leasing arrangement with Finch was, according to the testimony of defendant, an oral one, consisting of a conversation between himself and Finch, which he says occurred about the time Finch purchased the land, and which he details as follows: "Larry Finch drove up there and wanted me to show him the lines of his property, and we drove up on the hill, and I showed him, as near as I could, where the line ran. \* \* \* And he says: 'I want you to go on there and help me, and speak a good word if anybody comes here to look at it, and help me sell it, and stay right along.'" The defendant was then asked by his counsel: "Q. What were you to do with the property?" and he answered: "Well, I was to go right along the same as I had, clean out the ditches and take care of the alfalfa, furnish the water, and do just as I have done. I was not to give him any rental; I was only to perform these services." Granting, but not deciding, that this conversation was sufficient to constitute a good and valid lease as between Finch and Traver, it could in no manner bind the plaintiffs here, who purchased the land in about 90 days after this conversation between Traver and Finch, and apparently without any notice whatever of defendant's rights, if any he had, or his claim of right to possession. Defendant testified that he had never had any talk with Dodd and Jansick, the plaintiffs in this case, who had been the owners of the premises for three years prior to the filing of the complaint in this cause, in regard to this property; in fact he could not remember that he had ever seen either of them. Defendant was asked by his counsel, "Were you in the occupation of these premises at the time the sale took place to Dodd and Jansick?" and he answered, "I had the place in charge right straight along up to the time this court ruled that I must get off." The nature, however, and character of his "charge" of the land does not appear to have been such as would give notice to Dodd and Jansick that he claimed the right to occupy the same.

[2] 2. An examination of the record convinces us that the trial court committed reversible error in the determination of the question of plaintiffs' damages. The court allowed the plaintiffs damages in the sum of \$570. From its oral findings, made at the close of the evidence, this sum appears to have been made up of damage done to the growing alfalfa upon 40 acres of land, which the court fixed at \$10 per acre, \$80 for extra seed that the court found the plaintiffs were obliged, by reason of the trampling of the land by defendant's stock, to purchase for re-seeding the alfalfa land, and the rental value of the land for three years, which included the year 1909, the year for which the plaintiffs had leased the land to the said Dillon. It is apparent that a portion of



these damages, if rightfully assessed, would belong, not to the plaintiffs, but to Dillon, their tenant, to whom they had leased the land for the year 1909 at \$50 per year, the said Dillon being required, in addition to the \$50 per year, to do certain work upon the land as a consideration for its use. There is nothing in the record to indicate that Dillon had assigned his claim for damages to the plaintiffs. The \$400 item allowed for damages to the land is supported by the testimony of Dillon alone, and his testimony on this point was brief, incomplete, and we think wholly insufficient to establish the item of \$400 damages. Dillon was asked this question: "Q. What, from your knowledge of the condition of the alfalfa field prior to the time it was tramped by defendant's stock, and after it was tramped by defendant's stock prior to August, 1911, what would you say was the permanent damage to the alfalfa, if any? A. About \$10 per acre." This was all the testimony he gave on this point on direct examination. Immediately, upon cross-examination, Dillon was asked this question, "What is your full meaning, then, in regard to the fact that you think it was damaged that much?" and he answered, "Because I could have gotten \$10 an acre for the same ground this year, had they have gotten it seeded down last year. Q. Do you know what the ordinary rental of alfalfa land in the Uncompahgre Valley is in that locality? A. About \$10 an acre." This closes his testimony in so far as it pertains to this item of damages, for which the court allowed \$400. Nowhere did the witness attempt to state what the rental value of the alfalfa land was for the year 1909, without the re-seeding, nor was there any attempt made on behalf of plaintiffs to prove that without re-seeding it had no value. It will thus be seen that the court allowed the plaintiffs, by way of damages for this particular item, what the full rental value of the land would have been had it been properly re-seeded, and there had been no trampling. Again, the item of \$80, found by the trial court on account of extra seed which the plaintiffs were compelled to furnish by reason of the trampling of the land, was not sufficiently established by the evidence. Witness Dillon, the tenant, who was the only witness called on this or any other point by the plaintiffs, testified as follows: "Q. How much more seed did it take to re-seed it [meaning the land that was to be sown in alfalfa] than it did last year before it was tramped? A. They furnished me a little over double the amount of seed this year. I could not tell the exact amount, but it was something over 300 pounds, near 400 pounds, I think. It made a total of something over 600 pounds altogether. Alfalfa seed is worth 20 cents a pound on the market." On cross-examination he was asked: "Q. When you

went on that place in 1909 was there much re-seeding needed on this alfalfa field? A. Yes, sir; there was some re-seeding required at that time. We estimated it at 300 pounds," etc. It is apparent that this testimony is too indefinite and uncertain to warrant the finding that the sowing of \$80 worth of extra seed was made necessary by the trampling of the cattle of defendant.

[3] On the trial appellant propounded many questions, which we think were competent for the purpose of minimizing the damages which plaintiffs sought to recover against him, to every one of which the trial court sustained objections. For instance, the defendant attempted to show neglect on the part of the tenant, Dillon, in the matter of watering the alfalfa crop, that Dillon had a portion of the land planted to beets, and that the water with which he provided himself was utterly insufficient to cover the beet land and the alfalfa land. We think the trial court committed reversible error in sustaining the objections of the plaintiffs to this character of proof, and for that reason its judgment must be reversed, and the case remanded for a new trial.

Reversed and remanded.

(24 Colo. App. 406)

#### KOCH v. CITY AND COUNTY OF DENVER.

(Court of Appeals of Colorado. July 14, 1913.)

##### 1. MUNICIPAL CORPORATIONS (§ 819\*)—LIABILITY FOR DEFECTS IN STREET—SUFFICIENCY OF EVIDENCE—CONDITION OF STREET.

In an action against the city for injuries sustained by a fall from a wheel, evidence held insufficient to show that the street where the accident occurred was not in a reasonably safe condition for travel.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1739-1743; Dec. Dig. § 819.\*]

##### 2. MUNICIPAL CORPORATIONS (§ 763\*)—DEFECTS IN STREET—DEGREE OF CARE.

A city is not required to keep its streets in perfect condition but only in a reasonably safe condition for travel.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1612-1615; Dec. Dig. § 763.\*]

##### 3. WITNESSES (§ 286\*)—ADMISSIONS—PARTIES.

The trial court can permit a witness to testify in redirect examination as to admissions of the defendant, without a foundation for impeachment having been laid, since the order of examination is within the discretion of the trial court, and such admissions are always admissible, even though not impeaching.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 930, 994-999; Dec. Dig. § 286.\*]

##### 4. APPEAL AND ERROR (§ 181\*)—PRESENTATION OF GROUNDS IN LOWER COURT—NECESSITY.

The Court of Appeals will not reverse a judgment for any error not called to the attention of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1141-1151, 1157, 1158, 1160; Dec. Dig. § 181.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**5. MUNICIPAL CORPORATIONS (§ 821\*)—LIABILITY FOR DEFECTS IN STREET—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.**

In an action against a city for injuries sustained from a fall from a wheel caused by an alleged defect in the street where the facts attending the accident were stated, it was for the jury to determine whether, under all the circumstances, the city was negligent and whether the negligence of the rider contributed to cause the accident, even though there was no direct evidence specifically applicable to contributory negligence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1745-1757; Dec. Dig. § 821.\*]

**6. NEGLIGENCE (§ 97\*)—COMPARATIVE NEGLIGENCE—APPLICATION OF DOCTRINE.**

If the negligence of the injured person contributed in any degree to the injury, there can be no recovery, since the law does not recognize comparative negligence.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 93, 162; Dec. Dig. § 97.\*]

Error to District Court, City and County of Denver; Hubert L. Shattuck, Judge.

Action by Fred W. Koch against the City and County of Denver. Judgment for defendant, and plaintiff brings error. Affirmed.

T. J. O'Donnell and John W. Graham, both of Denver (E. H. Park, of Denver, of counsel), for plaintiff in error. H. A. Lindsley, T. R. Woodrow, and J. A. Marsh, all of Denver, for defendant in error.

BELL, J. [1] During the month of August, 1905, the Denver & Pueblo Construction Company, under contract with the city and county of Denver, defendant in error herein, was engaged in grading and curbing a number of streets in said city, including South Tenth street. The work, during this month, consisted in plowing the streets to a depth of from 6 to 20 inches and smoothing the surface thereof with bladed machines, after the excess earth was removed, so as to establish proper grades and foundations for a finished surface of 3 inches of disintegrated granite. The plowing and grading left the earth soft in some places, but put the streets in a passable condition for travel, although certain holes or depressions of from 2 to 4 inches deep were produced therein by reason of traffic and a subsidence of the soft earth. The work of plowing, grading, and curbing South Tenth street, between West Tenth and West Eleventh avenues, was completed some time about the middle of August, 1905, and was left in the condition as above described because of the inability of the contractor to obtain the necessary finishing material. During the course of the work the contractor maintained a watchman and red lights throughout the district in which it was operating, which included South Tenth street above mentioned. The contractor suspended operations and withdrew from said district on or about the 15th day of December, 1905, for lack of necessary finishing material and on account of the

frozen condition of the ground. During the course of the operation the work was in charge of Mr. George M. Post, an assistant engineer of the board of public works of said city, for defendant in error, Mr. Thomas J. Tully, vice president of the Denver & Pueblo Construction Company, for the contractor, and Mr. J. J. Noonan, subcontractor. Mr. Post, representing the city, and Mr. Tully, representing the contractor, were in the district every day during the course of the operation and went over the street in question herein about December 15, 1905, after the work thereon had been suspended, and testified that it was then in a reasonably safe state of repair for travel.

About 11:30 p. m. of December 30, 1905, Fred W. Koch, plaintiff in error herein, while riding to his home on a bicycle, at the rate of 3 miles an hour, fell therefrom at a point about 100 feet north of West Tenth avenue and near the center of said South Tenth street, between West Tenth and West Eleventh avenues, and sustained a painful injury to his arm from which he was still suffering at the time of the trial of this case. In his amended complaint he alleges that, at the time of the accident, he was using due care and caution, and that the accident occurred by reason of the negligence of the defendant in error in knowingly permitting a hole or excavation to be or remain in said street, and wholly and negligently failing to place any light or lights there to show where said hole or excavation was located, and, by reason of said negligence on the part of the defendant in error, he suffered damages in a large sum. The defendant in error in its answer denies that it negligently or knowingly permitted any defect in said Tenth street, or was guilty of negligence in any manner, and alleges that, if the plaintiff in error did meet with or suffer any such injury, the same was caused wholly through his own fault and negligence and was not the result of any fault or negligence on the part of said defendant in error. A replication was filed denying the allegations contained in the second defense. The case was tried to a jury in the district court and resulted in a verdict for defendant in error, upon which judgment was rendered and is now before us on a writ of error. The evidence shows that the plaintiff in error resided at 903 South Tenth street in said city, within one block of the alleged hole or excavation; that he passed the place of accident every day and every night in going to and from his saloon located on California street; that he was familiar with the condition of the street and knew of a depression therein about 3 feet east of the one complained of, but did not know of the one into which he rode, which is the alleged cause of the accident, until he encountered it that night; that some time in October, 1905, about 2

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



months previous to the accident, he informed Mr. Hunter, city engineer and member of the board of public works of said city, of the general bad condition of the street and suggested that he (Hunter) should have the contractor make the necessary repairs. Harry M. Clapp, the only witness for the plaintiff in error, stated that he could not testify as to any particular hole or to any particular part of the block, nor could he describe any specific defect therein. When asked if there were any holes in West Tenth street near West Tenth avenue, he testified as follows: "Well, there was through the block there. I could not say exactly whether they were right near West Tenth avenue or not, but in the block generally, in many instances and in many places, but I would not generalize right at that point because I do not remember." The testimony of the witness Clapp is a mass of general conclusions, too indefinite to aid the court or jury in any manner.

At the point in the street where the alleged accident occurred, there were three depressions, according to the testimony of the plaintiff in error, and only two according to the testimony of George E. Randolph, president of the board of public works of the city, who made a special examination of the grounds soon after the accident. Plaintiff in error testified that he knew there was a hole in the street about 8 feet long,  $1\frac{1}{2}$  feet wide, and from 5 to 8 inches deep, and, in trying to avoid this hole, he rode into a second hole about 3 feet to the west and about 2 feet further south on the street, which was about 18 inches long, 8 to 10 inches wide, and 3 or 4 inches deep; that the third hole was smaller than either of the other two, was only 1 or 2 inches deep, and nearer the curb; that he did not know of the presence of the second hole, which, he contends, caused the accident; and that when the front wheel of his bicycle went into the hole he was thrown off, and he and his bicycle fell sidewise. When asked how he was thrown off, he said: "By striking the hole, I guess, I don't know." He further testified that he never rode over the street again, and there is no evidence before us that he ever saw it after the accident.

Mr. Randolph, president of the board of public works, secured from the plaintiff in error a description of the alleged defects where it was said the accident occurred and officially visited and inspected the same some time after the accident, and testified as follows: "I looked around carefully to see what could be the basis of the claim, and the only things that I saw were two depressions (might be called depressions), one nearer the curb and one nearer the middle of the street. The first one perhaps three feet in diameter, and the one in the middle of the street larger. I should think both of them possibly three inches at the deepest down below the

ordinary surface of the street and running to nothing at the outer edge of each circle, \* \* \* and from there I went back to Mr. Koch and asked again whether the condition of the street was the same now as it was then, and he said that it was; that it was in the same condition when I saw it as it was when the accident occurred."

Plaintiff in error, in rebuttal, gave his version of his conversation with Randolph as follows: "He says to me, 'Is the street in the same condition now that it was then?' I says, 'No, I think that has been somewhat filled up now. Some sand blown in.'"

There seems to be no doubt that both parties to this action knew of the general condition of South Tenth street at the time of the alleged accident, but neither knew of the so-called hole or depression which is alleged to have caused the accident. Koch testified that "it looked like it sunk in from the water pipes" and was not present when he rode by the place that morning, and on cross-examination admitted that it might possibly have been there without his knowledge. He also testified that there was a city street light within 100 feet of the place of the accident, and frankly stated that he did not know whether the ground was hard or soft within the depression, though he said it was a cold night and the ground was generally frozen hard, and guessed he was thrown off by his wheel striking the hole, but that he did not know. It is difficult to perceive how a depression such as was described by him or by the president of the board of public works could be the proximate cause of the injury, riding, as he was, with his wheel properly lighted, at the rate of 3 miles an hour, which was his pace according to his testimony. It is a matter of common knowledge that a bicycle, being ridden at a pace of 3 miles an hour, is under the complete control of the rider and can be stopped at will or turned to one side or the other and the rider step to the ground without danger of falling, and, as well a matter of common knowledge, that such a wheel should pass over a depression such as described without a material disturbance of the wheel or rider.

[2] The city is not required to maintain its streets in a perfect condition but only in a reasonably safe condition for travel, and we do not find that the plaintiff in error has shown by a preponderance of the evidence, or at all, that South Tenth street was, at or near the place described in the complaint, other than in a reasonably safe condition for travel at the time of the alleged accident. It is true that the plaintiff in error and his witness Clapp made general statements that the block in which this alleged accident occurred was full of holes, but Clapp made no endeavor to describe any of them, neither did the plaintiff in error, except 3 in close proximity, one of which, he claimed, ranged from 5 to 8 inches in depth, over which he safely passed at other times, and on this oc-



casion intentionally avoided and rode into a smaller one from 3 to 4 inches deep, about 18 inches long, and from 8 to 10 inches wide, and a third, still further to the west, which was but from 1 to 2 inches deep. Such depressions can hardly be avoided on dirt thoroughfares and, as the same are described by the president of the board of public works, can be duplicated in the streets surrounding the state house and throughout the city, over which all kind of travel is daily passing with safety, and we think that the evidence thoroughly supports the verdict. Counsel for plaintiff in error, however, contends that the trial court committed numerous errors, without which the jury might have rendered a different verdict.

Assignments 1, 2, 3, and 4 are directed against the alleged improper exclusion of testimony. After examining the record and these assignments, we do not think any reversible error was committed by the trial court in this respect.

[3] The fifth assignment of error is based upon the ruling of the court in allowing the witness Randolph to testify that the plaintiff in error admitted to him that the street was in the same condition when the witness examined it as it was at the time of the accident. The reasons assigned by counsel for this alleged error are that the question was not proper redirect examination and was asked for the purpose of impeaching the plaintiff in error without laying the proper foundation by establishing time, place, persons present, etc. The order of the examination was a matter within the discretion of the court, which we think was properly exercised, and the admissions sought to be elicited fell within the rule of showing admissions of a party to the suit against his interests, and this, rather than for the purposes of impeachment, was the object of counsel; hence the ruling of the court was proper. Jones on Evidence (2d Ed.) § 851.

Assignments 6, 7, 8, 9, and 10 are based upon refusals of the court to give instructions tendered by the plaintiff in error; but as we think the jury was properly instructed on the material questions involved, and believing that substantial justice has been done through the verdict of the jury, we do not feel justified in further extending this opinion on the assignments above mentioned.

Assignments 11, 12, and 13 are directed to the alleged errors of the court in giving instructions to the jury. We think the instructions complained of fairly informed the jury of the law applicable to the facts presented in the record.

[4, 5] Assignment 12 is based upon the giving of instruction No. 9 pertaining to contributory negligence. The objection made at the time was based upon the alleged absence of evidence to which the instruction could apply, and we should not reverse the judgment on any error not called to the at-

tention of the trial court. The argument of counsel in this court, however, seems to be directed to their contention that the instruction recognizes degrees of negligence. It is true that there is no direct evidence that is made specifically applicable to contributory negligence, but the facts are stated attending the accident, and it then becomes a question for the jury, under all the circumstances, to determine: First, whether the defendant in error was negligent; and, secondly, if negligent, whether the negligence of the plaintiff in error contributed to the cause of the accident. We think, under the circumstances, that no injurious error resulted from the giving of this instruction.

[6] However, we think the phrase "in any degree" might well have been omitted. It serves no good purpose, as the test is, if the negligence of the plaintiff contributed to the injury, he cannot recover. The instruction reads in part as follows: "If you find that the conduct of the plaintiff in any degree contributed to the accident, then the case is one of mutual fault, and the law will neither cast all the consequences upon the defendant, nor will it attempt any apportionment thereof, and in such case the plaintiff should not recover."

Not only our courts, but most of the courts of the country, have discarded the doctrine of comparative negligence. However, the law writers and the courts very generally state the rule, in substance, as follows: "That a plaintiff cannot recover for the negligence of the defendant if his own want of care or negligence has in any degree contributed to the result complained of." Needham v. S. F. & S. J. R. Co., 37 Cal. 409-419, citing Gay v. Winter, 34 Cal. 153.

The text in Cyc. reads: "The general rule is that, if the negligence of the injured person contributed in any degree, no recovery can be had. \* \* \* The law will not attempt to measure the degree." 29 Cyc. 511; Chicago City Railway Co. v. Margaret Canevin, 72 Ill. App. 84; Mattimore v. Erie City, 144 Pa. 14, 22 Atl. 817; Gonzales v. New York & Harlem R. R. Co., 38 N. Y. 440, 9S Am. Dec. 58; Banning v. Chi., R. I. & P. Ry. Co., 89 Iowa, 81, 56 N. W. 277; Murch v. Con. R. Co., 29 N. H. 9, 61 Am. Dec. 631; Potter v. Chi. & N. W. Ry. Co., 21 Wis. 372, 94 Am. Dec. 548; Birmingham Railway, Light & Power Co. v. Bynum, 139 Ala. 397, 36 South. 736.

Counsel cite many cases to the effect that comparative degrees of negligence submitted to a jury is injurious error. That is conceded by our own Supreme Court, and even the state of Illinois, where the Supreme Court unwittingly committed the error of recognizing comparative negligence and persistently followed its ruling from the time of its decision in Galena & C. U. R. Co. v. Jacobs, 20 Ill. 478, wherein it departed from the current of authorities including its



own earlier decisions, up to the time of its decision in *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358, 3 N. E. 456, wherein it repudiated the rule announced in *Galena & C. U. R. Co. v. Jacobs*, supra, and the Illinois courts now hold the rule to be: "That there can be no recovery if plaintiff's negligence contributed *in any degree* to the injury." *Chicago City Railway Co. v. Margaret Canevin*, 72 Ill. App. 84.

The rule in this state is substantially in harmony with that in the states above cited in support of the general rule. Our Supreme Court stated the rule as follows: "Instruction No. 14 recognizes this qualification and in the main states the rule correctly but is erroneous in limiting its application to a case where the injured party was guilty of slight negligence only. As before said, the rule of comparative degrees of negligence does not prevail in this state, and it is immaterial what the extent of the injured party's negligence may have been; if it contributed *in any degree* as the proximate cause of the injury, there can be no recovery." *D. & R. G. R. Co. v. Spencer*, 25 Colo. 9-12, 52 Pac. 211, 212.

It will be noticed that the objection in the case above cited was to the court attempting to limit the negligence to "slight negligence only."

In *C. & S. Ry. Co. v. Webb*, 36 Colo. 224-230, 85 Pac. 683, 685, the Supreme Court upheld the refusal of a tendered instruction informing the jury that, "unless the evidence showed that the defendant had been guilty of gross negligence, in no event could the plaintiff recover," because it said: "Degrees of negligence, such as slight and gross, does not prevail in this jurisdiction."

In *D. & R. G. R. Co. v. Maydole*, 33 Colo. 150-152, 79 Pac. 1023, 1024, also cited by counsel for plaintiff in error, the condemned instruction reads: "If \* \* \* the deceased was also guilty of an equal or nearly equal degree of negligence, \* \* \* then the jury should find for the defendant." The other authorities from this state cited by counsel involve the same question of comparative degrees of negligence, which, in our opinion, has no application to the case before us.

We feel that substantial justice was administered in the trial court without reversible error; hence the judgment should be and it is hereby affirmed.

(24 Colo. App. 375)

**EMPIRE RANCH & CATTLE CO. v. BATTELLE.**

(Court of Appeals of Colorado. July 14, 1913.)

**1. TAXATION (§ 796\*)—TAX TITLES—QUIETING TITLE.**

The owner and holder of a promissory note, secured by deed of trust on land, can

maintain a suit to remove a cloud from the title to the land, caused by a void tax deed.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1578-1581; Dec. Dig. § 796.\*]

**2. JUDGMENT (§ 951\*)—RES JUDICATA—EVIDENCE.**

A county court decree, purporting to quiet title in defendant, offered by defendant, in a suit to remove a cloud, as an estoppel and as establishing title in himself, was not admissible when unaccompanied by the judgment roll or proceedings leading up to the decree.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1808-1812; Dec. Dig. § 951.\*]

**3. TAXATION (§ 749\*)—TAX DEED—VALIDITY.**

A tax deed, issued upon an assignment of a tax certificate by the county court clerk more than three years after the sale of the land, is void.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1496; Dec. Dig. § 749.\*]

**4. TAXATION (§ 805\*)—LIMITATIONS—REMOVAL OF CLOUD ON TITLE—VOID TAX DEED.**

In an action to remove as a cloud from title a void tax deed, the five-year statute of limitations was not available to defendant, not being an action for the possession of land sold for taxes; neither was the seven-year statute, as less than seven years had elapsed from the recording of the tax deed until the commencement of the suit.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1593-1597; Dec. Dig. § 805.\*]

Appeal from District Court, Washington County; H. P. Burke, Judge.

Action by Charles Battelle against the Empire Ranch & Cattle Company, to remove a cloud from title. From a judgment for plaintiff, defendant appeals. Affirmed.

R. H. Gilmore, of Denver, for appellant. Chalkley A. Wilson and Asher B. Wilson, both of Akron, for appellee.

**KING, J.** Action to remove cloud from title. From judgment in favor of plaintiff, defendant appeals.

[1] 1. That the owner and holder of a promissory note, secured by deed of trust on land, has sufficient interest in the property to enable him to maintain a suit to remove a cloud from the title, caused by a void tax deed, is settled by the Supreme Court of this state in *Munson v. Marks*, 52 Colo. 553, 124 Pac. 187.

[2] 2. The county court decree purporting to quiet title in defendant, when offered by it to show title or as an estoppel, without being accompanied by the judgment roll or proceedings leading up to the decree, was not admissible in evidence, and was properly excluded. *Terry v. Gibson*, 23 Colo. App. 273, 128 Pac. 1127; *Empire R. & C. Co. v. Coleman*, 23 Colo. App. 351, 129 Pac. 522; *McLaughlin v. Reichenbach*, 52 Colo. 437, 122 Pac. 47.

[3] 3. The tax deed relied on by defendant as paramount title, and alleged by plaintiff to constitute a cloud on his title, was issued upon an assignment by the county clerk of the certificate of purchase more than three years after the date of the tax sale, and is



therefore void. *McLaughlin v. Reichenbach*, supra; *Empire R. & C. Co. v. Coldren*, 51 Colo. 115, 117 Pac. 1005.

[4] 4. Neither the five-year statute of limitations pleaded, nor the seven-year statute, with payment of taxes under claim and color of title, was available to the defendant under the facts shown, as this was not an action for possession of land sold for taxes, and less than seven years had elapsed after the recording of the tax deed and before the commencement of this suit.

Perceiving no error in the record, the judgment is affirmed.

(24 Colo. App. 416)

**EMPIRE RANCH & CATTLE CO. v.  
HOWELL.**

(Court of Appeals of Colorado. July 14, 1913.)

Appeal from District Court, Washington County; H. P. Burke, Judge.

Action by Lardner Howell against the Empire Ranch & Cattle Company. From a judgment for plaintiff, defendant appeals. Affirmed.

R. H. Gilmore, of Denver, for appellant. John F. Mail, of Denver, for appellee.

**KING, J.** Action in the nature of ejectment for the possession of the northwest quarter of section 9, township 4 south, range 51 west, Washington county. It is admitted by counsel for appellant that the same questions of law, and under conditions and facts substantially the same as were raised and determined in *Empire Ranch & Cattle Co. v. Howell*, 22 Colo. App. 584, 126 Pac. 1096, are presented for determination in this case, and upon the authority of that decision the judgment herein appealed from is affirmed.

(24 Colo. App. 417)

**EMPIRE RANCH & CATTLE CO. v.  
HOWELL.**

(Court of Appeals of Colorado. July 14, 1913.)

**1. TAXATION (§ 762\*)—TAX TITLES—ASSIGNMENT OF CERTIFICATE BY COUNTY AFTER THREE YEARS.**

A treasurer's tax deed, which shows on its face that the certificate of purchase was assigned by the county clerk more than three years after the date of the sale, is void.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1514-1516; Dec. Dig. § 762.\*]

**2. EJECTMENT (§ 95\*)—PROOF OF TITLE—TRUSTEE'S DEED.**

In an action for the possession of land, where plaintiff claimed title through a deed of trust and a trustee's deed thereunder, and the trustee's deed, offered in evidence, showed prima facie that it was not executed under such deed of trust, no further showing being made, plaintiff failed to establish title.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 280-295; Dec. Dig. § 95.\*]

**3. EJECTMENT (§ 86\*)—TITLE TO SUPPORT.**

In an action for the possession of land, where plaintiff's title is denied, plaintiff has the burden of making prima facie proof of title, no matter what may be the condition of defendant's title.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 238-245; Dec. Dig. § 86.\*]

**4. TAXATION (§ 805\*)—TAX TITLES—LIMITATION OF ACTIONS.**

The five-year statute of limitations, barring the recovery of land sold for taxes, is no defense where the tax deed is void.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1593-1597; Dec. Dig. § 805.\*]

Appeal from District Court, Washington County; H. P. Burke, Judge.

Action by Lardner Howell against the Empire Ranch & Cattle Company. From a judgment for plaintiff, defendant appeals. Affirmed in part, and in part reversed and remanded.

R. H. Gilmore, of Denver, for appellant. John F. Mail, of Denver, for appellee.

**KING, J.** Appellee, as plaintiff, brought his suit to recover possession of the northeast quarter of section 17, township 5 north, range 50 west, and also the northeast quarter of section 34, township 4 north, range 51 west, based upon his claim of title to said tracts in fee simple. Defendant denied plaintiff's title and right of possession, alleged its ownership of both parcels of land under treasurer's tax deeds, pleaded the short statute of limitations, and payment of taxes for seven successive years under claim and color of title, made in good faith to vacant and unoccupied land. Judgment was rendered in favor of plaintiff as to both parcels of land.

[1] It was admitted that plaintiff had title in fee to the northeast quarter of section 34 above described, unless extinguished by the treasurer's tax deed under which defendant claimed. That deed, however, shows on its face that the certificate of purchase upon which it was based was assigned by the county clerk more than three years after the date of the sale, and for that reason is void.

[2] To establish his prima facie title to the northeast quarter of section 17 aforesaid, plaintiff offered a deed of trust from one Shultz, the patentee, to W. H. Lanning as trustee for the use of Thomas Frahm, to secure payment of a promissory note for the sum of \$200, with interest, conveying the land last referred to. Said deed of trust was dated June 1, 1888, recorded June 23d of the same year, at page 220 of Book 10; also a trustee's deed, which recited a sale under a deed of trust from Shultz to Lanning, as trustee for the use of Frahm, securing the same sum, conveying the same land, and bearing the same date as the trust deed offered, but recorded October 15, 1888, in Book 10 at page 303. Over defendant's objection the trustee's deed was admitted in evidence. The recitals of this trustee's deed show, prima facie, that it was not pursuant to a foreclosure of the deed of trust offered

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



(24 Colo. App. 395)

in evidence; and therefore, without further showing, the trust deed was not evidence to support the foreclosure. Defendant, for the purpose of showing that the foreclosure was not made pursuant to the deed of trust recorded October 15, 1888, in Book 10 at page 303, offered in evidence that deed, which disclosed that it was from Shultz to Lanning, for the same land, bearing the same date as the one offered by plaintiff, but given to secure the sum of \$50 instead of \$200, and for the use of one McKinley instead of Frahm, as in the trust deed offered by plaintiff. This deed showed, prima facie, that the trustee's deed offered by plaintiff was not executed under a foreclosure pursuant to said last-named deed of trust. Upon the present showing, plaintiff failed to establish title to the tract of land last named. In *Mulqueen v. Lanning*, 53 Colo. 143, 124 Pac. 577, an action to quiet title, plaintiff in support of his title offered a trustee's deed, which recited a trust deed not in evidence. The record did disclose a trust deed between the same parties, but for the use of a different person from the one for whose use the deed of trust forming the basis for the trustee's deed was made, and also securing a different sum from that stated in the trustee's deed. There was no evidence to reconcile these discrepancies, and the court held that plaintiff had failed to prove any title whatever. The case cited is authority for the conclusion we have reached.

[3] Appellee contends that the defendant, claiming through another and different source of title from plaintiff, has no right to raise objections to the trustee's deed. We know of no reason for so holding, and no authority which so holds under similar circumstances. After defendant's denial of plaintiff's title and right of possession, plaintiff was put upon proof of his own title; and, until he had made prima facie proof thereof, defendant was not required to submit his title deeds for adjudication. The plaintiff, without title had no right to annoy and harass the defendant, whatever may have been the condition of its title under the tax deed. *Daniels v. Case* (C. C.) 45 Fed. 843; *Empire Ranch & Cattle Co. v. Bender*, 49 Colo. 522, 113 Pac. 494.

[4] The five-year statute of limitations afforded no protection to title claimed under void tax deed, and payment of taxes for the requisite time under claim and color of title, made in good faith to vacant and unoccupied lands, was not proven.

For the reasons given, the judgment in so far as it affects the title to the northeast quarter of section 34, township 4 north, range 51 west, is affirmed; and as to the northeast quarter of section 17, township 5 north, range 50 west, it is reversed, and the cause remanded for further proceedings as to that tract only.

# EMPIRE RANCH & CATTLE CO. v. PATTERSON.

(Court of Appeals of Colorado. July 14, 1913.)

## 1. JUDGMENT (§ 951\*)—REQUISITES.

A decree of the county court, offered in evidence by defendant in an action to quiet title, purporting to quiet title in defendant, was properly excluded because not accompanied by the judgment roll.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1808-1812; Dec. Dig. § 951.\*]

## 2. TAXATION (§ 789\*)—TAX TITLE—DEED.

In an action to quiet title, the naked admission by plaintiff of the issuance of a tax deed to defendant, coupled with an allegation of its invalidity for matters appearing upon its face, does not obviate the necessity of defendant's offering the deed in evidence, if it wished to rely upon it as proof of title.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1556-1569; Dec. Dig. § 789.\*]

## 3. TAXATION (§ 805\*)—ACCRUAL OF RIGHT OF ACTION.

A suit, commenced within seven years from the first payment of taxes, under an alleged claim and color of title, is not barred by the statute of limitations of seven years.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1593-1597; Dec. Dig. § 805.\*]

Appeal from District Court, Washington County; H. P. Burke, Judge.

Action to quiet title by Virginia M. Patterson against the Empire Ranch & Cattle Company. Judgment for plaintiff, and defendant appeals. Affirmed.

R. H. Gilmore, of Denver, for appellant. William H. Wadley, of Denver, for appellee.

KING, J. Appellee, as plaintiff, brought this action to quiet her title to certain lands in Washington county. The defenses pleaded were: A general denial; paramount title under a treasurer's tax deed; former adjudication quieting title in the defendant; the seven-year statute of limitations. By her reply plaintiff alleged that the tax deed was void on its face, and that the decree purporting to quiet title in the defendant was void for want of jurisdiction.

Plaintiff deraigned title to the land in question by mesne conveyances from the United States.

[1] 1. Defendant offered in evidence a decree of the county court of said county, purporting to quiet its title to said land. Objection to the admission of the same in evidence, because not accompanied by the judgment roll, was properly sustained. *McLaughlin v. Reichenbach*, 52 Colo. 437, 122 Pac. 47; *Empire Co. v. Coleman*, 23 Colo. App. 351, 129 Pac. 522; *Terry v. Gibson*, 23 Colo. App. 273, 128 Pac. 1127.

[2] 2. Defendant's alleged tax deed was not offered in evidence. As shown by the abstract of the record, there was neither allegation, admission, nor proof of the due execution and acknowledgment of said deed, or of the record thereof. The naked admission by plaintiff of the issuance of the tax deed,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



coupled with an allegation of its invalidity for matters appearing upon its face, did not obviate the necessity of defendant's offering said deed in evidence, if it wished to rely upon the same as proof of title. *Empire Co. v. Langley*, 23 Colo. App. 49, 127 Pac. 451.

[3] 3. The first payment of taxes under the alleged claim and color of title was made after February 21, 1901. This suit was commenced within seven years from that date. For that reason the plea of the statute of limitations was not sustained by the evidence.

For the reasons given, the judgment quieting title in the plaintiff is affirmed.

(33 Okl. 377)

**BERRY, Sheriff, v. KIEFFER et al.**  
(Supreme Court of Oklahoma. May 13, 1913.  
Rehearing Denied July 22, 1913.)

*(Syllabus by the Court.)*

**SHERIFFS' AND CONSTABLES (§ 48\*) — FEES —  
COLLECTING MONEY ON SALE.**

By reason of section 6, chapter 69, Sess. Laws 1910, a sheriff may charge and collect "commission for collecting money on a sale," under special execution made by virtue of an execution of order of sale under a decree of foreclosure, where the purchase price is collected by the sheriff; but where the amount for which the property was sold does not exceed the judgment, and the judgment creditor or mortgagee is the purchaser, and the amount of the purchase price is applied as a credit upon the judgment, the sheriff is not entitled to any commission thereon.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 75; Dec. Dig. § 48.\*]

Error from District Court, Creek County;  
Wade S. Stanfield, Judge.

Action by John D. Kiefer against Ella Blackwelder and another. A charge of commission on a judicial sale, included in the bill of cost filed by John W. Berry, sheriff, was disallowed, and he brings error. Affirmed.

Hughes & Miller, of Sapulpa, for plaintiff in error. McDougal & Lytle, of Sapulpa, for defendants in error.

**HAYES, C. J.** This cause comes to this court on appeal from an order of the lower court, sustaining a motion of defendants in error to retax the costs in a cause in which he was plaintiff, and Ella Blackwelder and John H. Blackwelder were defendants. The proceeding in the lower court was for foreclosure of a mortgage on real estate. Under the decree of foreclosure, a special execution or order of sale was issued, which was served by plaintiff in error herein as sheriff of the county, and the property was sold at public auction to defendant in error, John D. Kiefer, the mortgagee, for the sum of \$2,500, which sum was credited upon his judgment, and no part of the same was collected in cash by plaintiff in error, who will

hereinafter be referred to as the sheriff. In making his return the sheriff included in his bill of cost a charge of \$33 as commission. Upon defendant in error's motion to retax the costs, this charge was disallowed.

The only question presented involves a construction of a portion of section 6, chapter 69, Session Laws 1910. That section provides the fees that may be charged and collected by sheriffs and constables. One of the charges provided for is: "Commission for collecting money on sale: First \$300, 3 per cent.; next \$200, 2 per cent.; all in excess of \$500, 1 per cent." It is the contention of plaintiff in error that he is entitled to charge and collect the commission on the amount of the sale when the judgment mortgagee or creditor is the purchaser, and the amount of the bid is credited upon the judgment, as well as when he collects the purchase price in cash and returns same to the court. In view of the other provisions of the statute, we think this contention cannot be sustained. It was contemplated by the statute to provide compensation for each service the sheriff is required to render. Other provisions of the same section fix a fee for his serving any order of sale and for making return thereof. It also provides a fee for summoning appraisers and appraising the property, for selling or offering for sale the property, and for making the deed and the acknowledgment thereto. For every service he is required to or may perform in connection with making a sale, a specific sum as compensation therefor is provided. The provision for the commission is that it shall be "for collecting money on sale." When no money is collected, there is no service rendered for which this commission could be charged. It was contemplated by this charge to reward the sheriff for receiving the money, and to compensate him for his liability in holding and accounting for same. It was not intended as a compensation for any other act in connection with the sale, for the reason that every other act is compensated by a fee specified in the statute.

Statutes relating to fees and compensation of public officers are, as a rule, strictly construed; and an officer is entitled only to what is clearly given by law. Section 714, Lewis' Sutherland Stat. Const. While a liberal construction of an ambiguous statute might be required, where a strict construction would fail to compensate an officer for some service he is required to render, a liberal construction would not require a meaning to be given to a statute when it results in awarding to the officer a fee or compensation for a service he does not render. No case has been cited, and we have been unable to find any, squarely in point; but the following cases, either because of the similarity of the statutes involved, or in the reasoning contained in the opinions of the court, sup-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



port the conclusion we have reached: State ex rel. Thompson v. Prince, 9 Wash. 107, 87 Pac. 291; Coleman v. Ross, 14 Or. 349, 12 Pac. 648; Fiedelkey v. Diserens, 26 Ohio St. 312; Dawson v. Grafflin, 84 N. C. 100; Vance v. Bank of Columbus, 2 Ohio, 214.

Counsel for plaintiff in error have argued with zeal that Wilkerson v. Belknap Savings Bank, 52 Kan. 718, 35 Pac. 792, is in point, and should settle this case in favor of plaintiff in error. We are unable to regard that case as in point. In that case was involved a Kansas statute of 1881, which contained language almost the same as the statute here involved, and also a later statute of that state, an act of 1893, which statute provided that the sheriff should not be entitled to charge for commission on a sale where the property had been bid in by or for the prior creditor. In that case both parties conceded that the earlier statute allowed the sheriff to collect the commission on the sale, regardless of whether the prior creditor bid in the property. The judgment creditor in that case contended that the earlier statute was repealed by the later statute, and the sheriff contended that the repealing statute was unconstitutional, and the question determined by the appellate court was the unconstitutionality of the later statute; the construction of the earlier statute by the parties being, of course, accepted by the appellate court. The case, therefore, not being directly in point, and not binding upon this court if it were in point, we refuse to give to the statute here under consideration the construction that appears to have been given to the statute there under consideration by the parties and the court; and we adopt that construction which appears to us to be the most consistent with the language of the act, and that must follow from an application of the rules of construction.

The judgment of the trial court is accordingly, affirmed. All the Justices concur.

(38 Okl. 468)

**BERRY v. WOODWARD et al.**

(Supreme Court of Oklahoma. April 15, 1913.  
Rehearing Denied July 15, 1913.)

(*Syllabus by the Court.*)

**APPEAL AND ERROR (§ 773\*)—AFFIRMANCE—INSUFFICIENT BRIEF.**

Dismissed for failure to comply with rule 25 of this court (95 Pac. viii).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.\*]

Appeal from District Court, Tulsa County; L. M. Poe, Judge.

Action by William E. Berry against Herbert E. Woodward and others. Judgment for defendants on demurrer, and plaintiff appeals. Affirmed.

John D. Wakely, of Tulsa, for plaintiff in error.

KANE, J. This is an appeal from the action of the court below in sustaining a demurrer to the petition of the plaintiff in error, plaintiff below. As counsel for the plaintiff in error has not complied with rule 25 (95 Pac. viii) of this court by setting forth material parts of the petition against which the demurrer was directed, the court declines to review the question raised. The rule requires that: "The brief of the plaintiff in error in all cases except felonies shall contain an abstract or abridgment of the transcript, setting forth the material parts of the pleadings, proceedings, facts and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of the questions presented to this court for decision, so that no examination of the record itself need be made in this court." A substantial compliance with this rule is mandatory.

The judgment of the court below is affirmed.

(38 Okl. 553)

**MOORE v. BOWERS et al.**

(Supreme Court of Oklahoma. July 22, 1913.)

(*Syllabus by the Court.*)

**APPEAL AND ERROR (§ 843\*)—ABSTRACT CASES.**

Abstract or hypothetical cases, disconnected from the granting of actual relief, or from the determination of which no practical result can follow, will not be determined by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.\*]

Appeal from Superior Court, Garfield County; Dan Huett, Judge.

Action by John C. Moore against Peter Bowers and others. Judgment for defendants, and plaintiff appeals. Dismissed.

John C. Moore, of Enid, for plaintiff in error. A. L. Zinser, of Enid, for defendants in error.

KANE, J. This cause comes on to be heard upon a motion to dismiss upon, among others, the following ground: "The decision of the Supreme Court in said cause would afford no actual relief and be followed by no practical results, for the reason that the only relief asked by the plaintiff in error is an injunction restraining the officers of the city of Enid from paying for certain fire apparatus purchased by them; that plaintiff in error filed no bond in the superior court, and no injunction, temporary or permanent, was ever issued by such court, and no restraining order was ever issued or even asked for; that subsequent to the decision in the superior court in said cause refusing plaintiff an injunction, and prior to the institution of proceedings in error in the Supreme Court, the city officers of the city of Enid paid for



said fire apparatus, and the same was delivered to the city of Enid."

The foregoing is supported by the affidavit of the city clerk of the city of Enid, which comes before us entirely uncontroverted. The case seems to belong to the same class as *Freeman v. Board of Medical Examiners*, 20 Okl. 610, 95 Pac. 229, and the great array of cases which follow it, wherein it has been held that abstract or hypothetical cases, disconnected from the granting of actual relief, or from the determination of which no practical result can follow, will not be determined by this court.

The cause must therefore be dismissed, without prejudice. All the Justices concur, except DUNN, J., absent.

(39 Okl. 54)

**BAUGHMAN v. ANICKER et al.**

(Supreme Court of Oklahoma. July 22, 1913.)

*(Syllabus by the Court.)*

**APPEAL AND ERROR (§ 1010\*) — REVIEW — SUFFICIENCY OF EVIDENCE.**

Where the judgment is reasonably supported by the evidence, it will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.\*]

Commissioners' Opinion, Division No. 2. Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action by Bert Baughman against William J. Anicker and others. Judgment for defendant, William J. Anicker, quieting title as against the other parties to the action, and plaintiff brings error. Affirmed.

E. V. Vernor and Chas F. Runyan, both of Muskogee, for plaintiff in error. L. J. Roach and Chris. M. Bradley, both of Muskogee, for defendant in error.

ROSSER, C. This was an action to quiet title to a certain tract of land in Muskogee county. There was a judgment for the defendant, and the plaintiff brings error.

The only ground urged for a reversal is that the judgment is contrary to the evidence. The question involved is as to the age of a Creek freedwoman, named Theodora Williams. She executed a deed to the defendant, Anicker, on the 4th of August, 1910, and on the 3d of September, 1910, she executed a deed to the plaintiff. It was claimed upon the part of the plaintiff that she was not 18 years old until the 28th of August; while it was claimed upon the part of the defendant that she was 18 years old on the 4th of August. It is admitted that unless she was of age on the 4th of August the plaintiff should recover, while if she was of age on that date the defendant should recover, and the judgment should be affirmed. Upon the part of the plaintiff,

several witnesses, including her mother, testified that Theodora Williams was born on the 28th of August. Her mother was unable to say in what year she was born, and though her mother had five other children she was unable to give the birthday of any other child, except one which she guessed was born about the 25th of November, but did not know the year. Some of the other witnesses testified that Theodora was born in 1892. An affidavit was introduced in evidence which showed that her mother stated that Theodora was 18 years of age on the 4th of August, at the time her deed to Anicker was executed; but her mother testified that the affidavit was misread to her, and that the actual statement she made was that Theodora was born on the 28th of August. The parties who prepared the affidavit, however, were not impeached in any other way, and the circumstances adduced against the correctness of the affidavit are not sufficient to justify a finding that it was not read to her as prepared. Upon the part of the defendant, a man, who stated that he had been the presiding elder of the A. M. E. Church for that part of the country for a number of years, testified to having made a record of the birth of the child shortly after she was born, and that she was born on the 4th of August, and before the 28th of August. Other witnesses testified as to the appearance of Theodora Williams. It was shown that she was married and the mother of two children. She did not testify in the case. The defendant, Anicker, paid an adequate consideration for the land.

The burden was upon the plaintiff to prove his case. The evidence upon both sides is very meager and very unsatisfactory. There is some evidence reasonably tending to support the finding in favor of the defendant, especially in view of the weak and unsatisfactory nature of the evidence on behalf of the plaintiff.

Where the evidence reasonably supports the judgment of the trial court, it should not be disturbed on appeal.

Therefore the judgment in this case should be affirmed.

PER CURIAM. Adopted in whole.

(38 Okl. 536)

**MADDIN v. ROBERTSON et al.**

(Supreme Court of Oklahoma. June 10, 1913.)

*(Syllabus by the Court.)*

**1. MORTGAGES (§ 191\*)—DEFAULT—RIGHTS OF MORTGAGEE—EJECTMENT.**

Under the laws in force in the Indian Territory before the admission of the state, a mortgagee of real estate, after default of the mortgagor, was entitled to possession of the mortgaged property until the mortgaged debt was discharged, and could maintain an action

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



of ejectment therefor against the mortgagor, or those holding under him.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 469, 476, 477, 479-481; Dec. Dig. § 191.\*]

**2. PARTIES (§ 88\*) — UNNECESSARY PARTIES PLAINTIFF—MOTION TO STRIKE.**

Where plaintiff has joined unnecessary parties with him as coplaintiffs in his petition, the proper practice is a motion to strike such parties from the petition, rather than a motion to strike the petition from the files.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 145-147; Dec. Dig. § 88.\*]

**8. EJECTMENT (§ 76\*) — PETITION — AMENDMENT—NEW CAUSE OF ACTION.**

Where plaintiff in ejectment alleged in his original petition that he was the owner of the legal and equitable title to the land in controversy, he does not allege a new and different cause of action in his amended petition by alleging that he is the holder of the legal title to the land in controversy, but that the deed executed to him was executed as a mortgage, and that the conditions had been broken; and the trial court committed no error in permitting such amendment.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 205-214; Dec. Dig. § 76.\*]

Error from Superior Court, Muskogee County; *Farrar L. McCain*, Judge.

Action by *W. G. Robertson* and *Lewis A. Kean* against *W. A. Maddin*. *Linda Manuel* was made party plaintiff. Judgment for plaintiffs, and defendant *W. A. Maddin* brings error. Affirmed.

*W. W. Noffsinger*, of Muskogee, for plaintiff in error. *Geo. S. Ramsey* and *C. L. Thomas*, both of Muskogee, for defendants in error.

**HAYES, C. J.** This is an action of ejectment originally instituted in the district court of Muskogee county by defendants *W. G. Robertson* and *Lewis A. Kean* against *Wm. A. Maddin*, to obtain judgment for possession of a certain tract of land fully described in their petition, and for damages, rents, and profits. They allege in their original petition that they are the owners of the "legal estate in fee simple and equitable estate" in the land in controversy, that plaintiff in error was in the unlawful possession thereof, and had unlawfully kept them out of possession for the past year, and that rents and profits arising from the land during said time were the sum of \$40. After answer had been filed to the original petition by plaintiff in error, hereinafter referred to as defendant, one *N. J. Allen*, with permission obtained from the court, filed an interplea in the action, in which he claims an interest in and to the property in controversy. He, however, was permitted thereafter to withdraw his interplea, and to withdraw from the action, and we need not therefore notice the allegations of his interplea. During the time this interplea was pending, however, the cause was transferred to the superior court of Muskogee county, where permission was obtained to

make defendant in error *Linda Manuel* (alias *Malinda Manuel*) a party plaintiff, and thereafter defendants in error, who will hereafter be referred to as plaintiffs, obtained leave and filed their amended petition, upon which, after answer thereto by defendant, the case was tried. In this amended petition it is alleged substantially that the land involved is a portion of an allotment set apart by the Commission to the Five Civilized Tribes to the heirs of *Allie Perryman*, a minor Creek freedman; that said *Allie Perryman* died in the year 1899, leaving surviving her as the sole heir at law her mother, *Linda Manuel*. In 1902 the land involved was selected and set apart to the heirs of *Allie Perryman*, and afterwards a patent, duly executed, was issued, conveying said land to her heirs. On the 27th day of June, 1906, *Linda Manuel* executed to plaintiffs *Robertson* and *Kean* a deed, the validity of which is not questioned, and by the terms of which the fee-simple title to the land is conveyed to *Robertson* and *Kean*, but it is alleged in the petition that said deed was executed for the purpose of securing an attorney's fee, and while it is in the form of a general warranty deed, it was intended, and is in effect, a mortgage, and that the debt it secured has matured. Other allegations are contained in the amended petition, to the effect that subsequent to the selection of the lands as an allotment, a deed had been executed by *Linda Manuel* in the year 1902 to defendant, which purports to convey to him the land in controversy for the recited consideration of \$250; but it is alleged as a matter of fact that said \$250 was never paid, nor promised to be paid, and that there was in fact and in law no consideration given for said land; that the same was obtained by the defendant from *Linda Manuel* upon the false and fraudulent representations that said instrument was an instrument of writing, purporting solely to renew an agricultural lease held by defendant at that time on the lands in controversy; that *Linda Manuel* was ignorant, and did not know that the deed was intended to operate to convey any estate in said land other than a lease thereon, and was obtained from her by false and fraudulent representations. She also alleges that it is absolutely null and void, for the reason that at the time it was executed she was without power or authority to alienate said land, by reason of restrictions imposed thereon against her alienation of same by the federal government in the treaty under which said lands were allotted. Plaintiffs thereupon pray that they have judgment for possession of the land, damages for its detention, and also have a decree setting aside and declaring null and void the instrument purporting to be a deed executed to defendant *W. A. Maddin* by *Linda Manuel*, and that said deed be removed as a cloud on that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



title. A motion to strike this amended petition from the files, upon the grounds that it changed the cause of action, the title of the action, and the parties to the action, was overruled. After answer was filed by defendant there was a trial to the court, which resulted in findings of fact and judgment thereon in favor of plaintiffs for possession of the land and cash.

Counsel for defendant has set out in his brief 14 assignments of error, but only two propositions are argued, and supported with authorities, as is required by rule 25 of this court (95 Pac. viii). Those propositions, repeated in the language of the brief, are as follows: First, "no cause of action existed in the original plaintiffs at the time of the institution of the action"; second, "it is error to permit an amendment that substantially changes the cause of action or defense." We shall not discuss any other propositions of law that might arise in this proceeding than the foregoing argued in defendant's brief. Both of these propositions arose on defendant's motion to strike the amended petition of plaintiffs from the files. No contention is made by defendant's counsel that the deed in 1902 from Linda Manuel to Maddin is valid, and that she therefore had no estate in the land at the time she executed the mortgage to her coplaintiffs. He, on the other hand, states that this contention is not presented by the pleadings and facts in the case, and he relies wholly to reverse the case upon the alleged error of the court in permitting the amendment. There is no contention that the original petition filed in the action by plaintiffs Robertson and Kean did not state a cause of action; but it is contended that by the amended petition upon which the case was tried, it is shown that their only interest in the premises in controversy is that of a mortgagee, and that such an interest will not support an action of ejectment for possession by the mortgagee, and therefore the amended petition discloses that said plaintiffs Robertson and Kean had no cause of action at the institution of this action in the trial court. This contention is without merit.

[1] Their mortgage was executed to them before the admission of the state into the Union, and in that part of the state which formerly constituted the Indian Territory, in which jurisdiction the interest and rights of a mortgagee in mortgaged real estate were determined by the rule at common law. By this rule the mortgagee may, after condition broken, recover in ejectment against the mortgagor. *Moore v. O'Dell*, 27 Okl. 194, 111 Pac. 308. Plaintiffs Robertson and Kean, by reason of their mortgage, had such an estate in the land, the debt which it secured having matured before the bringing of this action, as alleged in the amended petition, as would sustain an action of ejectment

against their coplaintiff, Linda Manuel, the mortgagor, if she were in his possession, or those claiming under her. Robertson and Kean are the holders of the legal title to the premises in controversy; but under their agreement with their grantor, she has an equity of redemption.

[2] As no effort is made in this proceeding to settle the equities between the mortgagees and the mortgagor, we are of the opinion that under the facts as alleged in the amended petition, Linda Manuel was an unnecessary party to this proceeding; but the proper procedure would have been a motion to strike her name from the amended petition as an unnecessary party, rather than to strike the amended petition from the files.

[3] Nor is there any merit in the contention that by the amended petition the cause of action was changed. In the original petition plaintiffs Robertson and Kean alleged that they were the owners of the legal and equitable title to the land in controversy, and therefore entitled to possession thereof. Stated concisely, the cause of action alleged by them was right of possession to the premises in controversy, and a violation of this right by defendant. The facts contained in the amended petition state the same cause of action. It is true that under the facts of the amended petition, certain equities are shown to exist between plaintiffs Robertson and Kean and their coplaintiff and grantor, Linda Manuel; but it is not attempted to adjudicate these equities in this proceeding; nor are they such as would in any way affect the right of plaintiffs Robertson and Kean to possession of the premises.

We are therefore of the opinion that a reversal of the cause upon the grounds urged should be denied, and the judgment of the trial court is affirmed. All the Justices concur.

(10 Okl. Cr. 77)

#### METCALF v. STATE

(Criminal Court of Appeals of Oklahoma.  
July 26, 1913.)

#### (Syllabus by the Court.)

##### 1. CRIMINAL LAW (§ 59\*)—PRINCIPALS.

(a) All persons who take part or participate in the commission of an offense are guilty as principals.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 71, 73, 74, 76–81; Dec. Dig. § 59.\*]

##### 2. INTOXICATING LIQUORS (§ 169\*)—ILLEGAL SALES—AGENTS.

(b) Any person who acts as a messenger or agent of the buyer in going after, purchasing, or bringing to such purchaser intoxicating liquors in this state is thereby aiding and assisting in the sale of such liquor and may be prosecuted for such sale.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 187, 188; Dec. Dig. § 169.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Appeal from County Court, Ellis County; A. L. Squire, Judge.

R. A. Metcalf was convicted of violating the prohibitory law, and appeals. Affirmed.

C. B. Leedy, of Arnett, and J. P. McLaughlin, of Osage City, Kan., for plaintiff in error. Smith C. Matson and E. G. Spilman, Asst. Attys. Gen., for the State.

**ARMSTRONG, P. J.** The plaintiff in error, R. A. Metcalf, was tried and convicted at the March, 1912, term of the county court of Ellis county on a charge of selling intoxicating liquor, and his punishment fixed at a fine of \$200 and imprisonment in the county jail for a period of 75 days.

The testimony on behalf of the state shows that one E. F. Brenecke went to the City Hotel in November, 1910, which was owned and operated by the plaintiff in error, and asked the plaintiff in error if he knew where he could get some whisky. That plaintiff in error said he did not know, but would go to see. That witness gave him a dollar. That he left the room and brought back a pint of whisky, set it down, and the witness picked it up and went away. The plaintiff in error, testifying in his own behalf, said that he took the dollar and went across the street and gave it to a man named Riley. That Riley came back with him, but that he did not know what became of the whisky.

[1] In the case of *Buchanan v. State*, 4 Okl. Cr. 645, 112 Pac. 32, 36 L. R. A. (N. S.) 83, this court held that a person who takes part, participates, or engages in any offense is guilty as a principal, and that it is immaterial whether he has any interest in or receives any financial gain from the commission of such crime.

[2] Under the law in this state the plaintiff in error is guilty on his own statement, and it is unnecessary to consider questions raised in his behalf on appeal. No injustice was done, and he was not deprived of any substantial right on the trial.

The judgment is therefore affirmed.

**DOYLE and FURMAN, JJ., concur.**

(10 Okl. Cr. 641)

#### METCALF v. STATE.

(Criminal Court of Appeals of Oklahoma.  
July 26, 1913.)

Appeal from County Court, Ellis County; A. L. Squire, Judge.

R. A. Metcalf was convicted of violating the prohibitory law, and appeals. Affirmed.

J. P. McLaughlin, of Osage City, Kan., and C. B. Leedy, of Arnett, for plaintiff in error. Smith C. Matson and E. G. Spilman, Asst. Attys. Gen., for the State.

**PER CURIAM.** The plaintiff in error, R. A. Metcalf, was convicted in the county court of Ellis county at the March, 1912, term on a charge of maintaining a place wherein intoxi-

cating liquors were illegally sold, and his punishment fixed at a fine of \$200 and imprisonment in the county jail for a period of 80 days.

We have carefully examined the record and are unable to say that the judgment of the trial court is wrong. It does not appear affirmatively that the plaintiff in error was denied any substantial right on the trial.

The judgment is therefore affirmed.

(10 Okl. Cr. 39)

#### BLOODSWORTH v. STATE.

(Criminal Court of Appeals of Oklahoma. Aug. 15, 1913.)

(Syllabus by the Court.)

#### 1. CRIMINAL LAW (§ 1004\*)—APPEAL—GOOD FAITH OF APPELLANT.

An appeal should not be taken from a judgment of conviction in a trial court, unless it is taken in good faith, and is prosecuted to final determination in the appellate court.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1004.\*]

#### 2. CRIMINAL LAW (§ 1182\*)—APPEAL—PROSECUTION.

When an appeal is taken in this court, and no brief is filed on behalf of the plaintiff in error and no appearance made for oral argument, the judgment will be affirmed, in the absence of fundamental error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3203-3214; Dec. Dig. § 1182.\*]

Appeal from District Court, Garvin County; R. McMillan, Judge.

Henry Bloodsworth was convicted of larceny, and appeals. Affirmed.

Patchell & Henderson and Blanton & Andrews, all of Pauls Valley, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

**ARMSTRONG, P. J.** The plaintiff in error, Henry Bloodsworth, was convicted at the January, 1912, term of the district court of Garvin county on a charge of larceny of live stock, and his punishment fixed at imprisonment in the state penitentiary for a year and a day.

[1, 2] The appeal was filed in this court on the 15th day of July, 1912, more than a year prior to the time it was placed on the assignment to be heard. No brief has been filed on behalf of the plaintiff in error, and no appearance was made for oral argument when the cause was set for hearing in this court. All persons convicted of crime in the courts of this state are entitled to appeal to this court under the law. This fundamental right is given, not for the purpose of delaying justice, but in order that no injustice or wrong be done such persons. An appeal should not be taken unless it is taken in good faith, and is to be prosecuted to final determination in the appellate court. Counsel who appeal causes for clients are charged with the duty of following that appeal by a brief or argument in the appellate court. When this is not done, it is evident that such

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



appeals so neglected were taken only for delay, and are wholly without merit. Occasionally this neglect is due to oversight, but all cases are set for oral argument before this court, and counsel of record are notified by the clerk. When no brief is filed, and no appearance made for oral argument, the record will be examined for the purpose of determining whether or not jurisdictional facts are disclosed, and when such facts are disclosed, and no fundamental error appears, the judgment of the trial court will be affirmed.

This record has been so examined, and, no fundamental error appearing, the judgment of the trial court is affirmed, with directions to that court to cause it to be executed.

DOYLE and FURMAN, JJ., concur.

(10 Okl. Cr. 100)

**PATE v. STATE.**

(Criminal Court of Appeals of Oklahoma. Aug. 15, 1913.)

*(Syllabus by the Court.)*

**PERJURY (§§ 11, 12\*)—EVIDENCE—SUFFICIENCY.**

On the trial of a person charged with perjury, the state is required to show, not only that the testimony given was false and corruptly given, but must also show that it was material to the issue joined in the cause on trial in which such testimony was given. When this is not done, a judgment of conviction cannot be sustained.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 38-54, 55-61; Dec. Dig. §§ 11, 12.\*]

Appeal from District Court, Pontotoc County; Tom D. McKeown, Judge.

Anthony Pate was convicted of perjury, and appeals. Reversed.

Crawford & Bolen, of Ada, and W. I. Cruce, of Ardmore, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

ARMSTRONG, P. J. Anthony Pate, the plaintiff in error in this cause, was convicted at the November, 1911, term of the district court of Pontotoc county on a charge of perjury, and his punishment fixed at imprisonment in the state penitentiary for a period of 10 years.

The conviction is based upon an allegation that the plaintiff in error gave certain false testimony in a cause tried in the district court of Pontotoc county, wherein one Mack Lee was charged by the state with the murder of E. M. Putnam. It is alleged in the information that it became and was a material issue in said case whether or not the said Mack Lee was in Coal county, Okl., on the 23d day of February, 1909, or at some other place, and that said Anthony Pate willfully and corruptly testified that Mack Lee was at the home of this plaintiff in error in

Coal county, Okl., on said 23d day of February, 1909. It appears from the record that the plaintiff in error gave the testimony complained of, and also that said testimony was false. The testimony was unqualifiedly given, and, as said by the Assistant Attorney General in his confession in error, if this was material to the issue—that is, the testimony complained of—it was undoubtedly perjury. We fail, however, to see from the record before us wherein it was shown that said testimony was material to any issue presented on the trial of Mack Lee. Putnam was killed on the 16th day of January, 1909, and just how the whereabouts of Mack Lee on the 23d day of February, 1909, became material to the issue in that trial we are unable to discover from the record before us.

On the trial of a person charged with perjury the state is required, not only to show that the testimony given was false and corruptly given, but also that it was material to the issue joined in the cause then being determined. No such proof was offered, and it cannot be presumed. If the state can show the materiality or pertinence of this testimony to the issues tried in the Mack Lee Case, then this cause should be retried; otherwise it should be dismissed.

The judgment is reversed, with directions to grant a new trial.

DOYLE and FURMAN, JJ., concur.

(10 Okl. Cr. 438)

**REMILLARD v. STATE.**

(Criminal Court of Appeals of Oklahoma. July 19, 1913.)

*(Syllabus by the Court.)*

**CRIMINAL LAW (§ 1159\*)—APPEAL—CREDIBILITY OF WITNESSES.**

Where there is a direct contradiction between the testimony of the complaining witness and that of the defendant, it is for the jury to determine which is worthy of belief, and their determination ordinarily will be sustained.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

Appeal from County Court, Ellis County; A. L. Squire, Judge.

Louis Remillard was convicted of violating the prohibitory law, and appeals. Affirmed.

C. B. Leedy, of Arnett, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen. (Herbert M. Peck, of Oklahoma City, of counsel), for the State.

DOYLE, J. This appeal is prosecuted from a conviction had in the county court of Ellis county on the 31st day of January, 1912, in which plaintiff in error was found guilty of unlawfully selling to Glen Hall one pint of whisky, and in accordance with the verdict of the jury he was sentenced to be confined

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



for 90 days in the county jail and to pay a fine of \$150.

The complaining witness, Glen Hall, testified that he went to the defendant's livery barn and asked him if there was anything around there to drink, and defendant replied that he did not know, but that he might find some in the manger; that he went to the manger and found a pint of whisky, and left a dollar, and as he left the barn he told the defendant that he had left a dollar in the manger, and defendant replied, "All right." The defendant, as a witness in his own behalf, stated that Glen Hall came into his barn of several occasions and asked him for whisky, but that he had never sold any to Hall, or kept any at the barn for sale, and denied that he said to Hall that he might find some in the manger.

These were the only witnesses who testified. There is a direct conflict in the evidence on the part of the state and that of the defendant. The jury had the witnesses before them, and could see their manner of testifying, and they, no doubt, in determining the truth, took into consideration all the attending circumstances of the case. The evidence was sufficient to satisfy the jury that the statute had been violated, and, if there is sufficient evidence to sustain the verdict, it must stand.

There is nothing shown by the record which casts any reflection upon the fairness or impartiality of the jury, and the case appears to have been carefully tried on the part of the court as well as of counsel.

It appearing that the defendant has had a fair and impartial trial, the judgment of the lower court is affirmed.

ARMSTRONG, P. J., and FURMAN, J., concur.

(10 Okl. Cr. 41)

#### FLYNN v. STATE.

(Criminal Court of Appeals of Oklahoma. July 19, 1913.)

(Syllabus by the Court.)

#### CRIMINAL LAW (§ 510\*)—EVIDENCE OF ACCOMPLICE—CORROBORATION.

To allow a conviction to stand upon the testimony of an accomplice, not corroborated by any other evidence tending to connect the defendant with the commission of the offense, would be in direct violation both of the letter and spirit of section 5884 (Rev. Laws 1910) Procedure Criminal. The requirement of the law in this respect cannot be satisfied by any amount of corroborative evidence which does not tend to connect the defendant with the commission of the offense charged. *Nichols v. State*, 133 Pac. 256.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124-1126; Dec. Dig. § 510.\*]

Appeal from County Court, Garvin County; W. B. M. Mitchell, Judge.

Jack Flynn was convicted of violating the prohibitory law, and appeals. Reversed.

Thompson & Patterson, of Pauls Valley, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., and C. J. Davenport, of Oklahoma City, for the State.

ARMSTRONG, P. J. The plaintiff in error, Jack Flynn, was convicted at the January, 1912, term of the county court of Garvin county on a charge of selling intoxicating liquor, and his punishment fixed at imprisonment in the county jail for a period of six months and a fine of \$500.

The sole and only proof having any bearing on the issues joined in this cause is by an accomplice, Click Cunningham, who testified that he, Cunningham, sold the whisky in question to J. W. Mitchell, and that he, Cunningham, was working for the plaintiff in error, Jack Flynn. There is absolutely no corroboration whatever of the story told by Cunningham.

In the case of *Nichols v. State*, 133 Pac. 256, determined at the present term of court, and not yet officially reported, in an opinion by Doyle, J., we said: " \* \* \* There was no evidence adduced that tended to connect the defendant with the commission of the offense charged, except that of his codefendant, who upon his own testimony is an accomplice, and a verdict of guilty upon the uncorroborated testimony of an accomplice is contrary to law and the evidence. *Thompson v. State*, 9 Okl. Cr. —, 132 Pac. 695; *Head v. State*, 9 Okl. Cr. —, 131 Pac. 937. Our view of the evidence necessarily disposes of and determines the case; however, it is apparent from the record in this case that the most simple and plain rules of evidence and procedure were disregarded upon the trial. A record of this kind we should not pass by in silence, lest our silence should be interpreted into an indorsement of or indifference to such practices." And again: "The rule of law forbidding a conviction upon the testimony of an accomplice unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense is, under the statute (section 5884, Rev. Laws), positive and peremptory. The state only demands the punishment of a citizen, when his guilt has been clearly established according to the forms and rules of law prescribed for ascertaining his guilt. It is not to shield the guilty, but to protect the innocent that courts are steadfast in upholding the forms and rules of law by which it may be lawfully determined who are guilty. A fair trial is a legal trial, or one conducted in all material things in substantial conformity to law."

The prosecuting witness in the case at bar had been confined in jail for some time, and admitted on the stand that he had agreed to give the testimony which he did give on the trial in consideration of his release from jail and the discontinuation of prosecution



against him by the county attorney. As aforesaid, he admitted making the sale himself, and he is the only person who in any way directly or indirectly connects the plaintiff in error with the transaction. Such a conviction is not warranted by law and cannot be upheld.

There are numerous other assignments but we find it unnecessary to consider them.

If the plaintiff in error had been prosecuted for maintaining a place wherein intoxicating liquors were illegally kept for sale, the story told by the prosecuting witness could possibly be corroborated by some of the testimony offered by the state; but upon the specific charge of sale there is not a single line of corroboration.

The judgment is reversed, and the cause remanded, with directions to grant a new trial.

DOYLE and FURMAN, JJ., concur.

(10 Okl. Cr. 43)

TEAGUE v. STATE.

(Criminal Court of Appeals of Oklahoma.  
July 19, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 562\*)—EVIDENCE—SUFFICIENCY.

To sustain a conviction, it should appear not only that the offense was committed, but the evidence inculcating the defendant should be so to a degree of certainty, transcending mere probability or strong suspicion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1253, 1263; Dec. Dig. § 562.\*]

Appeal from County Court, Noble County; L. B. Robinson, Judge.

J. C. Teague was convicted of violating the prohibitory law, and he appeals. Reversed.

A. Duff Tillery and Henry S. Johnston, both of Perry, for plaintiff in error. The Attorney General, for the State.

ARMSTRONG, P. J. Plaintiff in error was convicted, and in accordance with the verdict of the jury was on the 3d day of February, 1912, sentenced to be confined for 30 days in the county jail, and pay a fine of \$50, under an information which charges that he did "unlawfully have in his possession certain malt liquors, to wit, 10 pint bottles of beer, Old Heidelberg beer, with the intent of him, the said J. C. Teague, to sell, barter, give away, and otherwise furnish the same." The petition contains various assignments of error, the majority of which relate to the admission of alleged incompetent evidence; however, it is only necessary to consider the one that the verdict and judgment was contrary to law and the evidence.

John L. McGehee testified that in serving a search warrant he found 10 bottles of beer in a room occupied by the defendant's father.

Tom Wetsel, deputy sheriff, testified that he assisted in serving the warrant, and they found 10 bottles of beer and 25 empty beer bottles. There were some records offered of the Wells Fargo Express Company in connection with the testimony of Ray Norris, who testified that he became the agent of said express company about two months after said case was filed, and found said records in the office. John Ryan testified that he was cashier at the Santa Fé freight office at Perry, and identified two freight delivery receipts for two casks of beer, delivered in the month of June, 1911. Thereupon the state rested, and the defendant demurred to the evidence, and moved the court to direct a verdict of not guilty. The demurrer and motion were overruled, and exception allowed.

J. A. Teague, on the part of the defense, testified that his age was 78 years; that he was the father of the defendant, and had lived for two years in the room where the beer was found; that he had used beer all his life; that the beer found by the sheriff and deputy sheriff was for his personal use.

There was no evidence offered in any way tending to prove an unlawful intent. In a prosecution for having possession of intoxicating liquor with intent to sell, barter, give away, and otherwise furnish, the evidence should be of such character as to overcome prima facie the presumption of innocence. If the evidence raises a mere supposition, or, admitting all it tends to prove, the defendant's guilt is left doubtful or dependent upon mere supposition, surmise, or conjecture, the court should advise the jury to acquit the defendant.

It is our opinion that the verdict and judgment is contrary to the law and the evidence. The judgment of the county court of Noble county is therefore reversed, and the cause remanded thereto, to be disposed of as required by law.

DOYLE and FURMAN, JJ., concur.

(10 Okl. Cr. 79)

JONES v. STATE.

(Criminal Court of Appeals of Oklahoma. July 26, 1913.)

(Syllabus by the Court.)

1. DISORDERLY HOUSE (§§ 16, 17\*)—EVIDENCE—REPUTATION.

In a prosecution for keeping a bawdyhouse, it is competent for the state to show the general reputation of the house as being a house of ill fame, and that the house is resorted to by people of both sexes who are reputed to be of lewd and lascivious character and from evidence of the general reputation of the house and of the inmates and persons who resort thereto as being of lewd and lascivious character. The law will infer that such characters resort thereto for lewd and immoral purposes, and that the house is a bawdyhouse. The state is not required to show specific acts of lewd-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ness or prostitution in the house. It is sufficient if it be shown that the house is commonly resorted to for the commission of acts of immorality, and that the proprietor knows the fact, and either procures it to be done, connives at it, or does not prevent it.

[Ed. Note.—For other cases, see *Disorderly House*, Cent. Dig. §§ 21-25, 26-29; Dec. Dig. §§ 16, 17.\*]

**2. DISORDERLY HOUSE (§ 17\*)—CIRCUMSTANTIAL EVIDENCE—CHARACTER.**

In such a prosecution, it is sufficient to show that others and not the keeper committed acts of immorality. That the defendant knew the character of his house and the conduct of the inmates thereof, and knew the character of those who resorted thereto, may be shown circumstantially as well as directly.

[Ed. Note.—For other cases, see *Disorderly House*, Cent. Dig. §§ 26-29; Dec. Dig. § 17.\*]

**3. DISORDERLY HOUSE (§ 20\*)—INSTRUCTIONS.**

See opinion for instructions which, upon the evidence adduced, properly declare the law.

[Ed. Note.—For other cases, see *Disorderly House*, Cent. Dig. § 31; Dec. Dig. § 20.\*]

*(Additional Syllabus by Editorial Staff.)*

**4. DISORDERLY HOUSE (§ 16\*)—EVIDENCE—ADMISSIBILITY.**

In a prosecution for keeping a bawdyhouse, in violation of Rev. Laws 1910, § 2467, evidence of the arrest and conviction of a person for frequenting defendant's house was admissible on the issue whether defendant knew the character of the inmates.

[Ed. Note.—For other cases, see *Disorderly House*, Cent. Dig. §§ 21-25; Dec. Dig. § 16.\*]

**5. DISORDERLY HOUSE (§ 16\*)—EVIDENCE—ADMISSIBILITY.**

In a prosecution for keeping a bawdyhouse, in violation of Rev. Laws 1910, § 2467, evidence of the lewd character of defendant's daughter, who resided in the house with her parents, was properly admitted.

[Ed. Note.—For other cases, see *Disorderly House*, Cent. Dig. §§ 21-25; Dec. Dig. § 16.\*]

**6. DISORDERLY HOUSE (§ 5\*)—"KEEPER" OF BAWDYHOUSE.**

A keeper of a bawdyhouse, or house of ill fame, or of assignation, or of prostitution, or other house or place for persons to visit for unlawful sexual intercourse or for any other lewd, obscene, or indecent purpose, means and includes a person who has control, proprietorship, or management of the house in question.

[Ed. Note.—For other cases, see *Disorderly House*, Cent. Dig. §§ 5, 9-13; Dec. Dig. § 5.\*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3925, 3926.]

Appeal from County Court, Jackson County; B. N. Woodson, Judge.

J. W. Jones was convicted of keeping a bawdyhouse, and appeals. Affirmed.

Lawson & Dabney, of Altus, for plaintiff in error. Chas. West, Atty. Gen., for the State.

DOYLE, J. This appeal is prosecuted from a conviction had in the county court of Jackson county, in which plaintiff in error was found guilty of keeping a bawdyhouse, in violation of section 2467, Rev. Laws, which provides that: "Any person who keeps any bawdyhouse, house of ill fame, of assignation, or of prostitution, or any other house or

place for persons to visit for unlawful sexual intercourse, or for any other lewd, obscene, or indecent purpose, is guilty of a misdemeanor and upon conviction shall be fined in any sum not less than one hundred dollars nor more than five hundred dollars for each offense." On February 15, 1912, in accordance with the verdict of the jury, the court sentenced the defendant to pay a fine of \$100.

The evidence shows that the defendant occupied a house in the town of Altus with his wife and daughter that was resorted to by persons of both sexes who were generally reputed to be of lewd and lascivious character, and that the house was commonly reputed as being a house of ill fame; that Verna Jones, known as "Blondie," the daughter of the defendant, was generally reputed as being a prostitute; that Nellie Bennett, and Bertha Jackson, and a girl called "Goo Goo" frequently stayed at the defendant's house, and they were generally reputed to be prostitutes; that S. S. Rogers had been convicted on an information which charged him as a habitual frequenter of a house of prostitution, assignation, and ill fame, to wit, the house of J. W. Jones in the town of Altus, and that he was a frequent visitor at the place. Ten witnesses for the state all testify that the house was commonly reputed as being a house of prostitution, and several of these witnesses testified as to lewd conduct on the part of the inmates, and that large numbers of men frequently visited the place.

The defendant on his own behalf testified that he worked for the North Western Railroad Company, and had lived for several months at the house in question; that Nellie Bennett stayed there about 10 days after she had been in jail, but he did not know that she was a prostitute; that the Jackson girl stayed there three or four weeks and the Goo Goo girl about 10 days; that he did not know they were prostitutes, and did not know of the lewd conduct of his daughter and the other inmates of his house; that S. S. Rogers had worked for him and stayed at his house.

That the defendant's place was a bawdyhouse is established by evidence, which is overwhelming. The defendant by his own testimony attempted to prove that he had no personal knowledge of this fact.

[1-3, 6] Error is assigned upon exceptions taken to instructions given in the court's charge, which read as follows:

"Third. A keeper of a bawdyhouse, or house of ill fame, or of assignation, or of prostitution, or other house or place for persons to visit for unlawful sexual intercourse or for any other lewd, obscene, or indecent purpose, means and includes a person who has control, proprietorship, or management of the house in question, and it must be

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



shown to you beyond a reasonable doubt that the defendant did so keep the house herein charged before you can lawfully convict him.

"Fourth. You are further instructed that it is not necessary for the state to prove, in order to convict the defendant, specific acts of illicit intercourse; but the character of the place may be shown by the general reputation it has in its neighborhood, and the general reputation of the persons who resort to said place and all circumstances that go directly to prove the conduct of the inmates thereof and those who resort to said place.

"Fifth. You are instructed that it is incumbent upon the state to prove to your minds beyond a reasonable doubt that the defendant had knowledge and acquiesced in any lewd conduct or prostitution that might have been carried on within or about his residence, and if you do not so find beyond a reasonable doubt, then you should acquit the defendant and so say by your verdict. And, in determining the knowledge or acquiescence of the defendant to any such conduct as herein set out, you may take into consideration his opportunity to be informed thereof and the surrounding circumstances under which such acts, if any, committed, in arriving at your conclusion as to the knowledge or acquiescence of the defendant therein. You are further instructed that it is necessary for the state to show beyond a reasonable doubt that the defendant knew the character of his house and the conduct of the inmates thereof and the character of those who resorted there before you would be justified in convicting the defendant; but it is not necessary for the state to prove actual knowledge on the part of the defendant of the character of his place or the inmates or those who resorted there; but such facts may be shown and proven by circumstances and facts such as will convince you beyond a reasonable doubt that the defendant was bound to have cognizance and knowledge of the conduct of the inmates of the house or those who resorted there for the purpose set out in this information."

The defendant's counsel argue that these instructions are fundamentally wrong, because in effect they inform the jury that the defendant can be held responsible for the conduct of other people when he has no knowledge of their conduct and is in no way responsible for their acts.

We fail to find any force in this argument. These instructions correctly state the law and were as favorable to the defendant as the law permitted. It has been held that in a prosecution for keeping a bawdyhouse a statement in the court's charge to the jury: "That every person is presumed to have knowledge of that which goes on in his own house, and that, if it should be shown that

persons continuously resort to such house for immoral purposes, the proprietor of the house would be held responsible for keeping an immoral house," is not erroneous. *De Forest v. United States*, 11 App. D. C. 458. We are of opinion the charge of the court constituted a correct and complete exposition of the law of the case.

[4] It is also contended that the court erred in permitting evidence of the arrest and conviction of S. S. Rogers for frequenting the defendant's bawdyhouse. We think that this was competent evidence to establish the fact that the defendant did have knowledge of the character of the inmates of his house, in connection with the admitted fact that the defendant Nelle Bennett was permitted to stay there after her arrest and conviction as a prostitute, and the record shows that no objection was made to the introduction of this testimony. A man careful of the reputation of his house is not accustomed to permit prostitutes to stay and there receive callers.

[5] Neither did the court err in permitting evidence as to the lewd character of the defendant's daughter. It was not a question of her lawful right to reside at the home of her parents, but a question of her demeanor while there, and the fact that she was the daughter of the defendant did not destroy the inferential effect of her lewd character and conduct as tending to show the character of the house.

We see no error in the admission of evidence objected to nor in the instructions excepted to. It follows that the judgment should be affirmed.

ARMSTRONG, P. J., and FURMAN, J., concur.

(10 Okl. Cr. 45)

#### SMITH v. STATE.

(Criminal Court of Appeals of Oklahoma. July 19, 1913.)

(Syllabus by the Court.)

CRIMINAL LAW (§§ 763, 764\*)—ADULTERY—INSTRUCTIONS—WEIGHT OF EVIDENCE.

The jury must be left free to determine for themselves whether the evidence is sufficient to satisfy the law, and an instruction which advises them on that subject invades the province of the jury to determine the weight and sufficiency of the evidence. (See opinion for a statement in the charge of the court held to be a comment on the weight of circumstantial evidence and erroneous.)

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770; Dec. Dig. §§ 763, 764.\*]

Appeal from District Court, Greer County; G. A. Brown, Judge.

Rose Smith was convicted of adultery, and appeals. Reversed.

John S. Maxwell, of Mangum, for plaintiff in error. The Attorney General, for the State.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes



DOYLE, J. This appeal is prosecuted from a conviction had in the district court of Greer county on the 23d day of January, 1912, in which plaintiff in error was found guilty of adultery and her punishment assessed in accordance with the verdict of the jury at imprisonment in the penitentiary for a period of one year.

The record shows that when the judgment was pronounced she waived her right of appeal. The record further shows, by her verified application filed January 29th, that the waiver of her right of appeal was made by her under a misunderstanding of her rights, and for the further reason that she had no means with which to employ counsel and pay the expenses of an appeal in said cause. That thereupon the court denied her application to furnish record of the proceedings in said cause at the expense of Greer county, but allowed said cause to be reopened for the defendant to perfect her appeal, and fixed the amount of her appeal bond in the sum of \$500, to be given within ten days. Notice of appeal and acceptance of service thereof by the county attorney was filed with the clerk of the district court on January 29th. On January 31st there was filed a written waiver of appeal with the clerk of the district court which recites: "I, Rose Smith, do hereby waive and abandon my said appeal or notice of appeal as aforesaid and ask that the clerk of the district court of this county immediately issue a commitment to the sheriff of this county so that I may at once be transferred to the state prison at McAlester." This was done in the absence of her counsel, and he on his oath states that he had no knowledge of this waiver until after her commitment in the penitentiary at McAlester. On February 13, 1912, there was filed in this court a petition in error with transcript attached, and, upon the application of plaintiff in error to be admitted to bail pending the determination of her appeal, it was ordered by this court that she be released from the penitentiary upon giving an appeal bond in the sum of \$500. The Attorney General has filed a motion to dismiss the appeal on the ground that the record does not show the service of a notice of appeal upon the clerk of the district court. The record shows that such notice was filed with the clerk. That is sufficient. The motion to dismiss the appeal is overruled.

The first and second assignments of error are the usual ones that the court erred in overruling the motion for a new trial, and that the verdict was contrary to the law and the evidence.

The third assignment is that: "The court erred in ruling out competent and legal evidence offered on the part of the defendant to prove that she was of unsound mind and not legally responsible for her acts."

The fourth is based upon an exception

taken to instruction No. 5 of the court's charge to the jury.

The concluding assignment is an averment that: "Said court erred in allowing the clerk to issue an erroneous commitment herein after said cause had been reopened on motion and affidavit of the defendant, and before the time fixed by the court for giving an appeal bond had expired, and without any further order of the court permitting such commitment to be issued."

The judgment in this case must be reversed for an error apparent on the record and duly excepted to. The charge of the court clearly invaded the province of the jury. It contains a statement which can be considered naught save a direct comment on the weight of the evidence. After a proper instruction upon circumstantial evidence in a case where the state relied solely upon such evidence, the learned judge added: "That the defendant, Rose Smith, on or about the 1st day of September, 1911, or at any time within three years prior to October 3, 1911, the date of filing the information, in Greer county, in the state of Oklahoma, did have voluntary sexual intercourse with one Mat Moore, a male person, and that the said Mat Moore was then and there married to another woman, to wit, Sallie Moore, and was not the husband of the defendant, Rose Smith, and you further believe and find from the evidence that this prosecution against the defendant was commenced by said Sallie Moore by complaint made by her (the said Sallie Moore) and that said Sallie Moore at the time of making said complaint was the wife of Mat Moore, as alleged in the information herein, and that this prosecution against the defendant is being carried on by said Sallie Moore, *then the requirements of the law as to the sufficiency of circumstantial evidence will be sustained*, and in that event you should find the defendant guilty of adultery as charged in the information, and so say by your verdict."

The weight of circumstantial evidence is not for the consideration of the court in its charge to the jury but for the exclusive consideration of the jury in rendering their verdict, and the statement, "Then the requirements of the law as to the sufficiency of circumstantial evidence will be satisfied," is erroneous as invading the province of the jury, who are the exclusive judges of the weight and sufficiency of the evidence. It is our opinion that the exception to this instruction, as a comment upon the weight and sufficiency of the evidence, was well taken, and that the defendant was thereby prejudiced.

The other errors assigned present questions of some gravity and importance, but as this appeal is taken on a transcript of the record, without a transcript of the evidence, those questions cannot be considered, except to say that it is evident that the de-



defendant's waiver of her right of appeal made out of court, and in the absence of her counsel, was not sufficient to justify the officers in issuing a commitment and causing the defendant to be incarcerated in the penitentiary before the expiration of the time fixed by the order of the court for giving an appeal bond. Counsel had been appointed by the court to represent the defendant upon her trial, and after her conviction other counsel had been employed by the father of the defendant, and they should have been notified. And in view of the facts shown upon an application for writ of habeas corpus in this court for the release of the defendant from the penitentiary, wherein it was averred that prior to this prosecution the defendant had been a resident of Caddo county, residing with her parents, and had been adjudged a feeble-minded woman and a proper person to be admitted to the Oklahoma institution for the feeble-minded at Enid, but had not been transported thereto because the superintendent of said institution had notified the clerk of the county court of Caddo county that at that time there was no room for any more inmates, the inference is irresistible that such waiver was secured by undue influence as averred in the affidavit of her counsel attached to the record. Owing to the fact that an appeal was pending, and pending the hearing plaintiff in error was released upon her appeal bond, the application for writ of habeas corpus was abandoned.

Where a woman, feeble in intellect, is charged with crime, she should not be permitted to waive any right secured to her by law, except upon the advice of or in the presence of her counsel. We are constrained to say that the vindication of public justice does not require that a feeble-minded woman, more sinned against than sinning, shall be imprisoned in the penitentiary on a charge of adultery, where it is shown that, before the time of the commission of the offense charged, she had been found to be a feeble-minded woman and a proper person to be committed to the institution for the feeble-minded.

The judgment of the district court of Greer county is reversed, and the cause remanded thereto to be disposed of as required by law.

ARMSTRONG, P. J., and FURMAN, J., concur.

(10 Okl. Cr. 75)

ALLEN v. STATE.

(Criminal Court of Appeals of Oklahoma. July 26, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1028\*)—APPEAL—CREDIBILITY OF WITNESSES.

When a fair and impartial trial is had in a trial court, and no effort is made to impeach

the prosecuting witness, either directly or indirectly, an attack in this court upon his credibility is wholly without merit and unwarranted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2619, 2620; Dec. Dig. § 1028.\*]

2. HEALTH (§ 37\*)—ANTI-CIGARETTE LAW.

The anti-cigarette law was enacted by the Legislature for the purpose of being observed and enforced, and so long as it is on the statutes, it is the duty of public officials to see that infractions thereof are punished as provided.

[Ed. Note.—For other cases, see Health, Dec. Dig. § 37.\*]

Appeal from County Court, Garfield County; Winfield Scott, Judge.

G. C. Allen was convicted of violating the anti-cigarette law, and appeals. Affirmed.

McKeever & Walker and W. T. Church, both of Enid, for plaintiff in error. C. J. Davenport, of Oklahoma City, for the State.

ARMSTRONG, P. J. Plaintiff in error, G. C. Allen, was tried and convicted at the April, 1912, term of the county court of Garfield county on a charge of having unlawfully sold cigarette papers to one Howard L. Reynolds. His punishment was fixed at a fine of \$100.

The material testimony on behalf of the state was by witness J. F. Burford, the substance of which is that he and Reynolds went into the drug store of the accused, in the city of Enid, and drank a coca-cola; that Reynolds asked the accused for some cigarette papers; that the accused reached underneath a cash register, took out two red books, commercially known as "L. L. F.," and gave them to Reynolds, who paid him 10 cents therefor. The material testimony on behalf of the accused was given by him, and in substance may be stated as follows: That the accused never at any time saw the prosecuting witness in his store, and never sold to anybody with him any article of any kind in response to a request for cigarette papers.

[1] Counsel filed an extended brief in this court wherein they attack the credibility of the prosecuting witness. The record does not disclose a single suggestion that the credibility of the witness was attacked at the trial. No question was asked him on cross-examination, and no witness was offered or questioned relative to his credibility. The members of this court know nothing of the credibility of the respective witnesses introduced at the trial; and, even if they did, in the absence of any testimony showing, or contention on the trial, that he was not a credible person, such question cannot be raised, and avails nothing here. As said, *supra*, there is nothing in the record to indicate that prosecuting witness was otherwise than thoroughly credible.

[2] There are no material errors disclosed by the record. This is the first case that has

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



come to this court upon a prosecution for a violation of this particular statute. If prosecuting attorneys, courts, and juries will follow the example of enforcing this provision of the statute, as set by the county court of Garfield county in this case, the practice of selling these prohibited articles, among many others the Legislature has penalized, would be greatly diminished. It is a violation of the law to sell or give away cigarette papers in Oklahoma, and so long as such a law is in the statute it should be observed, and violations thereof punished.

The judgment of the trial court is in all things affirmed.

DOYLE and FURMAN, JJ., concur.

(10 Okl. Cr. 83)

Ex parte BURRIS.

(Criminal Court of Appeals of Oklahoma.  
July 26, 1913.)

(Syllabus by the Court.)

ADULTERY (§ 5\*)—HABEAS CORPUS (§ 85\*)—  
PRELIMINARY EXAMINATION—EVIDENCE.

For testimony which justified an examining court in holding a defendant to answer a charge of adultery, see opinion.

[Ed. Note.—For other cases, see Adultery, Cent. Dig. §§ 10, 11; Dec. Dig. § 5;\* Habeas Corpus, Cent. Dig. §§ 77, 78; Dec. Dig. § 85.\*]

Original application for writ of habeas corpus by Roy Burris. Writ denied.

M. L. Matson, of Sapulpa, for petitioner.  
V. S. Decker, Co. Atty., of Sapulpa, for the State.

FURMAN, J. This is an original application made to this court for a writ of habeas corpus based upon the ground that the judge of the district court of Creek county is absent from the state. Accompanying the petition is an agreed statement of facts signed by the county attorney of Creek county and the attorney for petitioner. From this agreed statement of facts it appears that petitioner is confined in the jail of Creek county by authority of a commitment issued by W. E. Root, a justice of the peace of Creek county, as the result of an examining trial held before said justice of the peace, wherein petitioner was bound over to await the action of the district court of Creek county on a charge of adultery, and his bail was fixed at the sum of \$500, which petitioner is unable to give.

It appears from the evidence that petitioner is charged with having committed adultery with Oma Monroe, who was not the wife of petitioner but who was the wife of George V. Monroe and that this prosecution for adultery was instituted against petitioner and said Oma Monroe by the said George V. Monroe. The contention of petitioner is that he is not guilty of said charge and that there is no testimony sustaining the judgment of

the justice of the peace holding petitioner to answer said charge.

In determining the sufficiency of testimony in any case, the nature of the subject-matter under inquiry must be considered. It is but seldom indeed that direct and positive evidence of adultery can be produced, for persons who have illicit sexual intercourse with each other ordinarily do not commit adulterous acts in the presence of witnesses. Therefore in such cases we cannot reasonably expect to have other than circumstantial evidence as to the commission of adultery. We are of the opinion that the testimony offered in behalf of the state was sufficient to authorize the judgment of the justice of the peace holding petitioner to answer the charge of adultery. But even if we were in error about this matter, petitioner himself has furnished further evidence as to his guilt, for it is proven that after he was committed to jail he wrote and sent to his codefendant, Oma Monroe, the following letter: "My Own Dearest Darling: It seems as the whole world is against us. It just made me sick all over when the judge said what he did. They didn't have evidence to hold us over and you know that as well as I do. And Dearest that remark he said I made about you, 'There comes my whore, maybe I can get it of her.' Dearest you know common sense will teach you that I would have more sense than to make that expression right in front of him and another thing you know I was still setting right by him when you came by and was not standing by no barber pole as he said I was. Dearest, Matson is going to start habeas corpus proceedings and try and get me out and if he can't get me out, well I reckon I will have to stand a trial. Dear one, I am going to ask one more favor of you. We nearly starve to death in here and the boys at the office have been getting me a meal now and then and we only get two meals a day and I could eat as much as they give to four. Now Dear one, if you possibly can, please get me a meal ticket at the Merchants Café. You can get one for \$3.50 and one meal a day that will last me a couple or three weeks and send me .50 to buy tobacco with if you can. Dear one, how I suffer for your sake and dearest I will hold you up as innocent as long as there is a drop of blood or a breath left in my body. Oh, how I would like to have gotten to him this morning. I would have made him say my wife and then curl up his lip like you was no better than a dog. Dear one when this ordeal is over, I will take you my darling wife where no one knows and start life anew and will be happy wout we dear and if he ever molests us in any way, sort of fashion I will kill him on sight. Dearest I love you more now than ever and God knows I will stand pat and will help you all I can. Dearest, I want to talk to you so

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



bad. Dearest, just to take you in my arms. Dearest if I had never met you, you would never had to suffer this humiliation. It is all my fault. God, why was I ever born? Dearest will you forgive me for causing you to suffer so? Dearest I have read both of these books. Now darling please for God's sake get me that meal ticket for I am nearly starved. My clothes are getting too big for me. I am falling off fast. If you can't do anything for me, please write me a letter and send a book or two for it seems as that you are the only friend I have in this world. I will more than repay you dearest. Do what you can dearest for I am so hungry. Well I will write no more for this time. Remaining forever your own Darling Heart-Broken Brown Eyed Boy. With all my love and a thousand kisses."

This letter is strongly suggestive of the fact that petitioner had debauched the wife of George V. Monroe. Men who are guilty of such conduct as this are most dangerous members of society. There is nothing in which society has a deeper concern than in the preservation of the integrity of the home and in the protection of the sanctity of the marital relations. A country is simply an aggregation of homes, and no country can rise superior to the sanctity and purity of its homes. Therefore, whenever a man invades the sanctity of a home and debauches the wife of another, he is guilty of treason against society and becomes an enemy to the human race. The sooner such men are sent to the penitentiary and the longer they are kept there the better it will be for society.

Petitioner in the letter above set out complains bitterly that as the result of his confinement he is losing in flesh and that his clothes are becoming entirely too large for him. If he will take a philosophical view of the situation he can console himself with the reflection that this may not be an unmixt evil, for as his blood becomes thinner and cooler it may have the effect of moderating the ardor of his affections for another man's wife and of assisting him in subduing his passions and keeping them within due bounds, which all good citizens should do. While petitioner may not take this view of the matter, yet if it has this effect it will certainly make a better and safer citizen of him and keep him out of trouble in the future. Seducing other men's wives and then threatening to kill the injured husband on sight if he objects to his wife's defilement are things which the law will not sanction, tolerate, or condone. Such men must either restrain their passions, leave the state, or expect to spend their time in jails or in the penitentiary.

The letter written by petitioner to his co-defendant fully sustains the statement frequently made by this court, viz., that illicit love is a most prolific source of crime and

assassination, for in this letter petitioner expresses a determination to possess the wife of George V. Monroe and threatens to kill the said Monroe if he attempts to interfere with this unlawful purpose. Human experience teaches that when a wife has been seduced she hates her husband and will not hesitate at any means to destroy him in order that she may gratify her illicit love. Many revolting assassinations have taken place in Oklahoma which were prompted by this motive alone, as is abundantly shown by the records of the courts.

The action of the justice of the peace in committing petitioner to answer the charge of adultery is sustained. The only mistake made by the justice was in fixing the bond of petitioner at \$500. It should have been larger.

The petitioner for a writ of habeas corpus will be denied.

ARMSTRONG, P. J., and DOYLE, J., concur.

(10 Okl. Cr. 49)

#### OELKE v. STATE.

(Criminal Court of Appeals of Oklahoma.  
July 19, 1918.)

#### (Syllabus by the Court.)

#### 1. INDICTMENT AND INFORMATION (§ 196\*)—INFORMATION CHARGING MISDEMEANOR—SUFFICIENCY.

An information charging a misdemeanor, preferred and signed by a legally constituted assistant county attorney, is sufficient to sustain a conviction, where no objection is made by motion to set aside, or by demurrer thereto.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 628-635; Dec. Dig. § 196.\*]

#### 2. INDICTMENT AND INFORMATION (§ 52\*)—INFORMATION CHARGING MISDEMEANOR—SUFFICIENCY.

Where an information charging a misdemeanor states an offense, and is sworn to positively by the county attorney, it is sufficient to authorize a warrant for the arrest of the defendant, and is sufficient to authorize the county court to put the defendant upon his trial.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 163-168; Dec. Dig. § 52.\*]

#### 3. CRIMINAL LAW (§ 742\*)—TRIAL—CREDIBILITY OF WITNESSES—QUESTION FOR JURY.

The credibility of the witnesses is the exclusive province of the jury to determine, and if they believe a witness has been impeached, the law does not require them to believe him, it matters not how much his evidence may have been corroborated; and it is error for the trial court to take this right away from them by its instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1093, 1138, 1719-1721; Dec. Dig. § 742.\*]

#### 4. CRIMINAL LAW (§§ 796, 889\*)—VERDICT—CORRECTION—INSTRUCTIONS.

Where upon the request of the defendant the court instructs the jury that, in the event they find a verdict of guilty, they may assess and declare the punishment in their verdict, it

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



is the duty of the court to require the jury, if they find a verdict of guilty and fail to agree upon the punishment, to so say by their verdict; and, if the jury render a verdict not in form, the court should with proper instructions direct them to reconsider it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1928-1934, 2109, 2110, 2112; Dec. Dig. §§ 796, 889.\*]

Appeal from the County Court, Canadian County; W. A. Maurer, Judge.

Carl Oelke was convicted of a misdemeanor, and appeals. Reversed, and new trial granted.

Forrest & Sansom, of El Reno, for plaintiff in error. Chas West, Atty. Gen., Smith C. Matson and E. G. Spilman, Asst. Attys. Gen., for the State.

DOYLE, J. This appeal is prosecuted from a conviction had in the county court of Canadian county on the 11th day of November, 1911. The judgment and sentence of the court was that the defendant be confined at hard labor in the county jail for a period of six months, and that he pay a fine of \$500.

The information, omitting title and indorsements, is as follows:

"Now comes W. E. Bennett, assistant county attorney of Canadian county, state of Oklahoma, who prosecutes on behalf of the state, and gives the court to know and be informed that one Carl Oelke, late of the county of Canadian and state of Oklahoma, on or about the 3d day of July, in the year of our Lord one thousand nine hundred and eleven, at and within the said county and state, did then and there willfully and unlawfully sell malt liquor, to wit, beer, to John Carnahan and J. S. Watson, said sale being made at one and the same time, and constituting a single transaction, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state. W. E. Bennett,

"Assistant County Attorney.

"The State of Oklahoma, Canadian County—ss.:

"Personally appeared J. L. Trevathan who, being first duly sworn, on his oath says that the statement contained in the above information is true. J. L. Trevathan.

"Subscribed in my presence, and sworn to before me, this 17th day of August, 1911.

"[Seal.]

J. O. Breuer,

"Clerk County Court."

The evidence was substantially as follows: J. S. Watson, the first witness called, testified that he bought two bottles of beer at the Belmont Hotel, and John Carnahan paid for it, and he and Mr. Carnahan drank it. On cross-examination he stated that he was employed in gathering evidence in the enforcement of the prohibitory law, and his compensation depended partly upon his success; that he had been drinking before he

went to the defendant's place. John Carnahan testified that he was a farmer, living near Calumet; that he went to the Belmont Hotel with Watson and bought a couple of bottles, and they drank it, and he was then asked if it tasted like beer, and answered: "No, sir; I do not think so." He was then asked if it tasted more like beer than anything you could think of, and answered: "No, sir." J. L. Trevathan, county attorney, who verified the information, was called as a witness for the defense, and testified that he had no personal knowledge of the commission of the offense charged; that his verification was based on the testimony of said witnesses before a court of inquiry.

[1, 2] It will be observed that the name of the county attorney does not appear in the body of the information, nor is the name of the county attorney subscribed thereto, as required by section 5694, Rev. Laws. We have held that an information signed in the name of the county attorney, by a duly and legally appointed assistant county attorney, satisfies the law, and is sufficient. McGarrahan v. State, 9 Okl. Cr. —, 183 Pac. 260. That W. E. Bennett, assistant county attorney, was acting under and by the directions of the county attorney appears from the fact that the information is verified by the county attorney, and the record shows that the county attorney in person prosecuted the case. We think the omission of the name of the county attorney in the body of the information is a technical defect which did not affect the substantial rights of the defendant, and the error was waived by failing to file a proper motion or demurrer thereto. The proper practice is for the assistant county attorney to sign the name of his principal to the information, yet we think it is sufficient when signed by and in the name of a legally constituted assistant, when no objection thereto before verdict is made. Where an information charging a misdemeanor is sworn to positively by the county attorney, it is sufficient to authorize a warrant for the arrest of the defendant, and is sufficient to authorize the county court to put the defendant upon his trial, even though the county attorney had no personal knowledge of the commission of the offense charged.

[4] The record shows that the defendant requested that the court instruct the jury that, in the event they found a verdict of guilty, they should assess and declare the punishment in their verdict. The jury returned a general verdict, finding the defendant guilty, but did not say by their verdict that they were unable to agree upon the punishment to be inflicted, and the court imposed the maximum punishment. Section 5926, Rev. Laws, provides: "If the jury render a verdict not in form, the court may, with proper instructions as to the law, di-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



rect them to reconsider it, and it cannot be recorded until it be rendered in some form from which it can be clearly understood what is the intent of the jury." We think it was the duty of the court to require the jury to render a formal verdict, showing that they were unable to agree upon the punishment.

[3] It also appears that an instruction was given, which by repeated decisions of this court has been held to constitute reversible error in a close case. *Rea v. State*, 3 Okl. Cr. 269, 105 Pac. 381; *Foster v. State*, 8 Okl. Cr. 139, 126 Pac. 835.

For the errors indicated, the judgment of the lower court is reversed, and a new trial granted.

ARMSTRONG, P. J., and FURMAN, J., concur.

(10 Okl. Cr. 87)

Ex parte BURROUGHS.

(Criminal Court of Appeals of Oklahoma.  
July 29, 1913.)

(*Syllabus by the Court.*)

HABEAS CORPUS (§§ 1, 92\*)—NATURE—  
GROUNDS.

The office of the writ of habeas corpus is not to determine the guilt or innocence of the prisoner, and the only issue which it presents is whether or not the prisoner is restrained of his liberty by due process of law; and a defendant, held by virtue of an information preferred by a proper prosecuting officer in a court of competent jurisdiction, cannot be discharged on habeas corpus on the ground that the evidence adduced upon his preliminary examination was insufficient to show that a public offense had been committed, or probable cause to believe the defendant guilty thereof.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. §§ 1, 3, 81, 83, 87-96; Dec. Dig. §§ 1, 92.\*]

Application for writ of habeas corpus by J. C. Burroughs. Denied.

A. F. Mood, of Claremore, for petitioner.

DOYLE, J. This is a petition for writ of habeas corpus, and is filed for the purpose of setting at liberty J. C. Burroughs. Petitioner avers that he is restrained of his liberty, and is unlawfully imprisoned in the county jail of Rogers county by Hiram Stephens, sheriff of said county. It is further averred therein: "That the cause of said restraint and imprisonment, according to the knowledge and belief of your petitioner, is a commitment issued out of the county court of the county of Rogers, state of Oklahoma, by the Honorable Walter W. Shaw, county judge of Rogers county, state of Oklahoma, sitting and acting as a committing magistrate in a certain preliminary examination, upon a charge in said county court against this petitioner of the crime of larceny, and further upon an information filed in the district court of Rogers county, state of Oklahoma, based upon said preliminary examination

so had and held before said Walter W. Shaw as such committing magistrate, as aforesaid, charging this petitioner with the crime of larceny by fraud. Your petitioner further states and alleges that said restraint and imprisonment is illegal and unauthorized, because the evidence produced before said Walter W. Shaw as such committing magistrate, upon said preliminary examination so had and held as aforesaid, wholly failed to show that this petitioner was guilty of the crime of larceny by fraud, or otherwise, or any other crime within the county of Rogers, state of Oklahoma, and your petitioner further says that said evidence was wholly insufficient to raise or sustain reasonable or probable cause for believing this petitioner to be guilty of the crime of larceny, or any other crime, within the state of Oklahoma; that a certified copy of said evidence is attached hereto and made a part hereof; that a like petition has been presented to and heard by T. L. Brown, judge of the second judicial district of Oklahoma, and the relief herein prayed for denied by him. Wherefore your petitioner prays your honor to grant a writ of habeas corpus, and that he be discharged without delay from such unlawful imprisonment. J. C. Burroughs, Petitioner."

Section 4893 Rev. Laws, provides: "No court or judge shall inquire into the legality of any judgment or process, whereby the party is in custody, or discharge him when the term of commitment has not expired in either of the cases following: \* \* \* 4th. Upon a warrant or commitment issued from the district court, or any other court of competent jurisdiction, upon an indictment or information." In this case it appears from the averments of the petition that the petitioner is being held by virtue of an information preferred by the county attorney in a court of competent jurisdiction, to wit, the district court of Rogers county, and under the foregoing provision of the statute the writ of habeas corpus cannot be resorted to for the purpose of determining the sufficiency of the evidence adduced upon the preliminary examination to show probable cause. The office of the writ of habeas corpus is not to determine the guilt or innocence of the prisoner, and the only issue it presents is whether or not the prisoner is restrained of his liberty by due process of law. The due and proper administration of public justice requires that whenever an information is filed in a court of competent jurisdiction, it is its right and duty to proceed to its final determination without interference from any other tribunal, and the writ of habeas corpus cannot be resorted to on the plea that the evidence adduced upon his preliminary examination was insufficient to show that a felony had been committed, or probable cause for believing the defendant

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



guilty thereof. The defendant has a right to raise this question in the court where the information is pending, by a plea in abatement, or by motion to quash, or motion to set aside the information.

It appearing that the application is insufficient to show that petitioner is entitled to the writ of a rule to show cause, it will be denied.

ARMSTRONG, P. J., and FURMAN, J., concur.

(10 Okl. Cr. 52)

STATE v. BROWN.

(Criminal Court of Appeals of Oklahoma.  
July 19, 1913.)

(Syllabus by the Court.)

INTOXICATING LIQUORS (§ 208\*)—INDICTMENT AND INFORMATION (§ 125\*)—CONTINUANDO—DUPLICITY.

Under section 3610 (Rev. Laws 1910) of the enforcement act, it is made a misdemeanor for any person to keep or maintain, by himself or by associating or combining with others, any clubroom or other place in which intoxicating liquors are received and kept for the purpose of distribution or division among the members of any club or association, by any means whatever, and it is made a continuing offense.

The information charges that the defendant, by himself and by associating and combining with others, did keep and maintain a clubroom in which intoxicating liquors were received and kept for the purpose of distribution and division among the members of a certain association.

Held an information charging a violation of this section may charge such keeping with a continuando, and where the statute makes it an offense to do this or that, mentioning both ways disjunctively, the information may, as a general rule, embrace the whole in a single count conjunctively, and it will not be bad for duplicity.

The judgment of the lower court sustaining a demurrer to the information herein is reversed, and the cause remanded for trial.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 228, 261; Dec. Dig. § 208;\* Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.\*]

Appeal from County Court, Coal County; R. H. Wells, Judge.

E. T. Brown was charged with violating the enforcement act, and from a judgment sustaining a demurrer to the information, the state appeals. Reversed and remanded.

James R. Wood, Co. Atty., of Coalgate, for the State.

DOYLE, J. The county attorney of Coal county preferred and filed in the county court of Coal county an information, verified by his own oath which, omitting title, verification, and indorsements, is as follows: "In the name and by the authority of the state of Oklahoma now comes Jas. R. Wood the duly qualified and acting county attorney in and for Coal county, state of Oklahoma, and gives the county court of Coal county and state of Oklahoma to know and be informed

that one E. T. Brown did in Coal county, and in the state of Oklahoma, during the months of August, September, October, and November, in the year of our Lord one thousand nine hundred and eleven, and anterior to the presentment hereof, commit the crime of keeping and maintaining a clubroom for selling and furnishing and distributing and dividing prohibited liquors, in the manner and form as follows, to wit: That he, the said E. T. Brown, being then and there a member of a certain organization and an association and a club, to wit, an organization and an association and a club known as the 'Order of Owls,' did then and there willfully and unlawfully and continuously, beginning on the 1st day of August, 1911, and continuing until, and including, the 25th day of November, 1911, keep and maintain by himself and by associating and combining with other persons, to wit, William Richardson and Press Muller and Charley Addison and Walter Mayer, and with divers and numerous other persons, all members of the aforesaid Order of Owls, a certain clubroom and a place, to wit, the upper story of a two-story frame building, located on the east side of Main street, in the town of Coalgate, in said county of Coal, and state of Oklahoma, known as the 'Opera House,' and more particularly described as being situated on lots 39, 40, and 41, in block 36, in said county of Coal, and state of Oklahoma in said upper story of which said building certain malt liquors, to wit, beer, and a certain imitation of and a substitute for malt liquors, to wit, an imitation of and a substitute for beer, were, during said period of time, being continuously received and kept for the purpose, and with a complete and full knowledge and understanding on the part of him, the said E. T. Brown, of being unlawfully sold, bartered, given away, and furnished, and for the purpose and with a full and complete knowledge and understanding on the part of him, the said E. T. Brown, of being unlawfully distributed and divided among the members of said association, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the state. Jas. R. Wood, County Attorney."

Upon arraignment the defendant interposed a demurrer on the grounds: "First, that said information does not contain a statement of the acts constituting the alleged offense in such language, or in such manner, as to enable a person of common understanding to know what is intended; second, that the information is duplicitous, and charges more than one offense." The court sustained the demurrer on these grounds. The state excepted, and gave notice of appeal from the judgment and ruling of the court. Proper notices of appeal were given, and the appeal perfected by filing in this court March 1, 1912, a petition in error with transcript.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Section 3610, Rev. Laws, provides that: "Every person who shall within this state, directly or indirectly, keep or maintain by himself or by associating or combining with others, any clubroom or other place in which any liquor, the sale of which is prohibited by this chapter, is received or kept for the purpose of selling, bartering, giving away, or otherwise furnishing, or for distribution or division among members of any club or association by any means whatsoever, and every person who shall sell, barter, give away or otherwise furnish, distribute or divide any such liquors so received or kept shall be guilty of a misdemeanor." Under this section of the enforcement act it is made a misdemeanor to keep or maintain, or to associate and combine with others in keeping or maintaining, a clubroom or other place in which intoxicating liquors are received and kept for the purpose of distribution or division among the members of any club or association by any means whatsoever, and it is made a continuing offense. An information charging a violation of this section may charge such keeping with a continuando. Says Mr. Bishop: "A continuando is an allegation, in any appropriate words, that an offense whereof a day of beginning is stated is continuing commonly to another day stated." 1 Bishop's New Crim. Proc. par. 394. Says Mr. Wharton: "A continuing offense is a transaction or a series of acts set on foot by a single impulse, and operated by an unintermittent force, no matter how long a time it may occupy." Wharton's Crim. Pl. 474. It is our opinion that the information, while it may be subject to criticism for redundancy, and unnecessary particularization, is sufficient. The information charges every essential allegation of the offense defined in the section above quoted, and it is not bad for duplicity.

It follows that the judgment of the county court of Coal county, sustaining the demurrer to the information, should be reversed, and the cause remanded for trial.

ARMSTRONG, P. J., and FURMAN, J., concur.

(22 Cal. App. 268)

NICOLL v. NICOLL et al. (Civ. 1,334.)

(District Court of Appeal, Second District, California. June 10, 1913. Rehearing Denied July 10, 1913.)

1. WITNESSES (§ 144\*)—PARTIES—CLAIMS AGAINST ESTATE.

In an action by a widow against the administrator with the will annexed and the minor children and devisees of her husband, to have a trust declared in lands which he purchased with her money before his death, from the estate for which he was guardian, and thereafter willed to the children, the wife is not an incompetent witness under Code Civ. Proc. § 1880, providing that a party cannot testify, in an action against an executor or administrator, on any claim or demand against the estate

of a deceased person, although she cannot testify as to any communications between her and her husband prior to his death, under section 1881, forbidding such testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 625-643; Dec. Dig. § 144.\*]

2. APPEAL AND ERROR (§ 1056\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE—PARTY NOT ENTITLED TO JUDGMENT.

Where the wife's deposition, which was erroneously excluded, was not sufficient to entitle her to the relief prayed for, the error was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.\*]

3. TRUSTS (§ 51\*)—RESULTING TRUST—PROPERTY SUBJECT TO TRUST.

Where a wife advanced money to her husband, who was the guardian of certain minor children, to enable him to enter into an arrangement whereby another was to buy the lands of his wards and thereafter convey it to him, the wife is not entitled to have a trust declared in the property so acquired, since the husband took title as trustee for his wards, and could not agree to convey it to his wife.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 71; Dec. Dig. § 51.\*]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Eliza Jane Nicoll against Charles J. Nicoll and others. Judgment for the defendants, and plaintiff appeals. Affirmed.

G. L. Whitham and E. S. Janes, both of Los Angeles, for appellant. Chase, Overton & Lyman, of Los Angeles, for respondents.

ALLEN, P. J. The action was one to have a trust declared in certain premises described in the complaint, it being alleged in such complaint that plaintiff was the widow of John E. Nicoll, deceased; that in 1904 the defendants, minors, were the owners of the premises described, and at that time John E. Nicoll was their guardian; that said guardian effected an arrangement with one Frank P. Nicoll, through which the guardian was to procure an order and confirmation of the sale of the wards' property to Frank P. Nicoll, upon the consummation of which said Frank P. Nicoll was to reconvey the premises to the guardian, upon repayment of the amount of money expended by him in such purchase; that this arrangement was carried out. It is alleged that, in order to raise the money with which to carry out the agreement, plaintiff advanced of her own separate estate the sum of \$258 with which to pay off a street assessment, a lien against said premises, and the further sum of \$300 to reimburse Frank P. Nicoll for the amount of money expended by him in cash in the original purchase; that this money was advanced and paid by plaintiff to her husband under an arrangement and agreement that when he acquired the title through Frank P. Nicoll, he was to convey the same to her in consideration of such advancements, which conveyance he thereafter refused to make; that he subsequently died, and by his last will and testament devised

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the premises to the minor defendants. The allegations of the complaint were denied, and upon the trial the court found that the allegations of the complaint with reference to the acquirement of the premises by Frank P. Nicoll, and the contract with reference thereto, were true, but that it was not true that plaintiff advanced and paid any part of the purchase price under an agreement that the title thereto should be conveyed to her. Judgment was rendered accordingly for defendants, from which plaintiff appeals upon a bill of exceptions.

[1] The only evidence in the record tending to show any agreement upon the part of the husband to convey the premises to plaintiff, or any facts from which a trust could arise in a proper case, came from a deposition of plaintiff. An objection to the introduction of this deposition was sustained by the court, and it is urged by appellant that this was error. We are of opinion that the court improperly rejected the deposition as an entirety. That portion thereof relating to communications between husband and wife during marriage was properly excluded under section 1881 of the Code of Civil Procedure, but the plaintiff was not an improper witness under section 1880 of the Code of Civil Procedure in an action of this character.

[2] However, the deposition appears in the record, and, considering the same, and that portion thereof which was improperly excluded, there is nothing in it tending to establish any agreement for the conveyance to plaintiff of the property by her husband, and no prejudice resulted from the exclusion of the deposition. It only tends to show that, as to the amount of money appropriated by the husband for the payment of the street assessment, the same formed a part of a larger sum which plaintiff had intrusted to her husband, and which he deposited in his own name, and seems to have used at his own will and pleasure. As to the remainder of the purchase price, to wit, \$300, paid to Frank P. Nicoll in adjustment of the amounts theretofore paid by him in the purchase, it is established that this money was the separate property of the plaintiff, but it further appears that the major portion of it consisted of a previous indebtedness of John E. Nicoll to Frank P. Nicoll.

[3] Conceding, however, the advancement of the entire \$300 on account of the purchase price, there is nothing in the record which would justify a court in awarding to plaintiff the relief sought. From the admissions of her complaint, upon the receipt of the deed to the premises by the husband under his arrangement with the pretended purchaser, of which plaintiff had full knowledge, a constructive trust arose in favor of the minor children as beneficiaries; the bare legal title being in the husband. As such trustee he could not, and had no author-

ity to, make an agreement of the kind and character specified, even were such agreement established; but the court finds that there was no agreement, no advancement of this money pursuant thereto, and there is ample evidence in the record to sustain such finding.

Upon any theory of the case the judgment was right, and should be and is affirmed.

We concur: JAMES, J.; SHAW, J.

(22 Cal. App. 248)

McCLURE, State Engineer, v. NYE, State Controller.

COMMISSION FOR FIFTIETH ANNIVERSARY OF BATTLE OF GETTYSBURG v. SAME. (Civ. 1,149, 1,150.)

(District Court of Appeal, Third District, California. June 7, 1913.)

1. STATUTES (§ 255\*)—TIME OF TAKING EFFECT—CONSTITUTIONAL PROVISIONS—"USUAL CURRENT EXPENSES."

Appropriations for the construction or completion of buildings, waterworks, and other improvements for state institutions, and for the transportation of survivors of the Battle of Gettysburg to the reunion, are not appropriations for the usual current expenses of the state within Const. art. 4, § 1, as adopted October 10, 1911 (see St. 1911 [Ex. Sess.] p. xvi), providing that acts making such appropriations shall go into effect immediately, since the "usual current expenses" of a state are the common, ordinary, regular, and necessary expenses of the various departments of the state government.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 336; Dec. Dig. § 255.\*]

For other definitions, see Words and Phrases, vol. 2, p. 1792.]

2. CONSTITUTIONAL LAW (§ 48\*)—INITIATIVE AND REFERENDUM.

Const. art. § 1, as amended October 10, 1911 (see St. 1911 [Ex. Sess.] p. xvi), known generally as the initiative and referendum, should be so construed as to make effective the reservation of power on the part of the people.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.\*]

3. STATUTES (§ 248\*)—TIME OF TAKING EFFECT—CONSTITUTIONAL PROVISIONS—CONSTRUCTION—INITIATIVE AND REFERENDUM.

The exceptions from the requirements of that article in regard to the time laws shall take effect are ample to prevent any danger to the public welfare, and should not be so liberally construed as to circumvent the will of the people.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 330; Dec. Dig. § 248.\*]

4. CONSTITUTIONAL LAW (§ 53\*)—LEGISLATIVE POWERS—ENCROACHMENT ON JUDICIARY—CONSTRUCTION OF STATUTE.

The courts are not bound by a legislative declaration that an appropriation is one made for the usual current expenses of the state.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 51; Dec. Dig. § 53.\*]

5. STATES (§ 119\*)—FISCAL MANAGEMENT—GIFTS OF PUBLIC MONEY.

An appropriation of public money for the traveling expenses of the survivors of the Battle of Gettysburg to the reunion is contrary

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



to article 4, § 31 (see St. 1911 [Ex. Sess.] p. xxii), prohibiting the Legislature from giving any gift of public money to any individual.

[Ed. Note.—For other cases, see States, Cent. Dig. § 118; Dec. Dig. § 119.\*]

Applications by W. F. McClure, as State Engineer, and by the Commission for the Fiftieth Anniversary of the Battle of Gettysburg, for mandamus against A. B. Nye, as State Controller, which were consolidated for hearing. Demurrer to the petitions sustained.

U. S. Webb, Atty. Gen., for petitioners. Robert A. Warring and E. J. Hughes, both of Sacramento, for respondent.

**BURNETT, J.** We have before us two separate applications for writ of mandate to require the state controller to draw and issue his warrant upon the state treasurer in favor of petitioners for several claims presented in pursuance of certain acts of the Legislature. These legislative acts are set forth in the petitions, and the two cases were heard together, and will be considered in one opinion. A general demurrer was filed to each petition; and, as the matter is thus presented, only one question needs to be discussed, as that is decisive of the whole controversy. That question is whether, under the constitutional provision hereafter to be noticed, any of these claims must or can be paid or a warrant drawn therefor at any time prior to 90 days after the adjournment of the Legislature. That provision is found in section 1 of article 4, adopted by the people October 10, 1911, and reads as follows: "No act passed by the Legislature shall go into effect until ninety days after the final adjournment of the session of the Legislature which passed such act, except acts calling elections, acts providing for tax levies or appropriations for the usual current expenses of the state and urgency measures necessary for the immediate preservation of the public peace, health or safety, passed by a two-thirds vote of all the members elected to each house. Whenever it is deemed necessary for the immediate preservation of the public peace, health or safety that a law shall go into immediate effect, a statement of the facts constituting such necessity shall be set forth in one section of the act, which section shall be passed only upon a ye a and nay vote upon a separate roll call thereon."

It appears, without controversy, that none of the legislative acts herein involved can be construed or considered as within the purview of any of said exceptions, unless possibly of that providing for "appropriations for the usual current expenses of the state."

[1] Eliminating, therefore, the other classes of legislation, and stating further, preliminarily, that it has been much less than 90 days since the Legislature passing said

acts adjourned, we address ourselves to the question whether, in any just view of the law, we can direct the controller to draw his warrant for any of these claims on the ground that it is for the "usual current expenses of the state." The said acts of the Legislature, respectively, appropriate various sums for the purposes therein enumerated, as follows: "(1) The sum of \$12,000.00, or so much thereof as may be necessary, is hereby appropriated out of any money in the state treasury not otherwise appropriated, to be used in accordance with the law for the completion of a dam and reservoir at Mendocino state hospital. (2) The sum of \$10,000.00, \* \* \* for the construction of temporary buildings at Fresno state normal school. (3) The sum of \$23,000.00, \* \* \* for building and furnishing cottages and dormitories at Preston school of industry. (4) The sum of \$5,700.00, \* \* \* to provide for the construction of a power house, power plant, equipment, tank, tank pipe line and improvements in drainage, water, heating and electrical systems on the premises of the state normal school at Chico, California. (5) The sum of \$5,000.00, \* \* \* to be used in accordance with the law for the development and extension of the water system at the California polytechnic school." (6) The sum of \$15,000.00 is appropriated for the purpose of paying the transportation of certain veterans of the Civil War to Gettysburg, Pennsylvania, on the occasion of the fiftieth anniversary of the gigantic contest of that memorable battlefield. This act, it may be said, provides for the appointment by the Governor of a commission of three persons, who are directed to obtain the names and addresses of all veterans now residing in this state who took part in that battle, and these commissioners are charged with the duty of making the proper and necessary arrangements for said transportation. To each of these acts is appended this statement: "This bill, inasmuch as it provides for the usual and current expenses of the state, shall, under the provisions of section 1 of article 4 of the Constitution of the state of California, take effect immediately."

Notwithstanding the legislative declaration to the contrary, we think it entirely clear that not one of said appropriations is for the "usual current expenses of the state." The *usual current* expenses are the common, ordinary, regular, and necessary expenses of the various departments of the state government. It is plain that they do not include the unusual, the extraordinary, the uncommon, or the exceptional. "Usual" is defined by Webster as "such as occurs in ordinary practice or in the ordinary course of events; customary; ordinary; habitual; common." According to the same authority, "current" means "now passing, as time; as the current month; common, as current history."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



"Running" is also a familiar, and more strictly the etymological definition of "current." In 12 Cyc. 998, "current expense" is defined as "ordinary expense; expense incurred within a reasonable time." While varying forms of expression may be used, therefore, it is fair to say that by said exception the people intended to provide that the regular or ordinary running expenses of the state government should be taken out of the operation of the general rule. That their intention was thus to confine this exception within limits no more extensive is manifest by a consideration of the context and the general purpose to be reached and accomplished by said constitutional enactment.

[2] This amendment to the Constitution provides a scheme for the exercise of what is known as the initiative and referendum, and, of course, if possible, the language should be construed so as to make effective this reservation of power on the part of the people. It was clearly their purpose, except where the exigency of the public service demanded otherwise, that no legislative enactment should become operative until an opportunity were afforded the people to express their judgment as to the merits of the measure. The time within which a petition may be presented in contemplation of this action by the people is limited to 90 days after the adjournment of the Legislature, and hence the manifest propriety of suspending for said period the operation of any measure that should be thus reviewed.

[3] The exceptions provided are ample enough to prevent any menace to the public welfare by reason of such delay incidental to a submission to popular vote, and they should not be given an interpretation so elastic as virtually to circumvent and nullify the will of the people so solemnly expressed in said constitutional provision.

[4] Nor is this a case where we are bound by the legislative declaration that these appropriations are for "the usual and current expenses of the state." If it appeared that this determination of the Legislature might be a lawful and rational conclusion from facts submitted for the consideration of the legislators, then we would be bound to draw the same inference. But we are not dealing with a question involving a possible conflict of evidence, or one permitting a different rational solution. The facts appear upon the face of the enactment, and the only reasonable conclusion is that such an appropriation is not for the "usual current expenses of the state." The said legislative declaration has no greater effect, and is no more binding upon the court, than if the Legislature had declared that a certain measure is or is not constitutional. In such contingency that question would still remain for the courts to determine. The question before us is simply one of construction or interpretation of an act of the Legislature and of a provision of

the Constitution, and that is a judicial question.

While no case entirely parallel to this has been called to our attention, the following decisions are somewhat suggestive and instructive:

In an opinion of the judges of the Supreme Court of South Dakota, reported in *Re Limitation of Taxes*, 3 S. D. 456, 54 N. W. 417, the question was considered whether the Legislature had the constitutional power to provide and impose, under any circumstances, a tax of two mills on each \$100 of assessed valuation. The Constitution provided that: "The Legislature shall provide for an annual tax sufficient to defray the estimated *ordinary expenses* of the state for each year, not to exceed in any year two mills on each \$100.00 of assessed valuation." It was declared that "the *ordinary expenses* of the state are practically defined in section 2, article 12 of the Constitution, and 'are the ordinary expenses of the executive, legislative and judicial departments of the state, the current expenses of state institutions, interest on the public debt and for common schools.'" It is further stated that the *ordinary current expenses* can be estimated each year with close approximation to correctness. Therefore the Constitution had provided against excessive taxation for those purposes, by establishing a fixed maximum rate. No such arbitrary limit was feasible, so it was held, for extraordinary and emergency cases, among which the court enumerates instances where expense might be incurred "to protect the people of the state by extreme and unusual means against an approaching pestilence, or to make temporary provision for the patients of the insane hospital, unhoused and scattered by a devastating fire, or for any other exceptional and extraordinary object essential to the welfare of the state. Such expenses would be, confessedly, extraordinary and unusual."

While no attempt is made in said opinion to enumerate fully the ordinary current expenses of the state, the view does appear therein that they are limited to those that are usual, necessary, and, as far as practicable, fixed and definite in their character. The opinion does not harmonize with the position that expenses incurred for new buildings, for the completion of a dam and reservoir, for the construction and equipment of a power house and power plant, and for the development and extension of a water system, and for the transportation of the citizens of the state to and from another state are any part of the "usual and current expenses of the state."

In *State v. Commissioners of Marion County*, 21 Kan. 419, the court had before it an application for an injunction to restrain the board of county commissioners from letting a contract to erect county buildings, and in the course of the opinion it was said: "The



words 'county charges and expenses,' employed in said section 1, are synonymous with the phrase 'current expenses' in sections 16 and 181, c. 25, Gen. Stat. These phrases only include such charges and expenses as are incidental in conducting the business of the county government for the current year. It would be a strained construction of language to say that the erection of permanent county buildings, costing thousands of dollars, is the ordinary current expense of a county. It is in fact an extraordinary and exceptional expense. When permanent county buildings are once erected and completed, the benefits to the county are permanent and continuous; and, while the erection of such buildings is a county charge and expense in the sense that the county, under proper conditions, must pay the cost of them, it is not a county charge in the meaning of said section 1, Gen. Stat. 295, nor a part of the 'current expense' referred to in the fourth subdivision of section 16 and in section 181, c. 25, Gen. Stat."

In *Sheldon v. Purdy*, 17 Wash. 140, 49 Pac. 230, it is said: "The building of new schoolhouses and the purchase of schoolhouse sites do not come within any authorized signification of 'current expenses.' Neither do they come within any well-defined acceptance of 'support of the common schools.' Both the terms, 'support' and 'current expenses,' when applied to the common schools of this state, mean continuing regular expenditures for the maintenance of the schools. Building a new schoolhouse and purchasing a site, while at times necessary and proper, are unusual and extraordinary expenditures."

In *Stanton v. Board of Education*, 68 N. J. Law, 496, 53 Atl. 236, it was held that the phrases "current expenses" and "running expenses" are identical in signification.

In *Mills v. Township of Richland*, 72 Mich. 100, 40 N. W. 183, it was held that the "ordinary expenses" of a township do not include those incurred in establishing lost section corners, or "in building a town hall, for the public gathering of the citizens, whether *in whole or in part* for the use of the town."

In *Mayor, etc., of Rome v. McWilliams et al.*, 67 Ga. 106, it was held that, under the statutory classification provided by the Legislature of that state, "the erection of a town hall, with its conveniences for the city government, engine houses, etc., belong to, and are to be regarded as a part of the 'ordinary current' expenses of the city," but it was further declared that: "It has heretofore been usually understood that 'ordinary current expenses' mean those *annual* expenses attending the administration of the city government that are expended and consumed in payment of salaries, and those temporary expenditures in the way of repairs, etc., that appertain to the city, its streets, bridges, culverts," etc. It

seems, however, that the legislative authority had specified what constituted extraordinary expenses, and had provided that all other "expenses and disbursements of the city of every kind" should be considered as ordinary current expenses.

It may be suggested that one or two of the appropriations herein considered approach more nearly than the others to what is understood to be required by the said constitutional provision. With some plausibility it might be argued that a distinction in this respect exists between an appropriation to complete a structure or enterprise already begun and an instance where the expressed purpose is to initiate and, maybe, to complete a public improvement. A case might arise where the distinction would be important and persuasive, but we do not think the condition here could be affected by any such consideration.

It is likewise probably true that some of these appropriations might have been made immediately available as emergency measures, but, as already seen, we are precluded from entering upon any inquiry of that kind, since no attempt was made to comply with the constitutional requirement as to emergency measures, hereinbefore set forth.

[5] It may be said, also, that the appropriation for the transportation of veterans to Gettysburg and return is clearly in contravention of section 31 of article 4 of the Constitution, providing that "the Legislature shall have no power \* \* \* to make any gift or authorize the making of any gift, of any public money or thing of value, to any individual, municipal or other corporation whatever." No refinement can make it appear otherwise than as a gift, and therefore under the ban of the Constitution.

As a matter of sentiment it is, of course, to be regretted that this appropriation cannot be made. No doubt our citizens generally would rejoice to know that this aid had been extended to these venerable men who, in the language of Webster, "have come down to us from a former generation," and who deserve so well of their countrymen. We are heartily in accord with the spirit that would lead to the gratification of their natural and commendable desire to revisit the scene of their heroic conflict, and to stand again shoulder to shoulder with their true comrades of the days "that are past and gone," but we have neither the right nor the inclination to ignore or override the law, even for so worthy a purpose.

We think the controller is clearly right in his contention, and the demurrer to each petition is sustained, and the writ denied.

We concur: CHIPMAN, P. J.; HART, J.



(22 Cal. App. 264)

**BOWLES et al. v. HICKSON et al.**  
(Civ. 1,247.)

(District Court of Appeal, Second District,  
California. June 10, 1913.)

**1. APPEAL AND ERROR (§ 1078\*)—WAIVER OF  
ERRORS—FAILURE TO ARGUE.**

Errors assigned to rulings of the trial court which are not argued on appeal will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.\*]

**2. NEGLIGENCE (§ 184\*)—SUFFICIENCY OF EVIDENCE—FIRE.**

In an action for the burning of an apiary, evidence held sufficient to support findings of the trial court that the fire started from a burning brush pile fired by the defendant, and that the latter was negligent in kindling the fire, or in permitting it to reach the plaintiff's apiary.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267-270, 272, 273; Dec. Dig. § 134.\*]

**3. APPEAL AND ERROR (§ 1010\*)—FINDINGS OF  
FACT—CONCLUSIVENESS.**

Findings of fact by the trial court which are supported by some evidence cannot be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.\*]

**4. LANDLORD AND TENANT (§ 141\*)—CONSTRUCTION OF LEASE—CONDITION—EVIDENCE.**

In an action by a lessee against the lessor for the burning of the lessee's apiary as a result of the lessor's negligence, a statement by the lessor at the time of the leasing that the lessee should be responsible for everything on the premises and that fires were frequent, was not sufficient to show a condition of the lease that the lessor would not be liable for his own negligence, and was therefore properly stricken.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 508, 514, 515; Dec. Dig. § 141.\*]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by A. C. Bowles and another against J. L. Hickson and another. Judgment for the plaintiffs, and defendants appeal. Affirmed.

Kuster, Loeb & Loeb, of Los Angeles, for appellants. Jones & Evans, of Los Angeles, for respondents.

**JAMES, J.** This action was brought to recover damages alleged to have been sustained by plaintiffs through the negligent act of defendants. It is alleged in plaintiffs' complaint that defendants negligently kindled a fire adjacent to the apiary of plaintiffs, and that defendants negligently permitted the fire to escape from the place where it had been kindled, with the result that it destroyed 130 stands of bees belonging to plaintiffs, together with the equipment of the apiary. Plaintiffs sought not only to recover for their pecuniary loss, but also treble damages, as provided in section 3344 of the Political Code. The trial judge,

however, while he made his findings in favor of the plaintiffs, ordered judgment for the amount of \$624.50; that sum being found to be the actual value of the property destroyed. The defendants appealed from the judgment and from an order denying their motion for a new trial.

[1] On this appeal the questions to be determined relate only to the sufficiency of the evidence to sustain the findings of the trial court. While there are a number of errors assigned as to rulings of the court made during the course of the trial, only one of those points is here argued, and the remainder are therefore not entitled to any consideration.

[2] It appeared by the evidence that plaintiffs had leased a small tract of land for bee-keeping purposes from defendants some time prior to the date when their plant was destroyed by fire. Defendants owned the land surrounding that upon which the apiary was located, and a portion at least of defendants' ground was devoted to orchard purposes. Not far from the apiary and to the south of it, on the 30th of September, 1910, stood a large pile of lemon brush, or trimmings from lemon trees, which had been taken from defendants' orchard. This pile of brush was about 15 feet wide, 80 feet long, and 4 feet high, and the brush on that date was in a state of dryness, which made it very inflammable. Defendant Hickson, at about 8 o'clock on the day mentioned, decided to burn up the brush, and accordingly set fire to it. He remained about the fire watching it, and some time after he had kindled the blaze a fire started at a point some distance away and upon the ground where the apiary was located. This fire, in spite of efforts to stop its progress, ate its way through dry brush and weeds and destroyed the bees and apiary equipment. Shortly after this, Hickson remarked to some of the bystanders that he had done enough damage for one day, and guessed he would go home. On the next day he met a brother of one of the plaintiffs, and said to him, according to the latter's testimony: "I was burning lemon brush over there, and the fire got away from me, and burned the bees up." There was testimony given by some of the witnesses for plaintiffs to the effect that on the day in question a strong wind was blowing from a southerly direction, the tendency of which would be to blow sparks and firebrands from the brush pile toward the apiary. There was testimony also as to the customary method employed by the farmers when they sought to destroy brush at a time when, on account of the extreme dryness, there would be danger of the fire spreading, and by this testimony was furnished evidence of precautions to be taken, none of which was shown to have been adopted by Hickson. Also testimony tending to show that the value of the property destroyed was of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the amount determined in the findings of the court. At the trial defendants contended, and it is here insisted, that on the day when Hickson caused the lemon brush to be burned away the wind was blowing from the north to the south and away from the property of plaintiffs, and that the physical conditions showed that there was an intervening strip untouched by fire and covered with dry and inflammable brush and grass, lying between the place where the brush was burned and the burned-over ground of the apiary. The contention of defendants further was that plaintiffs' bees were not of the value fixed by the trial judge, or of any value, because they were infected with what is termed "foul brood."

[3] It must be remembered that a reviewing court on appeal cannot weigh the testimony and attempt to determine whether plaintiff at the time of the trial produced a preponderance of the evidence. Whenever it appears upon such a review that there was some evidence offered for the consideration of the trial judge, which of itself and standing alone tended to sustain the findings of fact, then the functions of a reviewing court on that examination are at an end. It has often been said that the trial judge has the witnesses before him, and that he is afforded an advantage which an appellate court cannot have in observing the demeanor of the witnesses, determining the effect of whatever interest or bias they may feel, and so is enabled, to decide with better judgment upon the facts of the case. As to each and every issue presented in this action, it must be said that the findings of the court find some support in the evidence. In effect, nothing more was decided in the case of *Garnier v. Porter*, 90 Cal. 105, 27 Pac. 55, which is cited by appellants. Under the conflicting evidence, it was peculiarly the duty of the trial judge to determine whether the fire which burned the apiary was kindled by sparks or firebrands proceeding from the blaze made by the lemon brush, and having determined this question, to then decide whether defendant Hickson was negligent in kindling the fire under all of the circumstances and conditions shown by the evidence, or whether, after having kindled it without negligence, he was negligent in permitting it to be carried onto the apiary of plaintiffs. These were all questions of fact which the trial court was called upon to determine upon conflicting evidence, and, such questions having been settled adversely to appellants, the findings of the trial judge are conclusive upon this court.

[4] Among the alleged errors of the court occurring at the trial, appellants assign the ruling striking out the answer of defendant Hickson where he proposed to tell of a conversation had with the plaintiffs or one of their brothers, which occurred at the time

the ground was leased for use of the apiary. In that answer the witness stated that he had told "one of the Bowles boys" to "take all the land you want, \* \* \* and whatever you have inside of that fence you will be responsible for, as there is stock and there is liable to be fires, and, anything happens to those bees, I don't want to be responsible for them for 25 cents a stand." Upon motion of the plaintiffs' counsel that this matter was incompetent, irrelevant, and immaterial, the court ordered it stricken out. Appellants now contend that this testimony, if allowed to remain in the record, would have furnished sufficient substance upon which to base a finding that plaintiffs had contracted to relieve defendants from all responsibility in the event that the bees or apiary plant was destroyed by fire. Giving to the statement of the witness its greatest effect in that direction, it cannot be said that the language used, if admitted, could have established a condition of the lease contract, whereby defendants would be relieved from all liability for acts of personal negligence. It was therefore not error, under the issues made at the trial, to strike this answer from the record.

No prejudicial errors being shown, the judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

(22 Cal. App. 199)

**BAXTER v. RIVERSIDE PORTLAND CEMENT CO. et al.** (Civ. 1,331.)

(District Court of Appeal, Second District, California. June 3, 1913. Rehearing Denied July 2, 1913.)

**1. PLEADING (§ 238\*)—AMENDMENT—APPLICATION—REQUISITES.**

Though courts are liberal in permitting amendment to pleadings, since allowance is within the discretion of the court, it should require some showing which would justify the exercise of its discretionary power.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 602, 620-625; Dec. Dig. § 238.\*]

**2. PLEADING (§ 258\*)—AMENDMENT—DISCRETION OF COURT.**

In an action for injuries to an employé, a motion to amend the answer so as to allege assumption of risk, made at the date the cause was set for trial three months after the original answer had been filed, was properly refused, where no showing was made as to why the defense was not pleaded when the answer was filed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 765-782; Dec. Dig. § 258.\*]

**3. APPEAL AND ERROR (§ 1041\*)—HARMLESS ERROR—AMENDMENT TO PLEADINGS.**

Where all the evidence offered concerning the assumption of risk was admitted without objection, and the court instructed the jury fully on that issue, the defendant was not prejudiced by the refusal of the court to permit it to amend its answer, so as to allege assumption of risk, after all the evidence was in.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4106-4109; Dec. Dig. § 1041.\*]



4. MASTER AND SERVANT (§ 281\*)—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE—ASSUMPTION OF RISK.

In an action for injuries received when the footboard of an engine on which an employé was riding struck a bridge, evidence held sufficient to justify findings by the jury that the servant did not know of the unsafe condition of the place, or appreciate the danger, even though he did know that the footboard had rubbed against the bridge once before, and that repairs had not been made since that time.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 987-996; Dec. Dig. § 281.\*]

5. WITNESSES (§ 398\*)—CROSS-EXAMINATION—FACTS INCONSISTENT WITH TESTIMONY.

Where a servant claimed that his injuries were caused by defective ties in a track, and a witness for the defense testified that the ties were sound, it was proper cross-examination to ask if a certain pile of ties were not the ones under the track at the time of the accident, in order to lay a foundation for showing that the ties were the same, and that they were not sound, even though such evidence showed the making of repairs subsequent to the accident.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1267, 1274, 1275; Dec. Dig. § 398.\*]

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by Clarence P. Baxter against the Riverside Portland Cement Company and another. Judgment for the plaintiff, and the defendant Riverside Portland Cement Company appeals. Affirmed.

Gurney E. Newlin, of Los Angeles, and C. L. McFarland, of Riverside (Roy V. Reppy, of Los Angeles, of counsel), for appellant. Crouch & Crouch, of Los Angeles, for respondent.

ALLEN, P. J. The action was on account of personal injuries claimed by plaintiff, an employé of appellant, to have been occasioned through appellant's negligence. The complaint was filed on January 6, 1911. On February 1st following defendant Riverside Portland Cement Company filed its answer, in which it denied all of the allegations with reference to negligence, and pleaded contributory negligence on the part of plaintiff. The cause came on for trial April 26, 1911. Before the jury was impaneled, defendant Riverside Portland Cement Company asked leave of the court to file an amendment to its answer, setting forth facts showing an assumption of risk. The court refused this leave, and the cause proceeded to trial. After all of the evidence had been submitted, defendant again asked leave to amend its answer in the same manner as before proposed, in order that the pleadings might conform to the proof, and in connection with such request filed an affidavit to the effect that defendant did not know when it filed its original answer that the defense of assumption of risk was available, and did not learn the facts connected therewith until its attorney, on April 24th, saw a certain deposition of plaintiff, wherein evidence

had been given by plaintiff tending to establish that plaintiff had assumed the risk of the injury sustained by him. This leave to amend was also denied. The jury returned its answers to certain special interrogatories hereinafter referred to, together with a general verdict in plaintiff's favor, and from the judgment pronounced upon said verdict, and from an order denying a new trial, defendant prosecutes this appeal.

[1] It is appellant's primary contention that the court erred in refusing leave to amend the answer before trial in the respect requested. Courts are and should be liberal in the allowance of amendments, to the end that the cause may be properly presented, and in many cases it has been held to be an abuse of discretion to refuse appropriate amendments through which parties might avail themselves of causes of action or defenses not properly presented by the pleadings; but courts universally require, and should require, that some showing be made which would justify the exercise of such discretionary power.

[2] In the case under consideration, when the request to amend in the first instance was made, no reason was assigned why the omission to make all of the defenses available had occurred. Nearly three months had elapsed from the filing of the answer to the time of the trial, and, without any showing, it cannot well be said that the court improperly exercised its discretionary power.

[3] When the second request was made at the conclusion of the evidence, there was little necessity for such an amendment, for the record not only shows, but the motion admits, that the parties had been permitted to go in to and had tried the question involved in the assumption of risk, treating it as an issue; and, in addition, at defendant's instance, the jury were instructed fully and completely upon the matter of assumption of risk, and were told that, in performing the labor at which plaintiff was working at the time he received the injuries complained of, plaintiff assumed the risk of danger from all injuries incident to said work which was apparent and was appreciated by him, or would have been apparent to and appreciated by an ordinarily careful and prudent person; that an employer is not bound to indemnify for losses suffered in consequence of the ordinary risks of the business in which he is employed, and that if they believed the injuries were sustained in consequence of the ordinary risks of the business, there was no obligation on the part of defendant to indemnify for said injuries. Further, if the danger in performing the labor was apparent to and appreciated by plaintiff, or would have been apparent to and appreciated by an ordinarily careful and prudent person, and such danger contributed directly or proximately to the injury, that plaintiff cannot recover therefor. And in

\*For other cases see same topic and section NUMBER in Dec. Dig. & An. Dig. Key-No. Series & Rep'r Indexes



numerous instructions the court carefully and fully, at defendant's instance, instructed the jury as to the law involved in the matter of the assumption of risk. It will thus be seen that all parties and the court recognized that the issue of assumption of risk was involved. The case was tried upon that theory, and there is nothing in the record tending in the least to show that defendant was prevented from presenting any facts connected with the assumption of risk, or that any charge refused was not in general terms given and covered by those instructions given by the court. No prejudice can therefore be said to have resulted, even applying to its fullest extent the rule with reference to amendments.

[4] It is claimed, however, by appellant that the evidence introduced establishes plaintiff's full understanding, comprehension, and appreciation of the dangers incident to the work, and therefore the assumption of risk necessarily followed; in other words, appellant challenges the accuracy of the answers to certain of the special interrogatories. The interrogatories before mentioned, propounded at defendant's instance, with the answers returned, are in these words: "(1) Would a man of ordinary prudence and intelligence have worked in the place where plaintiff was working at the time of the accident? Answer. Yes. (2) At the time of the accident did the plaintiff know the unsafe condition of the place where he was working at the time of the accident? Answer. No. (3) Previous to the accident, did the plaintiff fully understand, comprehend, and appreciate the dangers incident to working at the place where he was working at the time he was injured? Answer. No. (4) At the time of the accident did the plaintiff fully understand, comprehend, and appreciate the dangers incident to working at the place where he was working at the time he was injured? Answer. No. (5) Did the defendant Riverside Portland Cement Company promise to remedy the defect in the place where plaintiff was working at the time he was injured? Answer. No. (6) Did any employé of defendant Riverside Portland Cement Company, charged with performance of that duty, promise to remedy the defect in the place where plaintiff was working at the time he was injured? Answer. No."

We think there is evidence to be found in the record sufficient to support the special as well as the general verdict. Plaintiff was a switchman in defendant's employ. On the night of September 7, 1910, and while plaintiff was so employed, it became part of his duty to ride upon a certain footboard attached to a certain switch engine of the appellant, which engine then and there was attempted to be operated upon a track immediately contiguous to a cement bridge constructed by third parties; the engine upon appellant's road at the time running forward. In passing this bridge the footboard of the engine caught thereon, and plaintiff

was thrown in front of the engine and injured. Ten days before the accident, when the engine was backing alongside of the bridge, the footboard rubbed against the bridge, and immediately a report was made by a superior of plaintiff to those connected with defendant's road whose duty it was to repair, to the effect that "the footboard was too long and if not cut off they would not have any footboard." Plaintiff knew generally what this report contained, notwithstanding which report no repairs were made, but the engine was continued in use, running by the bridge, in the usual way. It appears that immediately after this report was made plaintiff and the others connected with the operation of the engine ran the engine by the bridge slowly, and observed its effect, and found that no contact resulted between the bridge and the footboard, and thereafter the engine was repeatedly operated alongside the bridge, and the footboard did not collide therewith, although plaintiff and other employés were carefully noting the effect of the operation under such circumstances. The footboard never rubbed the bridge again until the night of the accident, nor at any other time when the engine was running forward. There is evidence that, as a result of these experiments, plaintiff did not appreciate any further danger by reason of the footboard striking the bridge, and continued his work, knowing that the repairs had not been made. We think it is established that defendant not only provided an unsafe place for work, but that plaintiff was justified in continuing his employment under the circumstances, and cannot be said to have understood or appreciated any danger as incident thereto.

[5] Appellant's final contention is that the court erred in permitting the following question to be propounded to a witness: "Do you know whether or not the pile of ties which is in the Orange street station house were the ones which were under the track at the scene of the accident the night of September 7th?" and, under the objection of defendant, the witness answered that they were the same. One of the theories in support of the claim of negligence, and in reference to which evidence appears, was that the contact between the bridge and the footboard was occasioned on account of the ties under defendant's road at that point having been permitted to become rotten and unfit for use, and that the weight of the engine upon these defective ties inclined it towards the bridge, and as a result the contact occurred. It is claimed by appellant that the admission of this evidence violated the established rule in this state that evidence of subsequent repairs or changes is not admissible to prove negligence. Granting the force of this rule, we think that no error resulted from the ruling of the court. The record shows that immediately preceding this question an attempt was made to show subsequent repairs, which



the court refused to permit. The witness was a witness of defendant, who had testified that the ties in use at the bridge were sound, and this question was proper cross-examination as an obvious attempt to show the identity of the ties in the station house in order to lay the foundation to impeach the statement of the witness as to their sound character. Counsel for plaintiff, at the time he asked the question, stated that in connection therewith he expected to show the identity of the ties in the station house as connected with those in use at the time of the accident, and that they were not in good condition. We think that the question was proper, and that no prejudicial error resulted. It is not contended by appellant that the evidence is insufficient to establish negligence on defendant's part, except in so far as it was affected by the assumption of risk.

We perceive no error in the record, and the judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

(22 Cal. App. 258)

**BLACK EAGLE OIL CO. v. BELCHER et al.**  
(Civ. 1,342.)

(District Court of Appeal, Second District,  
California. June 10, 1913. Rehear-  
ing Denied July 10, 1913.)

**1. APPEAL AND ERROR (§ 667\*) — REVIEW — RECORD.**

Plaintiff, on objecting to the introduction of a deed, on the ground that it appeared that a certain alteration had been made in it, should have presented to the court, and incorporated in the record, evidence of the fact of alteration; and the mere statement of counsel that an alteration had been made is insufficient, on appeal, to contradict the deed, which as copied in the record discloses no alteration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2862, 2863; Dec. Dig. § 667.\*]

**2. VENDOR AND PURCHASER (§ 231\*) — BONA FIDE PURCHASER — CONSTRUCTIVE NOTICE — RECORD OF DEED.**

The letters "B. M. & S." in a deed, following the part of the description giving the fractional section, and the range, and before the words "in the county of Kern," are clearly a transposition of the letters "S. B. & M.," generally used and recognized as meaning "San Bernardino Base and Meridian," in which, or in Mt. Diablo base and meridian, all lands in Kern county are situated, so that record of the deed is constructive notice to a subsequent purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 43, 55, 487, 513-539; Dec. Dig. § 231.\*]

**3. MORTGAGES (§ 36\*) — DEED AS MORTGAGE — BURDEN OF PROOF.**

One claiming an instrument purporting to be a deed was a mortgage has the burden of proof.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 95, 96; Dec. Dig. § 36.\*]

**4. APPEAL AND ERROR (§ 1011\*) — REVIEW — FINDINGS ON CONFLICTING EVIDENCE.**

Findings on a substantial conflict in the evidence are conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

**5. VENDOR AND PURCHASER (§ 242\*) — BONA FIDE PURCHASER — BURDEN OF PROOF.**

It appearing, in an action to quiet title, that defendant claims under a prior unrecorded deed, plaintiff has the burden of showing payment of the purchase money, without actual notice of such deed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 603-605; Dec. Dig. § 242.\*]

**6. VENDOR AND PURCHASER (§ 244\*) — BONA FIDE PURCHASER — EVIDENCE OF PAYMENT.**

The recital as to consideration paid in the deed of plaintiff, claiming as a bona fide purchaser against defendant holding a prior unrecorded deed, is not even prima facie proof of payment.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 609-611; Dec. Dig. § 244.\*]

Appeal from Superior Court, Kern County;  
J. W. Mahon, Judge.

Action by the Black Eagle Oil Company against S. E. Belcher and another. From an adverse judgment and order, plaintiff appeals. Affirmed.

R. H. Cross, of San Francisco (Arthur H. Brandt, of San Francisco, of counsel), for appellant. Charles N. Sears and C. L. Olaf-  
lin, both of Bakersville, for respondents.

SHAW, J. Action to quiet title. Judgment against plaintiff, from which, and an order denying its motion for a new trial, it appeals.

The land involved is the south  $\frac{1}{2}$  of the northeast  $\frac{1}{4}$  of section 34, township 12 north, range 23 west, S. B. M., in Kern county. It was stipulated that prior to July 27, 1906, the ownership of the entire northeast  $\frac{1}{4}$  of said section 34 was vested in defendant S. E. Belcher. Plaintiff then introduced in evidence the record of a grant deed executed by S. E. Belcher, dated March 9, 1910, recorded April 5, 1910, which purported to convey the land described in the complaint to the Black Eagle Oil Company, whereupon it rested its case. Thereupon defendant offered in evidence a grant deed and the indorsements thereon, as follows:

**"Grant Deed.**

"S. E. Belcher of Los Angeles, county of Los Angeles, state of California, in consideration of forty dollars, to me in hand paid, the receipt whereof is hereby acknowledged, does hereby grant to Ezra Belcher of Long Beach, county of Los Angeles, state of Calif., all that real property situated in the county of Kern, state of California, described as follows: The northeast quarter ( $\frac{1}{4}$ ) of section thirty-four (34), township twelve (12), range twenty-three (23) B. M. and S., in the county of Kern, state of California. Witness



my hand this 27th day of July, 1906. [Signed] S. E. Belcher.

"State of California, County of Los Angeles—ss.: On this 27th day of July, 1906, before me J. E. Counts, a notary public in and for said county, personally appeared S. E. Belcher, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged that he executed the same. Witness my hand and official seal. [Signed] J. E. Counts, Notary Public in and for the County of Los Angeles, State of California. [Notarial Seal.]"

Indorsed: "Recorded at the request of E. Belcher Aug. 8, 1906, at 55 min. past 11 a. m., in Book 178 of Deeds, page 224, Kern County Records. [Signed] Chas A. Lee, Recorder."

[1] Plaintiff objected to its introduction, upon the ground that it appeared that an alteration had been made in the deed by "changing the quarter from typewritten matter to a description by pen, which has not been explained, and that no township or range, and no base or meridian, is given." The objection was overruled. As to the first objection, there is absolutely nothing in the copy of the deed, as set forth and printed in the record, to indicate or show any alteration changing the typewritten matter, by the use of a pen or otherwise, or that any alteration or change whatsoever was made in the deed. Upon attacking the integrity of the deed plaintiff should have presented to the court, and incorporated in the record for review, evidence of the facts upon which such attack was based. The mere statement of counsel that an alteration had been made cannot be deemed by this court sufficient to contradict the deed which, as here presented, discloses no alteration made therein.

[2] As to the second objection, we think it sufficiently appears that the letters "B. M. & S." are clearly a transposition of the letters "S. B. & M.," generally used and recognized as meaning "San Bernardino Base and Meridian," in which, or in Mt. Diablo base and meridian, all the lands in Kern county are situated. This deed and the indorsements thereon clearly and unequivocally show it to be a conveyance duly made and acknowledged on July 27, 1906, by S. E. Belcher to Ezra Belcher, to whom it was duly delivered, and further shows that it was, on August 8, 1906, duly recorded in the records of the recorder's office of Kern county. Under these circumstances, plaintiff, when it, on March 9, 1910, received the deed from S. E. Belcher to the south  $\frac{1}{2}$  of the northeast  $\frac{1}{4}$  of said section 34, must be deemed to have had constructive notice of the fact that its grantor had no title or interest in the property, for the reason that he had, by a good and sufficient deed, conveyed the entire northeast  $\frac{1}{4}$  of the section to defendant E. Belcher.

[3, 4] Notwithstanding the instrument pur-

ports to be a grant, appellant insists that it was intended by the parties to be a mortgage for the purpose of securing the payment of money heretofore borrowed from E. Belcher by S. E. Belcher. The burden of proving that the deed absolute in form was in fact a mortgage rested upon plaintiff. While much evidence was adduced upon the point, it was insufficient in the mind of the court to establish such fact, and its conclusion in this regard is amply supported, not only by the circumstances, but by direct and positive testimony. E. Belcher had, from time to time, prior to the making of the deed, made to S. E. Belcher numerous loans, amounting in the aggregate to several hundred dollars. On the date of the execution of the deed he paid S. E. Belcher the \$40 mentioned therein as the consideration therefor. S. E. Belcher testified: "My father was willing to accept the deed then of the property in consideration of the moneys that he had advanced to me, and did receive the deed in consideration. It was considered and agreed that that closed up all amounts owing to my father by me, and that made he and I even in our affairs." Upon the same subject E. Belcher testified that prior to the execution of the deed he had advanced money in various sums, at various times, to S. E. Belcher, and kept an account thereof in a book which he kept for such purpose. "When we wound it all up, we figured the thing all up, our books and everything, and squared up. I haven't kept no account since, but I have let him have money since, but I haven't kept any account of it." At most, there was a substantial conflict of evidence upon the question, as to which the conclusion of the trial court must be deemed conclusive.

After the reception in evidence of the deed from S. E. Belcher to E. Belcher, oral evidence was adduced, tending to show that as originally written the deed described the land as the southeast quarter, instead of the northeast quarter, and as thus written it was recorded; that after it was recorded the description in the deed was changed by striking out the words "southeast quarter" and inserting in lieu thereof the words "northeast quarter," and as so changed it was introduced in evidence, but that no acknowledgment or certificate thereof as thus altered was had or made. We are unable to attach any importance to such facts, for the reason that defendant's right to the property is not based upon any deed other than that recorded August 8, 1906, which as shown correctly described the land. Moreover, if such oral evidence be deemed material, we cannot say the court should have accepted it as being sufficient to overthrow the fact established by the deed and the indorsement thereon. If the deed as introduced in evidence was not the one recorded—and that is the real claim of appellant—such fact could have been read-



ily and easily established by offering the record thereof from the recorder's office. This was not done.

[5, 6] Another point is presented upon which we feel that the judgment and order must be affirmed. No question exists but that the deed, even conceding the alteration in the description thereof as claimed by appellant, and admitting that it was not acknowledged nor recorded, was nevertheless sufficient as a conveyance of the property as between the parties. Assuming the right of E. Belcher to be that of the holder of a prior unrecorded deed, plaintiff could not recover upon a subsequent recorded deed, unless it was a purchaser in good faith and for a valuable consideration. Nor is this a rule of pleading, as suggested by appellant. *Kenniff v. Caulfield*, 140 Cal. 34, 78 Pac. 803. When it appeared, if at all in the course of the trial that defendant Belcher based his claim to the property upon a prior unrecorded deed, the burden was imposed upon plaintiff to show that, without actual notice of the existence thereof, it had in fact parted with a valuable consideration as the purchase price of the property. "To entitle a party to protection as such purchaser, he must aver \* \* \* the payment of the purchase money in good faith, and without notice, actual or constructive, prior to and down to the time of its payment; for, if he had notice, \* \* \* at any moment of time before the payment of the money, he is not a bona fide purchaser." *Boone v. Chiles*, 10 Pet. 210, 9 L. Ed. 388; *Scott v. Umbarger*, 41 Cal. 419; *Eversdon v. Mayhew*, 65 Cal. 163, 3 Pac. 641. Nor can the recitals contained in the deed as to the consideration paid be accepted as prima facie proof of such payment. "Such recitals are but the declarations of the grantor." *Long v. Dollarhide*, 24 Cal. 218. The deed made by S. E. Belcher to plaintiff appears to have been made pursuant to an agreement, made February 21, 1910, between S. E. Belcher and one George A. Cooley, which recites that the consideration therefor to be paid to said Belcher "shall be the issuance to him of 80,000 shares of the capital stock of the Black Eagle Oil Company, a corporation now being organized by the second party (George A. Cooley), with a capitalization of \$1,000,000, with one million shares. \* \* \* The second party (George A. Cooley) shall cause said company to purchase and place upon said property machinery and tools for drilling an oil well thereon as soon as practicable, and shall cause said company to employ first party as superintendent at a salary of \$200 per month, to commence as soon as said company is ready to purchase said machinery and tools." This agreement imposed no obligation upon either Cooley or the company "now being organized" to employ S. E. Belcher at a salary of \$200 per month for any definite or fixed time. Nor can the

promise of Cooley to cause to be purchased and placed upon the property machinery and tools for drilling an oil well be construed as an obligation to drill such well, or to do anything to improve the land. Moreover, Belcher was never employed, nor were any tools and machinery for drilling an oil well placed upon the property. The only consideration, therefore, paid to Belcher for the conveyance of the property was the issuance to him of two twenty-fifths of the capital stock of the corporation, whose sole and only assets, so far as disclosed, consisted of the land so by him conveyed to it. In the absence of anything done by the corporation to improve or enhance the value of the land, the value of the entire capital stock, if all was issued, could not exceed the value of the land. In other words, the effect of the transaction is consistent with the theory that Belcher got two twenty-fifths of his own land for a conveyance of the whole thereof.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

(22 Cal. App. 233)

DABNEY OIL CO. v. PROVIDENCE OIL CO. OF ARIZONA et al. (Civ. 1,333.)

(District Court of Appeal, Second District, California. June 6, 1913.)

1. RECEIVERS (§ 2\*)—APPOINTMENT—GROUNDS.

Since Code Civ. Proc. § 564, specifies the cases in which a receiver may be appointed, it is exclusive, and no authority exists for such appointment, in the absence of facts showing a case within one or more of the provisions of the section.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 2; Dec. Dig. § 2.\*]

2. RECEIVERS (§ 32\*) — APPOINTMENT — GROUNDS—STATUTES.

Appointment of a receiver cannot be justified under Code Civ. Proc. § 564, subd. 6, authorizing such appointment in all other cases than those mentioned in the preceding subdivisions of the section, where such practice had previously prevailed in courts of equity; the case alleged in the complaint being within one of the other subdivisions of the section.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 45-50, 64; Dec. Dig. § 32.\*]

3. RECEIVERS (§ 6\*)—APPOINTMENT—GROUNDS—CONSERVATION OF PROPERTY.

Where the complaint stated a cause of action to recover property and a fund consisting of the proceeds derived from the operation of certain oil lands, and there was no claim that defendants were not operating the lands in good faith, or that they were insolvent, and it also appeared that complete protection could be afforded by injunction, the court erred in appointing a receiver pendente lite, though it was satisfied that plaintiff was probably entitled to the property and fund in question.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 12; Dec. Dig. § 6.\*]

Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Suit by the Dabney Oil Company against the Providence Oil Company of Arizona, the Midway Royal Petroleum Company, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes



others. From an order made pendente lite, appointing a receiver to take charge of the proceeds of certain oil-producing wells, defendants appeal. Reversed.

J. S. McKnight, Murphey & Poplin, Kemp, Mitchell & Silberberg, and Ben Goodrich, all of Los Angeles, and Geo. E. Whitaker, of Bakersfield, for appellants. Valentine & Newby, of Los Angeles, for respondent.

SHAW, J. The action grew out of the following facts: Plaintiff was and is a corporation organized under the laws of the state of Arizona, and authorized to do business in California. In March, 1908, it was and had been for several years the owner of a leasehold estate in 110 acres of oil-producing lands, in the McKittrick district, and the owner in fee of 160 acres of undeveloped and unproved oil lands in the Midway district, all in Kern county. During the years 1906, 1907, and 1908 it neglected and failed to pay the corporation license tax required by the statutes of the state, by reason of which fact its right to conduct business therein as a corporation had been forfeited. The fact, however, that a forfeiture followed as a result of such default in the payment of the license tax was unknown to its directors at the time. The company had become involved financially, and in an action instituted therefor by the lessors, its lease to the lands in the McKittrick district had been declared forfeited by a judgment rendered, from which an appeal had been taken and a motion made for a new trial. On March 10, 1908, the board of directors, at a meeting held in Rhode Island, adopted a resolution as follows: "That Messrs. Thomas F. Gilbane and James Spears (both of whom were directors) be and are hereby appointed an executive committee to conduct the affairs of the Dabney Oil Company, with power to raise funds either by note, secured by a mortgage on any or all of the property of the company, or by other means, for the purpose of settling the claims against the company and to purchase property or leaseholds and to develop same, subject to and by the approval of the board of directors." Pursuant to this resolution Gilbane and Spears, both of whom were members of the board of directors, came to California, where they learned for the first time that as a result of default on the part of the corporation in paying its license fees, its right to do business in the state as a corporation had been forfeited, and that a judgment had been rendered against it, the effect of which was to declare the lease of the McKittrick property forfeited. Thereupon Spears and one Potter entered into negotiations with the owners of the leasehold, as a result of which they purchased for themselves and in their own names the fee of the property for the sum of \$40,000, and caused the proceedings for prosecuting the appeal from the judgment to be dismissed. Thereupon they, with Gilbane, caused to be organized under

the laws of Arizona a corporation known as the Providence Oil Company, with a capital stock of \$250,000, all of the stock of which was to be issued to and owned by the Dabney Oil Company and its stockholders, it being provided that said three persons as trustees should for five years have the voting power upon 55 per cent. of the stock; their intent apparently being that, except as to the right retained to vote the 55 per cent. of the stock, this company should take the place of and be substituted for the Dabney Oil Company. Thereupon Spears and Potter executed to the Providence Oil Company a lease of the property, title to which they had acquired, and of which, prior to forfeiture thereof, the Dabney Oil Company possessed a leasehold. The royalty reserved in this lease was the same as that under which the Dabney Oil Company held the property from its lessors. The lease contained a provision requiring the Providence Oil Company to bore a certain number of wells each year, but this provision was canceled and annulled. As purported managers in charge of the settlement of the affairs of the defunct Dabney Oil Company, they, on November 25, 1909, executed a deed conveying title of the Midway property to the Providence Oil Company, and the Providence Oil Company executed a lease, containing conditions for forfeiture in case of noncompliance therewith, of a portion of this tract to one A. T. Jergins, whose right and interest therein was, by successive assignments, transferred to the Midway Royal Petroleum Company, under which lease said company and its predecessors drilled an oil well upon the property and made expenditures thereon of upwards of \$50,000.

In 1909 an act was passed by the Legislature (Stats. 1909, p. 454), providing terms and conditions under which corporations which had failed to pay their license tax might be restored to their former rights. Plaintiff, upon compliance with these conditions, was, on November 22, 1909, rehabilitated in its right to conduct business in California. Thereupon plaintiff filed its complaint herein, asking for a decree declaring that Spears and Potter held said Midway tract, lease of which had been made to the Providence Oil Company, in trust for plaintiff; that the deed made by Spears and Gilbane as managers of the Dabney Oil Company, purporting to convey the Midway tract to the Providence Oil Company, be declared void, and that plaintiff's title to both pieces of property be quieted; that an accounting be had as to all of said defendants, as well as for other relief, and thereafter, upon notice, applied to the court for the appointment of a receiver of all of the property, and for an injunction enjoining defendants from operating the same. Upon the hearing of this motion, upon the pleadings and affidavits filed, the court made an order appointing a receiver, who was directed to take possession of the net



proceeds derived from the sale of oil produced upon the McKittrick district tract operated by the Providence Oil Company, and also the net proceeds derived from the sale of oil produced upon the Midway tract so leased by the Providence Oil Company to the Midway Royal Petroleum Company. It was further ordered that said Providence Oil Company, its officers, agents, attorneys, servants, and employes, and all persons, corporations, associations, or firms, holding any of the money, income, proceeds, and profits derived from the oil lands, either directly or indirectly, should, immediately upon production of the order, surrender into the possession of such receiver all of the said property referred to. It was further ordered that, in arriving at the net proceeds to be paid to the receiver, no salaries or compensation for services to the officers or directors of either the Providence Oil Company or the Midway Royal Petroleum Company, nor any expenses for drilling additional wells, should be allowed.

As appears from the complaint, the main purpose of the action is to recover possession of the oil lands and the title thereto, and to recover the fund derived by defendants from the proceeds of the sale of oil alleged to have been wrongfully abstracted from the land. The several answers, while admitting the salient facts, deny the practice of any fraud, and allege not only a ratification by plaintiff of defendants' acts, but the answer of the Midway Royal Petroleum Company purports to set up matter of estoppel against plaintiff. The pleadings and affidavits used at the hearing of the application for a receiver cover upwards of 400 pages of printed matter, from a consideration of which the trial judge stated in a written opinion, copy of which is presented, that it was impossible to say on which side justice inclined. Insolvency of defendants was not alleged. The lease to the Midway Royal Petroleum Company provided that its leasehold should be forfeited, unless it in good faith kept one string of tools in operation continuously until one well at least was drilled upon each 10 acres of the demised tract. At the time of making the order only one well had been drilled.

[1, 2] Section 564 of the Code of Civil Procedure provides in what cases the court may appoint a receiver; and, in the absence of facts showing that the case falls within some or more of the provisions of the section, no authority exists for such appointment. Subdivision 6 of the section provides that a receiver may be appointed in all other cases than those mentioned in the preceding subdivisions where heretofore such practice had prevailed in courts of equity. The provision of this subdivision, however, cannot be invoked in a case presented by a complaint which alleges facts bringing it within one of the preceding subdivisions.

[3] Clearly, the case at bar is one falling

within the provisions of subdivision 1 of the section, it being an action to recover property and a fund consisting of the proceeds derived from the operation thereof; hence the court had no power to appoint a receiver *pendente lite*, unless it was satisfied that the right of the plaintiff "in the property or fund, or the proceeds thereof, is probable," and also satisfied from the showing made "that the property or fund is in danger of being lost, removed, or materially injured." Notwithstanding the expressed opinion of the court that it was impossible to determine upon which side justice inclined, we must assume, since every intendment is indulged in to support the judgment, that the court was satisfied that the right of plaintiff to the property and fund which it seeks to recover was probable. Conceding, but not deciding, that the record justifies such conclusion, it must further appear that the order made was necessary to protect the property from danger of being lost, removed, or materially injured, thus securing it to plaintiff in case of a judgment in its favor. As to the Midway Royal Petroleum Company, it appeared the Midway tract was held under a lease requiring it in good faith to continue drilling wells, subject to penalty of forfeiture, and the effect of the order was, without any bond being given, to enjoin it from using the proceeds of the sale of oil, over and above the actual cost of operating the one well, in the prosecution of work required by the terms of its lease, and this in the absence of any showing that it was insolvent or unable to respond in damages. The question as to whether a court may be justified in appointing a receiver to operate mining or oil property, in a proper case, is not involved. Such power may be conceded. We must assume, in view of the absence of any stipulation or order requiring the operation of the property, that the court did not deem such operation necessary to protect the rights of plaintiff, but left it optional with defendants to continue operation.

The sole and only purpose of the order, besides empowering the receiver to seek the recovery of moneys, profits, and income therefore derived by defendants from the operation of the property, the recipients of which were ordered to pay it over to him, was to sequester the net income as therein defined, by requiring defendants to pay it over to the receiver. Ignoring any hardship or injustice to defendant resulting from the wrongful tying up of the profits during years of litigation, if finally determined in defendants' favor, the desired purpose, which was to hold the net proceeds intact pending the suit, could have been obtained by an order granting an injunction whereby, upon the giving of a sufficient undertaking to protect defendants from damages, they should be restrained from paying out any proceeds from the sale of oil other than for actual operation of the



wells. The power to appoint a receiver is a delicate one, and should be exercised with caution (*Roberts v. National Bank*, 9 Wash. 12, 37 Pac. 26; *High on Receivers* [4th Ed.] 289, 294), lest the injury thereby caused be greater than the injury sought to be averted (*Heinze v. Kleinschmidt*, 25 Mont. 89, 63 Pac. 927; *Frostburg Building Ass'n v. Stark*, 47 Md. 338; *Devlin v. Hope*, 16 Abb. Prac. 314). "The chancellor should so mould his order that while favoring one, injustice is not done to another, and if this cannot be accomplished the application should ordinarily be denied." 34 Cyc. p. 23. And a receiver should not be appointed where the desired result can be obtained by less stringent means calculated to protect the rights of all parties. *Hayes v. Jasper Land Co.*, 147 Ala. 340, 41 South. 909; *Secord v. Wheeler Gold M. Co.*, 53 Wash. 620, 102 Pac. 654, 17 Ann. Cas. 914. "Where an injunction will protect all the rights to which the applicant for the appointment of a receiver appears to be entitled, a receiver will not be appointed." 34 Cyc. p. 25; *Hickey v. Parrot Silver, etc., Co.*, 25 Mont. 164, 64 Pac. 330.

If in the mind of the court the facts were insufficient to justify the issuance of an injunction restraining defendants from paying out the net proceeds of the operation of the property, much less could they be invoked as sufficient to support the more stringent order appointing a receiver to obtain a like result. At all events, it was an abuse of discretion on the part of the court to appoint a receiver, when the purpose sought could be accomplished, and the rights of the parties more adequately protected, by the granting of an injunction upon the giving of an undertaking required by statute.

We think the order appointing the receiver was inadvertently made, and it is therefore reversed.

We concur: ALLEN, P. J.; JAMES, J.

(22 Cal. App. 207)

**BROWNLEE v. BOARD OF DIRECTORS  
OF VETERANS' HOME OF  
CALIFORNIA et al.**  
(Civ. 1,091.)

(District Court of Appeal, Third District, California. June 5, 1913. Rehearing Denied by Supreme Court Aug. 4, 1913.)

**ARMY AND NAVY (§ 52\*)—VETERANS' HOME—PENSIONS—"ANY MONEY."**

Act March 11, 1897 (St. 1897, p. 106) relating to the California Veterans' Home, provides that the directors of the Home shall pay over all trust moneys coming into their possession to the home treasurer, who each month shall forward to the state treasurer all moneys in his possession except certain enumerated funds including the "post fund." Section 10 declares that any balance of "pension money" held by the board, or by its authority, on the death of the pensioner, or "any money" belonging to the members of the Home, shall on their death be held as a trust fund, to be paid

by the board without probate, to the widow, minor children, or mother or father of the pensioner, in the order named, and, in the absence of a widow, minor child, or parent discovered within a year after the death of the pensioner, the balance of the money shall be paid to the post fund, to be used for the common benefit, subject to the future reclamation of the relatives designated on application within five years after the death of the pensioner. The section provides that nothing therein contained should conflict with the right of any member of the Home to dispose of his property, including pension moneys, by will. The laws of the United States provide for the payment of any balance of pension money to the pensioner's widow, minor children, or dependent father or mother in the order named, and if none are found within a year, the balance shall be paid to the post fund of the Home of which the pensioner is a member at his death, to be used for the common benefit, subject to future reclamation. Held, that the term "any money" as used in such section included a balance of pension money in the possession of a veteran member of the home at the time of his death, not disposed of by will, and that the act created a valid trust for the disposition of such fund to the persons so designated without administration, and was not recoverable by the member's administrator.

[Ed. Note.—For other cases, see *Army and Navy*, Cent. Dig. §§ 100-102; Dec. Dig. § 52.\*]

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by Walter S. Brownlee, as administrator of the Estate of John Murphy, deceased, against the Board of Directors of the Veterans' Home of California and C. De Colmesnil, secretary and treasurer. Judgment for plaintiff, and defendants appeal. Reversed.

F. L. Coombs, of Napa, for appellants.  
Nathan L. Coombs, of Napa, for respondent.

BURNETT, J. While a member of said Veterans' Home, at Yountville, in Napa county, the said John Murphy died intestate, on the 30th day of April, 1911. At the time of his death he owned and had on his person the sum of \$912.12. Possession of this was taken by defendants, and they refused upon demand to deliver the same or any part thereof to plaintiff. The action was therefore instituted by him, as administrator, to recover the money, upon the theory that it became and was a part of the assets of the estate of said decedent. Defendants, answering the complaint, admitted that they took and held and still hold possession of the money, but they attempted to justify by the following allegations: "The said Veterans' Home of California is a state institution, created by and existing under that certain act of the Legislature of the state of California, for the purpose and with the powers therein set forth, approved March 11, 1897 [St. 1897, p. 106]. \* \* \* That under and by virtue of, and in conformity with the provisions of the said act of the Legislature, and under the by-laws, rules, and regulations of said Veterans' Home of California, duly



passed, adopted, and then in force, and in order to receive and enjoy the benefits assured and to be secured thereby, the said John Murphy, on the 14th day of August, 1896, made his application in writing to be admitted to the said Veterans' Home as a member thereof." Then follow allegations concerning and copies of his application for membership and of the rules and regulations of the Home, as far as pertinent to the issue, and of his agreement "to transfer to the Home all moneys received as a pensioner while a member of the Home, subject to the rules and regulations governing the same," and the answer proceeds: "That it was further agreed therein that the said moneys, upon the death of said member, should be held and disposed of in conformity to the provisions of the laws of the United States regulating the disposition of such moneys," a copy of said law being set out, and "that thereupon, and in the month of August, 1896, the said board of directors considered said application, and, finding the said John Murphy qualified under the laws then in force, and under the by-laws, rules, and regulations of the said Veterans' Home then in force, admitted him to said Home as a member thereof, and said John Murphy, from the time of said admission to said Home, continuously to the time of his death, as aforesaid, was a member of said Veterans' Home, and subject in all matters, and especially in the matter of the disposition of his moneys at the time of his death, and of the moneys claimed by plaintiff herein, to the laws of the state of California, as the same might exist and be in force at the time of his death, and to the by-laws, rules, and regulations of said Home, as the same might exist and be in force at the time of his death. That while the said John Murphy was a member of said Veterans' Home, to wit, in the year 1907 (St. 1907, p. 330) the Legislature of the state of California passed an amendment to section 10 of said act of the Legislature creating the said Veterans' Home of California a state institution, which amendment remained and was in force and effect, and a part of said law at the time of his said death, and that said moneys were at said time, and now are, subject to the control and disposition of said Veterans' Home as therein provided.

\* \* \* That the said sum of \$912.12 is the balance of the aggregate of the pension moneys received by the said John Murphy from the government of the United States while he was a member of said Home, and found upon his person at the time of his death, and is now kept and retained by defendants, to be reclaimed by the widow, minor children, or dependent father or mother, within one year from the time of his death; otherwise to inure to the common benefit of the members of the Home, subject to future reclamation by said relatives within five years from said death." The lower court

sustained a general demurrer to the answer, and judgment was entered for plaintiff. Hence, the appeal by defendants.

The main controversy is directed to the construction of said amendment to section 10 of said act, and particularly to this clause: "Any balance of pension money held by the board, or by its authority upon the death of the pensioner, or any moneys belonging to the members of the Home, shall, upon their death, be held as a trust fund, to be paid by the board, directly and without probate, or by its order, to the widow, minor children or mother or father of the pensioner or member in the order named; and should no widow, minor child, or parent be discovered within one year from the time of the death of the pensioner, or of the member, said balance, or moneys, shall be paid to the post fund of the Home, to be used for the common benefit of the members of the Home under the direction of the board, subject to future reclamation by the relatives hereinbefore designated in the order named, upon application filed by the one entitled to the same within five years after the death of said pensioner, or member."

The first point of difference grows out of the expression, "or any moneys belonging to the member of the Home." Appellants contend that this necessarily means all the moneys, wherever found, belonging to the member at the time of his death. The position of respondent, however, is that, construing the words "with the whole section, we find that the pension, or any moneys 'to be held as a trust' are the moneys 'received by the directors, or by any officer of the Home.'" It may be remarked that appellants have given to this language an unnecessarily broad application. As before stated, the allegation of their answer is that this sum of \$912.12 was pension money received by the said Murphy while he was a member of said Home, and the exigency of appellants' case requires only that "any moneys" shall cover such pension money. This is, we think, the more reasonable view of the intention of the Legislature. Pension moneys and trust funds were the particular subjects in the legislative mind, and their disposition was contemplated and provided for by said section 10.

It is impossible, though, without doing violence to the ordinary significance of the terms employed, to limit the phrase in question to the pension moneys that had been received by the directors prior to the death of Murphy. This view would render the language entirely redundant. The prior expression, "any balance of pension money held by the board," was clearly intended to include all such pension money held in trust at the death of the pensioner. Indeed, it is difficult to understand how the intention could have been expressed more certainly. But the Legislature went a step further, and declared



that "any moneys" should be held as a trust fund. Limiting this to pension moneys, it is entirely clear that two conditions were contemplated, one, where pension moneys had been reduced to possession by the directors, and another, where they were not so held at the time of the death of the pensioner. We find nothing in the context demanding a different construction of the clause. The first part of the section declares what the directors shall do with all trust moneys coming into their possession, namely, pay them over immediately to the treasurer of the Home. Then follows the provision requiring said treasurer, on or before the 10th day of each month, to forward to the state treasurer "all moneys then in his possession," except certain enumerated funds, among which is the "post fund." The next clause covers the duty of the state treasurer as to the moneys so forwarded to him. Then we have the sentence whose construction is involved herein, directing, as already seen, that said money, if none of the designated relatives be discovered within a year, be paid to the post fund of the Home. It is then provided that all personal effects of the deceased member shall be held for one year for said relatives, and if not claimed in said period shall be sold, and the proceeds paid in to the post fund for the common benefit of the members, subject to future reclamation within the period of five years. The section then concludes as follows: "The board of directors shall make proper rules and regulations to carry this into effect. Provided, however, that nothing in this act shall in any way conflict with the right of any member of the Home to dispose of his property, including such pension moneys, by last will." We are unable to discover therein any expression modifying in any manner the meaning of the phrase before us, nor can we find in the application of the familiar canons of interpretation any support for the position taken by respondent. We cannot avoid the conclusion that "any moneys" includes at least the pension money in the possession of the member at the time of his death, and not disposed of by will.

But more reliance seems to be placed by respondent upon the contention that by the said language the state attempted to create a trust, which failed because it was not formally accepted by said board. In this connection the assertion is made that to complete the trust it was necessary for the board of trustees "to make proper rules and regulations to carry this into effect" and since, admittedly, no such rules or regulations were passed, the legislative scheme came to naught.

However, if it be considered in the aspect of a trust, it seems plain that the act of the Legislature has supplied all the terms and conditions, and the only thing required of the board is to devote the money to the purpose therein specified. This they are proceeding

to do, as alleged in their answer. It is not easy to perceive what additional rule or regulation is needed to effectuate the legislative intention.

The controlling features of the situation, as we view it, then, are these: The law authorizes a member of the Home to dispose of his pension money by will. If he does not choose to do so, in consideration of the privileges and benefits that he enjoys as a member, his pension money shall not be subject to administration, but shall be devoted to certain purposes that are therein specified, and the board of directors is designated as the agency by which the money is to be disposed of as required. The member, John Murphy, died intestate in possession of and owning pension money, and said board has accepted the trust, and insists upon its right to obey the command of the law. Nothing seems to be lacking to make the trust complete. Of course, the plan might have been set forth in more amplified form, but it is apparently intelligible and certain enough for the common understanding. It is true that there is no specific direction in the statute that the board shall take possession of said moneys, but this is necessarily implied in the provision that they shall "be held as a trust fund, to be paid by the board," etc.

It may be stated that the validity of said act is not assailed on any ground. It is not claimed that it is unconstitutional or in excess of legislative authority. Indeed, it is admitted by respondent that "section 10 clearly attempted a trust, and there is no question but, followed out, a trust is fully authorized."

Another view taken by respondent suggests the necessity for the consent of the member in order to make the trust effective. This position is manifestly somewhat inconsistent with the one already considered. But, regarded in this light, the conclusion is not unreasonable that consent is implied from the fact that the member made no disposition by will of the money. The law, which he is presumed to know, presented to him the alternative of devising this money or leaving it to be impressed with said trust. By his failure to act he impliedly chose the latter, and his administrator is not in a position to maintain the contrary.

Moreover, it is not unfair to say that when he became a member of the Home he expressly agreed that his pension moneys should be subject to this trust. In his application for admission to membership he declared he was a United States pensioner, and "I hereby agree to transfer to the Home all amounts received by me as such pensioner while a member of the Home, subject to the rules and regulations governing the same. \* \* \* I further stipulate and agree that, in the event of my death, while a member of the Home, any balance of pension money that may be to my credit in the hands of the treasurer



of the home, shall be disbursed to my heirs and disposed of in conformity to the provisions of the laws of the United States regulating the disposition of pension moneys due deceased members of the national homes for disabled volunteer soldiers." It may be said that "the laws of the United States" therein referred to provided for the payment of said balance to the "widow, minor children, or dependent mother or father in the order named," and in case none be found within one year, that said balance be paid "to the post fund of the branch of said national home of which the pensioner was a member at the time of his death, to be used for the common benefit of the members of the Home under the direction of the board of managers," subject to future reclamation.

It seems clear from the foregoing that at the time Murphy was admitted as a member of the home it was the intention and agreement on the part of himself and the said Home that his pension money should be paid into the treasury thereof and any balance remaining at his death should be charged with the same trust.

- It also is deducible from the pleadings that if the said intention and agreement had been carried out, the money now in controversy, instead of being in the possession of Murphy at the time of his death, would have been held by the treasurer of said Home for the purpose specified in said statute, and would constitute a part or the whole of the balance covered by his said agreement.

In that event the case would have been entirely similar to *Treadway v. Board of Directors*, 14 Cal. App. 75, 111 Pac. 111, wherein it was held that "the pension moneys agreed to be deposited were a trust fund, to the disposition of which the owner had consented in writing, reserving only the retained right to withdraw it in his lifetime, but with lawful directions for its disposition, in case of his dying intestate, as specifically directed." It was determined also in that case that the pensioner had the right and power to make this disposition of his pension money.

There is nothing before us to indicate that the said trust was changed or modified by agreement of the parties, but it seems that since the decision was rendered in the *Treadway* Case Congress has attached conditions to the appropriations of money for pensions and for the Home so as virtually to preclude the board of directors from exacting the deposit of the pension money when the warrant of the member is cashed. The policy of the law in this respect has thus been modified, but the disposition of the balance as agreed upon by the parties is unaffected. The difference is that the balance is now in the possession of the pensioner rather than of the board, and, as suggested by appellants, "the moneys now in dispute cannot be re-

tained upon the theory that they have become a trust fund by reason of their having been deposited for the purposes of the trust and dependent, in a measure, upon possession by the trustee," but the moneys are subject to a trust by operation of the words of said statute in connection with the agreement of the pensioner reaching this very fund.

We need not concern ourselves with the policy of the law, although, as stated in the *Treadway* Case, such policy cannot be declared harsh, ungenerous, or unjust.

It may be remarked that said section 10 was amended by the Legislature in 1911 (Stats. 1911, p. 1447) so as to confine said trust fund to the balance of pension money held by the board or by its authority, and to any moneys belonging to the members and deposited with the board or with any of its officers, and providing that said trust fund be paid by the board, directly and without probate, to "the heirs at law entitled thereto" and if none be discovered, then to be paid to said post fund of the Home. It is admitted, however, that this amendment did not go into effect until after the death of said Murphy, and it is not denied that the status of said money was fixed by the law in force at the time of said death.

We are unable to agree with the conclusions of the learned trial judge, and the judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

(22 Cal. App. 239)

DODGE v. NORTHERN ELECTRIC RY. CO.  
(Civ. 1,092.)

(District Court of Appeal, Third District, California. June 6, 1913.)

1. CARRIERS (§ 381\*)—INJURY TO PASSENGERS—EJECTION—EVIDENCE.

In an action for injuries to a passenger while being required to alight from a train which did not go to his destination, which he had boarded by mistake, conflicting evidence held to warrant a finding that plaintiff was removed from the train by defendant's brakeman with unnecessary force, and that in doing so plaintiff was injured.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1473-1476, 1479-1482; Dec. Dig. § 381.\*]

2. WITNESSES (§ 275\*)—CROSS-EXAMINATION—SCOPE.

In an action for injuries to a passenger while alighting from a train, a question on cross-examination, whether the idea of injury and of suit against the defendant did not have its birth while plaintiff was returning to his destination after being put off the train, etc., was intended to secure an admission from plaintiff that in fact he was not injured, and that the institution of the action was not because plaintiff had suffered damage at defendant's hands, but because of the entertainment by him of personal ill will toward defendant, and was therefore proper.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 924, 926, 967-975; Dec. Dig. § 275.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



### 3. APPEAL AND ERROR (§ 1058\*)—CURING ERROR—EXCLUSION OF EVIDENCE.

Error in sustaining an objection to a proper question was not prejudicial, where the same question was subsequently propounded and an answer allowed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4204, 4206; Dec. Dig. § 1058.\*]

### 4. APPEAL AND ERROR (§ 1048\*) — RULINGS ON EVIDENCE—PREJUDICE.

Where, in an action for injuries to a passenger by his alleged removal from the train by the carrier's agents by the use of excessive force, the conductor had previously testified that he could not state whether the train had actually come to a dead stop at the time plaintiff was ejected, witness having nothing more to do with putting plaintiff off the train after calling the brakeman, defendant was not prejudiced by the exclusion of a subsequent question, calling for the witness' best judgment as to whether the train came to a dead stop at the time plaintiff was ejected.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.\*]

### 5. APPEAL AND ERROR (§ 874\*)—DENIAL OF NEW TRIAL—REVIEW—RULINGS ON PLEADINGS.

The overruling of a demurrer to the complaint cannot be reviewed on appeal from an order denying a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3478, 3480, 3484, 3530-3540; Dec. Dig. § 874.\*]

### 6. APPEAL AND ERROR (§ 1040\*)—HARMLESS ERROR—DEMURRER TO COMPLAINT.

Where, in an action for ejection of a passenger, the complaint alleged negligence in that plaintiff, through defendant's negligence, boarded the wrong train, and was carried some distance in the wrong direction and then ejected, and also in that his injuries were received by his being forcibly ejected from the train, defendant was not prejudiced by the overruling of a demurrer to the complaint, on the theory that defendant was not responsible for a passenger taking the wrong train; the court by its instructions having confined the jury to the injuries received by plaintiff when leaving the train.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4080-4105; Dec. Dig. § 1040.\*]

### 7. CARRIERS (§ 277\*)—INJURY TO PASSENGERS—NEGLIGENCE—BOARDING WRONG TRAIN.

A passenger may recover damages for the carrier's negligence by which the passenger is induced to board the wrong train, if it can be shown that damage directly resulted therefrom.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1082-1084; Dec. Dig. § 277.\*]

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by P. M. Dodge against the Northern Electric Railway Company. Judgment for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Affirmed.

Charles W. Slack, of San Francisco, A. M. Seymour, of Sacramento, and W. H. Carlin, of Marysville, for appellant. H. D. Gregory, of Oroville, for respondent.

HART, J. This is an action by the plaintiff to recover the sum of \$10,000 as dam-

ages for personal injuries. The jury, before whom the cause was tried, returned a verdict in favor of the plaintiff for the sum of \$600. This appeal is by the defendant from the order refusing to grant it a new trial.

Insufficiency of the evidence to justify and support the verdict, errors in rulings upon the evidence, and error in overruling the demurrer specially directed against certain averments of the complaint are the main points relied upon for a reversal.

1. The plaintiff, 62 years of age and a resident of Thermalito, Butte county, having visited and been in the city of Marysville, on the 1st day of November, 1911, on the afternoon of said day went to the depot of the defendant in the last-mentioned city and purchased a ticket entitling him to transportation on the defendant's railway train from said city to his home. It appears that at the hour when the plaintiff should have boarded a train which would have taken him to Thermalito, two trains met at Marysville—one north-bound, going to Thermalito, Oroville, and other points north of Marysville, and the other south-bound, and whose destination was Sacramento. The plaintiff erroneously boarded the train bound for Sacramento, and the mistake was not discovered until the conductor, after the train had proceeded some two or three miles out of Marysville, came into the car in which the plaintiff was riding, and called upon the passengers for their tickets. What occurred thereafter was thus described by the plaintiff at the trial: "He (referring to the conductor) said 'Tickets,' and I raised up and handed him my ticket. He took the ticket and looked at it, and said: 'What in h—ll are you doing on this car; it is a Sacramento car; I have no time to fool with you; it is late now, and I haven't time to let you off.' and I said: 'If you stop the train I will get off and walk back.' He rushed back and rang the bell. He called the brakie and told him to let me off at the siding. The brakie grabbed, and got the bell rope and rang it. I don't know how many bells he rang. He told me to come on. I do not know where the conductor went. The brakie took the lead and went to the door and went to the platform, and I followed him out on the platform, and he said: 'Get down there on to the steps so as to be ready and not take any more time than possible,' and I got on the steps and had hold of a rod. The rod was on the end of the car for persons to hold on in going down the steps of the platform step. He told me to jump, and I said, 'If you stop the car I will get off,' and I said, 'No, I can't do that; if you stop the train I will get off.' About that time something struck me in the back, in the lower part of the shoulder, and about that time I was off." He testified that he did not know what struck him, or how he was struck, but that



the impact "didn't feel very much like something very hard or very soft, but it gave me a quick shove." Explaining the manner of his fall to the ground and the extent of the injuries thus received, he testified: "I fell headfirst on the left side. I struck on the ground and rock and gravel in the wagon crossing. My face struck on the ground here (showing) and over this eye and this cheek (showing). It cut me in all three places. As soon as I broke loose from the rod I threw my hands this way (showing), and it caught me on the heel of the hand and bruised it." He further testified: "It was dusk. I got up and I followed the railroad track back to Marysville. It took me three-quarters of an hour or an hour to get back to Marysville. \* \* \* I used the same ticket to go home to Thermalito that I had presented to the conductor going south on the wrong train. \* \* \* I was very lame and sore as the result of the injury through this side and this shoulder (indicating the left shoulder) and the heel of my hands where I struck the ground. I had a swelling on my left knee. I am suffering yet. \* \* \* When I felt the shoving on the back the brakeman was standing on the top of the steps of the platform. No one else was there. Next morning after I got home I went to dust my coat. There was dust all on it. On the back of my coat I saw the point of something rounding like the front part of a shoe and there was streaks, yellowish streaks there." The plaintiff testified that, on the day following that upon which he received his injuries, he called on and was treated for said injuries by Dr. Wilson, of Oroville, and that thereafter he called at the office of the doctor for the same purpose on several different occasions.

The witness, Moore, who was a neighbor of the plaintiff in Thermalito, testified that he remembered the occasion when the plaintiff returned from Marysville. His best recollection was that it was two or three weeks prior to Thanksgiving Day. "His face," said this witness, "was all cut up, and cut along the forehead and along the cheek in three or four places. When he turned around to walk from me he walked lame. \* \* \* He went around lame, and bent over for 10 days or two weeks."

Chester Kelley, who resided about 500 feet from the home of the plaintiff, testified that he saw the latter at about 8 or 9 o'clock in the morning of November 2d. "Mr. Dodge's clothes were very dusty," he stated, "and his face was scratched in numerous places, on the left cheek bone, the chin; rather bad bruises. I saw his left wrist. It appeared to be swollen. I looked at the back of his coat. There was dust there. I saw a mark. It appeared as a footprint. This was the day after he returned from Marysville."

There was some other testimony slightly corroborative of the plaintiff, but the reproduction of the foregoing is sufficient for the

purposes of the decision of the point under consideration.

There was no other person on the platform from which the plaintiff left the car, or who witnessed the circumstances thereof, but the brakeman, Clarence Ruth, and he testified that the train came to a standstill at Alicia station, where the plaintiff alighted, before the latter attempted to leave the platform upon which he was standing; that the plaintiff descended from the platform to the ground in the usual or ordinary way, and that he (Ruth) did not touch the plaintiff, nor use any force whatever upon him as he was in the act of leaving the car.

The conductor, Caverly, declared that when, on collecting the tickets, he discovered that the plaintiff was on the wrong train, he told the brakeman to signal the motorman to stop at Alicia, the next station, so as to let the plaintiff leave the train and catch the up-going train at that station. At Alicia, he said, the train came to a standstill for that purpose.

Many other witnesses testified that the train stopped a short distance out of Marysville, but some of these did not know the name of the station at which the stop was made.

A large number of witnesses, neighbors and acquaintances of the plaintiff, was introduced by the defendant, and they testified that the plaintiff's general reputation in Thermalito for truth, honesty, and integrity was not good.

Manifestly, upon the testimony given in the case, and of which the foregoing is a brief synopsis, this court cannot justly hold that the verdict was not justified by the evidence, unless we are prepared to say that the testimony of the plaintiff is so unreasonable upon its face as to be unworthy of belief, or entitled to absolutely no credit anywhere, or at the hands of any person or tribunal.

[1] The vital questions in this case are: (1) Was the plaintiff removed from the train by the defendant, or its agent, by means of unnecessary force? and, if so, (2) in so doing, did the defendant inflict or cause to be inflicted upon the plaintiff bodily or physical injuries?

From the evidence produced in behalf of the plaintiff, the jury were clearly warranted in answering, as they did, these questions in the affirmative. The positive denial by the brakeman of the salient facts to which the plaintiff testified merely raised a sharp and substantial conflict, and it was obviously for the jury to decide which of the two witnesses told the truth concerning the transaction. And even if, for reasons which to our minds might appear to be forceful we were of the opinion that the evidence upon which the verdict was manifestly predicated was unworthy of belief, it being sufficient to sustain the verdict and not so improbable upon its face as clearly to constitute it a question of law and the jury having seen fit to credit it,



this court would have no legal right to disturb the verdict; that power resting solely in the trial court before which the trial was had, and by which, equally with the jury, the testimony was heard. Nor can we say, as a matter of law, that the plaintiff was impeached, notwithstanding that a long list of witnesses, whose testimony upon the point was not contradicted, testified that his reputation for truth, honesty, and integrity was bad. It is to be conceded that, the testimony of these witnesses not having been shaken by cross-examination, or they themselves impeached or contradicted, the case upon its face does not present a very favorable appearance for the plaintiff, yet it cannot be said that a witness is impeached, within the judicial meaning of that term, until the tribunal which is to directly pass upon and decide the questions of fact shall have determined that his testimony for that reason is to be disregarded in the decision of the issue of fact to which it was addressed. It will not be disputed that it was within the province and the power of the jury, as the court in plain and explicit language instructed them, to disbelieve the testimony of any witness. Of course, this power may not be arbitrarily exercised, but how can a reviewing court say when it is or is not so exercised in a case, even where, as here, the testimony bears upon its face the appearance of being true? How can this court declare that there was not something in the manner of each of these witnesses, as he gave his testimony, which generated in the minds of the jury disbelief in or doubt as to the verity of his characterization of the general reputation of the plaintiff for the traits mentioned? Moreover, the jury could have believed the impeaching testimony, and still, without necessarily being inconsistent, have believed, in view of the corroborating evidence or of other reasons perfectly satisfactory to themselves, that the plaintiff told them the truth as to the circumstances under which he left or was removed from the train. Furthermore, if the trial court, in the consideration of the motion submitted to it by the defendant for a new trial, could not justly say, as presumptively it could not from its ruling thereon, that the jury erred in apparently disregarding the impeaching testimony, how may this court, not in a position to apply the usual tests determinative of the credibility of witnesses, or the weight, if any, which should be accorded their testimony, be consistently expected to so declare? As before stated, under the state of the record as it is presented here, so far as the evidence is concerned, there is, in view of the well-established and well-understood rule by which appellate courts in this state must be guided in the consideration and decision of such questions, open to this court no other course than to hold that the evidence is sufficient to support the verdict, even though, in reality, it

might not have justified the jury in returning said verdict.

[2, 3] 2. On cross-examination the plaintiff was asked the following question by counsel for the defendant: "Isn't it a fact that the idea of injury on your part, and of the suit against this defendant, had its birth while you were coming back to Marysville, after being put off the train while it stopped for you down there?" An objection to this question was sustained by the court. It is now claimed that the ruling was erroneous and prejudicial. The obvious purpose of the question was to secure an admission from the plaintiff that, as a matter of fact, he was not in any manner or degree injured, and that the institution of this action by him was not because he suffered any damage at the hands of the defendant, but because of the entertainment by him of personal ill will toward the company. The question was a proper one, but the ruling foreclosing an answer thereto was not prejudicial, for thereafter the same question was in effect propounded to the plaintiff by the defendant, and an answer thereto allowed.

[4] 3. It is next complained that the court erred in approving the objection to the question to the witness Caverly, defendant's conductor: "To your best judgment did the train at Alicia at that time come to a dead stop?" The question was no doubt intended to call for the best recollection of the witness as to whether the train did or did not come to "a dead stop," and, thus viewing it, it was a proper question. The ruling disallowing an answer to it, however, was not prejudicial, in view of the following statement previously made by the witness: "Whether or not that train actually came to a dead stop I cannot state, for there was nothing at the time to particularly impress the incident on my mind. I will not swear that the train came to an actual dead stop. I did not have anything more to do with putting the man off the train after I called the brakeman." The foregoing testimony appears to represent the "best judgment," or the best recollection, of the witness respecting the circumstance.

[5] 4. The objection that the court erred in overruling the demurrer to the complaint cannot, even if it were tenable, be availed of by the defendant. Although the preamble to the bill of exceptions states that said bill is to be used "on the motion for a new trial herein, and also on appeal to the District Court of Appeal from the judgment made and entered herein," there is no evidence in the record of an appeal having been taken from the judgment, and, of course, in the absence of such an appeal, the ruling of the court on the demurrer cannot be reviewed. In other words, a ruling on a demurrer to a pleading, or upon the sufficiency thereof, cannot be reviewed on an appeal from an order denying a new trial. Hayne on New Trial and Appeal, § 186; Fortain v. Smith, 114



Cal. 494, 46 Pac. 381; Frey v. Vignier, 145 Cal. 251, 78 Pac. 733.

[6] We may, however, with no impropriety, say that, even if the point were reviewable, we would be compelled to hold it not to be well taken. The objection to the complaint and the argument in support thereof arise as follows: The pleading sets out two different and distinct grounds of alleged negligence upon the part of the defendant, viz.: (1) That the plaintiff, through the negligence of the defendant, boarded the wrong train, and was thus carried some distance in the wrong direction; (2) injuries received by the plaintiff when, as he claims, he was forcibly ejected from the train.

[7] It is the first of the foregoing propositions which is challenged by demurrer for uncertainty, and the argument is that there is "no rule of law which makes a railroad company responsible for a passenger taking the wrong train, and that it is impossible to determine how much the jury may have awarded the plaintiff because of his alleged injuries occurring at the time he left the car, and how much they may have allowed him for the inconvenience of being carried in the wrong direction and being compelled to retrace the distance of approximately two miles on foot." The first reply to this argument is that the court, in its instructions, confined the jury in the determination of the question of damages exclusively to the consideration of the injuries alleged to have been received by the plaintiff when leaving the train. Nowhere in its charge did the court refer to the alleged negligence of the defendant in causing the plaintiff to take the wrong train. Furthermore, the portion of the complaint objected to does not seek to make the defendant "responsible for a passenger taking the wrong train," but alleges, as we have seen, that "through the negligence of defendant plaintiff entered said train," etc., and we know of no rule of law which would preclude a recovery for such negligence, if it were shown that damage directly followed therefrom.

No substantial reason has been shown for a reversal of the order, and it is therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(22 Cal. App. 256)

GARNER et al. v. MEIZEL. (Civ. 1,089.)  
(District Court of Appeal, Third District, California. June 7, 1913.)

**1. APPEAL AND ERROR (§ 356\*)—DISMISSAL OF APPEAL—GROUND—DELAY IN REQUESTING TRANSCRIPT.**

The compliance with Code Civ. Proc. § 953a, providing that an appellant may notify the clerk that he desires a transcript of the evidence for appeal, is not necessary to give the appellate court jurisdiction, and the appeal will

not be dismissed where the trial court certified the transcript, although the application was not made within the time required.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1926, 1927; Dec. Dig. § 356.\*]

**2. APPEAL AND ERROR (§ 417\*)—DISMISSAL OF APPEAL—FAILURE TO FILE NOTICE.**

Where the only notice filed by appellant was the notice to prepare a transcript of the evidence, the appeal will be dismissed for want of jurisdiction; since that notice is not a substitute for the notice of appeal, required by Code Civ. Proc. § 941b, to be filed with the clerk of court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2140-2143; Dec. Dig. § 417.\*]

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by U. L. Garner and another against Frank Meizel. Judgment for plaintiffs, and defendant appeals. Appeal dismissed.

M. C. Kerr, of Quincy, for appellant. L. N. Peter, of Quincy, for respondents.

CHIPMAN, P. J. [1] The cause was tried by the court without a jury, and plaintiff had judgment: The judgment was entered on November 18, 1912, and, on the same day, at the request of attorney for defendant, the court ordered: "That a stay of execution be granted, and that 30 days be granted for perfecting an appeal." It further appears that thereafter, to wit, on the 6th day of December, 1912, defendant filed with the clerk of the said court a notice, stating that defendant "desired and intended to appeal from the judgment of the said court in the said matter, and requesting a transcript of the testimony offered or taken, \* \* \* as provided by section 953a of the Code of Civil Procedure of the state of California, be prepared." The court made the requested order on December 12, 1912, and the reporter's transcript was filed with the clerk, and presented to the judge of said court for approval and settlement. Plaintiff's attorneys objected to the settlement of the transcript on the ground that the notice requesting the transcript was not made within the 10 days' time mentioned in section 953a of the Code of Civil Procedure, and the court had no authority to extend the time; and on the further ground that no undertaking was filed, as required by section 953b of the Code of Civil Procedure. The court overruled the objections, and approved and settled the transcript. The objections seem to have been made on the assumption that the time mentioned in section 953a is jurisdictional and cannot be extended.

In denying a petition for a hearing in the Supreme Court, in Smith v. Jaccard, after judgment in the District Court of Appeal, 128 Pac. 1023, 1026, the court said: "Section 953a does not provide at all for a notice of appeal. The purpose of that section, in connection with sections 953b and 953c, is to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



provide a method of preparing the record or transcript to be filed in the proper appellate court in support of the appeal. None of the proceedings there prescribed are jurisdictional to the appeal." The court further held that, when properly taken, either by the old or alternative method, "the court to which it is taken has jurisdiction of the appeal, even if no transcript on appeal is ever filed in support of it. It may dismiss such appeal for delay in filing the transcript. But such a dismissal will be a dismissal for want of diligence in prosecuting it, and not a dismissal for lack of jurisdiction of the appeal." The transcript is here, and is certified by the court. The appeal cannot be dismissed on the grounds urged.

[2] There is, however, no notice of appeal in the record or among the papers sent up to this court. Apparently, defendant deemed the notice of his desire and intention to appeal, given under section 953a, as sufficient. But if so, he was in error. In *Boling v. Alton*, 162 Cal. 297, 122 Pac. 461, it was held that section 953a "merely provides a substitute for a bill of exceptions. It does not purport to authorize an appeal, or prescribe how it may be taken." Section 941b provides that any person having a right to appeal may appeal from any judgment, order, or decree of the court "by filing with the clerk of the court \* \* \* a notice, \* \* \* which said notice shall state that the person signing the same does thereby appeal \* \* \* from the judgment; \* \* \* and the said notice must identify the said judgment \* \* \* with reasonable certainty." It was further said, in the case last cited: "We do not think that a notice, which is a literal and proper compliance with section 953a, and which merely initiates the statutory proceeding there prescribed for making up the record, should be turned by construction into a notice of appeal and held to be good, as such, under a section with which it does not comply."

It need hardly be added that, defendant having served no notice of appeal, this court is without jurisdiction. *Beets v. Chart*, 79 Cal. 185, 21 Pac. 730; *Lent v. California Fruit Growers' Ass'n*, 161 Cal. 719, 121 Pac. 1002.

The appeal must therefore be dismissed, and it is so ordered.

We concur: BURNETT, J.; HART, J.

(22 Cal. App. 281)

HUBBARD v. PRICE (Civ. 1,353.)  
(District Court of Appeal, Second District, California. June 6, 1913.)

1. PUBLIC LANDS (§ 54\*)—DISPOSAL OF STATE LAND—SCHOOL LANDS.

Where an applicant to purchase a section of school land has not made a personal examination of each legal subdivision of the section, as required by Pol. Code, § 3495, so as to de-

termine its character as agricultural land, and falsely made an affidavit that he had done so, his right to purchase may be defeated by contest, under Pol. Code, § 3500, providing that any false statement in the affidavit defeats the right of purchase.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 152-164, 166-169; Dec. Dig. § 54.\*]

2. APPEAL AND ERROR (§ 1011\*)—REVIEW—FINDINGS OF FACT—CONFLICTING EVIDENCE.

Findings of fact by the trial judge on conflicting evidence cannot be disturbed on appeal, when there is evidence in the record to support each finding made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by Charles L. Hubbard against Charles R. Price. Judgment for the plaintiff, and defendant appeals. Affirmed.

Lucian J. Clarke, of Porterville, and Heister, Merrill & Craig, of Los Angeles, for appellant. Jones & Evans, of Los Angeles, for respondent.

ALLEN, P. J. [1] This action arises by virtue of a contest between plaintiff and defendant as to their respective rights to purchase a certain section of school land belonging to the state. The trial court, upon the hearing of such contest, determined that plaintiff had fully complied with all of the conditions imposed by law; that the defendant, whose application was filed in 1910, the affidavit in support of which was made in August, 1909, all at a date preceding the application of plaintiff, had not, before making his affidavit, as required by section 3495 of the Political Code, made a personal examination of each and every legal subdivision of such section of land, and under section 3500 of the Political Code his right to purchase was defeated by reason of the falsity of his affidavit filed with his application. A reading of section 3495 of the Political Code, as amended in March, 1909, indicates that such personal examination is made necessary because of the fact that the section also provides that any legal subdivision which could be cultivated without artificial irrigation, and by ordinary process of tillage produce ordinary agricultural crops, shall be deemed to be agricultural land, with reference to which character of land the area authorized to be purchased is restricted; hence the personal examination that these facts may be correctly set forth. They are matters which could only be stated after a careful and personal examination of each legal subdivision, and could not invariably be determined by a general examination of the entire tract from an overlooking eminence, or by generally passing through the section as an entirety. Whatever may have been the legislative intent, however, the condition of personal examination



of each legal subdivision, by direct enactment, attaches, and, if the applicant states falsely the matters connected therewith, his right to purchase is defeated upon contest commenced within five years.

[2] There is a conflict in the evidence as to the fact of such personal examination by defendant before application, yet not of a particularly serious character, for from defendant's own statement the personal examination requisite is scarcely established. But the learned trial judge had before him the parties, heard their testimony, saw their demeanor and bearing as witnesses, and was in a position to determine the matter of credibility. We find evidence in the record sufficient to support each finding made by the court, and under the familiar rule the same will not be disturbed on appeal.

Judgment affirmed.

We concur: JAMES, J.; SHAW, J.

(66 Or. 570)

# NELSON v. ST. HELENS TIMBER CO.

(Supreme Court of Oregon. July 22, 1913.)

## 1. APPEAL AND ERROR (§ 528\*)—RECORD—MOTION FOR NEW TRIAL.

Where a ruling denying a motion for a new trial was not made a part of defendant's bill of exceptions, it could not be reviewed, though it was made a part of defendant's abstract, to which no objection was made until plaintiff's brief was filed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2374, 2384-2388; Dec. Dig. § 528.\*]

## 2. APPEAL AND ERROR (§ 718\*)—ASSIGNMENTS OF ERROR—EFFECT.

Assignments of error on appeal from a judgment in a law action are equivalent to the averments of a complaint, being impliedly denied by the adverse party; the bill of exceptions affording the only available evidence applicable to the matter.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 718.\*]

## 3. MASTER AND SERVANT (§§ 153, 218\*)—INJURIES TO SERVANT—COUPLING LOG CARS—ASSUMED RISK—DUTY TO WARN.

Where plaintiff, who had been employed by defendant for about eight months in piling logs near defendant's railroad where they were loaded on log cars, was ordered to couple two cars with a link and pin, and, though he had seen other employes do such work, he had never previously done so himself, and his hand was crushed by his failure to remove it quickly as the cars came together, plaintiff did not assume the risk; defendant owing him the duty to warn him of the danger and instruct him as to the method of performing the duty imposed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 314-317, 601-609; Dec. Dig. §§ 153, 218.\*]

## 4. MASTER AND SERVANT (§ 89\*)—INJURIES TO SERVANT—EXTRA HAZARDOUS EMPLOYMENT.

Where plaintiff's foreman directed him to do an act not within the scope of his employment and which exposed him to a hazard and danger not contemplated in the contract of service, defendant was liable for the resulting injuries; plaintiff not having been guilty of contributory negligence, and the act being done

under such circumstances that it could not be said he assumed the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 153-156; Dec. Dig. § 89.\*]

Department 1. Appeal from Circuit Court, Multnomah County; Robt. G. Morrow, Judge.

Action by Fritz Nelson against the St. Helens Timber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action by Fritz Nelson against the St. Helens Timber Company, a corporation, to recover damages for a personal injury. The complaint alleges the defendant's incorporation; that it operated a railroad and used cars which were coupled by a link and a pin; that on June 27, 1911, the plaintiff was and for several months prior thereto had been employed by the defendant in piling logs on a rollway; that he was inexperienced in coupling cars, which fact was known to the defendant's agents who neglected to notify him of the danger incident thereto; that pursuant to defendant's order he undertook to make a coupling and in doing so his left hand was crushed, rendering it useless to his damage in a specified sum. The answer denies the material averments of the complaint and alleges that the injury complained of was occasioned by the plaintiff's carelessness; that the risk was assumed by him; and that the hurt was caused by the negligence of a fellow servant. The reply denies the averments of new matter in the answer, and the cause having been tried resulted in a verdict and judgment in plaintiff's favor for \$3,000, and the defendant appeals.

Rauch & Senn, of Portland, for appellant. Seton & Strahan, of Portland, for respondent.

MOORE, J. (after stating the facts as above). [1] It is contended that an error was committed in refusing to set aside the judgment and to grant a new trial; the application therefor being based on the ground that the amount of damages awarded was excessive. The defendant's abstract contains what purports to be a copy of the order denying the motion, assigning as a reason therefor that article 7, § 3, of the Constitution, as amended, deprived the trial court of power to grant such relief. Though the ruling complained of was not made a part of the bill of exceptions, it is argued that since the order was set forth in the abstract, to which no objection was made until plaintiff's brief was filed, the alleged error should be considered.

[2] The assignments of error on appeal from a judgment in a law action are equivalent to the averments of a complaint, which allegations are impliedly denied by the adverse party. The issue thus formed is to be determined from a consideration of a bill of exceptions, which affords the only available evidence applicable to the matter. As the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



formal statement in writing of the exceptions taken to the rulings of the court, as settled and allowed, does not contain any reference to the motion referred to, the action of the court thereon is not before us for consideration.

[3] An exception having been taken to a part of the court's charge, as evidenced by the transcript but inadvertently omitted from the bill of exceptions, it is insisted that an error was committed in instructing the jury as follows: "When an employer takes on a new hand, it is his duty to explain to the man the work, if there is any danger about it, and point out to him where the danger is, and how it is likely to arise, and if he moves a man from one employment to another it stands on the same footing. He must see that his employes are instructed as to the dangers of the business unless the employe can see them, and any man of his age, intelligence, and experience can know what they are without explanation, or unless he is experienced or says he is. If he claims to be an experienced man in that line of work, why then you don't have to tell a man a thing he already knows." In order to render the language complained of relevant, it becomes necessary to state the facts involved so as to determine whether or not the plaintiff possessed such a degree of knowledge of the instrumentalities causing the hurt as to enable the court to say, as a matter of law, that he assumed the risks incident to the employment in which he was engaged at the time he was hurt. The testimony tends to show that plaintiff at the time he was hurt was 34 years old. He is not a native of this country and had been in the United States only a year and a half. He could not speak the English language but understood a few words thereof. After working for the Chapman Timber Company five months, engaged in cutting wood and sniping logs, he was employed by the defendant and worked for it, prior to the hurt, eight months rolling logs down an inclined way and piling them near a railway operated by the defendant. The cars used to transport logs from the camp to the market consisted of four wheel trucks, about ten feet long, having a cross bumper on which the ends of the logs rested. Two trucks were used for each load; the forward carriage being connected by an iron link held in place by an iron pin to the car or locomotive immediately in front of it. Until the day preceding the accident the plaintiff had never assisted in loading logs upon trucks, but on that day, the man whose duty it was to help perform that service being absent, Nelson, at the direction of C. M. McDonnell, who had charge of that branch of the work, assisted in placing logs on the cars. The next day, a load of logs having been placed on trucks, McDonnell released the brakes, causing the cars gradually to move downgrade at the rate of about four miles an hour towards another loaded car, and

directed the plaintiff to make the coupling. Nelson being on the right side of the moving car, held the link thereof with his left hand, and as the trucks neared the car standing on the track he removed the pin therein with his right hand so as to allow the link to enter at the proper place where he dropped the pin into position, but failing to remove his left hand it was crushed by the cars coming together. Prior to the accident he rode on the trucks nearly every day in going to and returning from his work. He had seen brakemen couple these cars and he had worked near the defendant's railway where the trucks were in daily use, but before the injury he had never attempted to make a coupling.

It is argued by the defendant's counsel that the testimony adverted to shows that the risk of coupling cars with an iron link and a pin was so visible as to compel the plaintiff, who was of mature years, to form a just estimate of the hazard to which he was exposed and of the consequences which might possibly result to him from any delay or false movement in performing the service, so as to render it unnecessary for the defendant to notify or warn him of a fact of which he was also well aware, and, this being so, the instruction challenged was erroneous. The question to be considered is whether or not the hazard incident to coupling, in the manner indicated, a car loaded with logs moving on a downgrade was so visible that the plaintiff, who was inexperienced in such service, but who for several months had ridden on logging trucks to and from his work and had seen such couplings made, was bound to observe and avoid the danger, thus relieving the defendant of the duty of warning him of the risk. "Railroad employes who are required to couple and uncouple cars," says a text-writer, "are presumed to know the risk of this detail of the service and to assume it." White, *Personal Injuries on Railroads*, § 335. To the same effect is *Tucker v. Northern Terminal Co.*, 41 Or. 82, 68 Pac. 426. This rule, however, can have no application to the plaintiff, who was employed to assist in rolling and piling logs preparatory to their shipment, which service did not require him to couple cars. Whether or not from riding daily upon the trucks he must have seen that the buffers occasionally came in contact with each other, notwithstanding the link and pin, and that the danger in coupling such cars must necessarily have been apparent, cannot be inferred in the absence of evidence tending to show the character of any part of the defendant's railway, over which he rode, as to being downgrade. A careful examination of the entire evidence, which is attached to the bill of exceptions, does not show that he understood or should have appreciated the danger incident to coupling cars. If he had never seen the buffers strike each other, he may reasonably have inferred that the drawheads of the



cars were so constructed that the slack of the train from inertia or in moving on a down-grade would cause the ends of the link to come in contact with some obstruction made for that purpose, thereby preventing a contact of the buffers. The assumption of risk was put forward by the defendant to defeat a recovery, and in order to substantiate the averment it was required to produce testimony tending to support the allegation. No evidence was offered to show the character of the defendant's railway as to whether or not it was a tangent or consisted of a series of curves, was level or otherwise, except at the place where the injury occurred, so that by riding on the trucks it would necessarily be inferred that the plaintiff observed the buffers strike each other.

One of the duties which the master owes is to exercise reasonable care in instructing an inexperienced adult servant as to the dangers incident to a performance of the service and to warn him how properly to avoid the hazard, unless the risk, is so open and apparent that any person of his age, experience, and capacity should have appreciated the danger to which he was subjected. 7 Am. & Eng. Ency. Law (2d Ed.) § 350; *Westman v. Wind River Lumber Co.*, 50 Or. 137, 91 Pac. 478; *Magone v. Portland Mfg. Co.*, 51 Or. 21, 93 Pac. 450; *Ferrari v. Beaver Hill Coal Co.*, 54 Or. 210, 94 Pac. 181, 95 Pac. 498, 102 Pac. 175, 1016; *Elliff v. O. R. N. Co.*, 53 Or. 66, 99 Pac. 76. In the latter case it was ruled that, when a servant was taken from his usual work and required to assist in some hazardous task with which he was not conversant, the change in employment rebutted any inference which might arise that in seeking service he impliedly represented that he was qualified to perform any labor that might be demanded of him. The rule thus recognized supports that part of the charge under consideration to the effect that, in requiring the plaintiff to couple cars instead of rolling and piling logs, he should have been warned of the danger incident to the duties outside the service he was engaged to perform.

[4] It was incumbent upon the defendant not to expose the plaintiff to risks that did not pertain to the service in which he was engaged, and as Nelson was placed under the authority of McDonnell who directed him to do an act not within the scope of his employment, and which exposed him to a hazard and danger not contemplated in the contract of service, the defendant is liable for the resulting injuries, unless the plaintiff was chargeable with contributory negligence or the act was done under such circumstances that it could be said he assumed the risk. *Wood, Master & Servant* (2d Ed.) § 439; *Cincinnati, etc., R. Co. v. Madden*, 134 Ind. 462, 34 N. E. 227; *Chicago & N. W. Ry. Co. v. Bayfield*, 37 Mich. 205. The instruction complained of was a true exposition of the law applicable

to the facts herein, and no error was committed as alleged.

Other errors are assigned, but deeming them immaterial or not properly presented, the judgment is affirmed.

McBRIDE, C. J., and RAMSEY, J., concur. BURNETT, J., concurs in the result.

(66 Or. 272)

MUTUAL BENEFIT LIFE INS. CO. OF  
NEWARK, N. J., v. CUMMINGS et al.

(Supreme Court of Oregon. July 22, 1913.)

1. INTERPLEADER (§ 29\*)—LIFE INSURANCE—  
EVIDENCE—SUFFICIENCY.

In a contest between claimants to a life policy, evidence held to show that the insured intended that the proceeds should be paid to his mistress instead of his legal wife; the policy having named the mistress as beneficiary, though designating her as "wife."

[Ed. Note.—For other cases, see *Interpleader*, Cent. Dig. § 57; Dec. Dig. § 29.\*]

2. INSURANCE (§ 146\*)—LIFE INSURANCE—  
CONTRACTS—CONSTRUCTION.

A life policy is a contract and should be construed so as to effectuate the intention of the parties, being treated as of a testamentary character.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.\*]

3. NAMES (§ 10\*)—ADOPTION OF NAME—RIGHT  
TO ADOPT.

A person may adopt or assume a different name from his true one and carry on business and make contracts under the fictitious name.

[Ed. Note.—For other cases, see *Names*, Cent. Dig. § 7; Dec. Dig. § 10.\*]

4. INSURANCE (§ 586\*)—LIFE INSURANCE—  
DESIGNATION OF BENEFICIARY.

When a life policy is issued and delivered, naming a beneficiary without a reservation of power on the part of the insured to change, an irrevocable trust is created.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1470; Dec. Dig. § 586.\*]

5. INSURANCE (§ 585\*)—LIFE INSURANCE—  
RIGHT TO PROCEEDS OF POLICY.

Where a man, who had deserted his lawful wife and was living and cohabiting with another woman, took out a policy in the latter's favor, designating her as "wife," the contract being wholly made for her benefit, she is entitled to the proceeds of the policy as against insured's true wife, for a person may insure his own life in favor of one having no insurable interest in his life; the fact that the beneficiary was named as his wife, and had adopted his surname not affecting her rights, for a person may adopt a fictitious name.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1461-1468; Dec. Dig. § 585.\*]

6. APPEAL AND ERROR (§ 1009\*)—REVIEW—  
FINDINGS.

Findings in equity cases are of no persuasive force on appeal; L. O. L. § 405, providing that such cases shall be tried anew.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.\*]

McBride, C. J., dissenting.

Department 1. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge. Interpleader by the Mutual Benefit Life

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
133 P.—74



Insurance Company against Evelyn M. Cummings and Sophia J. Cummings. From a decree for defendant Sophia J. Cummings, defendant Evelyn M. Cummings appeals. Reversed.

See, also, 126 Pac. 982.

This is a suit in equity in the nature of a bill of interpleader brought by the Mutual Benefit Life Insurance Company of Newark, N. J., against Evelyn M. Cummings and Sophia J. Cummings to require them to interplead concerning the right to receive the amount of a policy of life insurance on the life of Harry A. Cummings, deceased.

On the 5th day of May, 1911, said insurance company issued a policy of life insurance on the life of Harry A. Cummings in the sum of \$2,000, which policy was issued in consideration of the payment by said deceased of an annual premium of \$54.34 or a semi-annual premium of \$27.14. Said deceased paid to said company the first semiannual premium of \$27.14 at the time said policy was issued. Said Harry A. Cummings died on the 23d day of August, 1911. Said policy had earned \$2.08, making the amount due on the policy \$2,002.08. There was due as a semiannual premium on said policy the sum of \$27.14, which leaves due, as a balance, the sum of \$1,974.36. Said policy by its terms made said sum of \$2,000 payable, on the death of the insured, to "Evelyn M. Cummings, his wife." The defendant Evelyn M. Cummings claimed that she was entitled to the said sum of \$2,000 as the beneficiary of said policy and made proof of her claim. Said Sophia J. Cummings claimed that she was entitled to said \$2,000 as the beneficiary of said policy as the wife of Harry A. Cummings, deceased, and made proof of her claim. Each of said parties claimed the whole of said \$2,000 and demanded payment thereof. Said company filed its complaint, alleging the necessary facts and asking that said defendants be required to appear and set forth their several titles and claims to the proceeds of said policy, and asked the court to require them to adjust and settle their respective demands between themselves. The plaintiff insurance company deposited in the court below the proceeds of said policy, to be paid to the person entitled thereto.

Each of the defendants filed an answer to the plaintiff's complaint, claiming to be entitled to said money. The defendant Evelyn M. Cummings in her answer alleges that for about two years before the death of Harry A. Cummings and until his death she lived with him as his wife, and that he represented to the public and his friends that she was his wife, and that she was known to the public as his wife, etc. The defendant Sophia J. Cummings was shown by the evidence to be the wife of the deceased, but she resided in California, and she and the deceased had not lived together, at

any time, for about three years prior to his death.

The court below rendered a decree that the defendant Evelyn M. Cummings was not entitled to the proceeds of said policy on deposit, and that the defendant Sophia J. Cummings was entitled to said money, etc. The defendant Evelyn M. Cummings appealed.

Emmons & Emmons & Reid, of Portland, for appellant. Arthur P. Tift and Hamilton Johnstone, both of Portland, for respondent.

RAMSEY, J. (after stating the facts as above). The question for decision is whether the defendant Evelyn M. Cummings or the defendant Sophia J. Cummings is entitled to the proceeds of said policy of insurance on deposit in the court below.

[1] The evidence shows that Sophia J. Cummings was the wife of said Harry A. Cummings, and that Evelyn M. Cummings was not his wife. It appears that Harry A. Cummings and his wife, Sophia J., separated about three years before his death in the state of Washington, and that his wife never resided in Oregon until after his death, and that she resided in California at the time of his decease, and that she had had no correspondence with the deceased during said separation.

The defendant Evelyn M. lived with the deceased about two years as his wife, and he represented to his friends and to the public that she was his wife, and she claimed to be his wife. She bore the name of Evelyn M. Cummings, in Portland, but there had been no marriage ceremony. The deceased had not been divorced from his wife and could not legally enter into a marriage contract. Evelyn M. testified that she and the deceased had entered into an agreement to be married. Such agreement, however, was void, but evidence of it was relevant to show the relation between her and the insured. She testified, also, that during the time that she lived with the deceased as his wife she advanced to him money, amounting in the aggregate to \$6,000 and jewelry of the value of \$2,000, and that she did this to assist him in business. She claims that he never repaid her this money. She testified, also, that he introduced her to his friends as his wife, and this is corroborated by the evidence of other witnesses. She does not claim that they were married, and, of course, she was not his wife, and it was a gross deception for him to represent to his friends and the public that she was his wife. There is no doubt that Sophia J. was his wife and that he had a daughter by her.

The policy of insurance provided that the \$2,000 named therein should be paid to Evelyn M. Cummings, "his wife." The evidence shows that, shortly after he obtained this policy, he delivered it to Evelyn M. and told her that it was a present to her, and that it



remained in her possession. Sophia J. had no knowledge of this policy until after his death. In the application for the policy it is stated that the beneficiary thereof should be "Evelyn M. Cummings," wife of the insured.

In her testimony, Sophia J. testified that she had never seen the original policy, and that she doubted whether any one but Evelyn M. had seen it. It is clearly shown, and not disputed, that the deceased lived with Evelyn M. two years as his wife; that he called her his wife; that he introduced her to his friends and acquaintances as his wife; that his friends and acquaintances believed her to be his wife; that the application for the policy referred to her as his wife, and stated that she should be the beneficiary of the policy; that the policy named her as the beneficiary; and that, after he obtained the policy, he delivered it to her and told her that the policy was a present to her, and that she retained possession of the policy, and that Sophia J. never had the policy or heard of it until after the death of the insured. These facts prove to a moral certainty that Evelyn M. was intended by the insured to be the beneficiary and to have the whole interest in the policy. This conclusion is strengthened by the fact that he had been for years estranged from Sophia J., his wife, and that this estrangement was so intense that no letters had passed between them since the separation, a period of several years.

[2] The policy is a contract and should be so construed as to effectuate the intention of the parties to it. In 25 Cyc. p. 741, the rule for the construction of policies is thus stated: "The language of the policy designating the beneficiary is to be treated as of testamentary character and is to receive as nearly as possible the same construction as if used in a will. In determining the intention as to the beneficiaries, the policy should be so construed, if possible, as to give effect to every clause and word, and obviously clerical errors will be corrected or disregarded."

[3] In this case, by agreement between the deceased and Evelyn M., she adopted his surname and was called by them and by her and his acquaintances "Evelyn M. Cummings," and by their agreement she was called his wife. A person may adopt or assume a different name from his or her true name and transact business in such assumed name. 29 Cyc. 270 states the law upon this subject thus: "Without abandoning a real name, a person may adopt any name, style, or signature wholly different from his own name by which he may transact business, execute contracts, issue negotiable paper, and sue and be sued. Such assumed or fictitious name may be either purely an artificial name or a name that is or may be applied to natural persons." On page 271 of the same book the author further states the rule thus:

"It is customary for persons to bear the surname of their parents, but this is not obligatory. A man may change his name without resort to legal proceedings and for all purposes the name thus assumed will constitute his legal name just as much as if he had borne it from birth."

[4] When a policy is issued and delivered, naming a beneficiary, to whom the money is to be paid, without a reservation of power to change the beneficiary, an irrevocable trust is created. Bacon on Benefit Societies and Life Insurance, § 292.

[5] It is the settled law of this country that a person has a right to insure his own life and have the money made payable to any person whom he may desire, whether such beneficiary has an insurable interest in his life or not. Brett v. Warnick, 44 Or. 519, 75 Pac. 1061, 102 Am. St. Rep. 639; Dolan v. Supreme Council, 152 Mich. 266, 116 N. W. 383, 15 Ann. Cas. 232; Reed v. Provident Life Insurance Co., 190 N. Y. 111, 82 N. E. 734; Locher v. Kuechenmeister, 120 Mo. App. 701, 98 S. W. 92; Hess v. Sengenfelder, 127 Ky. 348, 105 S. W. 476, 14 L. R. A. (N. S.) 1172, 128 Am. St. Rep. 343; Union Fraternal League v. Walton, 109 Ga. 1, 34 S. E. 317, 46 L. R. A. 424, 77 Am. St. Rep. 350; Langdon v. Union Mutual Life Insurance Co. (C. C.) 14 Fed. 272; 25 Cyc. 708; Hill v. United Life Insurance Co., 154 Pa. 29, 25 Atl. 771, 35 Am. St. Rep. 807; Milner v. Bowman, 119 Ind. 448, 21 N. E. 1094, 5 L. R. A. 95.

In Brett v. Warnick, supra, Justice Wolverton says: "It is beyond cavil that a person may take out a policy of insurance on his own life and make it payable to whomsoever he pleases; he being the moving spirit and assuming the responsibility of meeting the premiums or assessments."

In Reed v. Provident Life Insurance Company, supra, the New York Court of Appeals says: "But a person may insure his own life and provide in the contract of insurance that the money shall be payable to any one whom he may appoint or assign the policy to."

In Dolan v. Supreme Council, supra, the Supreme Court of Michigan says: "The authority of these cases [referred to in the opinion] and their reasoning warrants the statement that the rule of public policy which forbids one insuring a life in which he has no insurable interest does not prevent his being made a beneficiary in an insurance policy secured by the insured."

In the case of Union Fraternal League v. Walton, supra, the Supreme Court of Georgia says: "But we feel assured, both by reason and the long line of adjudicated cases to which only partial reference has been made, that the true rule which should obtain in such cases is that where one obtains a contract of insurance on his own life and keeps up the same out of his own means, and directs the amount of the policy to be paid at his death to



another whom from love, friendship, or any other reason he desires to benefit, the named beneficiary is entitled to recover on such contract, notwithstanding it may not be shown that he or she has any other insurable interest in the life of the deceased than exists in his good will and emanates from his expressed wish to benefit."

In this case the policy was made payable to Evelyn M. Cummings, designated as the wife of the insured. She was not his lawful wife, but she was reputed to be his wife. The insurance company is not making any defense in this case, and, in fact, it admits its liability.

The living together as husband and wife of the deceased and the beneficiary, while the deceased had a wife living, was an act of gross immorality that cannot be too strongly condemned, but this illicit relation between them did not incapacitate him to make a valid contract of insurance upon his life for the benefit of his reputed wife. If he had made her a present of \$2,000, the gift would have been valid as to all the world, excepting his creditors. A man or a woman, being of lawful age and compos mentis, has power to give all his or her property to his or her paramour, and no one but the creditors of the person making such a gift can successfully contest the validity thereof. The immoral relation between the parties does not vitiate their contract or gift.

It may have been the insured's duty to provide for his wife and child and to have made no provision for the woman with whom he lived illegally. We do not doubt his duty in the premises, but this duty is of imperfect obligation, and this court has no power to make a contract for him or to change one he has made. By the contract which he made with the insurance company, the proceeds of the policy were to be paid, at his death, to the appellant, Evelyn M. Cummings. We have no power to decree that, when he stipulated that this money should be paid to Evelyn M., his wife, he meant that it should be paid to Sophia J., his wife. It is true that Evelyn M. was not his lawful wife, but she was his reputed wife and was generally so known. It is our duty to construe the policy so as to effectuate the intention of the insured and the company that issued the policy. It is morally certain that the parties to this contract intended that the proceeds of the policy should be paid to Evelyn M. and not to Sophia J.

The case of *Bogart v. Thompson*, 24 Misc. Rep. 581, 53 N. Y. Supp. 622, is very much like this case. There a husband abandoned his wife but thereafter promised to marry one whose Christian name was "Emma L." His fiancée did not know of his previous marriage, but she knew that he had lived with the woman who was his wife. She claimed, however, that she did not know of his marriage to her. He obtained a policy on his life and made it payable to his fiancée as

"Mrs. Emma L. Thompson, his wife." His wife's name was Eliza Jane Thompson. Both he and his wife died, and his fiancée and the administrator of his wife's estate each claimed the proceeds of the policy. A suit of interpleader was brought, and the wife's administrator claimed the money on the ground that his intestate was the wife of the insured and that his illegal fiancée was not his wife, but the court held that the insured intended his fiancée to have the money and gave it to her. The court said: "The defendant contends that the designation 'wife' indicated Thompson's intention to designate his lawful wife, Eliza Jane Thompson. In view, however, of the difference in names, and of his engagement to marry the plaintiff, and of the delivery of the contract (policy) to her, it is manifest that by such designation he intended to name the plaintiff and not his lawful wife, Eliza Jane Thompson. The duty of the court is to ascertain the intention of the member of the beneficiary order and to give that intention effect, provided it does not contravene public policy or any statute." The court decided that the woman to whom the insured was illegally engaged was entitled to the money.

In *Story v. Williamsburgh M. M. B. Ass'n*, 95 N. Y. 474, the facts were: Story married a woman named Mary and lived with her as his wife until his death, but he had a lawful wife living in England. During his life he obtained a policy and made it payable to "Mary Story, his wife." After his death, she claimed the proceeds of the policy and sued the insurance company. The Court of Appeals held that the reputed wife, named as the beneficiary, was entitled to the money, and that it was not necessary that she should be his lawful wife, although she was referred to in the policy as his wife.

In the case of *Lampkin v. Travelers' Insurance Company*, 11 Colo. App. 249, 52 Pac. 1040, the facts were briefly these: "Jos. R. Lampkin obtained a policy of insurance on his life, and made it payable to Lou Lampkin as his wife. He died, and the beneficiary sued the company to recover the insurance, and the company defended on the ground that the beneficiary named was not his wife, and that he had a lawful wife living. The company claimed that the statement, in the application for the policy, that the beneficiary was his wife was a warranty. The insured had lived with the beneficiary as his wife. The Court of Appeals, however, held that the statement in the application that the beneficiary was his wife was not a warranty but a mere description of the person. The court held also that a woman who lives with a man as his wife, although she is not his wife, has an insurable interest in him."

In this case the insurer makes no defense, and there is no issue as to fraud or breach of warranty, and therefore the cases on those subjects are irrelevant.

The counsel for the respondent placed



much reliance on the case of *Hogan v. Wallace*, 166 Ill. 328, 46 N. E. 1136. The facts were these: Michael Hogan, who could neither read nor write, obtained a policy of insurance on his life, and it was made payable to "Mrs. Kate Hogan, his wife." Another person filled out the application for the insured and made a mistake in the name of the beneficiary. His wife's name was Ellen B. Hogan. The insured lived with her until the time of his death and had several children by her. He never had any other wife. His sister's maiden name was Kate Hogan, but when this policy was issued her name was Kate Wallace. His wife and his sister each claimed the proceeds of the policy. His sister's name did not correspond with the name in the policy, as it was payable to Mrs. Kate Hogan, his wife, while her name was Kate Wallace, and of course she was not his wife. His wife's name was Ellen B. Hogan. The court after hearing the evidence, decided that there was an error in the name and gave the money to the wife on the ground that it was the intention of the insured to provide for her.

In this case it is morally certain that there was no error in the name of the beneficiary; the appellant having adopted the name "Cummings" with the approval of the insured, and he having held her out to the public as his wife. We are satisfied that he intended that she should receive the proceeds of the policy, and that his lawful wife should have no interest therein.

[8] The respondent's counsel claims that the findings of the court below should be of persuasive force on this appeal, but section 405, L. O. L., expressly provides that equity cases shall be tried anew in this court *without reference to such findings*. This indicates that the findings of the court below, in equity cases, should be disregarded on appeal.

The decree of the court below is reversed, and a decree of this court will be entered requiring the payment to Evelyn M. Cummings, the defendant and appellant, of the said sum of \$1,974.36 deposited in this case in the court below, as the proceeds of said policy of insurance by the complainant, the Mutual Benefit Life Insurance Company, of Newark, N. J., and neither party will be allowed costs or disbursements in this court or in the court below.

MOORE and BURNETT, JJ., concur.

McBRIDE, C. J. (dissenting). The cases cited in the opinion fully justify upon authority the conclusion reached, but in my opinion they all overlook to a great extent the element of morals and public policy which enters into the question. Under the testimony here we have a case of a man deserting his lawful wife and living in adultery with another woman, who, the circum-

stances indicate, must have been aware of his offense against his wife and family. In this situation he takes the money that should have been expended for the protection of his lawful wife and buys a policy of insurance for his mistress. To allow the mistress under such circumstances to recover would, in my judgment, be contrary to public policy and good morals. It would tend to encourage such illicit relations and to promote their continuance. Though the contract was void as against good morals, the insurance company has not made such a defense, but by its interpleader has brought the money into court and says that it is indifferent as to who takes it. Since the money of the husband bought the policy, and we are sitting as a court of equity to dispose of it, I am of the opinion that it would be good equity to turn it into the husband's estate.

There is no precedent for the course thus indicated, but, in my judgment, the Supreme Court of Oregon should make one, as I believe the law justifies it and the conservation of public morals requires it.

(68 Or. 1)

STATE ex rel. FIRST NAT. BANK OF  
KLAMATH FALLS v. SIEMENS,  
County Treasurer.

(Supreme Court of Oregon. July 29, 1913.)

1. STATUTES (§ 181\*)—CONSTRUCTION—INTENTION OF LEGISLATURE.

The fundamental rule of construing legislative enactments is to ascertain and declare the intention of the Legislature as expressed in the statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.\*]

2. DEPOSITARIES (§ 6\*)—CONSTRUCTION—REMEDIAL STATUTES.

Gen. Laws 1913, p. 515, requiring county treasurers to designate depositaries for county funds, is remedial in character, and should be construed so as to promote the remedy.

[Ed. Note.—For other cases, see Depositaries, Cent. Dig. § 20; Dec. Dig. § 6.\*]

3. STATUTES (§ 227\*)—CONSTRUCTION—MANDATORY AND DIRECTORY STATUTES.

Mandatory provisions of a statute must unflinchingly be followed, while directory provisions need not necessarily be followed in the precise manner indicated.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 308, 309; Dec. Dig. § 227.\*]

4. STATUTES (§ 227\*)—CONSTRUCTION—MANDATORY OR DIRECTORY PROVISIONS.

Where compliance with the particular provision of a statute is a matter of convenience rather than of substance, or where the directions are given with a view merely to the proper and prompt conduct of business, the provision may be regarded as directory.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 308, 309; Dec. Dig. § 227.\*]

5. DEPOSITARIES (§ 6\*)—STATUTORY PROVISIONS—CONSTRUCTION.

The provision of Gen. Laws 1913, p. 515, requiring the designation of depositaries of county funds to be made on the first Monday in June, is directory, not mandatory; and, where the act did not go into effect until the



day after the first Monday in June, but the intention of the Legislature was plain that it should be effective in that year, the county treasurer is required to designate depositories after the act became effective.

[Ed. Note.—For other cases, see *Depositaries*, Cent. Dig. § 20; Dec. Dig. § 6.\*]

#### 6. DEPOSITARIES (§ 6\*)—DESIGNATION—DISCRETION.

Under Gen. Laws 1913, p. 515, providing that the county treasurer shall designate such banks as possess the required qualifications for county depositories, the only discretion allowed the treasurer is to determine whether the bank possesses the required qualification, and a demurrer to a writ of mandamus to compel a treasurer to designate a certain bank, which writ alleges that the bank possessed the qualifications, will be overruled.

[Ed. Note.—For other cases, see *Depositaries*, Cent. Dig. § 20; Dec. Dig. § 6.\*]

#### 7. MANDAMUS (§ 72\*)—GROUNDS—NATURE OF ACT.

Mandamus will lie to compel a public officer to perform a duty prescribed by law, but not to control the performance of that duty when the act involves the exercise of discretion.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 134; Dec. Dig. § 72.\*]

McBride, C. J., and Burnett, J., dissenting.

In Banc. Original mandamus in Supreme Court by the State of Oregon, on relation of First National Bank of Klamath Falls against J. W. Siemens, County Treasurer of Klamath County. Demurrer to writ overruled.

This is an original application in this court, for mandamus to compel J. W. Siemens, county treasurer of Klamath county, Or., to receive the application of the First National Bank of Klamath Falls, Or., to be designated a depository for county funds under the provisions of chapter 273 of the General Laws of Oregon for 1913. The alternative writ of mandamus, after reciting that plaintiff is engaged in the banking business at Klamath Falls, Klamath county, Or., and organized under the laws of the United States of America, avers: That defendant is the treasurer of the county, and on June 3, 1913, plaintiff filed with defendant an application to be designated a depository of county funds, which application was accompanied by a sworn statement of the financial condition of the bank. That on the day following, the bank renewed its application, and on June 10th, defendant returned the application to plaintiff with the indorsement: "Rejected, J. W. Siemens County Treasurer." That defendant admitted the application was in the proper form. That the securities offered for protection of the county funds were good and genuine, and the proper kind to be accepted to secure deposits of county funds. That as a justification for such rejection, defendant stated he was vested with absolute discretion to accept or refuse any application, even though the applicant was qualified and had performed the acts required by statute. Sea-

sonably, following the service of the writ, defendant appeared by a demurrer, presenting the following objections thereto: (1) That it appears on the face of the writ that the matters stated do not entitle plaintiff to relief; (2) that the writ does not show any reasons why adequate and prompt relief might not be obtained in the circuit court; (3) that the writ contains no statement calling for the exercise of the discretionary jurisdiction of this court; (4) that there is a defect of parties defendant on account of the omission of the district attorney; (5) that plaintiff failed to comply with the provisions of rule 33 (117 Pac. xiii), requiring the application for the writ to be served on defendant.

A. M. Crawford, Atty. Gen., and Geo. G. Bingham, of Salem (Kuykendall & Ferguson and J. C. Runtenic, all of Klamath Falls, on the brief), for plaintiffs. Thomas Drake, of Klamath Falls, for defendant.

McNARY J. (after stating the facts as above). The act under consideration was passed by the House of Representatives February 14, 1913, by the Senate the 25th day of the month, received by the executive department on February 27th and filed with the Secretary of State on the same day. By reason of matters purely political the Legislature did not adjourn until March 2d, and for that account the act did not become effective until Tuesday following the first Monday of June, 1913, which was the 3d day of the month.

Those provisions of the act pertinent to an understanding of the statute recount that the county treasurer of the several counties of the state shall, on the first Monday in June of each year, designate such banks and trust companies within the respective counties as have become eligible county depositories, for the purpose of receiving on deposit funds of said county. The applicants must qualify in this manner: They shall, on or before the first Monday in June of each year, file applications in writing with the county treasurer, accompanied by a sworn statement of their financial condition. The county treasurer shall pass upon the same, and shall stamp upon the application either the words "Approved" or "Rejected," append his signature, and submit the same to the district attorney, together with all securities offered for protection of the county funds, who shall, upon receipt thereof, and after examination, advise the county treasurer as to their legality. No securities shall be approved, unless their market value shall equal the amounts of deposits applied for by any bank. The statute further provides that the county treasurer shall deposit, and at all times keep on deposit in the county depositories, all of the moneys of the county coming into his hands, and which funds shall be deposited in the depositories in proportion that the capital

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



and surplus of the depositaries bear to the total public funds; that such deposits shall be subject to payment when demanded by the county treasurer, and the depositaries shall be required to pay the county for the privilege of holding the funds, interest at the rate of 2 per cent. per annum on the daily average deposits.

We believe there are but two questions to be considered: (1) Does the writ contain facts sufficient to warrant plaintiff relief; (2) is the county treasurer privileged to exercise absolute discretion in refusing the application of a prospective depositary?

On the surface of this proceeding it is obvious the statute did not become vitalized until a day subsequent to the time specified in the act for the selection of depositaries, and, on account thereof, it is argued defendant could designate no depositaries until the intervention of a year; that is, until the first Monday in June, 1914.

[1, 2] These conditions suggest a careful analysis of the statute. It will not be denied the great fundamental rule in construing legislative enactments is to ascertain and make efficacious the intention of the lawmaking body, keeping in mind the intention as expressed in the statute; and, when that legislative will is ascertained, no other judicial duty need be performed than to declare such intention. Confessedly, the statute under consideration is remedial in character, and that the words therein are to be construed beneficially, so as to promote the remedy contemplated by the act.

[3] Another formula of statutory construction is that mandatory provision of a statute must unfailingly be followed, while directory provisions need not necessarily be followed in the precise manner indicated in the law. If the subject-matter and language of the act be examined in the light of these principles, an interpretation both rational and wholesome will appear. That it was the manifest intention of the Legislature to have the act vital on the first Monday of June in the year of its passage is apparent from the early course the enactment took through the Legislature. That the first Monday of June expired one day earlier than the maturity of the statute was a political contingency not anticipated by the framers of the act or the lawmaking body. That the statute is remedial in its nature plainly appears from a casual reading of the enactment.

[4] However, a graver question arises when we take up the consideration whether the particular provision in thought is to be regarded as directory or mandatory. We think the true rule is expressed in the following language: "When the particular provision of the statute relates to some immaterial matter, where compliance is a matter of convenience rather than substance, or where the directions of the statute are given with a view to the proper, orderly, and prompt con-

duct of business merely, the provision may generally be regarded as directory." *Hurford v. City of Omaha*, 4 Neb. 350. To the same effect we cite *Sedgwick on Constitutional Law*, p. 372; 36 Cyc. 1158. In *People v. Lake County*, 33 Cal. 487, a case of recognized similarity, the Supreme Court, speaking through Justice Rhodes, said: "When a statute specifies the time at or within which an act is to be done, it is usually held to be directory, unless time is of the essence of the thing to be done, or the language of the act contains negative words, or shows that the designation of the time was intended as a limitation of power, authority, or right."

[5] In the determination of the query whether defendant should designate county depositaries regardless of the fact the law became effective a unit of time after the date specified in the statute, significance must be given to the nature of the official act; that is, whether the time prescribed in the enactment is intended as a limitation of time in which official duty must be performed, or, whether the designated time was indicated as a convenient period, and merely with a view to the proper, orderly, and prompt administration of a public duty. The act before us for construction has fixed the first Monday in June of each year as the day the treasurers of the respective counties of the state shall designate banks or trust companies that shall become depositaries for county funds. There is nothing in the nature of the duty indicating it might not be as effectually exercised after the first Monday in June as before that date, had the law been extant. Furthermore, the law contains no prohibition to exercise the selection of the depositaries after the first Monday in June. We are at loss to see where the time specified in the act for the selection of depositaries is of the essence of the statute, or, a matter of substance to the contrary, the law was conceived in the belief that it was promoting the public weal, that a remedy is needed for existing abuse, and that a convenient time should be stated when official duty should be performed. To say the act must be construed, as being in a state of repose until the first Monday in June next, is placing an interpretation thereon of strict and literal severity. The essence, the very quintessence, of the statute is to establish county depositaries and to divert into the public exchequer moneys in the way of interest that had heretofore flowed into private reservoirs, and to hold otherwise would be placing a premium on form, and minimizing, if not destroying, the effect and value of substance.

[6] The concluding question is whether a county treasurer is vested with absolute discretion in rejecting or accepting applications of banks or trust companies for designation as county depositaries.

Section 1 of the act reads: "It shall be the duty of the county treasurer \* \* \* to



designate such banks and trust companies \* \* \* as have \* \* \* become eligible county depositaries. \* \* \* The county treasurer shall pass upon the application," sign the same, and stamp thereon "Approved" or "Rejected," and "transmit to the district attorney such application, together with all securities offered for protection of the county funds."

Section 2 provides: "The county treasurer shall deposit, and at all times keep on deposit in the county depositaries, \* \* \* all the moneys of the county coming into his hands," etc.

[7] Apparently from these excerpts no discretion abides with the county treasurers respecting the performance of official duty which is imperative. The enactment requires the officer to initiate the act which makes the statute a living rule of official conduct, but leaves to the treasurer the freedom to act in all matters pertaining to the selection, rejection, or designation of county depositaries, according to his own judgment, honestly exercised. Mandamus will lie to compel the execution, by a public officer, of a duty prescribed by law, but not to control the exercise of that duty, when the act to be done involves the exercise of judgment or discretion.

Considering the enactment in question, we believe the county treasurer of the several counties in this state must select depositaries for county funds, subject only to the controlling influences of a sound discretion in the matter of the financial strength and qualifications of a depositary and the form of the application as detailed by the statute.

The demurrer to the writ must be overruled.

BURNETT, J. (dissenting). At the suit of the state of Oregon, on relation of the First National Bank of Klamath Falls, an alternative writ of mandamus has been issued out of this court, directed to the defendant as county treasurer of Klamath county. It recites that on June 2, 1913, the bank made application to defendant to be designated as a depositary for county funds, that the application was accompanied by sundry municipal and school district bonds, amounting to \$63,150, and an American Surety Company bond of that date for \$25,000, and that on the following day the bank renewed its application in the same words, and accompanied by the same bonds, together with a sworn statement of the financial condition of the bank at the close of business May 31, 1913. It is also stated in the writ "that defendant did, on June 10, 1913, unlawfully, and without just or any reason therefor, reject said applications, and returned the same indorsed: 'Rejected. J. W. Siemans, County Treasurer'—together with said sworn statement of financial condition and said bonds. That defendant in making said rejection de-

clared and admitted that said application was in proper form, duly and properly made, executed, and tendered, and that said bonds were good, genuine, and valid bonds, and of a proper kind to be accepted to secure deposits of county funds, but defendant alleged and declared, as a basis and justification for such rejection, that he, as such treasurer, had and was vested with an absolute discretion to accept or reject any application for designation as such depositary, even though the applicant was qualified for such designation, and had performed each of the acts required by law to secure such designation." The application, a copy of which is attached as an exhibit, states that the bank estimates the bonds of the present value of \$90,000, and gives a list of the same, and that all the municipal and school district bonds have the proper coupons attached, and the market value of the same is par or more. Nothing is stated in the writ or in the copy of the application attached as an exhibit about whether the American Surety Company is qualified or not. It concludes with a direction, in substance, that the defendant designate the relator as a depositary for county funds, or show cause to the contrary. The defendant demurs to the writ on several grounds, the first of which only is necessary to be considered, namely, "that it appears on the face of said writ that the facts and matter therein stated did not entitle the relator to the relief demanded."

The act of February 27, 1913, being chapter 273 of the Laws of that year, provides: "It shall be the duty of the county treasurers of the several counties of the state of Oregon, on the first Monday in June of each year to designate such banks and trust companies within the respective counties as have, under the provisions of this act become eligible county depositaries for the purpose of receiving on deposit funds of said county and paying out the same on order, or check of the county treasurer. Such banks and trust companies shall qualify as county depositaries as follows: The banks and trust companies, applying to be made depositaries under the provisions of this act, shall on or before the first Monday of June of each year, file application in writing with the county treasurer, said application to be accompanied with a sworn statement of the financial condition of said bank, or trust company at the time said application is made. The county treasurer shall pass upon the application made in compliance with this act and shall stamp upon said application 'Approved,' or 'Rejected' and the same shall be duly signed by the county treasurer and it shall be the duty of the county treasurer to transmit to the district attorney such application, together with all securities offered for protection of the county funds, and it shall be the duty of the district attorney upon the receipt of such application, and securities, to pass upon the same, and advise the county treas-



urer as to their legality." It is also provided, in substance, that before any such application shall be approved, it shall be accompanied by a bond secured by a duly qualified surety company, guaranteeing the amount of deposits applied for in the said application, or it may be accompanied by other bonds specified in the act. It is also said, in section 1 of the act, that, "No securities shall be approved unless their market value shall equal the amounts of deposits applied for by any bank."

Section 28, art. 4 of the Oregon Constitution states: "No act shall take effect until ninety days from the end of the session at which the same shall have been passed, except in case of emergency. \* \* \*" The session of the legislative assembly at which the act in question was passed ended March 4, 1913. The 90-day period thereafter expired on Monday, June 2, 1913, the same being the first Monday of that month; hence the law became effective only on the day following. The statute is prospective in its terms. On the first Monday of June of the present year there was no law in any way qualifying or repealing the statute making the treasurer the custodian of all the county funds. Hence no petition could regularly have been filed at the time prescribed in the statute, namely, on the first Monday of June, 1913. If the statute had said that petitions should be filed on the second Monday of August or December of each year, no one would contend that the treasurer could anticipate the date on which he could designate the depositaries. The reason of the rule is the same when applied to the actual dates involved. No duty is enjoined upon the treasurer until the time named in the statute. If he can take it upon himself to designate a depositary either before or after the day named in the statute, the exercise of power is discretionary, and cannot be controlled by mandamus.

It is said in the law that the petition must be presented on or before the first Monday of June of each year. It is then made the duty of the county treasurer to "pass upon the application made in compliance with this act." Something more, then, is required of him than to adjudicate whether or not the mere form of the statute is observed. It goes without saying that if the application does not conform to the act in question, the treasurer would be justified in rejecting it; but the new law says that an application made in compliance with the act is still the subject of his consideration, and the law itself prescribes two forms of judgment which the treasurer may adopt, namely, "approved" or "rejected." It must be remembered, also, that the statute further says: "No securities shall be approved unless their market value shall equal the amounts of deposits applied for by any bank." It does not establish any procedure or specify any authority by which this value can be determined. Manifestly that is one of the matters committed

to the judgment of the public custodian of funds. It certainly cannot belong to the applicant. It is not reasonable to suppose that the Legislature intended that a would-be depositary should be permitted to sit in judgment on its own case and bind the treasurer by its own valuation of the offered security. The treasurer, being the person elected by the people for the purpose of controlling the custody of funds, is in good reason the one to pass upon the value of securities tendered in such cases.

It is said in section 613, L. O. L., that a writ of mandamus "may be issued to any inferior court, corporation, board, officer, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; but though the writ may require such court, corporation, board, officer, or person to exercise its or his judgment, or proceed to the discharge of any of its or his functions, it shall not control judicial discretion." The general rule in such instances is that the court by the extraordinary writ of mandamus may compel the officer to act, but it cannot control the result of his decision. While it commands him to act, it cannot put into his mouth the judgment which he must render. This is not a case of postponed duty. It is argued that if the defendant neglected to appoint a depositary on the date named in the statute, he could be compelled to do the act afterwards; but, on the first Monday in June, as we have seen, there was no law requiring the act to be done. It having been required that the petition must be presented on or before the day named, if we regard the plain words of the statute, it must be on the first Monday in June next following when the appointment is to be made. In this case the defendant had acted in one of the only two ways in which the statute says he must act. In the language of Mr. Justice Bradley in *United States ex rel. v. Black*, 128 U. S. 40, 9 Sup. Ct. 12, 32 L. Ed. 354: "The court will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but, when they refuse to act in a case at all, or when, by special statute or otherwise, a mere ministerial duty is imposed upon them—that is, a service which they are bound to perform without further question—then, if they refuse, a mandamus may be issued to compel them. Judged by this rule the present case presents no difficulty. The commissioner of pensions did not refuse to act or decide. He did act and decide. He adopted an interpretation of the law adverse to the relator, and his decision was confirmed by the Secretary of the Interior, as evidenced by his signature of the certificate. Whether if the law were properly before us for consideration, we should be of the same opinion, or of a different opinion,



is of no consequence in the decision of this case."

Here is an officer with jurisdiction of the subject-matter and power to render either of two specified decisions. He may have decided wrongly or rightly, or may or may not have given a wrong reason for a proper decision; but the result is not to be made the subject of mandamus. Section 603, L. O. L., says: "Any party to any process or proceeding before or by any inferior court, officer, or tribunal may have the decision or determination thereof reviewed for error therein, as in this chapter prescribed, and not otherwise." This language clearly indicates the writ of review to be the proper remedy for the grievances of which the relator complains, if they exist as a matter of law.

The demurrer should be sustained.

McBRIDE, C. J., concurs.

(66 Or. 218)

### JONES v. NATIONAL LAUNDRY CO.

(Supreme Court of Oregon. July 29, 1913.)

#### 1. MASTER AND SERVANT (§ 289\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether a servant, who was injured by defective shafting in a laundry, was guilty of contributory negligence in failing to stop the machinery before making repairs held, under the evidence, a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.\*]

#### 2. MASTER AND SERVANT (§ 217\*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

A servant does not assume hazards which he does not know of and appreciate, since he has a right to presume that the master has furnished him a safe place to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

#### 3. NEGLIGENCE (§ 136\*)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

The question of contributory negligence is for the jury under the test of whether the plaintiff acted as a reasonably prudent man would act under like circumstances, unless the testimony is so plain that his negligence contributed to the injury that no reasonable man could arrive at any other conclusion.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.\*]

Department 1. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Ira A. Jones against the National Laundry Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The plaintiff, describing himself as an able-bodied man aged 40 years, with an expectancy of 28 years, an engineer by vocation, whose services were reasonably worth \$80 per month, states that he was employed in that capacity by the defendant in its steam laundry, and that his duties required

him to work in and about the machinery of the establishment. He further avers, in substance, that while he was thus engaged the manager and another employé of the defendant made an addition to the main horizontal driving shaft of the machinery, which added shafting was broken or wrenched or bent in some way unknown to the plaintiff, but in such manner that it did not fit as it was designed and was a dangerous and insufficient piece of machinery, unprotected by any safety appliance or boxing, and was left unguarded and insecure, all of which was unknown to the plaintiff. He states that he was required to work about this appliance, and while engaged in the performance of his duties his clothing was caught by the defective shafting, whereby he was injured in the manner stated in his complaint, all to his damage in a sum stated. He attributes his injuries to the fault and neglect of the defendant in not furnishing a safe place in which plaintiff was to perform his duties. The truth of the complaint is challenged in material particulars by the answer. The defendant affirmatively states that the plaintiff was the chief engineer of the laundry plant and had control of the operation of the machinery, assisted in installing the additional shafting, and knew all about its condition; but with such knowledge, and while the machinery was in motion, without orders or suggestions from the defendant, he voluntarily climbed upon some boxes, stood close to the shaft so newly installed, and attempted to adjust the same while it was in rapid revolution, in consequence of which his clothing came in contact with the appliance mentioned, whereby he received his injury, all on account of his own contributory negligence. The second defense was that with full knowledge of the situation he assumed the ordinary risks of the employment and was injured without fault of the defendant. The answer being traversed, the plaintiff at the end of a jury trial recovered a verdict and judgment, from which the defendant appeals.

George W. Stapleton, of Portland (G. Evert Baker, of Portland, on the brief), for appellant. Isham N. Smith, of Portland (John F. Logan and Isham N. Smith, both of Portland, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). [1] At the close of plaintiff's case the defendant interposed a motion for nonsuit, specifying as grounds therefor that the testimony was insufficient to show any act of negligence on the part of the defendant which resulted in plaintiff's injury; that the testimony shows that plaintiff was in absolute charge of the machinery, and that his conduct in getting upon the boxes and standing in a position where his clothing was caught, when he had power to close down

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the machinery, amounted to contributory negligence; further that all dangers incident to the repair or adjustment of the shaft in question, as the plaintiff attempted to make them, were obvious, open, and apparent to any person of ordinary intelligence, and that the plaintiff knew and fully realized the danger of the situation. In connection with the motion for nonsuit, the defendant asked the court to pass upon the question of contributory negligence as a matter of law, and not to submit the same to the consideration of a jury. The case turns upon whether or not the court erred in overruling the motion for nonsuit and in not deciding as a matter of law that the plaintiff was guilty of contributory negligence.

The testimony tends to show, on the part of the plaintiff, that the defendant had proposed to install an additional washing machine in its plant, which was to be connected with the main line of overhead shafting. To supply power for the new machine, it became necessary to add to the shafting. While the plaintiff was engaged in setting up the machine, the manager of the plant called upon him for measurements of the length of shafting required, which the plaintiff supplied. The manager then procured a piece of shafting which had been broken off of one formerly used. The piece was five or six feet long and, being supplied at one end with a safety coupling, was connected to the shafting then in place and supported by a hanger. The outer end of this shaft was where the break had occurred, and projected about 18 inches beyond the hanger. The fracture was a diagonal one. There is some dispute in the testimony about it having been battered, but the piece in evidence shows that, whether battered or not when put in place, it was still rough and jagged. There is a dispute in the testimony about whether plaintiff knew of the condition of the shafting or not. The testimony on his behalf is to the effect that, although he knew in a general way that a piece of shafting was to be installed, he was not aware of its condition. He testifies that he was required to make repairs and adjustments while the machinery was in motion, and that he was specially employed to keep it going continually so as not to incur loss by having to lay off a large number of employes while repairs were being made. The testimony tends to show that the additional shafting was installed after the machinery had stopped on Saturday night; that on Monday morning, as required by plaintiff's general duties, he started up the machinery, and, discovering by the sound that the shaft was out of order, he climbed up to adjust it while it was in motion. He says it was revolving at 250 revolutions per minute, and while it was thus in motion he could not detect that it was rough and liable to catch his clothing. Of course his testimony on that subject is in

some respects disputed by the testimony of the defendant.

The principal question presented for our consideration is whether or not, under these circumstances, the court should have declared as a matter of law that the plaintiff was guilty of contributory negligence so as to defeat his recovery. It is urged by the defendant that an employe who chooses a dangerous place to work where a safe one is open to him, or where there is a safe way and a dangerous way to perform the work, and the employe whose business it is to do the work voluntarily chooses the dangerous one and is injured, he cannot recover. This may be all true if the facts justify such a conclusion. But there is testimony here to the effect that the plaintiff was required to adjust machinery and make repairs without stopping it, so that it still is a question for the jury to determine whether or not there were two ways in which he might have accomplished his task.

[2] The defendant also argues that the plaintiff assumed the risk arising naturally from his employment and the hazards which are apparent or which he knows and appreciates. But the question is whether under these circumstances the plaintiff did know or appreciate the hazards to which he was exposed in adjusting the shaft. He had a right to rely upon the principle that the master had furnished him a reasonably safe place in which to perform his duties. He said he did not himself know anything of the condition of the piece of shafting which had been installed, and, being required to repair it while it was in motion, he could not see that it was jagged at the end so as to be liable to catch his clothing.

[3] The ultimate question to be determined by the jury as to the allegation of plaintiff's contributory negligence was whether or not he acted as a reasonably prudent man would act under like circumstances and under similar conditions. The question of contributory negligence is peculiarly a question of fact for the jury. *Palmer v. Portland Ry. L. & P. Co.*, 62 Or. 539, 125 Pac. 840, and authorities there cited.

Given the hypothesis that the plaintiff was required to perform his work while the machinery was in motion, that he did not know the condition of the newly installed shafting, and could not know it on account of it being in rapid motion, the court could not as a matter of law say that he was guilty of contributory negligence in undertaking to adjust it under those circumstances. The conditions surrounding the performance of labor are so numerous, varied, and complex that it is impossible to lay down specific rules of law to govern every case in advance. Manifestly all the court can do is to enunciate general principles to guide the jury. The standard of conduct imputed to plaintiff in such cases is that ordinarily adopted by



a reasonably prudent man in his situation and with his knowledge under like circumstances. Whether he did so act or not must be determined by the jury, unless the testimony is so plain against him that no reasonable man could arrive at any other conclusion than that he himself was negligent in a way contributing to his own injury. It is common knowledge that engineers work about machinery and often make important adjustments of it while it is in motion. The case here is strengthened by testimony to the effect that the plaintiff was required to do so by the terms of his employment. Honest men may reasonably differ in opinion about whether or not he departed from the legal standard of care in this instance; hence the circuit court was right in refusing to take the case from the jury.

The judgment is affirmed.

McBRIDE, C. J., and MOORE and RAMSEY, JJ., concur.

(66 Or. 474)

LEITER et al. v. DWYER PLUMBING & HEATING CO. et al.

(Supreme Court of Oregon. July 29, 1913.)

1. CONTRACTS (§ 284\*)—PERFORMANCE—DECISION OF ARCHITECT.

Where a contract for the construction of a government building provided that the supervising architect could suspend the work whenever, in his opinion, it was necessary or advantageous, and that the government could make such changes as it desired, the right of the architect to suspend the work is not subject to review by the court except in case of fraud, gross mistake, or negligence amounting to bad faith.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1292-1302, 1308-1310, 1312-1316, 1326-1338, 1340-1342, 1344-1346, 1350, 1351; Dec. Dig. § 284.\*]

2. EVIDENCE (§ 158\*)—BEST AND SECONDARY EVIDENCE—FACTS EVIDENCED BY WRITING.

Where the contract did not require the opinion of the architect suspending the work to be in writing, oral evidence that he suspended the work was admissible in an action by the contractor against a subcontractor and his surety who claimed that the delay was a breach of the subcontract, even though there were letters which might have been produced which would have shown his authority for ordering the suspension.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 472, 473, 474½-504, 506-526; Dec. Dig. § 158.\*]

3. PRINCIPAL AND SURETY (§ 100\*) — DISCHARGE OF SURETY—PROVISIONS OF BUILDING CONTRACT—SUSPENSION OF WORK.

Where a subcontract for work upon a federal building provided that the work should be done when called for by the general contractor and continued so as not to delay the other work, and expressly stated that the terms of the original contract were made a part of the subcontract, a suspension of the work by the architect for one year under authority conferred upon him by the original contract did not discharge the surety of the subcontractor, even though there was an advance in the price

of material during the time the work was suspended.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 162-165; Dec. Dig. § 100.\*]

4. PRINCIPAL AND SURETY (§ 88\*) — DISCHARGE OF SURETY — BREACH OF ASSURED CONTRACT.

In order for a surety company to be relieved of liability, it must appear that the breach of the contract assured, which it claims discharges its liability, is a substantial one working pecuniary disadvantage to the surety or depriving it of some protection or privilege reserved in the bond.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 135; Dec. Dig. § 88.\*]

5. PRINCIPAL AND SURETY (§ 162\*) — DISCHARGE OF SURETY—PROVISIONS IN BUILDING CONTRACT.

Where the supervising architect of a building, under the authority conferred upon him by the general contract, suspended work for more than one year and made several changes in the plans which caused additional delay, it could not be said as a matter of law that the suspension of the work and the delay were so unreasonable as to relieve the surety of a subcontractor from liability.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 442-445; Dec. Dig. § 162.\*]

6. PLEADING (§ 180\*)—REPLICATION—DEPARTURE—CONTRACT.

Where the complaint in an action against the surety of a subcontractor set out the original contract in general terms, and the surety denied liability because of delay in calling for the work, a replication which stated in detail the provisions of the original contract permitting the suspension of the work by the architect was not a departure from the cause of action stated in the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 358-384; Dec. Dig. § 180.\*]

7. PLEADING (§ 180\*)—REPLICATION—DEPARTURE.

A plaintiff cannot set up one cause of action in his complaint and recover upon another and different ground alleged in his replication.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 358-384; Dec. Dig. § 180.\*]

8. CONTRACTS (§ 170\*) — CONSTRUCTION BY PARTIES—SPECIAL ACTS.

Where the work on a building was suspended by the order of the architect by authority given him by the general contract, and the subcontractors, after the time originally provided for the completion of the work, inquired when they could proceed, and some time thereafter informed the principal contractor that they could not carry out their contract because of financial embarrassment, such conduct is a construction of the subcontract by the parties that the terms of the original contract as to suspension of the work were incorporated therein.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. § 170.\*]

Department 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by R. A. Leiter and another against the Dwyer Plumbing & Heating Company and another. Judgment for the plaintiffs, and the defendants appeal. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



This is an action brought to recover \$3,000 from the Pacific Surety Company of California upon a bond executed by Dwyer Plumbing & Heating Company, as principal, and Pacific Surety Company of California, as surety, to the plaintiffs for the purpose of insuring the faithful performance of one of the subcontracts for the construction of a federal building at Seattle, Wash. The cause was tried by the court without a jury, and findings of fact were made in favor of the plaintiffs. From a judgment thereon, the defendant Pacific Surety Company appeals.

It appears from the record that on the 13th day of October, 1903, the United States entered into a contract with Megrath & Duhamel, as general contractors, for the construction of a public building in the city of Seattle, Wash., to be used as a United States courthouse, customs house, and post office, for the sum of \$805,000. This written contract required the general contractors to furnish all labor and materials and perform all the work required in the construction of the building (with certain minor exceptions) in accordance with the plans and specifications which were attached to and made a part of the contract. It also provided that the contractors should carry on the work in the time and manner required by and under the supervision of the supervising architect of the United States Treasury Department, or his representative; that the building should be completed on or before the 1st day of February, 1906, time being expressly made the essence of the contract. The United States was given the right to suspend the work whenever "in the opinion of the supervising architect it might be necessary for the purposes or advantage of the work," and, upon such suspensions being made, the contractors were to be entitled to additional time equal to that of the suspensions. Included in the plans and specifications of the general contract was certain plumbing and gas piping work required to be done upon the building which the plaintiffs, the general contractors, sublet to the defendant Dwyer Plumbing & Heating Company by a contract entered into on the 31st day of October, 1904. By the terms of the latter contract the Dwyer Plumbing & Heating Company agreed to furnish all labor and materials and install the plumbing and gas piping in the building in accordance with the plans and specifications thereof. It agreed to complete all underground work within 60 days from the date of the contract, to start other work upon notice from the general contractors, and continue the same to completion so as not to cause any delay in the progress of other work on the building. It was expressly provided in this subcontract as follows: "It is hereby understood and agreed that said Megrath & Duhamel, parties of the second part, have contracted with the United States as general contractors for the within

mentioned building, and that the terms of the original contract, plans, and specifications are hereby declared part and parcel of this contract in so far as they apply to the work herein contemplated."

The bond upon which this action is based was given to secure the performance of this subcontract and obligated the parties thereto to perform the same fully and faithfully within the time and according to the terms therein prescribed. A breach of the contract contained in the bond, on the part of the defendants, is predicated upon failure of the plumbing company to perform the work. There is no dispute upon the point of fact that the Dwyer Plumbing & Heating Company completed the underground work as agreed and received payment therefor in accordance with the terms of the subcontract. Nor is it disputed that the plumbing company did not do any other work under such subcontract. The defense was pleaded in the answer of the defendant Pacific Surety Company that the plaintiffs never called upon the plumbing company to complete the rest of the work at any date which would have enabled it to do so on or before the 1st day of February, 1906; that on January 15, 1907, the plaintiffs gave notice to the Dwyer Plumbing & Heating Company to complete the work. By their reply the plaintiffs emphasized that provision of the general contract which permitted the United States to suspend the work whenever, "in the opinion of the supervising architect, it might be necessary for the purposes or advantage of the work," and allow an extension of time equal to any delays caused by such suspensions.

Thomas H. Crawford and S. C. Spencer, both of Portland (Holman & Hampson, of Portland, on the brief), for appellant Pacific Surety Co. R. A. Leiter, of Portland (Griffith, Leiter & Allen and Abel & Burnett, all of Portland, on the brief), for respondents.

BEAN, J. (after stating the facts as above). The theory of the defendant, as pleaded in its answer, was that the 1st day of February, 1906, was made the date for the completion of the work covered by the subcontract by reference being made therein to the general contract, and since the general contractors failed to prosecute the balance of the work to such an extent as to enable the subcontractor to perform its part of the work by the 1st of February, 1906, no obligation rested upon it to install the work thereafter. This construction of the contract contended for ignores the provision of the original contract whereby the government, acting by its supervising architect, was empowered to suspend any of the work, and, in the event that this was done, that the contractor should be allowed an additional time equal to that of the suspensions. The original contract also provided that the government could make any changes or additions in the



work as it desired. We thus find that the general contract in effect made provisions for the building to be completed by February 1, 1906, with the provisos that the supervising architect could suspend the whole or any part of the work whenever in his opinion it was necessary for the purposes or advantage of the work, and that the government could make such changes as it desired. Such alterations might necessitate a delay in the completion of the building and would not release the surety. *De Mattos v. Jordan*, 15 Wash. 378, 46 Pac. 402; *Drumheller v. Amer. Surety Co. of N. Y.*, 30 Wash. 530, 71 Pac. 25; *Ovington v. Aetna Indemnity Co.*, 36 Wash. 473, 78 Pac. 1021. The time of all suspensions and other delays caused by the United States was by the terms of the contract to be ascertained and allowed by the supervising architect. The effect of the contract was to leave the matter of suspensions and other delays entirely with the government.

[1] The plaintiffs introduced evidence tending to show that the United States suspended work on the building from October, 1904, to October, 1905, on account of the regrading of the street, and made about 40 changes in the plans and specifications of the building, causing delays. Mr. Grant, who superintended the work under the direction of the supervising architect, testified that the work on the building was suspended by order of the United States; that the government caused a great many delays in the progress of the construction by the various changes in the plans made by authority of the supervising architect. He states: "I instructed the contractors to suspend operations." Suspension of the work by order of the supervising architect, whether upon an expressed or unexpressed opinion as to the necessity, could not, under the terms of the contract, be questioned by Megrath & Duhamel, except in case of gross error or fraud in making the same. *Livesley v. Johnston*, 45 Or. 30, 76 Pac. 946, 65 L. R. A. 783, 106 Am. St. Rep. 647; *Kihlberg v. United States*, 97 U. S. 398, 403, 24 L. Ed. 1106.

By the execution of the subcontract and the bond, the defendants became bound by the terms of the original contract, which so far as applicable were made a part of the subcontract, thereby making the same supplemental and subordinate to the general contract. In the absence of pleading and proof of fraud, gross mistake, or negligence amounting to bad faith, the judgment of the supervising architect upon the question of suspension is final and will not be subjected to the revisory power of the court. *United States v. Gleason*, 175 U. S. 588, 602, 20 Sup. Ct. 228, 44 L. Ed. 284; *Vanderhoof v. Shell*, 42 Or. 578, 72 Pac. 126.

[2] The opinion of the supervising architect was not required by the terms of the contract to be in writing. When the super-

intendent notified Megrath & Duhamel to suspend the work, they were bound to obey. Plaintiffs showed by the testimony of the architect, who was recognized as representing the government, that the work was suspended at different times. The defendant surety company objected and excepted to oral evidence of this fact for the reason that the letters authorizing such suspensions, being in Seattle, Wash., were not produced and were the best evidence. The suspensions of the work and the length of time of such cessations were facts resting in parol, which in the nature of things were not capable of being evidenced by any writing. No official or other record of such matters of detail are usually made. The letters would show more particularly the authority of the architect for the suspensions. The terms or phrases of the letters were not in dispute. The authority of the architect giving directions to Megrath & Duhamel arose incidentally or collaterally. There was no real dispute in regard to the work actually having been suspended by authority of the architect. There was no prejudicial error in admitting the oral evidence. *Wigmore on Ev.* § 1246; *Peay v. Salt Lake City*, 11 Utah, 331, 40 Pac. 206; *East v. Pace*, 57 Ala. 521. Under the stipulations of the contract and the evidence as to suspensions and changes in the work necessitating a longer time for the performance thereof, the fact that the suspensions were had and the changes actually made and acquiesced in by those interested in the erection of the building rendered the question of any written authority for the same of but little importance.

[3] The defendant surety company insists that the suspension of the work by the United States for more than a year was unreasonable and without authority, under the terms of the contract, and amounted in effect to the making of a new contract, thereby discharging the surety from all liability upon the bond; that in the meantime prices advanced 25 per cent. We do not think such a construction of the contract is warranted. The subcontract, in which the original one was incorporated and made a part thereof, provided (except as to the underground work): "All other work to be started upon notice from the parties of the second part and continued to completion with a sufficient force of men so as not to cause any delay in the progress of any other work on the building." This provision as to time is very general, and it is only by a reference to the original contract that the time for performance can be more definitely ascertained. When Dwyer Plumbing & Heating Company made the contract with expectation of speculative profits, and the surety company for a compensation guaranteed the faithful performance thereof, the principal and surety should have taken into consideration the possibility of gain or loss by increase or de-



crease in the price of materials. By their contract they clearly assumed the responsibility for any loss that might be sustained in this respect, and they should not be relieved of their obligation.

[4] It is not shown that plaintiffs were guilty of a breach of the contract. In order for the surety company to escape responsibility, it should appear that such company has been prejudiced by a breach of the contract. The breach must not have been merely technical, but a substantial one, working a pecuniary disadvantage to the surety company, or depriving it of some protection or privilege reserved in the bond. *James Black Masonry, etc., Co. v. National Surety Co.*, 61 Wash. 471, 475, 112 Pac. 517.

[5] It cannot be said as a matter of law that under the agreement contained in the contract the delays occasioned by the suspensions of the work and changes in the architecture were unreasonable. They were clearly within the contemplation of the parties to the contract. The undertaking which the obligees assumed in part was an important one and provided for the construction of a \$605,000 building. The reasons given for the cessations and delays were cogent. It appears that the regrading of the avenue was undertaken after the walls of the building had been built of granite to a certain height. This regrading necessitated the tearing down and rebuilding of part of these granite walls. By the terms of the original contract the United States reserved the right to change any of the materials specified, to construct the building entirely of granite, to make changes in the plans, and, in order to provide time for the consideration thereof, to order suspensions.

[6] Counsel for the defendant surety company earnestly contend that the reply of the plaintiffs referring to the general contract which permitted the United States to suspend the work was a clear departure from the cause of action set out in the complaint. This position is untenable. The complaint alleges in general terms the making of the new contract between the plaintiffs and the United States on the 13th day of October, 1903, and described the same generally. There is attached to the complaint a copy of the subcontract, by the terms of which the original contract, plans, and specifications were declared to be part and parcel thereof so far as applicable to the work. The complaint alleged that the Dwyer Plumbing & Heating Company failed and refused in all respects to perform the contract except as to the underground plumbing. If the complaint was not as specific in detailing the provisions of the original contract as the defendant surety company desired, its remedy would have been by motion to make the same more definite. The reply simply sets forth a portion of the details of the original

contract referred to in the complaint. It does not set up new matter constituting another cause of action, or matter inconsistent with the allegations of the complaint. *Childs Lumber & Mfg. Co. v. Page*, 28 Wash. 128, 68 Pac. 373.

[7] It is a well-settled rule of law in this state that the plaintiff must prevail, if at all, upon the matters alleged in his complaint, and that he cannot set up one cause of action in the complaint and recover upon another and different ground of relief alleged in his reply. We do not think there was any infringement of this rule in the case under consideration.

[8] The real controversy between the plaintiffs and the surety company is in regard to the construction of the contract. It appears that the parties acquiesced in the construction of the contract as contended for by the plaintiffs, as on the 12th day of February, 1906, 12 days after the time alleged by the defendant as the date when the work should have been completed under the contract, the Dwyer Plumbing & Heating Company wrote to Megrath & Duhamel to ascertain when they would be ready for the plumbing work to proceed. They were informed that it would be late in the fall of that year. After apparently acquiescing therein, they wrote to Megrath & Duhamel on the 15th of October, 1906, that they would be unable to carry out the contract on account of financial embarrassments. The original contract was performed by the plaintiffs according to its terms, to the satisfaction of the government and the Dwyer Plumbing & Heating Company, and it was apparently satisfactory to the surety company.

The judgment of the lower court should be affirmed, and it is so ordered.

McBRIDE, C. J., and EAKIN and McNARY, JJ., concur.

(66 Or. 388)

OATMAN et al. v. BANKERS' & MERCHANTS' MUT. FIRE RELIEF ASS'N.

(Supreme Court of Oregon. July 29, 1913.)

1. INSURANCE (§ 115\*) — "INSURABLE INTEREST"—WIFE'S PROPERTY.

The insured cannot recover on a fire insurance policy, running to him, on his wife's interest in the insured premises, as his interest in his wife's property is not deemed an insurable interest, within the rule that an insurable interest exists only when the insured would lose in case the property should burn.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 139-157, 177; Dec. Dig. § 115.\*]

2. INSURANCE (§ 114\*)—INSURABLE INTEREST—IN GENERAL.

In an action on an insurance policy, plaintiff must allege and prove that the insured had an insurable interest in the property, both at the time of the making of the contract of insurance and at the time of the loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 136-138; Dec. Dig. § 114.\*]



### 3. INSURANCE (§ 282\*)—TITLE OF INSURED—STATUTE.

Where the ground on which the house of insured was situated was owned partly by others than the insured, and the policy contained a provision, as required by L. O. L. § 4666, as amended by Laws 1911, pp. 279-284, that, if insured was not the sole and unconditional owner in fee simple of the ground, the policy would be void, unless otherwise agreed in an indorsement on the policy, and there was no such indorsement, the policy was void.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 601-635; Dec. Dig. § 282.\*]

### 4. INSURANCE (§ 282\*)—CONSTRUCTION—LANGUAGE TO BE FOLLOWED.

L. O. L. § 4666, as amended by Laws 1911, pp. 279-284, which requires insurance companies to state in their policies that, if the insured is not the sole and unconditional owner in fee simple of the ground covered by the insured building, the policy shall be void, unless otherwise agreed in an indorsement thereon, and imposing a penalty for failure to make such provision in their policies, must be construed according to its language as making a policy containing such provision, and lacking the indorsement under such circumstances, void.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 601-635; Dec. Dig. § 282.\*]

### 5. INSURANCE (§ 282\*)—CONSTRUCTION OF POLICY—SEVERABILITY.

Where a policy covers a house and also personal property, and the insurance on the house is void because there was no indorsement, as required by the policy, that insured were not the sole owners, the insurance on the personal property is not rendered invalid, as the two parts are severable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 601-635; Dec. Dig. § 282.\*]

Department 1. Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge.

Action by H. M. Oatman and T. A. Lane against the Bankers' & Merchants' Mutual Fire Relief Association. From a judgment for plaintiffs, the defendant appeals. Reversed.

This is an action upon a policy of fire insurance, issued by the defendant to the plaintiffs, to recover the sum of \$2,000, the amount of said policy. This policy was issued September 7, 1911, upon a two-story frame dwelling house at Myrtle Creek in Douglas county and upon personal property. The amount of insurance on the house was \$1,600 and on the personal property \$400. All of said property was destroyed by fire on February 3, 1912. The plaintiffs paid a premium of \$20 on said policy. The plaintiffs made proof of their loss by said fire. It is claimed that said proof was defective. Issues were made up, and this case was tried by a jury, and a verdict and a judgment were rendered for the plaintiffs in the sum of \$1,500. The defendant appeals and alleges the commission of various errors by the trial court.

Buchanan & Porter, of Roseburg, and Hollis & Graham, of Forest Grove, for appellant. Cardwell & Watson, of Roseburg, and C. I. Leavengood, of Myrtle Creek, for respondents.

RAMSEY, J. (after stating the facts as above). The evidence tended to show that the plaintiffs were the owners of the personal property insured.

[1] The plaintiff H. M. Oatman, when a witness in his own behalf, was asked who owned the real estate insured in the policy sued on, and answered: "My wife, Mr. Lane's boy, Mr. Lane's wife, Floyd Weaver, and Annie Fry, and a few small interests in it of two little cousins of hers or Mrs. Dement's. I do not know what their given names are; two minor heirs, two little girls." This witness testified also that he and his coplaintiff owned the dower interest of Mrs. Emma Dement in said real property, and this is all the interest that the plaintiffs claimed in the real property, upon which the house was located, and it was shown that this interest was conveyed by a deed made by Emma Dement, dated October 28, 1909. This deed is in evidence and is defendant's Exhibit No. 1. Mr. Oatman admitted that this is the deed by which he and Mr. Lane claimed said dower interest in said real property, and that they had no interest in said real property, excepting what was conveyed by said deed. This instrument was recorded in the records of deeds of Douglas county. It is a quitclaim, and remised and released and quitclaimed unto Mrs. Homer Oatman, T. A. Lane, and J. B. Harris all the rights of dower which said Emma Dement had in the Geo. Dement estate of every kind and nature wherever situated, together with the personal property of said estate set off to said Emma Dement by the county court of Douglas county, Or., including her dower interest in the real estate in Myrtle Creek and the furniture and furnishings in the hotel. It recites that it was made for the sum of \$200, paid by Mrs. Homer Oatman, T. A. Lane, guardian of Harold Lane, a minor, and J. B. Harris.

Mr. Oatman, one of the plaintiffs, testified that Mrs. Homer Oatman is his wife, but asserts that he and Mr. T. A. Lane paid the consideration for said deed and that his wife did not pay anything for said dower right or for said personal property. However, the deed is made to her and not to him. He never had any deed for any interest in said land, and hence he had no interest therein. Her name may have been inserted in the deed by mistake, but we are constrained to construe the deed as it reads. Therefore the evidence shows that the plaintiff H. M. Oatman had no interest in the insured real estate, and that the plaintiff T. A. Lane owned only one-third of the dower interest of said Emma Dement in said premises, and that the other two-thirds of said dower right in said premises are owned by Mrs. Homer Oatman and J. B. Harris, who are not named as beneficiaries in said policy. The plaintiff H. M. Oatman has no insurable interest in



said real property on which said house was located, but he may have an insurable interest in the personal property. A person has an insurable interest in property only when the conditions are such that he will lose in case the property should be burned. *Farmers' & Merchants' Insurance Co. v. Mickel*, 72 Neb. 122, 100 N. W. 130, 9 Ann. Cas. 992; *Home Insurance Company of N. Y. v. Mendenhall*, 164 Ill. 458, 45 N. E. 1078, 36 L. R. A. 374. In the case last cited the Supreme Court of Illinois says: "Where the title of one is such, though not in fee, that he would suffer a loss or damage by the destruction of the premises, he may protect his interest, whatever may be the nature of it, by insurance, and thus it follows that an insurable interest is not always a fee-simple title."

[2] In an action on an insurance policy, the plaintiff must allege and prove that the insured had an insurable interest in the property, both at the time of the making of the contract of insurance and at the time of the loss. *Chrisman v. State Insurance Company*, 16 Or. 283, 18 Pac. 466; *Hardwick v. State Insurance Company*, 20 Or. 547, 26 Pac. 840. In this state a husband has no insurable interest in his wife's property. 19 Cyc. 589; *Agricultural Insurance Co. v. Montague*, 38 Mich. 548, 31 Am. Rep. 326; *Mercantile Insurance Co. v. The Orphan Boy*, Fed. Cas. No. 9,431.

The evidence tends to show that the plaintiffs had an insurable interest in the personal property referred to in the policy and that T. A. Lane had an insurable interest in the dwelling house, but the plaintiff Oatman appears not to have had any interest in the house. There is an irreconcilable conflict in the decisions of the courts as to whether agents of insurance companies can waive conditions in contracts of insurance. This court in several cases held that conditions in such contracts could be waived. *Arthur v. Palatine Insurance Co.*, 35 Or. 27, 57 Pac. 62, 76 Am. St. Rep. 450; *Allesina v. London Insurance Co.*, 45 Or. 442, 78 Pac. 392, 2 Ann. Cas. 284.

[3] But in 1907 the Legislature of this state passed an act on this subject (section 4666, L. O. L.) changing this rule, and this act was amended in 1911. See Laws of 1911, pp. 279-284. This statute requires insurance companies to incorporate into their policies, inter alia, the following condition: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void \* \* \* if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple," etc. Under this provision, which is a part of the policy sued on, less than an unconditional or sole ownership or an interest less than a fee simple may be insured, but a statement setting forth such interest must be indorsed on the

policy or added thereto or the policy is void. The policy sued on contains the conditions of the statute quoted, supra, but contains no indorsement or statement showing that the insured's interest in the real property on which the dwelling house was situated was less than a sole ownership, or that their estate therein was less than a fee simple. Hence, according to the terms of said policy and of said statute, said policy is void.

[4] It was argued by the respondent that said statute did not affect the validity of the policy, and that it merely imposed on an insurance company a fine for noncompliance with its terms. But we think that noncompliance with its terms invalidates the policy, so far as it applies to interests in real property.

The statute declares that, unless its terms are complied with, the policy shall be void, and statutes are to be construed according to the language used. This statute was construed by this court recently in *Finlon v. National Union Fire Insurance Company*, 132 Pac. 712, and it was there held that noncompliance with the provisions of said statute invalidated the policy. In that case, commenting on the statute referred to, supra, Justice Burnett said: "There being no agreement to the contrary indorsed upon the policy or added thereto as required by the statute, that instrument [the policy] was shown to be void, making plaintiff's case amenable to the objection urged by the motion for a nonsuit." We follow that decision and hold that the policy in this case is void so far as it attempted to insure the dwelling house.

[5] The policy in this case placed \$1,600 on the dwelling house and \$400 on personal property. We hold that the policy is separable and that it is void as to the \$1,600 on the house and valid as to the \$400 on the personal property.

19 Cyc. p. 626, says: "When the contract (policy) is invalid as to part of the risk, it may be enforced as to that part as to which it is not invalid, if the two can be separated. Agreements or stipulations in a policy, which are forbidden by law, will be disregarded and the contract sustained."

In this case the insurance on the personal property is separable from the void part of the policy and enforceable.

In the first instruction given by the trial court to the jury is contained the following: "There has been some evidence introduced here tending to show that there was a deed made by the parties owning this property to Mrs. Oatman and to Mr. Lane, and the evidence tends to show that he was guardian of Harold Lane. I instruct you as the law that the ownership of such an interest, with the knowledge of the defendant making the policy, would be an insurable interest, and the plaintiffs under such a state of facts would be entitled to recover, under the policy, the value of the property destroyed."



The evidence shows that the deed referred to in the foregoing instruction was made by Mrs. Emma Dement, and that all the interest that she had or conveyed was her right of dower in said premises, and she conveyed this dower right to Mrs. Oatman, Mr. Lane, and J. B. Harris, Mrs. Oatman and Mr. Harris are not among the beneficiaries of the policy issued, and all the evidence as to the fee-simple title of the land, upon which the dwelling house was situated, tended to show that it was vested in a number of heirs who were not beneficiaries of the policy. It is evident that the plaintiffs acted in good faith in obtaining this policy, and that the defendant's agent knew substantially what the facts were as to the title of the real premises, but the statute referred to, *supra*, declares that a policy issued as this was issued is void. It is our duty to obey the mandate of the law and hold that it is void as to the dwelling house. It follows that the above instruction was erroneous. It is not necessary to pass on the other questions raised by this appeal.

The judgment of the court below is reversed, and a new trial granted.

MCBRIDE, C. J., and MOORE and BURNETT, JJ., concur.

(66 Or. 151)

WILLIAMS v. PACIFIC SURETY CO. et al.  
(Supreme Court of Oregon. July 29, 1913.)

1. APPEAL AND ERROR (§ 1217\*)—JURISDICTION OF APPELLATE COURT AFTER REMAND.

This court retains jurisdiction over a cause until the end of the term at which the case was decided, although the remitter may have been issued before the expiration of the term.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4717, 4718; Dec. Dig. § 1217.\*]

2. APPEAL AND ERROR (§ 1218\*)—CORRECTION OF MANDATE—JURISDICTION.

If a remitter fails to express correctly the ultimate determination of a cause, the appellate court, though after the term at which the case is decided, has, in its inherent authority over its own judgments and decrees, plenary power to recall and correct the mandate so as to make it conform to the decision which was rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4719; Dec. Dig. § 1218.\*]

3. PLEADING (§ 418\*)—DEMURRER—ANSWERING OVER.

Answering over after a demurrer to a complaint is overruled does not waive the objections, raised by the demurrer, that the complaint does not state a cause of action and that the court has no jurisdiction of the subject-matter, so the prudent practice is to answer over after the demurrer is overruled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1399, 1403-1406; Dec. Dig. § 418.\*]

4. PRINCIPAL AND SURETY (§ 81\*)—BREACH OF CONTRACT—LIABILITY OF SURETY—DAMAGES.

Where a surety company executed a bond for the sum of \$25,000 to guarantee the per-

formance of a contract by a third party for the delivery of 200,000,000 feet of logs, the measure of the surety's liability upon breach, is not the sum specified in the bond but actual damages.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 126; Dec. Dig. § 81.\*]

On motion to recall and modify mandate. Motion denied.

For former opinion, see 132 Pac. 959.

MOORE, J. This is a motion to recall a mandate. The judgment herein was affirmed October 22, 1912. 127 Pac. 145. A petition for a rehearing and an application to remand the cause with leave to answer were denied April 29, 1913. 131 Pac. 1021. Based thereon, judgment was entered in this court, but by inadvertence it was rendered against the defendant A. H. Ford, who, refusing to join in the prosecution of the action, was made an adverse party. He was entitled, however, to a share of the money so ordered to be recovered against the appellant, the Pacific Surety Company. Conforming to the judgment so erroneously entered, a mandate was issued and mailed to the clerk of the lower court, who, without filing the remitter, delivered it to plaintiff's counsel, who returned it for correction. Thereupon appellant's counsel renewed their motion for permission to apply to the trial court for leave to answer, which latter motion was granted, and the original judgment rendered in this court was modified to that extent. 132 Pac. 959. Predicated on the alteration a second remitter was issued July 3, 1913, and sent to the clerk of the lower court. This motion was interposed to prevent entering the mandate of record, to have it recalled and corrected to correspond with the judgment as it was intended to have been rendered April 29, 1913.

It is argued that, when the petition for a rehearing was denied and the mandate sent down, the jurisdiction of this court over the cause terminated; and, this being so, it was powerless thereafter to modify the judgment of October 22, 1912, or to allow application to be made to the lower court for leave to answer, and the determination to that effect is a void judgment which should be corrected.

[1] A diversity of judicial expression exists as to when an appellate tribunal loses control of a cause, in respect to which the following rules have been established by courts of last resort, to wit: (1) Jurisdiction is retained until the remitter is sent to and filed in the lower court; (2) the right further to hear and determine a cause is reserved until the end of the term at which the case is decided, although the remitter may have been issued before the expiration of the term; and (3) jurisdiction ceases when, without accident, fraud, or inadvertence, the remitter has gone down. *Ott v. Boring*, 131 Wis. 472, 110

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



N. W. 824, 111 N. W. 833, 11 Ann. Cas. 857, 866.

[2] These rules are subject, however, to the prevailing precept that, if in issuing the remitter a mistake is made in the language employed to express the ultimate determination of a cause, the appellate court, after the expiration of the term at which the case is decided, has, as an exercise of its inherent authority over its judgments and decrees, plenary power to recall and correct the mandate so as to make it conform to the decision which was rendered.

If the first rule hereinbefore referred to is controlling, it follows that, the original mandate not having been filed in the lower court, but was returned for correction, jurisdiction of this court over the cause was not thereby divested. However that may be, we have adopted the second rule which governs this case. *Chapman v. Wilbur*, 5 Or. 299; *Morrell v. Miller*, 28 Or. 354, 370, 43 Pac. 490, 45 Pac. 248; *Livesley v. Johnston*, 47 Or. 193, 196, 82 Pac. 854; *Krause v. Oregon Steel Co.*, 50 Or. 88, 91, 91 Pac. 442, 92 Pac. 810.

The original petition for a rehearing herein was denied April 29, 1913, but an application for a re-examination of the question was renewed during the same term of court after the mandate was returned by plaintiff's counsel for correction without having been filed in the lower court. If the remitter had not been sent back, however, this court, during the term at which the rehearing was denied, was empowered to recall the mandate and reconsider the cause if it satisfactorily appeared that substantial justice had not been administered.

[3] A defendant who, in order to delay the trial of a case, interposes to a complaint a demurrer, and when it is overruled declines further to plead, permitting a judgment or a decree to be rendered against him, is not entitled to much sympathy after such determination is affirmed on appeal, for, if the procedure suggested were allowable, the judicial examination of issues between parties to a suit or action would be unduly protracted. If a complaint fails to state facts sufficient to constitute a cause of action or suit, or if the court does not have jurisdiction of the subject-matter, answering over, after a demurrer to the plaintiff's primary pleading has been overruled, does not waive such defects, and hence it is prudent that an answer should generally be filed in the cases which are believed by defendant's counsel to come within the specifications indicated. Where, however, by the former decisions of this court a rule of practice has been adopted, which guide is relied upon by a defendant in demurring to a complaint, and after the demurrer is overruled, if he elects to stand upon such formal mode of challenging the sufficiency in law of the initiatory pleading and a judgment or a decree is rendered

against him, he ought not to be subjected to a very severe penalty for supposing that the procedure so apparently approved would not be departed from in his case. Mr. Justice Burnett in the judgment rendered herein June 3, 1913, refers to the overruling of our decisions by the determinations reached in this case. 132 Pac. 959.

[4] In order to guarantee the faithful performance of the contract of the Oregon-Idaho Company to deliver to the plaintiff and Ford 200,000,000 feet of logs, the Pacific Surety Company gave to the latter a bond in the sum of \$25,000. If, by reason of a breach of the agreement, the obligees referred to sustained damages to the extent of the sum so specified, they are entitled, upon a trial of the cause, to recover that amount from the Pacific Surety Company. Such quantum of damages is the full measure of the plaintiff's recovery as against the surety, and he has no just cause of complaint because a way is suggested whereby he is required to establish, to the satisfaction of the court and jury, the pecuniary compensation to which he is entitled for the loss suffered through the omission of the Oregon-Idaho Company.

A sense of fairness will undoubtedly convince unprejudiced persons that proof of the damages suffered should be made at a trial of this cause rather than that a judgment for the sum specified in the bond should be rendered against the appellant without a hearing or determination of the question of damages.

The motion herein should be denied, and it is so ordered.

(66 Or. 113)

# BINGHAM & McCLELLAND CO. v. NATIONAL BRICK & CLAY CO. et al.

(Supreme Court of Oregon. July 22, 1913.)

## PRINCIPAL AND SURETY (§ 155\*) — BOND — CONDITIONS—TIME TO SUE.

Plaintiff made two contracts with defendant brick company to purchase a specified number of bricks under each contract, paying therefor in advance, and taking a surety bond for prompt delivery. Only a small portion of the bricks having been delivered, plaintiff sued on the bonds, which required that any actions should be instituted within six months after default. The complaint alleged that after the execution of the first contract, plaintiff demanded the bricks, but that the brick company failed to deliver, except 12,655 bricks. The answer denied such paragraph, and alleged delivery of 24,205 bricks, without stating the date thereof, and that the brick company failed, neglected, and refused to manufacture the brick mentioned in the contract and to deliver the same, as requested by plaintiff during February and March, 1911. The reply contained no allegation of new matter, but admitted that the brick company neglected and refused to deliver the brick as requested during February and March, as alleged in the paragraph of the answer, and denied the remainder thereof. Held, that the reply was not an affirmative allegation, nor the admission that the first breach of contract occurred in February; and, since the brick company could be put in default only by plaintiff's

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



demand of performance after reasonable time for manufacture had elapsed, in the absence of an affirmative allegation that a request by plaintiff had been made for bricks, it was open for the court to find, under the evidence, that the brick company was not in default until within six months prior to suit brought.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 422; Dec. Dig. § 155.\*]

Department 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Bingham & McClelland Company against the National Brick & Clay Company and Charles H. Page, as receiver thereof, and the Pacific Surety Company. Judgment for plaintiff, and defendants appeal. Affirmed.

This is an action to recover on a surety bond; the facts being as follows: The defendant the National Brick & Clay Company, on the 21st day of February, 1911, entered into a contract in writing with plaintiff to manufacture and sell, and the plaintiff to purchase, 500,000 bricks, of the size, color, and composition of those submitted, at the price of \$6.50 per thousand, to be delivered at the times and places named by plaintiffs, and providing that, as plaintiff is to pay for the bricks in advance, the seller shall furnish a surety company bond in the sum of \$3,250, the sum so to be advanced, as a guaranty of faithful delivery of the bricks. On the same date, in compliance with the terms of said contract, the defendant the Pacific Surety Company executed in favor of the plaintiff its bond for the faithful performance of said contract by the National Brick & Clay Company, which contract is referred to in the bond, or, in default thereof, to pay to it the sum of \$3,250. It is conditioned in the bond that the surety company shall be notified by the purchaser of any breach of the contract by the principal immediately after the occurrence of such act shall have come to its knowledge and further provides that any suit or action brought thereunder must be instituted within six months after the first breach of the contract. On the 4th of March, 1911, another contract for the manufacture and sale of bricks was entered into between the plaintiff and the defendant the National Brick & Clay Company, namely, for the delivery of 700,000 bricks on the same terms and conditions as in the one above described; and the defendant the Pacific Surety Company on that date executed a bond in the sum of \$4,200 in favor of plaintiff, upon like terms and conditions as the one of date February 21st, for the fulfillment by the National Brick & Clay Company of the contract above mentioned. On September 15, 1911, the plaintiff brought this action upon these two contracts and bonds, alleging the default of defendant the National Brick & Clay Company to deliver said brick, or any part thereof, except that they admit they received

12,655 bricks thereon, and setting out the contracts and bonds in full as part of the complaint, and ask for judgment on the former in the sum of \$3,177.75, and on the latter in the sum of \$4,200. But one issue is tendered on this appeal, namely, that plaintiff failed to bring suit or action against the Pacific Surety Company to recover on the bond within six months after the first breach of the contract. The Pacific Surety Company alone defends herein. The cause was tried without the intervention of a jury, and the court made findings in favor of the plaintiff, with the exception that it found there were 42,575 bricks delivered, and rendered judgment against defendant surety company for \$7,173.25. The defendants appeal.

Willbur, Spencer & Dibble, of Portland, and Thomas H. Crawford, of La Grande, for appellants. Coovert & Stapleton, of Portland, for respondent.

EAKIN, J. (after stating the facts as above). There is no bill of exceptions nor transcript of the evidence in the record, but by stipulation the findings of the court are made part of the record on appeal. The only error relied on here is that the action was not commenced within the time limited in the bond; defendant contending that this defect is disclosed by the pleadings, and is fatal to the judgment. But we think the contention is without merit.

Counsel seem to have misconceived the effect of the reply, contending that it admits that there was a breach of the contract by the seller in February, which would be more than six months prior to the time the action was commenced, but that is not the effect of the reply. The complaint, in paragraph 8 of the first cause of action, alleges that after the execution of the contract the plaintiff demanded the bricks of the seller, but that it failed to deliver the same, or any part thereof, except 12,655 bricks. The answer denies this paragraph, and alleges the delivery of 24,205 bricks, without stating the date thereof, and in the third paragraph of the new matter alleges: "That the defendant the National Brick & Clay Company failed, neglected, and refused to manufacture the brick mentioned in said contract, \* \* \* and failed and neglected and refused to deliver the brick, as requested by the plaintiff in this action, during the months of February and March, 1911." The National Brick & Clay Company could be put in default only by demand made by plaintiff for the bricks after a reasonable time for the manufacture thereof had elapsed. This affirmative allegation of the answer does not state that any request by plaintiff was made for bricks, except by inference, nor when, if at all, a request therefor was made, by which the time of the default might be fixed. It amounts only to a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



recital that there was a failure by the seller to manufacture and deliver any bricks in February or March, without an affirmative allegation of the facts that constitute the default, and it is not sufficiently specific to show a breach in February. The reply contains no allegation of new matter, and it denies the first part of subdivision 3 of the new matter of the answer on information and belief. It admits a part thereof in the exact language of the answer, namely: "Admit that said defendant the National Brick & Clay Company failed, neglected, and refused to deliver the brick as requested by the plaintiff in this action during the months of February and March, as alleged in paragraph 3 of the answer"—denying the remainder thereof. This is not even in effect an affirmative allegation, nor a new assignment of the cause of action set out in the complaint, or any part thereof, and it does not admit nor confess that the first breach of the contract occurred in February, only to the extent and in the form that it is alleged in subdivision 3 of the answer, which does not state affirmatively the fact of a breach in February. Neither the answer nor reply state when a request for bricks was first made. In 31 Cyc. 49 it is said: "It is not sufficient that a fact may be inferable from facts pleaded, where it is not necessarily implied." The part of the reply referred to cannot be taken as an attempt to vary the facts set up in the complaint, nor as an admission or statement that a demand for bricks was made and refused in February. It is said in *Houghton & Palmer v. Beck*, 9 Or. 325, that there is no doubt that formal defects, such as imperfect statements or omissions of certain formal allegations, are cured by verdict. And in 1 *Bates on Pleading and Practice*, p. 270, it is said: "Facts must be stated issuably, and not by way of rehearsal, argument, inference, or reasoning." In *Walker v. Harold*, 44 Or. 205, 74 Pac. 705, it is said that, if from the facts stated the defense or issue relied on may be reasonably implied, and is acted on by the parties and the trial court, every intendment in its favor will be invoked, and the evidence introduced will be examined to determine whether or not it sustains the theory adopted by the parties and pursued by the trial court. The evidence is not before us, but from the findings of fact it appears that the question of the time of the default was tried out, and the court finds that the refusal of the National Brick & Clay Company to deliver bricks was after the 24th day of March. The date of defendant's default not being mentioned in any pleading, and in no manner raised until the trial, it was considered at the trial by the parties, as well as by the court, that the question was not determined by the pleadings, and the court made findings of fact thereon. Thus by the trial it is made to appear that the action was brought within

six months after the first breach of the contract by the National Brick & Clay Company. The judgment is affirmed.

MCBRIDE, C. J., and BEAN and McNARY JJ., concur.

(66 Or. 199)

### BENSON v. MURTON.

(Supreme Court of Oregon. July 29, 1913.)

#### 1. APPEAL AND ERROR (§ 1006\*) — REVIEW — PRESUMPTIONS.

Where former verdicts have been previously set aside, it will be presumed that they were set aside for good cause.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3951-3954; Dec. Dig. § 1006.\*]

#### 2. APPEAL AND ERROR (§ 999\*) — REVIEW — VERDICTS.

This court will not be controlled by a verdict, if there was error in the trial that contributed to it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3912-3921, 3923, 3924; Dec. Dig. § 999.\*]

#### 3. FRAUD (§ 59\*) — ACTIONS — DAMAGES.

In an action for damages from fraudulent representations in the sale of real estate, damages cannot be claimed on a prospective loss on the final outcome of the venture.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 60-62, 64; Dec. Dig. § 59.\*]

#### 4. EVIDENCE (§ 471\*) — OPINION EVIDENCE — VALUE.

In an action for damages from fraud in the sale of real estate, plaintiff's testimony that the land was not worth 15 cents is not a statement of fact, but a conclusion.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.\*]

Department 2. On petition for rehearing. Denied.

For former opinion, see 183 Pac. 340.

EAKIN, J. The principal ground for the petition for rehearing is based on the holding of the opinion that Murton was not shown to be a party to the fraud by which the \$1,500 was added to the actual price of the land and returned to McNair, by which McNair and Page alone profited; second, that the opinion holds that plaintiff suffered no damage by reason of any fraud of defendant; and, third, especially that this court assumes to decide questions of fact passed upon by the jury.

[1] We will consider the last point first. We find nothing in the record as to the former jury trials of this case, only as stated in plaintiff's brief and as mentioned in the oral argument; but, assuming that it be the case, we must also assume that former verdicts were set aside for good cause, that we have only to do with the present verdict uninfluenced by prior ones, and that we are not to be controlled by it, if there was error in the trial that contributed to the verdict.

As to the damages suffered by plaintiff, the only special damages sufficiently alleged to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



admit of proof is the payment of interest, expenses of the survey of the land, and taxes paid, which items were not incurred in consequence of the fraud alleged, but are legitimate items of expense of the undertaking. Loss of time would be an element of special damages; but, the facts not being specifically alleged, it cannot be considered.

[2] The only other item of damage is that plaintiff has suffered loss in the sum of \$5,000. This allegation will include any items of general damages. The only item of general damages that can be considered was the plaintiff's share of the \$1,500 rebate on the purchase price. Actual damages cannot be based on a possible foreclosure of plaintiff's interest, or prospective loss on the final outcome of the venture. If plaintiff feared such a result, his remedy to rescind was ample protection.

[3] Plaintiff's testimony that his interest was not worth 15 cents is not a statement of a fact, but a mere conclusion, and he testifies that the land is worth \$75 an acre, being \$7,000 more than it cost; so that, if defendant was not knowingly a party to the deception as to the actual price being \$18,500, and of the refunding of the \$1,500, there was no proof of damage with which defendant was chargeable. On April 15th Murton signed the contract for the purchase of the land for the price of \$18,500, on May 21st gave his notes for the unpaid part of that amount, and on August 2d severed his connection with the transaction.

Plaintiff cites McNair's testimony, wherein it is asked: "Q. Did he [Murton] know anything about these representations?" He answered: "Well I think he did"—the misrepresentations about the \$5,650 claimed to have been paid to Murton on his assignment being the subject of inquiry, and the answer of the witness is not evidence as to Murton's knowledge of the rebate in price. We are not passing on the proof, nor the extent of the fraud on the part of McNair and Page. No doubt, as appears from the evidence, there was ample ground to charge them with it, and that actual damage resulted therefrom; but the defendant must not suffer for fraud or damage with which he is not connected.

The petition is denied.

(69 Or. 494)

ALLEN et al. v. ANGUS et al.

(Supreme Court of Oregon. July 22, 1913.)

APPEAL AND ERROR (§ 338\*)—TRANSCRIPT—FILING—STATUTES.

Defendants, desiring to appeal from an adverse decree of the circuit court of Hood River county, counsel caused notice of appeal to be served, and filed the same March 31, 1913. Eight days thereafter an undertaking on appeal was served and filed, and the transcript was filed in the Supreme Court at Salem May 15th following. *Held*, that it was not necessary that an authenticated copy of the record should have been forwarded to Pendleton on or before

May 5, 1913, at which time and place the next term of the Supreme Court convened after the appeal was perfected.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1879-1882, 3057; Dec. Dig. § 338.\*]

Department 1. Appeal from Circuit Court, Hood River County; W. L. Bradshaw, Judge.

Action by Mary Coburn Allen and another against F. W. Angus and another. Judgment for plaintiffs, and defendants appeal. On motion to dismiss. Denied.

George R. Wilbur, of Hood River, for appellants. Ernest C. Smith, of Hood River, for respondents.

MOORE, J. This is a motion to dismiss an appeal. A decree in this suit was rendered by the circuit court of the state of Oregon for Hood River county. Desiring to secure a review of such determination, the defendants' counsel caused to be served a notice of appeal, and filed the same March 31, 1913. Eight days thereafter there was served and filed an undertaking on appeal, and no exceptions were taken to the sufficiency of the sureties thereon. The transcript on appeal was filed in this court at Salem May 15, 1913, and it is insisted that the authenticated copy of the record of the cause would have been forwarded to Pendleton on or before May 5, 1913, at which time the next term of this court convened, after the appeal was perfected.

The question here presented was considered and determined adversely to the contention of plaintiffs' counsel in the case of Pringle Falls Electric Power & Water Co. v. Patterson, 128 Pac. 820, and the conclusion thus reached is controlling herein.

It follows that the motion should be denied, and it is so ordered.

(69 Or. 180)

FRALEY v. HOBAN et al. (JONES, Garnishee).

(Supreme Court of Oregon. July 29, 1913.)

APPEAL AND ERROR (§ 417\*)—SUFFICIENCY OF "NOTICE OF APPEAL."

Under L. O. L. § 550, providing that a notice of appeal to the adverse party is sufficient if it contains the title of the cause, the names of the parties, and notifies the adverse party or his attorney that an appeal is taken, a "notice of appeal," which correctly specifies the court in which the judgment was rendered, gives the names of the parties to the action, the date of the judgment, and informs the adverse party that an appeal from the judgment has been taken, is sufficient without any other description.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2140-2143; Dec. Dig. § 417.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4839-4844; vol. 8, p. 7733.]

Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Action by Edward J. Fraley, as adminis-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



trator of J. H. Truby, deceased, against A. J. Hoban and another, partners as Hoban & Taggart, and W. N. Jones, garnishee. Judgment for plaintiff against the garnishee, and he appeals. On motion to dismiss appeal. Motion denied.

J. B. Ryan, of Portland, for appellants Hoban and Taggart. S. B. Huston, of Portland, for appellant Jones. C. M. Idleman and Sidney J. Graham, both of Portland, for respondent.

MOORE, J. This is a motion to dismiss an appeal, based on the ground of the alleged insufficiency of the notice properly to describe the judgment sought to be reviewed.

The record of the cause before us shows that on December 30, 1912, the plaintiff herein recovered from the defendant W. N. Jones, garnishee, the sum of \$5,090, with interest thereon from July 11, 1907, at the rate of 6 per cent. per annum and the costs and disbursements of the action. The notice referred to is entitled in the proper court; it gives the names of all the parties to the action, and, omitting the signature of the appellant's attorneys, it reads as follows: "You are hereby notified that the defendant W. N. Jones, garnishee in the above-entitled suit, appeals to the Supreme Court of the state of Oregon from the judgment rendered and entered herein on December 30, 1912, in favor of the plaintiff and against the said defendant; and that this appeal is taken from the whole of said judgment." This notice was served on plaintiff and the service thereof was also admitted by the co-defendants Hoban and Taggart, so that all the adverse parties who might be affected by a reversal or a modification of the judgment were thus informed of the proceedings undertaken to secure a transfer of the cause.

A statute declaring the adequacy of the information required to be furnished in order to obtain a review of a judgment or a decree reads as follows: "Such notice shall be sufficient if it contains the title of the cause, the names of the parties, and notifies the adverse party or his attorney that an appeal is taken to the Supreme or Circuit Court, as the case may be, from the judgment \* \* \* or decree, or some \* \* \* part thereof." L. O. L. § 550.

A notice of appeal, which correctly specifies the court rendering the determination involved, gives the names of the parties to the action, the date of the judgment, and informs the adverse parties that an appeal from the judgment in the cause has been taken, is sufficient without any other description. *Ream v. Howard*, 19 Or. 491, 24 Pac. 913. The notice of appeal herein comes within the specification thus approved. It was served upon all the adverse parties; the designation of the judgment is sufficient for identification; and, an undertaking on

appeal having been given, jurisdiction was thereby conferred upon the court.

It follows that the motion should be denied, and it is so ordered.

(66 Or. 224)

PRUDENTIAL LOAN & TRUST CO. v. METZLER (MERCHANTS' NAT. BANK, Garnishee).

(Supreme Court of Oregon. July 22, 1913.)

1. GARNISHMENT (§ 162\*) — PROCEEDINGS AGAINST GARNISHEE—BURDEN OF PROOF.

Where, in proceedings against a garnishee subsequent to garnishment, under L. O. L. § 319, which provides that the issues in such proceedings shall be tried as ordinary issues of fact, the ownership of the funds in the garnishee's hands was the only issue raised, the burden of proof was on plaintiff.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 800; Dec. Dig. § 162.\*]

2. APPEAL AND ERROR (§ 1010\*)—TRIAL BY COURT—FINDINGS—EVIDENCE.

Under L. O. L. § 159, making findings by the court equivalent to a verdict, such findings will not be disturbed on appeal, when supported by any competent evidence, though only such evidence was introduced by the party not prevailing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.\*]

3. GARNISHMENT (§ 164\*) — PROCEEDINGS AGAINST GARNISHEE—SUFFICIENCY OF EVIDENCE.

Evidence in proceedings against a bank as garnishee, under L. O. L. § 320, providing that judgment may be given against a garnishee for the value of defendant's property in his possession, held to sustain a finding that a deposit in the bank in the name of "J. J. M., Agent," belonged to J. J. M., the defendant, and that the word "agent" was affixed as a subterfuge to keep his funds from being attached by his creditors.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 302; Dec. Dig. § 164.\*]

4. GARNISHMENT (§ 116\*) — PROCEEDINGS AGAINST GARNISHEE—DEFENSE—WAIVER.

Where a bank, pending garnishment proceedings, paid to the judgment debtor a fund in its hands belonging to him at the time of the garnishment, it waived its right to set off against the plaintiff, in proceedings subsequent to the garnishment, a debt owing it by the judgment debtor; the rule permitting a garnishee to apply funds in its hands to a debt due it from defendant being merely for the protection of the garnishee, and not available as a shield for the debtor.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 237; Dec. Dig. § 116.\*]

Department 2. Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action by the Prudential Loan & Trust Company, a corporation, against J. J. Metzler and the Merchants' National Bank, as garnishee. From judgment for plaintiff, the garnishee appeals. Affirmed.

This is a proceeding subsequent to garnishment. The plaintiff brought an action against J. J. Metzler upon a promissory note. Judgment was rendered against the defend-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ant by default. Prior to the judgment the plaintiff served two garnishment notices upon the Merchants' National Bank, one on the 8th day of November, 1911, and the other on the 11th day of November, 1911. To both garnishments the bank answered, certifying that it had no funds belonging to the defendant. The certificate being unsatisfactory to the plaintiff, the Merchants' National Bank was ordered to appear before the court and be examined on oath concerning the same. Allegations and interrogatories were served upon the garnishee, pursuant to the provisions of section 815, L. O. L., to which the bank answered, denying that it had any money upon deposit belonging to defendant, J. J. Metzler, and disclosing that at the time of the garnishments it was carrying an account with the defendant in the name of "J. J. Metzler, Agent;" that after the garnishments it continued to receive deposits on such account and pay checks against the same signed by "J. J. Metzler, Agent;" that there was a balance of the account, which was afterwards paid to the order of "J. J. Metzler, Agent." By an amendment to the answer the garnishee alleged "that the deposits in the name of J. J. Metzler were of funds drawn by J. J. Metzler, as agent, upon parties with whom he was dealing in the purchase and sale of hops, that checks had been drawn against such deposits, in payment for the purchase of such hops, and that this garnishee was regularly advised of the same." The garnishee further alleged that at the time each of the garnishments was served upon it, J. J. Metzler was personally indebted to the bank in the sum of about \$1,500 upon demand notes. The defendant Metzler was called as a witness, and testified that he had carried an account in the bank as "J. J. Metzler, Agent," for several years; that he drew drafts upon different persons, with whom he was doing business, sometimes with bill of lading or warehouse receipt attached, and deposited the money in the bank in order to pay for hops purchased; that he ran two hop ranches, and raised hops himself; that the hop farm account was kept with the money for buying hops, but that he had no money in the bank on account of the hop farm at the time of the garnishment; that he received one-half cent per pound as commission for buying hops for one firm; and that he usually received whatever he could make by the purchases and filling of orders for other firms. He stated that he did not know whether or not there was any commission belonging to him among the funds in question. In regard to commissions he said: "I don't know whether it was mine or not; it might have been some there." Upon being questioned particularly as to different deposits he made about the time of the notices of garnishment, he mentioned drafts upon his brother and a firm in Chicago. He did not say whether the drafts were for hops shipped from his farm,

and seemed unwilling to explain the matter except in a general way. In the account the money was mingled together. His evidence tended to show that on the 4th of November, 1911, he drew a check on this account in favor of the Merchants' National Bank for \$1,004.45, in payment of his note, and that he used the funds for his personal expenses and had full control over such funds. It was admitted by the garnishee that the funds in the account in question at the time of the garnishment were paid out subsequent thereto, upon checks signed by the defendant, and that no part of such funds was applied to the defendant's indebtedness to the garnishee. The court found that the funds in the hands of the garnishee, to the amount of \$1,128.87, belonged to the defendant Metzler, and rendered judgment in favor of the plaintiff against the garnishee for \$616.59, the amount of plaintiff's judgment against Metzler. The garnishee appeals.

M. M. Matthliessen, of Portland (Richard W. Montague, of Portland, on the brief), for appellant. C. M. White, of Portland (Farrington & Farrington, of Portland, on the brief), for respondent.

BEAN, J. (after stating the facts as above).

[1] The garnishee contends that the evidence does not sustain the findings made by the trial court. Section 819, L. O. L., provides that the issues in such a proceeding shall be tried as ordinary issues of fact. The ownership of the funds was the only issue raised. The burden of proof was upon the plaintiff.

[2] In an action at law, tried by the court without a jury, the findings of the trial court are equivalent to the verdict of a jury. L. O. L. § 159. In such a case, this court upon appeal will examine only the testimony in order to ascertain if there is any competent evidence to support the findings. If there is such evidence, the findings cannot be disturbed. *Savage v. Salem Mills Co.*, 48 Or. 1, 85 Pac. 69, 10 Ann. Cas. 1065; *Singer v. Pearson-Page Co.*, 58 Or. 526, 115 Pac. 158; *Giaconi v. City of Astoria*, 60 Or. 12, 29, 113 Pac. 855, 118 Pac. 180. In the determination of this question all the evidence should be considered as the plaintiff is allowed the benefit of any evidence introduced by the adverse party. *Morrison v. Franck*, 59 Or. 429, 435, 110 Pac. 1090, 117 Pac. 308; *Dryden v. Pelton-Armstrong Co.*, 53 Or. 418, 421, 101 Pac. 190.

[3] It appears from the record that at the time of the garnishment, and for a long time prior thereto, the defendant deposited funds with the garnishee in the name of "J. J. Metzler, Agent." See *Proctor v. Greene*, 14 R. I. 42. The garnishee by its answer disclosed no knowledge of any principal, nor did the defendant in his testimony, except by alluding in a vague and general way to



several persons with whom he did business. He did not state to whom the money belonged. He testified in regard to the deposits as follows: "I probably bought some hops for some firm and went into the bank and drew the amounts with a draft on the parties, whoever they went to." He does not appear to have dealt with the funds as belonging to any particular person other than himself. A fair estimate from his statement as to his commission received indicates that there was in the bank at the time an amount in excess of the judgment belonging to him for commission. His testimony is very vague and indefinite, and is not a complete disclosure of the transaction. The fact that he was in possession and control of the money, and used it indiscriminately for his own purposes, and the further fact that, in any event, a large amount of the deposits belonged to him as his commission, together with the other circumstances of the case, have great probative force, and in our judgment are decisive evidence of title. *Slisbee State Bank v. French Market Grocery Co.* (Tex. Sup.) 132 S. W. 465, 34 L. R. A. (N. S.) 1207. This evidence was not overcome in any manner. From the evidence the trial court, acting as a jury, might reasonably conclude that the money belonged to the defendant Metzler, and that the word "Agent" affixed to his name was only a subterfuge on his part to keep his funds from being attached by his creditors. The Merchants' National Bank, garnishee, alleged and showed, and the trial court found, that when the bank was garnisheed, defendant Metzler owed the garnishee about \$1,500 on demand notes. It appears from the answer of the latter that between the 1st and 11th of November, 1911, seven deposits were placed in the bank by J. J. Metzler, amounting to \$9,830.52, and that during the same time 13 checks were paid to the order of "J. J. Metzler, Agent," amounting to \$3,919.87.

[4] The claim of the garnishee that the funds should be applied to the payment of the notes of Metzler is inconsistent with its denial that it had any funds belonging to this debtor. *Jackson v. Bank of U. S.*, 10 Pa. 61, 67. We will pass that question, however. It is a general rule that the garnishee may set off, against the debt due to the principal debtor, whatever demands the garnishee might have set off against such

debtor himself had the latter sued the garnishee. *Nutter v. Framingham & Lowell R. Co.*, 132 Mass. 427, 430. The bank had the right to apply the funds in its hands at the time of the garnishment, belonging to Metzler, to the payment of a debt due from the latter to it, had it manifested a desire to do so by its pleading and proof. But it had no right to pay such funds to the order of Metzler during the garnishment proceedings and such payment was at the risk of the bank. It seems that the bank disclosed the facts affecting its liability to Metzler as fully as they could be ascertained from him. As between the attaching creditor and the judgment debtor the garnishee should occupy a disinterested position, and hold the money or property garnisheed until the matter is adjudicated or the attachment is discharged. *Archer v. Whiting*, 88 Ala. 249, 7 South. 53; *Drake on Attachment* (7th Ed.) § 453. The bank waived the privilege of applying the funds upon Metzler's notes by paying him the same during the pendency of the garnishment proceedings. By so doing it clearly indicated that there was no intention on its part to do so, and no agreement or understanding with Metzler that such application should be made, thereby eliminating that question from this case.

By the bank simply holding a note against the debtor would not enable him to draw his money and defeat the attachment. The rule permitting the garnishee to apply funds in its hands to the payment of a debt due to such garnishee is for the protection of the latter, and cannot be made a shield for the judgment debtor. Section 320, L. O. L., directs that if by the answer of the garnishee it shall appear, or if upon trial it is found, that the garnishee, at the time of service upon him of a copy of the writ of attachment and notice of garnishment, had any property of the defendant liable to attachment, not admitted in the certificate, and to which the garnishee is required to certify, judgment may be given against the garnishee for the value thereof.

The evidence in this case fairly sustains the findings of fact. The judgment of the lower court will therefore be affirmed.

McBRIDE, C. J., and EAKIN and McNARY, JJ., concur.



## MEMORANDUM DECISIONS

**DENVER & R. G. R. CO. et al. v. RUANE.** (Supreme Court of Colorado. July 7, 1913.) Error to Garfield County Court; R. J. Smith, Judge. Action by Bernard Ruane against the Denver & Rio Grande Railroad Company and another. There was a judgment for plaintiff, and defendants bring error. Reversed and remanded, with directions to dismiss. E. N. Clark and J. G. McMurtry, both of Denver, for plaintiff in error Denver & R. G. R. Co. Henry T. Rogers and Rogers, Ellis & Johnson, all of Denver, and C. W. Darrow, of Glenwood Spgs., for plaintiff in error Colorado Midland Ry. Co.

**MUSSER, C. J.** The judgment here for review on this writ of error was the result of an action instituted by defendant in error to recover damages for the killing of a cow that had wandered upon the railroad track and was struck by an engine. The only negligence alleged in the complaint was the failure of the railroad companies to fence the right of way. The companies demurred separately to the complaint, on the ground, among others, that it did not state facts sufficient to constitute a cause of action. When the demurrers were overruled, the defendants elected to stand thereon. It is plain that the action was brought upon the liability imposed by the railroad fencing statute of March 14, 1902. That act was held unconstitutional in *Denver Co. v. Moss*, 50 Colo. 282, 115 Pac. 696, and upon the authority of that case it is ordered that the present judgment be reversed and the cause remanded, with directions to dismiss the action. Reversed and remanded, with directions.

**GABBERT and BAILEY, JJ., concur.**

**ROBINSON v. MULLEN et al.** (Supreme Court of Oklahoma. June 30, 1913.) Appeal from District Court, Carter County; Stilwell H. Russell, Judge. Action between Frank Robinson, administrator, etc., and others, and J. S. Mullen and others. From the judgment, Robinson appeals. Dismissed. Moore & Bass, of Ardmore, for plaintiff in error. H. A. Ledbetter, I. R. Mason, L. S. Dolman, and Sigler & Howard, all of Ardmore, for defendants in error.

**KANE, J.** This cause comes on to be heard upon the petition for rehearing, praying the court to review a former order, wherein it overruled a motion to dismiss the foregoing proceeding in error. Upon a re-examination of the record, we are of the opinion that the former order ought to be set aside and that the motion to dismiss ought to be sustained. The grounds upon which the motion to dismiss is based are: "(1) That this court has no jurisdiction of this case, and should dismiss the same, for the reason that the case-made was not served within three days from the date of the judgment, and no extension of time to make and serve a case-made was granted within said time, and this case not being one in which a motion for a new trial was necessary, the filing of said motion did not extend said time, and because the cause was not filed in the Supreme Court for more than six months after the trial, and plaintiff in error does not assign as one of the grounds for reversing said judgment that the court erred in overruling his motion for a new trial. (2) Because Wilson H. James, G. W. McMillian, and Oscar Wilkerson are not made parties to this proceeding, and they were parties in the case in the court below, James appearing as one of the plaintiffs, and McMillian and Oscar Wilkerson appearing as defendants. (3) Because the case-made was not served on Steve Sampson, one of the parties made defend-

ant in error and a party below, and he never waived service of said case-made, and because he had no notice of the time and place of signing and settling the case-made, and did not waive same, and was not present when said case-made was signed and settled." There seems to be an abundance of authority supporting each of the foregoing grounds. The motion to dismiss must therefore be sustained. All the Justices concur.

**BARNES v. STATE.** (Criminal Court of Appeals of Oklahoma. July 26, 1913.) Appeal from County Court, Oklahoma County; John W. Hayson, Judge. Jake Barnes was convicted of operating a roulette game, and appeals. Reversed. Kistler, McAdams & Haskell, of Oklahoma City, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., and Jos. L. Hull, Sp. Asst. Atty. Gen., for the State.

**PER CURIAM.** The plaintiff in error, Jake Barnes, was tried and convicted at the April, 1912, term of the county court of Oklahoma county on a charge of operating a roulette game, and his punishment fixed at a fine of \$500 and imprisonment in the county jail for a period of 90 days. Among other assignments urged for reversal of this cause, counsel for the accused contend that the court erroneously permitted Ross N. Lillard to amend the information after a demurrer had been sustained thereto, their contention being that under and by virtue of the laws of this state no person has the power to amend an information for a misdemeanor except the county attorney or one of his duly qualified and acting deputies. The record contains the following recital: "It is further admitted by the state that Ross Lillard amended the information in the above-entitled cause by permission of the court, and was not at the time of the amendment of said information the duly qualified and acting assistant or deputy county attorney within and for Oklahoma county, state of Oklahoma." Under the doctrine announced by this court in the case of *McGarrah v. State*, 133 Pac. 260, decided at the present term, this cause will have to be reversed. It is unnecessary to consider the other assignments. The judgment of the trial court is reversed and the cause remanded with directions to the county court of Oklahoma county to permit the county attorney to file a proper information and proceed with the trial of the cause.

**CARLISLE v. STATE.** (Criminal Court of Appeals of Oklahoma. July 9, 1913.) Appeal from County Court, Texas County; W. C. Crow, Judge. W. H. Carlisle was convicted of violating the prohibitory law, and appeals. Affirmed. Wallace G. Hughes, of Guyman, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for the State.

**PER CURIAM.** This appeal is prosecuted from a conviction had in the county court of Texas county on the 18th day of April, 1912, in which plaintiff in error was found guilty of unlawfully selling to J. F. Frazier one pint of whisky for one dollar, and was in accordance with the verdict of the jury sentenced to be confined for 30 days in the county jail and pay a fine of \$75. The main contention is that the evidence is insufficient to support the verdict and judgment. There is a direct conflict in the evidence on the part of the state and that of the defendant; but the evidence was sufficient to satisfy the jury that the statute had been violated, and, if there is sufficient evidence to sustain the verdict, it must stand, whatever the



opinion of this court might be upon the same testimony, if it were its duty to pass upon the facts. There is nothing shown by the record which casts any reflection upon the fairness or impartiality of the jury. It appearing that the defendant has had a fair and impartial trial, the judgment of the lower court is affirmed.

**CAUDILL v. STATE.** (Criminal Court of Appeals of Oklahoma. Aug. 2, 1913.) Appeal from County Court, Custer County; J. C. McKnight, Judge. W. M. Caudill was convicted of violating the prohibitory law, and appeals. Dismissed. See, also, 130 Pac. 812. Bulow & Walton, of Clinton, for plaintiff in error. Chas. West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen., for the State.

**PER CURIAM.** In this case the Attorney General has filed a motion to dismiss appeal, which reads as follows: "Comes now the state of Oklahoma, by the Attorney General, and moves the court to dismiss the appeal herein, and for grounds for said motion shows: That heretofore, to wit, on the 17th day of July, 1912, in the case of State of Oklahoma v. W. M. Caudill, pending in the county court of Custer county, a verdict was returned by a jury finding the defendant guilty upon an information charging the maintenance of a place where intoxicating liquors were received and kept for sale, etc. That the court upon said verdict imposed a fine of \$150, but did not impose a jail sentence as required by the laws of Oklahoma for violation of the liquor laws. That thereafter, and on October 24, 1912, an appeal was prosecuted from said judgment. That on December 7, 1912, the state filed a motion for an order to remand the cause for proper judgment. That the case was set for submission on March 7, 1913, at which time plaintiff in error by his counsel in open court filed a motion to dismiss the appeal. That thereafter, on March 22, 1913, this court dismissed said appeal pursuant to the motion of the plaintiff in error and remanded the cause to the county court of Custer county, with directions that the court assess the punishment of appellant by both such fine and imprisonment within the terms of the law as in its discretion it might deem proper. That the mandate issued out of this court on the 8th day of April, 1913, and was received and filed by the clerk of the county court of Custer county on the 10th day of April, 1913; that on said day the plaintiff in error was present in person and represented by his counsel, at which time the court proceeded to sentence the said defendant in compliance with the mandate of this court and of the laws in force, and adjudged and decreed that the plaintiff in error pay a fine of \$150 and that he be confined in the county jail of Custer county for 30 days. And the state says that this appeal is unauthorized; that the trial court in the imposition of the penalty imposed by law acted in strict accordance with the mandate of this court, and that there is no question properly before this court upon this appeal. Wherefore the state moves that the appeal be dismissed, and that the trial court be directed to enforce the judgment rendered in said cause on the 10th day of April, 1913." This is the second appeal in this case. See 9 Okl. Cr. —, 130 Pac. 812. The judgment in pursuance to the mandate of this court was entered April 10, 1913. This appeal is on a transcript, yet it appears that the lower court allowed 105 days in orders extending the time to make and serve a case-made. Obviously no good cause could be shown for the orders so made, and the allowance of bail was a matter of doubtful propriety. The motion to dismiss the appeal is sustained. Mandate forthwith, with direction to the court below to cause its judgment and sentence to be executed without further delay.

**DAY v. STATE.** (Criminal Court of Appeals of Oklahoma. July 12, 1913.) Appeal from

County Court, Oklahoma County; John W. Hayson, Judge. Harry Day was convicted of violating the prohibitory law, and he appeals. Affirmed. Lee F. Wilson and E. G. Wilson, both of Oklahoma City, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for the State.

**PER CURIAM.** Plaintiff in error, Harry Day, was convicted upon an information which charged that Harry Day and Doc Beech did have the possession of intoxicating liquor with the intent to sell said liquor contrary to law. The record shows that only the defendant Day appeared for trial. The jury returned a verdict finding the defendant Day guilty as charged, and assessed his punishment at confinement for six months in the county jail and that he pay a fine of \$50. On January 23, 1912, the judgment and sentence was entered in accordance with the verdict. Upon a careful examination of the record, our conclusion is that the assignments of error are not well taken. The guilt of the defendant was established beyond any reasonable doubt. The judgment of the county court of Oklahoma county is therefore affirmed.

**DE WITT v. STATE.** (Criminal Court of Appeals of Oklahoma. Aug. 16, 1913.) Appeal from District Court, Alfalfa County; James W. Steen, Judge. George H. De Witt was convicted of felonious assault, and appeals. Dismissed. Talbot & Owen, of Cherokee, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

**PER CURIAM.** The plaintiff in error, George H. De Witt, was tried at the January, 1912, term of the district court of Alfalfa county on a charge of assault with intent to kill, and was convicted of the included offense of assault with a sharp and dangerous weapon with intent to do bodily harm without justifiable or excusable cause, and his punishment fixed at imprisonment in the state penitentiary for a period of four years. The appeal was filed in this court on the 12th day of August, 1912. On the 29th day of July, 1913, counsel for the plaintiff in error filed a motion in this court, asking that the appeal be dismissed, for the reason that the plaintiff in error desired to abandon the appeal and seek executive clemency. The motion is sustained, and the appeal is dismissed, at the request of the plaintiff in error.

**DISHON v. STATE.** (Criminal Court of Appeals of Oklahoma. July 3, 1913.) Appeal from County Court, Caddo County; C. Ross Hume, Judge. Otto Dishon was convicted of a violation of the prohibitory law and appeals. Affirmed. Bristow & McFadyen, of Anadarko, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson and E. G. Spilman, Asst. Attys. Gen., for the State.

**PER CURIAM.** This appeal is prosecuted from a conviction had in the county court of Caddo county on the 30th day of March, 1912, in which the plaintiff in error was found guilty of the offense of having possession of intoxicating liquors with the intention of violating provisions of the prohibitory law, and his punishment assessed at confinement in the county jail for 30 days and a fine of \$50. From a careful examination of the record, our conclusion is the evidence is sufficient to support the verdict of the jury. And we find no error committed on the trial of the cause. The judgment of the county court is therefore affirmed.

**GRANT v. STATE.** (Criminal Court of Appeals of Oklahoma. July 19, 1913.) Appeal from County Court, Pottawatomie County; Ross F. Lockridge, Judge. Bert Grant was convicted of violating the prohibitory law, and appeals. Affirmed. S. P. Freeling and I. C. Saunders, both of Shawnee, for plaintiff in error. Chas.



West, Atty. Gen., and Smith C. Matson and E. G. Spilman, Asst. Attys. Gen., for the State.

**PER CURIAM.** Plaintiff in error was convicted of unlawfully selling intoxicating liquor, and on the 20th day of March, 1912, in accordance with the verdict of the jury, he was sentenced to be confined in the county jail for 30 days and to pay a fine of \$50. The record shows that upon his arraignment the court informed said defendant of his right to be represented by counsel, and the defendant stated that he was aware of his rights in this regard; that he was able to procure counsel, but that he did not desire to be represented by counsel; that he could and would represent himself. E. A. Pierce, sheriff, testified that in making a raid in the Reebie Hotel in Shawnee he found the defendant standing behind a bar; another man was standing in front of the bar; he reached over to pick up a glass of whisky; witness reached over and said he would take that. Defendant knocked the glass and spilled most of its contents; that there was a quarter of a dollar lying on the bar. He also found three bottles of whisky and some other liquor in bottles. John J. Dutton, deputy sheriff, testified substantially to the same state of facts. This was all the evidence in the case. The defendant offered no evidence. After his conviction, the defendant secured counsel and filed motions for new trial and in arrest of judgment, which were overruled. Where the guilt of the defendant is established by evidence which is undisputed, this court will not consider it an error which will demand a reversal of the conviction, that the information was bad for duplicity, where no objection by demurrer was made thereto. Tested by the plain and simple rules prescribed by our Code of Criminal Procedure the information is sufficient to support the verdict and judgment. The judgment is therefore affirmed.

**Ex parte HAMRICK.** (Criminal Court of Appeals of Oklahoma. July 26, 1913.) Application for writ of habeas corpus by G. L. Hamrick. Writ denied. E. L. Persons, of Chickasha, for petitioner. Smith C. Matson, Asst. Atty. Gen., and C. J. Davenport, of Oklahoma City, for respondent.

**PER CURIAM.** This is an application for the writ of habeas corpus by G. L. Hamrick, seeking his discharge from a judgment entered in the district court of Grady county imposing upon him a fine of \$250 and imprisonment upon failure to pay the same. The material portion of the judgment upon which the petition is based is as follows: "It is therefore ordered, adjudged, and decreed, that the said G. L. Hamrick is guilty as shown by the verdict of the jury, and that he be assessed a fine of \$250 and all costs in the above-entitled cause, and that the said G. L. Hamrick be confined in the county jail of Grady county, Okl., at hard labor until said fine and costs are paid, at \$1 per day. It is further ordered that the bond by reason of which said G. L. Hamrick is now out shall continue in force for five days, and if said fine and costs are paid by that time the defendant, G. L. Hamrick, shall be discharged; otherwise, he shall be taken into the custody of the sheriff of Grady county, Okl." It is contended by the petitioner that the judgment does not specify any legal limit to the imprisonment therein provided, and for that reason is void. With this contention we cannot agree. The judgment is not void. It is irregular, and the irregularity is one which this court will correct on appeal. The writ of habeas corpus does not have for its purpose the correction or modification of judgments unless the legal portion thereof has been complied with. The petitioner would be entitled to have the judgment corrected by proper proceedings in the trial court, or be released on habeas corpus by this

or any other court having jurisdiction after he had served the time prescribed by the statute in case of his failure to pay the fine. The petition is without merit. The writ is denied.

**HERBER v. STATE.** (Criminal Court of Appeals of Oklahoma. July 12, 1913.) Appeal from Superior Court, Logan County; S. S. Lawrence, Judge. Joe Herber was convicted of violating the prohibitory law, and he appeals. Affirmed. McGuire & Smith, of Guthrie, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen. (J. S. Estes, of Oklahoma City, of counsel), for the State.

**PER CURIAM.** Plaintiff in error, Joe Herber, was convicted under an information which charged that J. L. Hallock and Joe Herber did have the possession of ten quarts of whisky with the intent to sell said liquor, contrary to law. When the case was called for trial, the defendant Hallock failed to appear. The jury returned a verdict finding the defendant Herber guilty as charged, and assessed his punishment at confinement for 30 days in the county jail, and to pay a fine of \$100. September 23, 1911, the judgment and sentence was entered in accordance with the verdict. From a careful examination of the record, our conclusion is that the assignments of error are not well taken. The guilt of the defendant was established beyond any reasonable doubt. The judgment of the Superior Court of Logan county is therefore affirmed.

**HERNDON v. CITY OF McALESTER.** (Criminal Court of Appeals of Oklahoma. July 3, 1913.) Appeal from County Court, Pittsburg County; B. P. Hammond, Judge. Tom Herndon was convicted of violating a city ordinance relating to the sale of intoxicating liquors and he appeals. Affirmed. J. G. Harley and Jas. R. Miller, both of McAlester, for plaintiff in error. T. D. Davis, City Atty., of McAlester, for defendant in error.

**PER CURIAM.** Plaintiff in error was convicted in the police court of the city of McAlester on a charge of selling intoxicating liquor, in violation of Ordinance No. 440 of said city of McAlester. From the judgment of conviction he appealed to the county court of Pittsburg county, where he was again convicted, and in accordance with the verdict of the jury he was on December 1, 1911, sentenced to be confined for 30 days in the city jail, and to pay to the city of McAlester a fine of \$50 and costs. From the latter judgment, he prosecutes this appeal. From a careful examination of the record, we find that the charge of the court presents the law, and the evidence is sufficient to support the verdict. No error being apparent, the judgment of the court below is affirmed.

**McLAUGHLIN v. STATE.** (Criminal Court of Appeals of Oklahoma. July 5, 1913.) Appeal from County Court, Johnston County; Nick Wolfe, Judge. Ben McLaughlin was convicted of violating the prohibitory liquor law, and appeals. Affirmed. Kennamer & Coakley, of Madill, and Gullett & O'Bryan, of Tishomingo, for appellant. Smith C. Matson, Asst. Atty. Gen., for the State.

**PER CURIAM.** Appellant was convicted for violating the prohibitory liquor law, and appealed. The legal questions involved in this case have already been decided adversely to the contentions of counsel for appellant. It is therefore not necessary to repeat here what has been said. The judgment of the lower court is affirmed.

**MERCHANT v. STATE.** (Criminal Court of Appeals of Oklahoma. July 5, 1913.) Appeal from County Court, Stephens County; W. H.



Admire, Judge. H. S. Merchant was convicted of crime, and appeals. Affirmed. Womack & Brown, of Duncan, and Gilbert & Bond, of Oklahoma City, for appellant. C. J. Davenport, Asst. Atty. Gen., for the State.

PER CURIAM. We find no prejudicial error in the record. The evidence was conflicting, but this was a question for the jury alone to settle. The judgment of the trial court is therefore affirmed.

MOODY v. STATE. (Criminal Court of Appeals of Oklahoma. July 19, 1913.) Appeal from County Court, Cherokee County; J. T. Parks, Judge. John Moody was convicted of violating the prohibitory law, and appeals. Affirmed. J. I. Coursey, of Tahlequah, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error was convicted on an information which charged the unlawful sale of intoxicating liquors, and on the 10th day of November, 1911, in accordance with the verdict of the jury he was sentenced to be confined for 30 days in the county jail and to pay a fine of \$50. From a careful examination of the record it is our conclusion that the assignments of error are not well taken, and the defendant has had a fair and impartial trial. The judgment of the county court of Cherokee county is therefore affirmed.

PRUITT v. STATE. (Criminal Court of Appeals of Oklahoma. Aug. 15, 1913.) Appeal from District Court, Jefferson County; Frank M. Bailey, Judge. Tom Pruitt was convicted of larceny, and appeals. Affirmed. P. T. Hamilton, of Waurika, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiff in error, Tom Pruitt, was convicted at the December, 1911, term of the district court of Jefferson county on a charge of grand larceny, and his punishment fixed at imprisonment for a year and a day in the state prison at Granite. The appeal was filed in this case on the 6th day of March, 1912, more than a year prior to the date the cause was set for hearing in this court. No brief was filed on behalf of the plaintiff in error, and no appearance made for oral argument. No fundamental error appearing from the record, the judgment of the trial court is affirmed. Mandate stayed for 30 days.

REED v. STATE. (Criminal Court of Appeals of Oklahoma. July 26, 1913.) Appeal from County Court, Ottawa County; W. Y. Quigley, Judge. Jack Reed was convicted of violating the prohibitory law, and appeals. Reversed. Thompson & Mason, of Miami, for plaintiff in error. C. J. Davenport, of Oklahoma City, for the State.

PER CURIAM. The plaintiff in error, Jack Reed, was convicted in the county court of Ottawa county at the April, 1912, term, on a charge of selling intoxicating liquor, and his punishment fixed at a fine of \$300 and imprisonment for a period of 60 days in the county jail. The only testimony introduced on behalf of the state was given by the witness Ray Phones, who testified that he bought a half pint of whisky from the accused some Saturday in March, 1912. He admitted that he was intoxicated at the time. This testimony is flatly contradicted by four other witnesses present, who say that the accused refused to sell liquor to the prosecuting witness. Their credibility is not attacked. In the case of De Freese v. State, 133 Pac. 254, decided at the present term of the court, we said: "There was no effort made to impeach any of the witnesses for the defendant, all of whom seem to be creditable men, and on the part of the only witness for the

state we have the fact that he himself testifies to having drank whisky on his way to town that day; and we must take this into consideration in determining how far we shall credit his statement that the defendant had permitted him to take a pint of whisky from his drug store, as against the strong defense which was presented by the defendant, not only supporting his denial of having delivered the pint of whisky to the prosecuting witness, but showing that said witness was intoxicated, and in possession of a bottle of whisky before he went to the defendant's drug store. While the cases are very rare in which this court interferes to disturb the judgment of the trial court, and it is only in a case where the verdict is clearly contrary to the evidence, or when the doubtful character of the evidence against the defendant and the preponderance in his favor is such that it is evident that the jury were influenced by passion or prejudice, that a judgment will be reversed because the evidence is insufficient to sustain it. In this case we think that the evidence, unless we are to discredit entirely the testimony of unimpeached witnesses, falls within the rule laid down by these cases, and that a new trial should be granted." The judgment is reversed, and the cause remanded, with directions to dismiss the prosecution.

ROSS v. STATE. (Criminal Court of Appeals of Oklahoma. July 26, 1913.) Appeal from County Court, Pottawatomie County; Ross F. Lockridge, Judge. Frank Ross was convicted of gambling, and appeals. Affirmed. S. P. Freeling, of Shawnee, A. M. Widdows, of Pawhuska, and L. O. Saunders, of Shawnee, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, Frank Ross, was convicted at the March, 1912, term of the county court of Pottawatomie county on a charge of conducting a gambling game commonly known as "poker," and his punishment fixed at a fine of \$250 and imprisonment in the county jail for a period of 30 days. We have carefully examined the record, and find no error sufficient to justify a reversal of the judgment. It is therefore affirmed.

VANN v. STATE. (Criminal Court of Appeals of Oklahoma. Aug. 16, 1913.) Appeal from District Court, Cherokee County; John H. Pitchford, Judge. A. E. Vann was convicted of embezzlement, and appeals. Dismissed. Geo. K. Powell, of Muskogee, for plaintiff in error. Geo. M. Hughes, Co. Atty., of Tahlequah, and C. J. Davenport, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiff in error, A. E. Vann, was convicted at the September, 1912, term of the district court of Cherokee county on a charge of embezzlement, and his punishment fixed at imprisonment in the state penitentiary for a period of three years and the payment of a fine of \$2,040.10. Counsel for the state filed a motion to dismiss the appeal in this case, on the ground that the plaintiff in error has become a fugitive from justice and cannot be made to answer the judgment upon the merits of his appeal by this court. We have carefully examined the showing made, and are of opinion that the motion to dismiss is well founded and should be sustained. The appeal is dismissed, and the clerk directed to issue the mandate forthwith.

WEINBERGER v. STATE. (Criminal Court of Appeals of Oklahoma. July 12, 1913.) Appeal from Superior Court, Logan County; S. S. Lawrence, Judge. Dave Weinberger was convicted of violating the prohibitory law, and he appeals. Reversed. McGuire & Smith, of



Guthrie, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., and Jos. L. Hull, of Oklahoma City, for the State.

**PER CURIAM.** The plaintiff in error, Dave Weinberger, was convicted at the September 1911, term of the superior court of Logan county, on a charge of having the unlawful possession of intoxicating liquor with intent to sell the same, and his punishment fixed at imprisonment in the county jail for a term of 30 days and a fine of \$100. Upon a careful examination of the record, we find that the proof introduced is wholly insufficient to sustain the conviction. The judgment is reversed, and the cause remanded, with direction to the trial court to grant a new trial.

**WIETELMANN v. STATE.** (Criminal Court of Appeals of Oklahoma. July 12, 1913.) Appeal from County Court, Oklahoma County; John W. Hayson, Judge. F. Wietelmann was convicted of a violation of the prohibitory law, and appeals. Affirmed. Edward A. Wagoner, of Oklahoma City, for plaintiff in error. The Attorney General, for the State.

**PER CURIAM.** Plaintiff in error was convicted under an information which charged that he did have in his possession intoxicating liquors with intent to violate the prohibitory law, and on January 29, 1912, he was sentenced to be confined in the county jail for six months and pay a fine of \$500. No briefs have been filed or oral argument made on his behalf. The Attorney General for this reason moved to affirm the judgment. The judgment of the county court of Oklahoma county herein is therefore affirmed.

**ROMINGER v. NEIL.** (Supreme Court of Oregon. July 15, 1913.) Department 1. Appeal from Circuit Court, Linn County; William Galloway, Judge. Action by B. L. Rominger against J. C. Neil. Judgment for defendant, and plaintiff appeals. Affirmed. This is a suit to enforce an alleged specific contract, the substance of which is alleged to be that the defendant agreed with plaintiff that plaintiff should work for him on defendant's farm for one year at the wages of \$40 a month; that plaintiff should have the possession of a dwelling house situated on the premises, and the use of all the land he wished for garden purposes, one milch cow for the use of himself and family, wood, and incubators enough to produce 1,000 chickens. Plaintiff alleges that, at great expense to himself, he moved on the place and performed everything that was required of him, and that defendant, without any reason therefor, commenced an action of forcible entry and detainer in the justice's court, and, after pleading duly filed and a trial had, obtained judgment in his favor, directing a restitution of the house to defendant. This suit is brought to enjoin the defendant from enforcing such judgment and to compel specific performance of the alleged contract. Plaintiff answered, alleging that he hired defendant to work on his farm at a monthly wage of \$40, to continue so long as plaintiff's services should be satisfactory, but denying that such hiring was by the year; that he agreed that plaintiff should occupy the dwelling house on the place during his employment, and have the use of one of defendant's cows during said time, what garden truck he could use out of defendant's garden, such firewood as he should cut, and one-half of such chickens as he might raise on the premises during said time; that plaintiff moved into the dwelling house on said premises and began work on September 4, 1911, and continued to work until February 4, 1912, when, by reason of his habits of idleness and intoxication, resulting in neglect of his work, plaintiff discharged him;

and that, when discharged, he refused to quit the premises. Whereupon plaintiff began and prosecuted to judgment the forcible entry and detainer proceeding set up in the complaint. The judgment roll in that action is made an exhibit to the answer. The circuit court found in favor of defendant, and plaintiff appeals. B. S. Martin, of Brownsville, and Weatherford & Weatherford, of Albany, for appellant. Hewitt & Sox, of Albany, and A. A. Tussing, of Brownsville, for respondent.

**McBRIDE, C. J.** The plaintiff in the action against him in the justice's court interposed the same defense that he has here, and was defeated. He then brought this suit in the circuit court, which, after seeing the witnesses and hearing their testimony, again found against him. After a careful perusal of the testimony and a comparison of plaintiff's own testimony with the reckless statements made in his complaint, we are disposed to credit defendant's statements as to the real contract between the parties and as to plaintiff's failure to give satisfaction. Taking this view of the facts, plaintiff has no case, either in law or in equity, and the decree of the circuit court is affirmed.

**MOORE, BURNETT, and RAMSEY, JJ.,** concur.

**SCAIEFE v. SCAIEFE.** (Supreme Court of Oregon. July 29, 1913.) Department 1. Appeal from Circuit Court, Lane County; L. T. Harris, Judge. Action by Benjamin F. Scaiefe against Sarah E. Scaiefe. Judgment for plaintiff, and defendant appeals. Affirmed. Lark Bilyen and G. F. Skipworth, of Eugene, for appellant. C. A. Hardy, of Eugene (Thompson & Hardy, of Eugene, on the brief), for respondent.

**BURNETT, J.** In this suit for a divorce on the ground of cruel and inhuman treatment, rendering the plaintiff's life burdensome, the circuit court, after a full hearing, found against the resistance of the defendant and granted the plaintiff a divorce, providing in the decree that he should pay for the support of the defendant and the minor children of the parties \$95 per month, and that neither party should recover costs or disbursements. On the appeal of the defendant from this decree, a careful reading of the entire testimony reveals the time-old story of jealousy poisoning the fountain of conjugal happiness. Who is at fault is a pure question of fact, which has been determined adversely to defendant by a judge whose ability, experience, and probity are worthy of great confidence. Without recounting the details of this domestic calamity, suffice it to say that we see no reason to disturb the decree of the circuit court. It is therefore affirmed.

**McBRIDE, C. J., and MOORE and RAMSEY, JJ.,** concur.

**YENCO v. BALLOG et al.** (Supreme Court of Washington. July 8, 1913.) Department 1. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge. Action by Steve Yenco against Julia Ballog and others. From a judgment for plaintiff, defendants appeal. Affirmed. Davis & Neal, of Tacoma, for appellants. Louis I. Lefebvre, of Tacoma, for respondent.

**PARKER, J.** The plaintiff seeks to have his title to a lot in Tacoma quieted as against the claim of the defendants thereto, which claim is rested upon a sheriff's sale of all of the right, title, and interest of Mary Dzurik therein under a judgment rendered against her in the superior court of Pierce county. A judgment was rendered in favor of the plaintiff, quieting his title as against the claim of the defendants, upon the ground that, neither at the time of the rendering of the judgment un-



der which the sheriff's sale was made, nor at any time thereafter, did Mary Dzurik have any right, title, or interest in the lot, either in law or equity, but that at such times the plaintiff was the lawful owner thereof, free from any claims of Mary Dzurik. From this disposition of the cause the defendants have appealed. In April, 1909, while Mary Dzurik was the owner of the lot in question, she made an assault upon Julia Ballog, resulting in personal injuries to the latter. Thereafter, on May 3, 1909, Mary Dzurik conveyed the lot to her brother, Steve Yenco, this respondent. Thereafter, on July 8, 1909, Julia Ballog and her husband commenced an action in the superior court of Pierce county, seeking recovery of damages from Mary Dzurik on account of the personal injuries resulting from the assault made by her upon Julia Ballog. That action resulted in judgment against Mary Dzurik in favor of Julia Ballog and her husband for the sum of \$150 and costs. Thereafter, on July 8, 1911, execution was duly issued upon that judgment, resulting in the sale by the sheriff of Pierce county of all the right, title, and interest of Mary Dzurik in and to the lot. It is upon this judgment and sheriff's sale that appellants rest their claim of title to the lot. The main question presented by the issues raised in the pleadings is whether the deed executed by Mary Dzurik to respondent, after her assault upon Julia Ballog and before the commencement of the action for damages claimed on account of the injuries resulting from that assault, was fraudulently made for the purpose of defrauding the creditors of Mary Dzurik, and particularly Julia Ballog and her husband. The argument of learned counsel for appellant is addressed almost wholly to questions of fact. The controlling evidence, other than the deed from Mary Dzurik to respondent and the record of the action for damages, consists of testimony of witnesses given in open court. This testimony is in hopeless conflict, is very much involved, was given largely through an interpreter, and shows the parties to the action to be of foreign birth and of but little experience touching the nature of the ownership of real property under our laws. We will not undertake the seemingly hopeless task of analyzing this testimony in detail, with a view of demonstrating the truth or falsity of the various conflicting statements therein. We deem it sufficient to say that we have read the entire testimony, and are convinced therefrom that the learned trial court, seeing and hearing the witnesses, was warranted in believing that the deed was given for a valuable, adequate money consideration passing from respondent to Mary Dzurik, and that at the time of its execution, neither Mary Dzurik nor respondent knew that Julia Ballog and her husband were contemplating an action against Mary Dzurik for damages on account of the assault made by her upon Julia Ballog, and that the deed was not given with a view of defrauding Julia Ballog and her husband by seeking to prevent the collection of any judgment they might recover in

such an action. While the evidence is not free from suspicious circumstances pointing to an intent on the part of Mary Dzurik and respondent to defraud Julia Ballog and her husband by the conveyance of the lot to prevent collection of any judgment which might be recovered on account of the assault, in view of the whole record we cannot say that the learned trial court was in error in declining to take the view that the deed was given with such fraudulent intent. We think no useful purpose would be served by a further detailed discussion of the facts involved. Other errors are suggested, relating to the admission and rejection of evidence. We think, however, that, whatever our views might be relative thereto, they are of such minor importance that our conclusion upon the correctness of the learned trial court's decision upon the merits would not be different, in view of the fact that this is an equity case tried before the court without a jury. We are constrained to hold that the court did not err in its decision in favor of respondent. The judgment is therefore affirmed.

CHADWICK, GOSE, and MAIN, JJ., concur.

---

CAMPBELL v. PEOPLE. (Supreme Court of Colorado. July 7, 1913.) On petition for rehearing. Denied. For former opinion, see 133 Pac. 1043.

GABBERT, J. Counsel contend that defendant was entitled to have the jury advised that the force he was justified in using was the degree of force which it appeared to him was reasonably necessary under the emergency of the occasion. This is substantially the law, but we think that was the purport of the instruction on the subject, for thereby the jury were advised, in effect, that a police officer in making an arrest is justified in using such reasonable force as may be necessary to subject the prisoner to his authority, that the amount of such force must necessarily be left to his sound judgment and discretion, when acting within the scope of his authority, and when not actuated by malice or ill will, and that in resisting the interference of deceased the defendant was justified in using such force as might be reasonably necessary in the exercise of a sound discretion, viewed in the light of all the surrounding circumstances present at the time. We think, in the circumstances of this case, the fair inference to be drawn from the instruction is that the jury were advised that defendant was justified to employ that degree of force which it seemed to him was reasonably necessary. The whole case turns upon the one question of whether the defendant was justified in using the force he did in resisting the interference of the deceased. We think that question was fairly submitted to the jury, and that under the facts of this case they could not have been misled by other instructions given, although they may not have correctly stated the law, and may not have been warranted from the evidence. The petition for rehearing is denied.

MUSSER, C. J., and HILL, J., concur.



















